

December 10, 2018

Submitted via [www.regulations.gov](http://www.regulations.gov)

Samantha Deshommes, Chief  
Regulatory Coordination Division, Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
20 Massachusetts Avenue NW  
Washington, DC 20529-2140

Re: Comments on Department of Homeland Security, Inadmissibility on Public Charge Grounds, RIN 1615-AA22, 83 Federal Register 51114 (October 10, 2018)

Dear Chief Deshommes:

The Center for American Progress (CAP) is an independent nonpartisan policy institute dedicated to improving the lives of all people living in the United States, including U.S.-born citizens, naturalized citizens and immigrants.

CAP strongly opposes this proposed regulation. We urge the Department of Homeland Security (DHS) to withdraw it, and reiterate that the long-standing and historical interpretation of what it means to be a “public charge” under sections 212(a)(4) and section 237(a)(5) of the Immigration and Nationality Act (the Act), as stated in the Department of Justice’s *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, remains in place.

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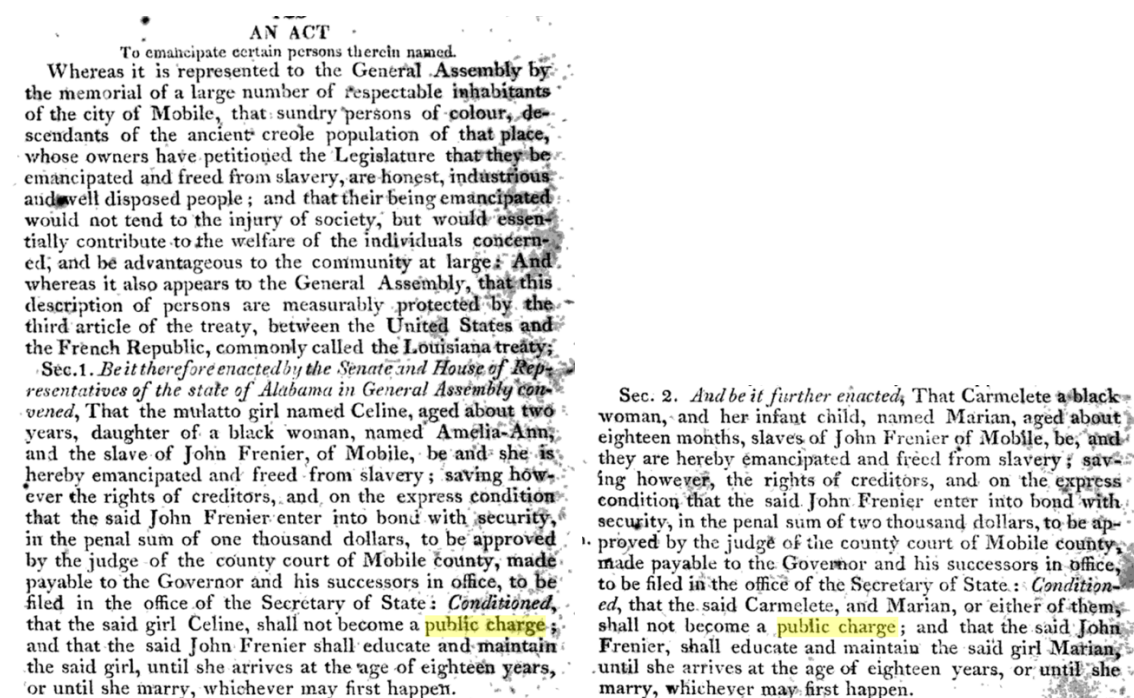
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## DHS' Proposed Definition of What it Means for a Person to be a Public Charge is Unreasonably Expansive

Proposed section 212.21 would classify a person as “public charge” if they received Medicaid, SNAP, or certain other benefits above modest thresholds that are defined in monetary and temporal terms. This definition is a sharp departure from what it has meant to be a “public charge” for over a century, is inconsistent with other provisions of federal law, and absurdly implies that most working-class Americans are properly thought of as undesirable public charges. The 1999 Field Guidance defined what it means to be a public charge in a reasonable manner, although it is too expansive in some respects.<sup>1</sup>

### *The Ordinary, Historical, Administrative and Legal Meaning of Public Charge*

The use of the term “public charge” to classify human beings has an odious history. In slave states in the early 1800s, legislative grants of emancipation to individual slaves were generally conditioned on the emancipated slave not becoming a public charge.

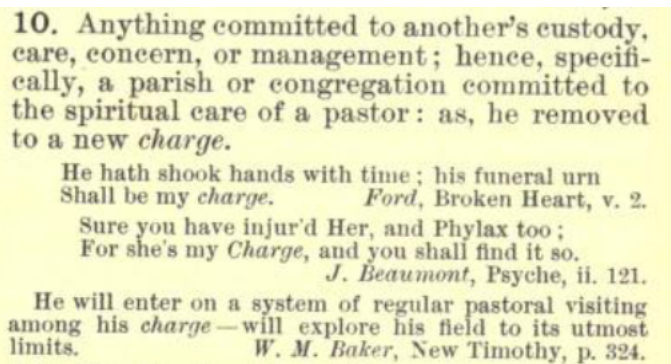


**Figure 1** Acts of Alabama (1824) conditioning emancipation of individual slaves on not becoming a public charge.

<sup>1</sup> Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 FR 28689 (May 26, 1999).

Fortunately, the practice of classifying human beings as “public charges” is now largely defunct. With this proposed rule, DHS is attempting to revive an archaic term to unilaterally rewrite federal immigration law and draw new exclusionary lines in a way that departs from over a century of history.

The term “public charge” was first added to federal immigration law in 1882. Leading dictionaries from this period do not define “public charge”, but they do define what it means for a person to be a “charge.” According to the *Century Dictionary of the English Language* (1889-1891), the most comprehensive American dictionary at the time, a person is a “charge” if he or she is “committed to another’s custody, care, concern, or management ....”<sup>2</sup> In addition, the *Century Dictionary* defines the closely related term “pauper” as “a very poor person; a person entirely destitute of property or means of support; particularly one who, on account of poverty, becomes chargeable to the public ...”<sup>3</sup>



10. Anything committed to another's custody, care, concern, or management; hence, specifically, a parish or congregation committed to the spiritual care of a pastor: as, he removed to a new *charge*.

He hath shook hands with time; his funeral urn  
Shall be my *charge*. *Ford, Broken Heart, v. 2.*

Sure you have injur'd Her, and Phylax too;  
For she's my *Charge*, and you shall find it so.  
*J. Beaumont, Psyche, ii. 121.*

He will enter on a system of regular pastoral visiting  
among his *charge*—will explore his field to its utmost  
limits. *W. M. Baker, New Timothy, p. 324.*

**Figure 2.** Relevant definition of Charge (n.) from Century Dictionary (1889)

The first edition of *Webster's New International Dictionary* similarly defines a person as a “charge” if she or he is: “committed or intrusted to the care, custody, or management of another; a trust. ....”<sup>4</sup> A “pauper” is: “1. A person destitute of means except such as are derived from charity, specif. one who receives aid from public poor funds. ... 3. A very poor person; —usually contemptuous.”<sup>5</sup>

<sup>2</sup> *The Century Dictionary of the English Language*, Carboy-Cono., Vol. I, Part IV, at p.929 (The Century Co.: New York, 1889-1891). Related, but more general, definitions of “charge” in the *Century Dictionary* include “load; a weight; a burden ...” Similarly, the term “chargeable” is defined as “expensive; costly, causing expense, and hence burdensome.”

<sup>3</sup> *Century Dictionary*, Part XI, at p. 4334, available at: <https://archive.org/details/centurydictipt1500whituoft/page/4334>.

<sup>4</sup> *Webster's New International Dictionary of the English Language* (Springfield: G. & C. Merriam Co., 1910).

<sup>5</sup> *Ibid.*

The 1910 edition of *Black's Law Dictionary* does not define the term public charge, but says the term "poor":<sup>6</sup>

denotes those who are so destitute of property or of the means of support, either from their own labor or the care of relatives, as to be a public charge, that is, dependent either on the charity of the general public or on maintenance at the expense of the public. The term is synonymous with "indigent persons" and "paupers."

Given these definitions, members of Congress at the time "public charge" was added to federal immigration law would have considered someone "likely to become a public charge" if the person was likely to be "committed to" or "entrusted to" a public official's "custody, care or management"—a "very poor" and usually "contemptuous" person so "entirely destitute of property or means of support" that they have "become chargeable to the public."

In the late 1800s and early 1900s, this typically would have meant commitment to an almshouse or similar public institution at public expense.<sup>7</sup> Less typically, it would have meant being similarly committed to a public official's custody, care, or management, but living outside of an institution. For example, a child "placed out" at public expense, or, in today's terms, placed in foster care.<sup>8</sup>

Reflecting this understanding of what it meant to be a public charge, the 1892 Annual

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<sup>6</sup> *Black's Law Dictionary*, 2nd Edition (St. Paul: West Publishing, 1910).

<sup>7</sup> "Historically, individuals who became dependent on the Government were institutionalized in asylums or placed in "almshouses" for the poor long before the array of limited-purpose public benefits now available existed. This primary dependence model of public assistance was the backdrop against which the "public charge" concept in immigration law developed in the late 1800s." Inadmissibility and Deportability on Public Charge Grounds, 64 F.R. 28676 (May 26, 1999) at page 28677. For a history that includes this period, see Walter I. Trattner, *From Poor Law to Welfare State* (New York: The Free Press, 1989). For a detailed review of the "poor laws" of Massachusetts and New York in the latter half of the 1800s, see John Cummings, "Poor Laws of Massachusetts and New York," *Publications of the American Economic Association*, 10(4): July 1895), available at: <https://www.jstor.org/stable/i342439>.

<sup>8</sup> "Early in the twentieth century, 'placing-out' was the term that designated all non-institutional arrangements to care for dependent children. Placing-out could mean baby farming. It could mean boarding homes, in which agencies paid families to care for children, or working homes, where older children earned their keep. Traditional indentures were still used by orphanages in many states into the twentieth century and these were not unusual as a means of acquiring children for adoption. Indenture contracts secured children's services for a period of years in exchange for the provision of food, shelter, and basic education. At their age of release, typically 18, indentured children were given a fixed sum of money, a suit of clothing, or other material resources specified in advance." The Adoption History Project, Department of History, University of Oregon, "Placing-Out" available at: <https://pages.uoregon.edu/adoption/topics/placingout.html> (last accessed December 2018).

Report of the Immigration Service<sup>9</sup> (1892 annual report) included a section titled “Paupers in Almshouses in 1890.” According to tables in this section of the report, one of which is reproduced below, of the 66,578 white “almshouse paupers” in the United States in 1890, 36,656 were native-born and 27,648 were foreign-born.

REPORT OF THE SUPERINTENDENT OF IMMIGRATION. 21

SUMMARY, BY GROUPS, OF ALMSHOUSE PAUPERS IN THE UNITED STATES IN 1890.

Geographical divisions.	Aggregate.	White.								Colored.
		Total.	Native.					Foreign born.	Nativity unknown.	
			Total.	Parents native.	One parent foreign.	Parents foreign.	One or both parents unknown.			
The United States .....	73,045	66,578	36,656	21,519	949	3,580	10,608	27,648	2,274	66,467
North Atlantic .....	31,143	30,180	15,251	9,414	483	2,017	3,337	14,330	599	6963
South Atlantic .....	8,100	5,286	4,498	3,703	64	104	627	705	83	2,814
North Central .....	25,615	24,634	13,062	5,795	304	1,215	5,748	10,265	1,307	2981
South Central .....	5,049	3,406	2,655	1,892	39	38	686	500	251	1,643
Western .....	3,138	3,072	1,190	715	59	206	210	1,848	34	766

<sup>a</sup> Includes 36 Indians and 13 Chinese.      <sup>d</sup> Includes 14 Indians.  
<sup>b</sup> Includes 10 Indians and 1 Chinese.      <sup>e</sup> Includes 1 Indian.  
<sup>c</sup> Includes 3 Indians.                              <sup>f</sup> Includes 8 Indians and 12 Chinese.

Figure 3: Table from 1892 Annual Report of Superintendent of Immigration, p. 21.

At the time of the 1892 annual report, William Owen was the U.S. Superintendent of Immigration. In addition to being the first Superintendent, he had previously chaired the House Immigration Committee as a Republican representing the Tenth District of Indiana. In the 1892 annual report, Owen described his understanding of the LPC provision:<sup>10</sup>

The existing immigration law was framed to sift the incomers—to draw a dividing line between the desirable and the undesirable immigrants. The law prohibits the landing of all paupers, and of all persons who are likely to become a public charge; all idiots and insane persons; persons suffering from a loathsome or dangerous contagious disease; persons who have been convicted of a felony or misdemeanor involving moral turpitude; polygamists; any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come ...; also all contract laborers. The classes here mentioned include all the undesirable elements, as heretofore understood. If a wider signification is to be given to “undesirable immigrants” it will be necessary to add other classes. I take it that it is not the serious intention of the Government to prohibit immigration, but from time to time to prohibit the people whom experience has demonstrated fail in some important direction in entering beneficially into American citizenship. [italics added]

<sup>9</sup> Pages 23-26 of Immigration Service, “Annual Report of the Superintendent of Immigration to the Secretary of the Treasury for the Fiscal Year Ended June 30, 1892” (Washington: Government Printing Office, 1892).

<sup>10</sup> Pages 11-12 of 1892 annual report.

Superintendent Owen went on to note that:

The very large per cent of the foreign-born over the native-born in the unfortunate classes of the States having the great immigration ports directs attention to these classes. It appears that the majority of these unfortunates came here without money and without skill as workmen, and in many instances of adversity, such as sickness or inability to secure work, *turned the women into the asylums*, and the men, after eking out an existence at odd jobs or as tramps, *landed disappointed or diseased in the poorhouse or before the courts*. ... In the struggle for a living the weaker went down and became a charge upon the community in *some one of the state institutions*. [italics added]

As a former chairman of the House Committee on Immigration, Owen spoke with authority on Congress's understanding of the LPC provision. In these two passages, Owen equates becoming a public charge with being maintained in a public institution—"asylums"; "state institutions"—that is outside of "the community...". He also treats the LPC provision as a minimal restriction—one of the provisions that "from time to time" prohibit the admission of "undesirable elements, as heretofore understood." As he saw it, the public charge test was narrowly tailored to exclude "undesirables" who were likely to end up in asylums and other state institutions. (Similarly, in the 1907 annual report, the Commissioner-General explained that "[t]he exclusion from this country of the morally, mentally, and physically deficient is the principal object to be accomplished by the immigration laws.")<sup>11</sup>

Owen makes clear in the report that he favored additional restrictions on immigration. He notes for example that: "the legislation of Congress is *moving* in the direction of restricting the idle and thriftless and ignorant, and those who come in a spirit of reckless adventure, or solely because wages are higher here than at their homes."<sup>12</sup> But he also understood that only Congress, not the U.S. Immigration Service that he led, had the power to decide whether to "give a wider signification" to the original understanding of what it meant to be a member of the "undesirable classes" that Congress had excluded up until that time.

According to this plain and original understanding of what it means to be a public charge, if DHS wants to add additional groups to the list of inadmissible "undesirables" in 2018—for example, workers who enroll in public health insurance or homeowners who benefit from the mortgage interest deduction—they need Congress to explicitly add them as new inadmissible classes in sections 212 and 237 of the Act.

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<sup>11</sup> Page 62 of Annual Report of the Commissioner-General of Immigration to the Secretary of Commerce and Labor for the Fiscal Year Ended June 30, 1907 (Washington; Government Printing Office, 1907), available at <https://catalog.hathitrust.org/Record/008902943>.

<sup>12</sup> Page 20 of 1892 annual report. [italics added].

Case law from this time is consistent with the dictionary definitions and the administrative understanding of the LPC provision. In *Howe v. United States ex rel. Savitsky*, 247 F. 292 (1917) the 2nd Circuit said: “We 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.”<sup>13</sup>

That same year, in the Immigration Act of 1917, Congress explicitly equated having become a public charge with being committed to an institution when it required the Commissioner General of Immigration to “secure information as to the number of aliens *detained* in the penal, reformatory, and charitable *institutions* (public and private) of the several States ... and to inform the officers of such institutions of the provisions of law in relation to the deportation of aliens who have become public charges.”<sup>14</sup> [italics added]

In the same section of the 1917 act, Congress separately referred to immigrants who may “fall into distress or need public aid” but was careful not to classify them as public charges. Instead of requiring the removal of immigrants in distress or needing public aid, Congress gave the Commissioner General authority to “enter into contract for the support and relief of such aliens as may fall into distress or need public aid” and to pay for them to return to their native country, but only if they were “*desirous of being so removed.*” [italics added]

In short, Congress in 1917 clearly distinguished between 1) immigrants who were “detained” in various institutions and 2) immigrants who may fall into distress or need public aid. The former were public charges and subject to mandatory removal; the latter were not public charges, despite being potentially eligible for federally funded “support and relief.”

Similarly, the 1920 Annual Report of the Commissioner General of Immigration explains that the:<sup>15</sup>

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<sup>13</sup> Savitsky was a 26-year-old citizen of Canada who was admitted to United States after having a physical examination and was immediately gainfully employed in a business partnership with his brother in Brooklyn. An immigration inspector subsequently found him “likely to become a public charge at the time of entry” because he had written a bad check before leaving Canada and had been accused of other dishonesty.

<sup>14</sup> Section 23 of the Immigration Act of 1917, February 5, 1917. Available at: <https://www.loc.gov/law/help/statutes-at-large/64th-congress/session-2/c64s2ch29.pdf> (last accessed December 2018).

<sup>15</sup> Pages 69-70 of U.S. Department of Labor, Bureau of Immigration, “Annual Report of the Commissioner-General of Immigration to the Secretary of Labor” (Washington: Government Printing Office, 1920).



... provisions of the 1903 and 1907 acts on this subject were regarded by the bureau and department as relating to aliens *likely for any reason to become public charges*, and were so applied and administered; *i.e., aliens likely, by reason of their criminal disposition or similar propensities to get into trouble and land in penal or reformatory institutions, as well as those likely for any reason to become inmates of almshouses, asylums, and like institutions*, were considered within the excluded class; and *those who actually became inmates of such institutions were regarded as within the expelled class*. In passing the 1917 act, Congress seems to have given legislative asset to this view of the scope of previous laws and to have intended that the same construction shall be placed upon the existing law. ... [italics added]

Here, again, the Bureau of Immigration equates becoming a public charge with becoming an “inmate” of an almshouse, asylum, or similar institution, and that this was consistent with LPC provisions in the 1903 and 1907 Immigration Acts.

Subdivision of Rule 19 of the Immigration Rules of January 1, 1930 provides that an application for a public charge warrant: “... must be accompanied by a certificate (Form 534) of the *official in charge of the institution in which the alien is confined*, or other responsible public office if the alien is not confined showing that the alien is being maintained at public expense. ...”<sup>16</sup> While this rule does include non-institutionalized persons, “being maintained” implies a similar level of total dependence that is akin to being maintained in an institution, rather than other supplementary or temporary forms of relief. For example, children placed in foster care were likely thought of as “being maintained” at public expense in a manner similar to those in orphanages and similar institutions.

Not long afterward, Daniel W. MacCormack, the Commissioner of Immigration and Naturalization from 1933 to 1937, “ruled that receiving public relief did not constitute a basis for claiming that the recipient had become a public charge, in the sense as used in the immigration laws.”<sup>17</sup>

Since the late 1800s, the term “public charge” has become increasingly archaic. It has probably not been used in common speech, new legislation, or by benefit-granting agencies for at least a half a century. There is no good reason to think that the plain meaning of the term today includes the new classes of people that DHS is seeking to

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<sup>16</sup> Page 163 of Immigration Laws and Rules, January 1, 1930, available at: [https://eosfcweb01.eosfc-intl.net/eosfcsq101\\_U95007\\_Documents/Immigration%20Laws%20and%20Regulations/ImmLR%201930.pdf](https://eosfcweb01.eosfc-intl.net/eosfcsq101_U95007_Documents/Immigration%20Laws%20and%20Regulations/ImmLR%201930.pdf). [italics added]

<sup>17</sup> Page 51 in Harold Fields, *The Refugee in the United States* (New York: Oxford University Press, 1938), available at <https://babel.hathitrust.org/cgi/pt?id=mdp.39015034321904;view=1up;seq=18>.

exclude as likely to become public charges.<sup>18</sup>

The modern dictionaries cited in both the 1999 proposed rule and the 2018 proposed rule reinforce the longstanding historical understanding of the term. According to the 1999 proposed rule:<sup>19</sup>

... The word “charge” has many meanings in the dictionary, but the one that can be applied unambiguously to a person and best clarifies the phrase “become a public charge” is “a person or thing committed or entrusted to the care, custody, management, or support of another.” *Webster’s Third New International Dictionary of the English Language* 377 (1986). The dictionary gives the following apt sentence as an example of usage: “[H]e entered the poorhouse, becoming a county charge.” *Id.* (See also 3 *Oxford English Dictionary* 36 (2d ed. 1989) (definition #13 for “charge”—“The duty or responsibility of taking care of (a person or thing); care, custody, superintendence”).)

According to the Merriam Webster Online Dictionary cited in the 2018 proposed rule, a person is a charge if he or she is “committed into the care of another.”<sup>20</sup> Searching the 2018 online version of the *American Heritage Dictionary* yields a similar definition of the noun “charge”,<sup>21</sup> as “Care; custody: *a child put in my charge*”, “Supervision; management: *the scientist who had overall charge of the research project*. See Synonyms at **care**”<sup>22</sup> and “One that is entrusted to another’s care or management: *the baby sitter’s three young charges*.” [bold and italics in original]

To support its proposal to expansively redefine what it means to be a public charge, the agency cites two modern dictionary definitions of public charge. The current Merriam-Webster Online Dictionary’s terse definition of “public charge” as “one that is

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<sup>18</sup> George Borjas, a long-time advocate of restricting family-based immigration and shifting to a points-based immigration system, believes there is a “common-sense definition [of public charge] ... that we carry in our heads ....” George Borjas, “Who is a Public Charge?” February 1, 2017, available at <https://gborjas.org/2017/02/01/who-is-a-public-charge/>. Given the archaic nature of the term, it seems doubtful that many ordinary people carry a common-sense definition of public charge in their heads. If one asks a non-expert today what it means for a person to be a “charge”, they will probably be puzzled, but they may think of an adult who has children in their charge, or some similar meaning.

<sup>19</sup> Page 28677 of 1999 proposed rule.

<sup>20</sup> Page 51158 of 2018 proposed rule.

<sup>21</sup> The American Heritage Dictionary of the English Language, Fifth Edition (Boston: Houghton Mifflin Harcourt Publishing Company, 2018), available at: <https://www.ahdictionary.com/word/search.html?q=charge&submit.x=0&submit.y=0> (last accessed December 2018).

<sup>22</sup> The synonyms are “**care, charge, custody, keeping, supervision, trust** These nouns refer to the function of watching, guarding, or overseeing: *left the keys in my care; has charge of the library’s rare books; took custody of the author’s papers; left the canary in the neighbors’ keeping; assumed supervision of the students; documents committed to the bank’s trust.*” [bold and italics in the original.]

supported at public expense” and a 1990 *Black’s Law Dictionary* of it as “an indigent; a person it is necessary to support at public expense by reason of poverty alone or illness and poverty.”<sup>23</sup> Read in light of all of the other evidence on the longstanding historical, administrative, and legal understandings of what it means for a person to be a charge, a public charge, or a pauper, it would be unreasonable for DHS to claim that these definitions provide any support for their attempt to vastly expand the regulatory definition of public charge.

In summary, the LPC provision has been understood historically to exclude people who are likely to become “inmates of” or “confined to” institutions, typically described as “almshouses, asylums, and like institutions.” Public charges are “paupers”—very poor people, typically viewed with contempt—who are so entirely destitute that they become chargeable to the public. The LPC provision was intended to be a minimal restriction that excluded those considered at the time to be clearly “undesirable” rather than a broadly defined restriction that encompassed people who were employable or had family support. All of the terms that make up the various historical definitions—including “committed to”, “entrusted to”, “custody, care or management”, “being maintained”, “typically contemptible”, “very poor”, and “entirely destitute”—plainly mean that the relationship between the charge and the person overseeing her or him is a hierarchical one in which the charge is completely or nearly completely dependent on the other person or entity for their subsistence.

Employable immigrants, among others, have never been thought of as public charges. Yet, the agency’s proposed redefinition of public charge would classify millions of working people as public charges merely because they receive Medicaid or modest amounts of other supplemental benefits that it would be impossible to live on in the absence of earnings or other money income.

The historical, administrative, and legal understanding of what it means to be a public charge is generally consistent with the 1999 Field Guidance, but not with the 2018 proposed rule. It would not be reasonable to say that a person is “being maintained” at public expense simply because he or she, like millions of other working-class and middle-class Americans, receives Medicaid or other in-kind supplemental benefits.

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<sup>23</sup> Page 51158 of 2018 proposed rule.

## *The Agency's Definition of Public Charge is Inconsistent with Other Provisions of Federal Law*

DHS's expansive regulatory definition of what it means to be a public charge is inconsistent with various sections of 8 U.S.C. 1602-1646, as well as sections of the Food Stamp Act and federal Medicaid laws. Taken as a whole, these provisions not only restrict aliens' eligibility in certain ways for SNAP, Medicaid, and other benefits, they also authorize and require the provision of SNAP, Medicaid, and other benefits to certain qualified immigrants. Some examples:

- non-exempt qualified immigrants (generally legal permanent residents [LPRs] who do not have humanitarian status or circumstances) are generally ineligible for TANF and Medicaid during their first five years in the United States, but are eligible (at state option) after their first five years in the United States;<sup>24</sup>
- non-exempt qualified immigrants who can be credited with 40 or more qualifying quarters of coverage under title II of the Social Security Act are eligible for Medicaid, SNAP, TANF, and various other benefits, and states cannot opt to deny Medicaid and TANF benefits to eligible qualified immigrants who have sufficient quarters of coverage;<sup>25</sup>
- qualified immigrant children (under age 18) are eligible for SNAP benefits, including during their first five years in the United States;<sup>26</sup>
- lawfully residing pregnant women and children are eligible (at state option) for Medicaid, including during their first five years in the United States.<sup>27</sup>

There is nothing in 8 U.S.C. 1601-1646, the Food Stamp Act, or federal Medicaid law that calls for a new, more expansive regulatory definition of what it means to be a public charge, or that provides textual or other support for DHS's current attempt to re-define the term. These provisions do not say that someone is a public charge if they receive Medicaid, SNAP, or other means-tested benefits.

Moreover, it is impossible to reconcile Congress's explicit extension of Medicaid and other benefits to certain lawfully residing immigrants with DHS's proposal to now treat people who receive these benefits as public charges. If anything, these provisions support an even less expansive definition of public charge than is contained in the 1999 Field Guidance. For example, if a qualified immigrant can be credited with 40 quarters

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<sup>24</sup> 8 U.S.C. 1613.

<sup>25</sup> 8 U.S.C. 1612(a)(2)(B).

<sup>26</sup> 8 U.S.C. 1612(a)(2)(J).

<sup>27</sup> 42 U.S.C. 1396b(v)(4).

of Social Security coverage, and is a Supplemental Security Income (SSI) beneficiary, they should not be treated as a public charge, even though the 1999 Field Guidance would imply otherwise.<sup>28</sup> That the Trump administration is attempting to expand, rather than restrict, the public charge definition shows just how unreasonable its proposal is.

### *A Regulatory Definition of Public Charge Must Consider Both Section 212(a)(4) and Section 237(a)(5)*

Under section 237(a)(5) of the Act, a person is deportable if she or he “has become a public charge” within five years after her or his date of entry into the United States for causes not shown to have arisen since entry. Under section 212(a)(4) of the INA, an immigrant or non-immigrant is inadmissible if she or he is “likely at any time to become a public charge.” In other words, a person who has definitely “become a public charge” within five years is deportable, and one who is “likely” to “become a public charge” is inadmissible.

At the core of both provisions is the same language: “become a public charge.” The Field Guidance and 1999 proposed rule reasonably defined public charge for both admissibility and deportation purposes. The Field Guidance adopted, and the 1999 proposed rule proposed adopting, the same core definition of public charge— “primarily dependent on Government for subsistence”—while also specifying that certain other additional conditions (relating to repayment and based on longstanding case law) had to be met before deportation. (Specifically the requirement that someone is not deportable unless the government entity that paid for a person’s long-term care has a legal right to seek repayment of those benefits, has demanded repayment within five years of the person’s entry, and has obtained a judgment obligating repayment after the person has failed to repay the benefit).<sup>29</sup>

A regulatory action that defines public charge must logically start by determining what it concretely means to have “become a public charge” as that term is used under 237(a)(5) of the Act. Once this core state is defined, then the logical next step is to figure out how immigration and consular offices should go about determining, under section 212(a)(4) of the Act, if someone before them is “likely ... at any time in the future” to end up in that core state of having “become a public charge.”

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<sup>28</sup> This is also consistent with DHS’s decision to not consider old age, survivors, and disability insurance (OASDI) benefits in LPC decisions.

<sup>29</sup> 1999 Field Guidance at 28691.

The Field Guidance defines “public charge” for both admissibility and deportation purposes. And in the 1999 proposed rule, the Department of Justice considered both public charge admissibility (section 212(a)(4) of the Act) and deportation (section 237(a)(5) of the Act) as part of a single regulatory action.

By contrast, in the current regulatory action, DHS only addresses inadmissibility, and in defining public charge under 212(a)(4) gives no thought to whether and how the use of the term in section 237(a)(5) should matter for its regulatory definition. “Generally, identical words used in different parts of the same statute are ... presumed to have the same meaning.”<sup>30</sup> In effect, DHS puts the cart before the horse, or perhaps more aptly stated, DHS builds the cart without giving any thought to what it will be pulling along.

This may be a political or strategic attempt by the administration to adopt an expansive core definition of public charge for admissibility purposes that would appear even more unreasonable (than its proposed definition) if considered at the same time in the context of deportation.

In addition to increasing the likelihood of an incorrect interpretation of federal law, DHS’ failure to consider how section 237(a)(5) should matter for its regulatory definition is irresponsible from a public perspective. Once DHS has finalized a definition of public charge for inadmissibility purposes, most people will reasonably assume that public charge for deportation purposes has the same or similar *core* meaning.

Defining public charge without taking into account the implications of the definition for deportation purposes, and without seeking public comment in advance on these implications, means that the agency has utterly failed to consider an important aspect of how to regulate in this area. Moreover, it denies the public the opportunity to meaningfully comment on the impact of the proposed regulation. Once DHS has finalized a core definition of “public charge” for admissibility purposes, this administration will likely act quickly to adopt it for deportation purposes.

In short, the 2018 proposed rule adopts a much more expansive definition of public charge for admissibility purposes, but does not explicitly adopt this definition for deportation purposes, or even consider that the use of the term public charge in section 237(a)(5) of the Act should inform its interpretation of the same term in section 212(a)(4) of the Act. The 2018 proposed rule also fails to consider: 1) whether this core definition would be reasonable for deportation; 2) how it might otherwise affect deportation; and

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<sup>30</sup> Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012) at p. 170.

3) how it might further heighten fear and anxiety related to deportation among lawful permanent residents and others.<sup>31</sup>

### ***The Agency's Definition Would Mean Most Native-Born Working-Class Americans Are Public Charges***

In the 1892 annual report, the Superintendent presented data on the number of “almshouse paupers” to provide a sense of how many Americans, both U.S-born and foreign, were public charges at the time (see figure 3 in our comments above). As we noted in the previous section, the total number—and the total share of the U.S. population it comprised—was very small. In 2018, DHS is proposing to redefine the meaning of public charge in a way that would sweep much of the U.S. population into the ranks of the “undesirable” and “typically contemptible.” In fact, the proposed redefinition would mean that most native-born, working-class Americans are or have been public charges. It would also mean that substantial numbers of middle-class Americans are or have been public charges.

This is absurd, and cannot be what Congress intended. A quick review of some of the characteristics of Medicaid and Medicare Part D Low-Income Subsidy (LIS) enrollees suffices to demonstrate the absurdity of the agency’s position. In 2017, 62.5 million people—nearly 1 in 5 people in the United States—were covered by Medicaid. Among those enrolled:<sup>32</sup>

- Nearly half (29.7 million) lived in married-couple families.
- Forty-one percent lived in households with annual incomes of more than \$50,000.
- Among enrollees age 18 and older, some 41 percent—14.2 million—had post-secondary education beyond a high school degree.
- Among enrollees age 18 to 64, some 8 million worked full-time, year-round, another 7.8 million also worked, but less than full-time, year-round.

Similarly, 27 percent of Medicare beneficiaries were eligible for Medicare Part D LIS in

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<sup>31</sup> On current fears, see “More Latinos Have Serious Concerns About Their Place in America Under Trump” (Washington: Pew Research Center, 2018), available at <http://www.pewhispanic.org/2018/10/25/more-latinos-have-serious-concerns-about-their-place-in-america-under-trump/> (finding 55 percent of Latinos in the United States “worry that they, a family member or a close friend could be deported)

<sup>32</sup> U.S. Census Bureau, Table HI-01, Health Insurance Coverage Status and Type of Coverage by Selected Characteristics for 2017, available at <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-hi/hi-01.html>.

2009.<sup>33</sup> Nearly two-thirds of LIS-eligible individuals are auto-enrolled in the subsidy. According to data from the 2005-2007 Medicare Beneficiary Study, among LIS eligible individuals, nearly one in four were married, nearly 50 percent had a high school degree or more, and just over half had income above the federal poverty line.<sup>34</sup>

It is unimaginable that the 1882 Congress or any subsequent Congress would think that most working-class Americans and many middle-class ones are accurately referred to as “public charges” or “undesirables.” To be sure, some intellectuals have provocatively characterized the United States as a “nation of takers”<sup>35</sup> but there is no evidence that Congress intended the LPC provision to be read in anywhere near such an expansive manner.

## DHS’ Proposed Framework for Making Public-Charge Predictions is Unreasonable and Unworkable

### *DHS’ Proposed Variable-Factor Test for LPC Predictions is Inherently Arbitrary and Will Increase the LPC Error Rate*

Case law and section 212(a)(4)(B) require consular and immigration officers and the Attorney General to consider age; health; family status; assets, resources, and financial status; and education and skills. The agency is proposing to turn these general considerations into a complex, variable-factor test that always involves more than five factors, and that will massively increase the error rate for LPC decisions. The complex, variable-factor nature of the proposal is illustrated by Tables 33-35 in the proposed rule.

An analysis of Table 35, reproduced below, illustrates many of the problems with the proposed test.<sup>36</sup>

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<sup>33</sup> J. Samantha Shoemaker and others, “Eligibility and Take-up of the Medicare Part D Low-Income Subsidy,” *Inquiry* 49: 214–230 (Fall 2012), available at [https://journals.sagepub.com/doi/pdf/10.5034/inquiryjrn1\\_49.03.04](https://journals.sagepub.com/doi/pdf/10.5034/inquiryjrn1_49.03.04).

<sup>34</sup> *Ibid* at Table 3.

<sup>35</sup> See, e.g., Nicholas Eberstadt, *A Nation of Takers: America’s Entitlement Epidemic* (PA: Philadelphia, 2012).

<sup>36</sup> Proposed 2018 rule at page 51217.



**Table 35: Example Applicant B**

Factor	Considerations	Positive or Negative Findings By Factor	Weight of Factor
Age	<ul style="list-style-type: none"> <li>68</li> </ul>	Negative	Neutral
Health	<ul style="list-style-type: none"> <li>Arthritis and heart disease (Class B medical conditions) that affect ability to work and require extensive medical treatment, as indicated in the medical examination</li> </ul>	Negative	Neutral
Family Status	<ul style="list-style-type: none"> <li>Widow, adult child is providing alien with over 50% of support. Household of 6 (alien, alien's adult child, and the adult child's spouse, and 3 children)</li> </ul>	Positive - in comparison to assets and resources	Neutral
Assets, Resources and Financial Status	<ul style="list-style-type: none"> <li>Alien has no earned income</li> </ul>	Negative	Neutral
	<ul style="list-style-type: none"> <li>Annual household gross income is at 125 percent of the FPG for household of 6 (including adult child's income)</li> </ul>	Positive	Neutral
	<ul style="list-style-type: none"> <li>Alien has no pension and no additional assets or resources</li> </ul>	Negative	Neutral
	<ul style="list-style-type: none"> <li>Currently receiving a state cash benefit for income maintenance in excess of 15 percent of FPG consecutively for over the last 12 months</li> </ul>	Negative	Heavily Weighed
	<ul style="list-style-type: none"> <li>Has not received any immigration fee waivers</li> </ul>	Positive	Neutral
	<ul style="list-style-type: none"> <li>No information on credit history or score</li> </ul>	Not applicable	Neutral
Education and Skills	<ul style="list-style-type: none"> <li>No history of employment</li> </ul>	Negative	Neutral
	<ul style="list-style-type: none"> <li>No high school diploma or other education or skills</li> </ul>		
Affidavit of Support	<ul style="list-style-type: none"> <li>Sufficient Affidavit of Support from adult child at 125 percent of the FPG for household of 6</li> </ul>	Positive	Neutral
Prospective Immigration Status and Period of Stay	<ul style="list-style-type: none"> <li>Applying for Adjustment of Status under Family Category - Parent of a U.S. citizen (IR-0)</li> <li>LPR/Permanent period of stay</li> </ul>	Neutral	Neutral
Analysis in the totality of the circumstances:	<p>Although the alien's family status, assets, sources, and financial status (household income is at 125 percent of the FPG), and sufficient affidavit of support are positive factors, the alien's negative factors outweigh the alien's positive factors. The alien's health, lack of employment history, and lack of education and skills indicate that the alien is unlikely to work in the future to meet her needs. Moreover, the alien has two heavily weighed negative factors. The alien has Class B medical conditions that are likely to require extensive medical treatment, and the alien has no earned income, personal assets and resources, or prospect of private health insurance to cover the cost of medical care to treat the diagnosed Class B medical conditions.</p>		

Applicant B is a 68-year-old widow who lives with her married adult children and their three children. In other words, Applicant B is Grandma B to the three children she lives with and Mother/Mother-in-Law B to the adult couple she lives with. As a widow living with adult children who has no history of employment, it seems likely that Grandma has spent most of her life as a homemaker caring for her children and now-deceased spouse, and engaged in unpaid household production. She may continue to play an important supportive role in her household, including by contributing to household production and care of her grandchildren.<sup>37</sup>

<sup>37</sup> According to the U.S. Census Bureau, nearly one in four preschoolers, 4.83 million children, were regularly cared for by grandparents. Among preschool children with employed mothers, Asian and Hispanic preschoolers were the most likely to be cared for by grandparents. About 41 percent of Asian children with an employed mother were cared for by grandparents, and about 34 percent of Hispanic children with an employed mother were cared for by grandparents. Table 2 of Lynda Laughlin, *Who's Minding the Kids? Child Care Arrangements: Spring 2011* (Washington: U.S. Census Bureau, 2013) available at <https://www.census.gov/prod/2013pubs/p70-135.pdf>. This report does not specifically look at differences between non-citizens and citizens, but other research has documented how "kin-

The Grandma B table lists positive, negative, and neutral findings for the 12 factors that, in her case, end up determining whether she passes the LPC test. A 13<sup>th</sup> factor is classified as “not applicable.” Some factors included in the text of the rule, including having proficiency in English or other languages, are not noted in the table. In the factor category of “Assets, Resources, and Financial Status” there are seven factors; all but one are given positive or negative labels, and two are treated as heavily weighted. By comparison, the factors Family Status and Affidavit of Support are treated as only two of the 13 factors, and neither is heavily weighted.

Neither the table nor the proposed rules specify quantitative weights for the 13 factors. Presumably: 1) the factor labeled “not applicable” has a weight of zero and is not included in the numerator or denominator of any quantitative or qualitative final “score” of the proposed test; and 2) “heavily weighted factors” have a much greater weight than all other factors. This might mean that the agency intends each of the applicable factors to have a weight equal to 1, and heavily weighted factors have a weight equal to 2. While something along these lines is the most straightforward reading of the table and rules, what the rules actually require is unclear.

Most of the 12 applicable factors in the Grandma B table are likely to have relatively high correlations with one another. The use of unspecific but simple weighting and a long list of highly correlated factors is certain to produce a substantial number of erroneous and arbitrary LPC determinations. This is especially the case given the agency’s expansive redefinition of what it means to be a public charge. It is one thing to make the kind of LPC decisions that appear regularly in the case law over the last century, nearly all of which involve people who are 1) currently institutionalized or completely dependent on public cash assistance for income maintenance, 2) lack family support, and 3) are neither capable of or particularly willing to work. It is another to predict whether or not someone is likely to receive Medicaid for 13 months in a 36-month period or \$1,800 in SNAP benefits during a 12-month period. Developing a system for consistently and non-arbitrarily making these kinds of complex predictions about whether people will cross over very precise thresholds at some point in the future

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keeping and caregiving [by older immigrants] make possible their children’s participation in the American economy and society.” Judith Treas and Shampa Mazumdar, “Kinkeeping and Caregiving: Contributions of Older People in Immigrant Families,” *Journal of Comparative Family Studies*, 35(1): 105-122 (2004) available at [https://www.jstor.org/stable/41603919?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/41603919?seq=1#page_scan_tab_contents), and how “[c]hildren in immigrant families are ... nearly twice as likely as those in native-born families to be living with grandparents, other relatives, and non-relatives.” Donald Hernandez, “Demographic Change and the Life Circumstances of Immigrant Families” *Future of Children* 14(2): 16-47 (2004). See also Judith Treas, Transnational Older Adults and Their Families, *Family Relations* 57(4): 468-478 (October 2008).

(typically more than five years in the future, given the 1996 restrictions on eligibility) is no simple matter. At a minimum, it requires statistical analysis to develop the system, practical testing to determine whether or not the system makes reasonably accurate predictions, and further refinement and analysis based on this testing. DHS opted not to do any of this work before publishing its proposed rule in October 2018.

Even if Grandma B is unlikely to obtain employment in the future, given her supportive family and AOS, there is no good reason to think she is likely “to become a public charge” in the normal sense that Congress intended when it established the LPC provision. She is not likely to end up in an institution, or primarily dependent on public cash assistance for income maintenance. And given existing restrictions on public cash assistance for income maintenance, she is not likely to receive SSI or TANF.<sup>38</sup> (According to the example, she receives a “state cash benefit for income maintenance”, which is treated as a heavily weighted negative factor, but given her family support and the already very limited nature of General Assistance (GA) programs, it seems unlikely that she would be receiving ongoing cash assistance from GA, and unlikely that she should end up receiving GA in the future.<sup>39</sup>)

Of course, the agency is also claiming that it can fundamentally redefine the legal and historical meaning of public charge to include SNAP, Medicaid, LIS, and rental/public housing assistance. Assuming for the sake of argument that it has this authority, it is still a stretch to conclude that Grandma B is “likely” to become a long-term participant in any of these programs.

Unless she is likely to become eligible for Medicare (and there is little reason to think she is based on the facts in the table), she is unlikely to become eligible for Medicare Part D LIS.

Given her family support and the heavily rationed nature of rental housing assistance,

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<sup>38</sup> Since she lacks 40 quarters of Social Security credits, finding her likely to receive SSI in the future would require: 1) finding that she is likely to become a naturalized citizen within five or more years in the future, 2) finding she is likely to be financially eligible for SSI. Neither are simple matters. SSI eligibility may seem simple, but because she lives with and receives substantial support from her family, her eligibility and benefit amount would depend on multiple factors beyond her own income and disability status. Finding her likely to receive TANF would require finding her likely to become the relative caretaker of a minor child (and that is only the tip of the iceberg).

<sup>39</sup> Her potential eligibility for GA would depend on: 1) whether she lived in a state or city with such a program; 2) eligibility rules of the program, including whether she was categorically eligible, whether any of her sponsor’s income was deemed to her, and whether any of the in-kind support and maintenance she received from her family was considered in determining her eligibility or benefit amount.

she is unlikely to receive housing assistance. At a minimum, an immigration or consular official would need to first conclude she is likely to move out of the household she shares with her other family members.

She will be ineligible for SNAP unless she becomes a naturalized citizen (which will take at least five years and seems unlikely at her age for reasons discussed further below). Moreover, even if she becomes a naturalized citizen, whether she is eligible for SNAP will depend on the income of other members of her household. Even if eligible, most eligible elderly individuals do not participate in SNAP, so an immigration officer cannot presume<sup>40</sup> Grandma B's participation in SNAP is likely even if financial eligibility is likely.

Grandma B will not be eligible for federal Medicaid during her first five years in the United States; after that, her eligibility will depend on whether she lives in a state that has taken the federal option to provide Medicaid to qualified immigrants after the five-year bar and the Medicaid sponsor-deeming rules of the state she lives in. Sponsor-deeming means that as an LPR she is likely to remain ineligible until she naturalizes.

Naturalization is not automatic, particularly for elderly non-citizens. Prior to 1996, likelihood of naturalization may not have been particularly relevant to LPC predictions, but Title IV of PRWORA unarguably made it a factor that is relevant to any prediction of whether a non-citizen is likely to receive SSI, SNAP, TANF, Medicaid, and certain other benefits in the future. (It also unarguably made the likelihood of being credited with 40 quarters under Social Security, and several other factors relevant to determining future likelihood of benefit eligibility and receipt. The agency, of course, must consider all of these relevant factors as part of its regulatory action.) In Grandma B's case, she can only apply to become a naturalized citizen after living continuously in the United States as an LPR for five years. After that, she must apply and pass the English language and civics tests, and meet other requirements.<sup>41</sup> Given her age, the burdens involved, and other factors, it seems like quite a stretch to conclude that she is likely to naturalize.<sup>42</sup>

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<sup>40</sup> "Fact Sheet: USDA Support for Older Americans," available at <https://www.fns.usda.gov/pressrelease/2015/020215>.

<sup>41</sup> Despite her age, she is unlikely to be eligible for a waiver of the English test (which requires 15 to 20 years of residency as an LPR. She may be eligible for a disability exemption.

<sup>42</sup> Hainmueller and co-authors find "current high fees prevent a considerable share of low-income immigrants who desire to become Americans from submitting their applications" and that "the poorest immigrants face deeper challenges to naturalization that are not easily overcome with the lost-cost nudges" tested in the study. Jens Hainmueller and others, "A randomized controlled design reveals barriers to citizenship for low-income immigrants," *Proceedings of the National Academy of Sciences*, 115(5); 939-944 (January 2018), available at <http://www.pnas.org/content/115/5/939.full>.

A related issue is that the likelihood of naturalization would need to be treated as a negative factor in the LPC test for some applicants (like Grandma B), but as having both positive and negative implications for younger applicants. Research suggests that citizenship may:<sup>43</sup>

... increase immigrants' economic success both in its instrumental advantages—improving labor market access, for example, by signaling to employers greater stability or language skills—and in its psychological ones, namely a deeper sense of security, confidence, and attachment to one's community. Observational research from the United States and other advanced industrial countries has shown that immigrants who naturalize attain higher incomes, better job prospects, and higher rates of home ownership compared with other long-term immigrants who do not naturalize. Moreover, recent quasi-experimental evidence from Switzerland has shown that naturalization promotes the long-term social and political integration of immigrants.

In short, in Grandma B's case, the variable-factor test the agency is proposing to require for LPC determination will require officers: 1) to make negative or positive findings on a long list of factors, including many that have little relevance to whether Grandma B is likely to become a public charge; and 2) in some largely unspecified way, to aggregate these factors to determine whether Grandma B has passed or failed the test.

At the same time, the proposed variable-factor test does not take into account factors that are more relevant to Grandma's B likelihood of receiving benefits above the DHS thresholds (essentially gives them weights of zero) than the explicitly weighted factors and the explicitly heavily weighted factors. Moreover, the most relevant factors in Grandma B's case—her supportive family and enforceable affidavit of support—get much less weight than the two heavily weighted factors, both of which are related to her health, which appears relatively normal considering her age. According to the agency, Grandma B has failed the LPC test, but as our analysis above shows, she is unlikely to actually "become a public charge" in a manner consistent with congressional intent, or even as the agency has proposed to expansively redefine the term.

### *DHS' Proposed Variable-Factor Test for LPC Predictions is an Extraordinary Departure from Over a Century of Administrative Practice*

On September 9, 1930, President Hoover held a news conference on immigration in which he discussed a State Department report released that same day by the White House. The State Department report noted that:<sup>44</sup>

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<sup>43</sup> Ibid.

<sup>44</sup> The President's News Conference of September 9, 1930 at pages 363-365 of Public Papers of

In normal times an applicant for admission to the country (not otherwise ineligible) if he appears to be an able-bodied person who means to work and has sufficient funds to support himself and those dependent on him until he gets to his destination in that part of the United States where he is going, would be admitted without particular stress being placed on whether he has other means of support.

The State Department report and President Hoover (paraphrasing the report) went on to say that in “abnormal times like the present”—the Great Depression—it was necessary to “tighten up” LPC enforcement in cases of labor immigration until “employment conditions again become normal.” At the same time, the State Department and the President made clear this “tightening up” was meant to apply only to “labor immigration”, and not to family immigration.<sup>45</sup>

“[t]his method of tightening up the volume of immigration of persons who are certain to be public charges will not affect preferences given to relatives under the law. It is obvious that relatives of residents in the country are not likely to become public charges.”

In other words, even when the Executive Branch took temporary steps to “tighten up” the LPC clause as applied to “labor immigration”, it reiterated that the “normal” LPC standard required admission of any otherwise eligible immigrant who “appears to be an able-bodied person who means to work.” And even during the abnormal times of the Great Depression, it was “obvious” to the President and State Department “that [immigrant] relatives of residents in the country are not likely to become public charges.” The State Department also made clear that an applicant refused a visa under the temporarily tightened LPC standard would not “lose the advantage of his priority of application ... and may get his visa when employment conditions again become normal.”<sup>46</sup>

President Hoover’s statement and the accompanying State Department report are probably the most high-profile historical example of the longstanding and very straightforward standard for making LPC determinations. According to this standard, the two fundamental questions have always been:

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the Presidents of the United States, Herbert Hoover, 1930: Containing the Public Messages, Speeches, and Statements of the President, January 1 to December 31, 1930 (Washington: Government Printing Office, 1999).

<sup>45</sup> Ibid at 364; see also: “Labor Immigration Halted Temporarily at Hoover’s Order,” *The New York Times*, September 10, 1930, page 1, column 6. At the time, immigration from countries in the Western Hemisphere was not capped, but there were annual quotas on immigration from Western Europe, Eastern Europe, Asia (for those racial eligible for entry), and Africa and Oceania (with same restriction). The National Origins system in place then allocated most of the available visas under these quotas to Western Europe. However, spouses and minor were able to enter outside these numerical limitations. See Wolgin, “Family Reunification.”

<sup>46</sup> President’s News Conference of September 9, 1930 at p. 365.

- Question 1: can you work?
- Question 2: do you have family or other support?

If the answer to these questions, based on the “totality of the circumstances” existing at the time of the application, is “yes”, then an immigration official must admit an otherwise eligible immigrant. This was true even during the Great Depression, the worst economic crisis in U.S. history. Today, by contrast, “some companies in the Midwest are literally rolling out the welcome mat for immigrants and refugees” because they lack “enough labor to meet demand.”<sup>47</sup> It is hard to imagine a less rational time than now to expansively redefine an archaic law to make it more difficult for family-based immigrants who have the willingness and capability to work, as well as family support, to pass the LPC test.

## Caselaw

Over the years, Congress, the federal courts, the Board of Immigration Appeals (BIA), and federal agencies have fleshed out what this standard means as a general rule and in particular cases. Here are some examples:

- In *Matter of Martinez-Lopez*,<sup>48</sup> the BIA noted that: “a healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency” and that “specific circumstances, such as mental or physical disability, advanced age, or other facts reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, *must be present.*” [italics added].
- In *Matter of T—*,<sup>49</sup> the BIA overturned an inadmissibility determination, concluding that a 46-year-old single mother and her minor son were not inadmissible on LPC grounds because the mother was “quite capable of earning her own livelihood independent of her husband [who had been found not admissible on other grounds]” and “assurances ... had been given by relatives ...

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<sup>47</sup> Alfredo Corchado, “Even as Trump tightens immigration, Lincoln situation shows U.S. labor shortage is becoming a crisis,” *Dallas Morning News*, May 23, 2018, available at [https://journalstar.com/business/local/even-as-trump-tightens-immigration-lincoln-situation-shows-u-s/article\\_51e4b285-6bc5-5a52-92f8-45a2a9ade4b9.html](https://journalstar.com/business/local/even-as-trump-tightens-immigration-lincoln-situation-shows-u-s/article_51e4b285-6bc5-5a52-92f8-45a2a9ade4b9.html).

<sup>48</sup> *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421 (Att’y Gen. 1962).

<sup>49</sup> *Matter of T—*, 3 I&N Dec. 641 (BIA 1949) available at p. 641 in <https://babel.hathitrust.org/cgi/pt?id=mdp.39015047779643;view=1up;seq=666>

which appear to be in good faith although they are not legally liable ...”.

- In *Matter of A—*,<sup>50</sup> the BIA ruled that a 33-year-old mother of three was not likely to become a public charge, despite not working for four years prior to filing her application for adjustment of status. The BIA noted that “it is not unusual for a mother to stay home to care for her children, especially when the children have not started school” and that a “mother’s absence from the work force to care for her children is not by itself sufficient basis to find the mother likely to become a public charge.” The BIA went on to note that “circumstances beyond the control of the alien which temporarily prevent an alien from joining the work force”—including absence of available jobs in the local economy—must be considered. Of particular note, the BIA concluded that the regional director (who had found A—likely to become a public charge) had “placed undue weight” on the family’s financial circumstances “thereby overshadowing the more important factors; namely that the applicant has now joined the work force, that she is young, and that she has no physical or mental defects which might affect her earning capacity.”
- In *Matter of Perez*,<sup>51</sup> the BIA considered the case of a 28-year-old single mother with three children who was living with her mother and her stepfather and had (apparently) been unemployed for four years, including at the time of her initial hearing. Although the immigration judge had ruled that she was “likely to become a public charge”, the BIA ruled that she was “capable of finding employment” and “at a time when she may present herself to a United States Consul for a visa, she may well be able to convince him that she has prospective employment or other means of support.” In a 1998 cable to diplomatic and consular posts, the Department of State explained that “for several reasons a properly filed, non-fraudulent I-864 shall normally be considered sufficient to overcome the 212(a)(4) requirements. The I-864 is a legally enforceable contract, and therefore shall be granted significantly more evidentiary weight than the previous affidavit of support. Moreover, the new AOS requirements have not changed the long-standing legal presumption that an able-bodied, employable individual will be able to work upon arrival in the U.S. The presumption that the applicant will find work coupled with the fact that the I-864 is a legally enforceable contract will provide in most cases a sufficient basis to accept a sponsor's or joint sponsor's technically sufficient AOS [Affidavit of Support] as overcoming the public charge ground.”<sup>52</sup>

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<sup>50</sup> *Matter of A—*, 19 I&N Dec. 867 (BIA 1988).

<sup>51</sup> *Matter of Perez*, I&N Dec. 136 (BIA 1974).

<sup>52</sup> U.S. Department of State, “I-864 Affidavit of Support: Update No. 14 – Commitment to



## Ability to Work and Family Support Must Be Heavily Weighted

In short, for over a century, federal law has been understood to require the extremely heavy weighting of two factors: 1) ability to work in the future and 2) having potential family support. Even if someone is unlikely to work or have family support, they will still pass the LPC test if they have financial resources that make it unlikely they will end up being maintained in an institution or otherwise totally dependent on government for subsistence. Factors like age and health are also generally considered, but only because they help inform immigration and consular officials' prospective judgement about whether someone is likely to be capable of finding employment after entry.

By contrast, the new weighting scheme the agency proposes is a radical departure from how the LPC test has been understood for over a century by Congress, courts, and federal agencies. In essence, the agency unreasonably underweights the two most important factors while overweighting several other marginal factors. Of particular note:

- *The agency fails to give ability and willingness to work a heavy positive weight.* Instead, it apparently treats not having current employment as a heavily weighted negative factor<sup>53</sup>, unless an applicant is a full-time student or (it appears) unauthorized to work. Moreover, proposed 212.22(c) is so confusingly drafted that it is hard to say what it means. Under proposed 212.22(c) "Not being a full-time student and authorized to work, but unable to demonstrate current employment, recent employment, or no reasonable prospect of future employment". When the agency states "the alien is unable to demonstrate ... no reasonable prospect of future employment" is a heavily weighted negative factor, does it mean to say that "inability to demonstrate ANY reasonable prospect of future employment" is a heavily weighted negative factor? If an applicant is able to demonstrate a reasonable prospect of future employment, but is current unemployed, is the agency still proposing to treat current unemployment as a heavily weighted negative factor? Presumably the answer is no, but then why are inability to demonstrate current employment and inability to demonstrate recent employment also included as potential heavily weighted *negative* factors in this section?

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Provide Assistance," UNCLAS STATE 102426 (June 1998), available at <https://www.aila.org/infonet/dos-cable-on-public-charge-ineligibility>.

<sup>53</sup> Proposed 212.22(c)(i).

- *The agency fails to treat having an affidavit of support, including an enforceable affidavit of support, as a heavily weighted positive factor.*
- *By contrast, the agency treats mere past receipt of one or more of the benefits targeted by the rule (above the low thresholds set by the proposed rule) as a heavily weighted negative factor.<sup>54</sup>*

The disparate ways in which these three things (work ability—*not heavily weighted*; family support—*not heavily weighted*; and past receipt of one or more benefits, including ones that are commonly received by native-born citizens—*heavily weighted*) are treated has no rational basis. Why, for example, in a prospective test, would work ability and having legally enforceable family support be less heavily weighted than past receipt of Medicaid or SNAP? This kind of disparate treatment might be justifiable if Congress had drafted the public charge test in a way that explicitly directed the agency to give heavier weight to past receipt of benefits than to future employability and family support, but Congress has done nothing of the sort. Past receipt of benefits isn't even mentioned by Congress as a factor that should be given any weight in an LPC decision. It is hard to imagine that DHS's differential treatment of these factors is driven by anything other than discriminatory animus against working-class immigrants.

The only heavily weighted positive factors in the agency's proposed rule are two factors that are without precedent in more than a century of LPC law: 1) being currently employed with an income of at least 250 percent of the federal poverty level; and 2) having financial assets, resources, and support of at least 250 percent of poverty.<sup>55</sup>

This unreasonably treats millions of people who work full-time, year-round in many of the largest and fastest-growing occupations in the United States as people who are public charges or likely to become public charges. The table below lists the twenty occupations with the most job growth over the next decade. In nine of these occupations, workers who work full-time, year-round and earn the median wage for the occupation would not meet the 250 percent of the federal poverty standard based on their wages even if they were a household of *only one* individual. In 14 of the 20 occupations (all shaded light red), a worker would not meet the standard if her or his household included only one child and no other members.

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<sup>54</sup> Proposed 212.2(c)(1)(iii). In addition, proposed 212.22(b)(4)(ii)(F) treat both "applying for" a public benefit and have been "certified or approved to receive public benefits" as factors.

<sup>55</sup> Proposed section 212.22(c)(2).

Table I. Twenty occupations with the most job growth, 2016 and projected 2026, and family size needed to meet 250 percent of poverty standard.

Occupation	Estimated employment change, 2016-2026 (thousands of jobs)	2017 median annual wage	Family size at which median annual wage is below 250 percent of poverty
Personal care aides	777.6	\$23,100	1
Combined food preparation and serving workers, including fast food	579.9	\$20,180	1
Registered nurses	438.1	\$70,000	5
Home health aides	431.2	\$23,210	1
Software developers, applications	255.4	\$101,790	8
Janitors and cleaners, except maids and housekeeping cleaners	236.5	\$24,990	1
General and operations managers	205.2	\$100,410	8
Laborers and freight, stock, and material movers, hand	199.7	\$27,040	1
Medical assistants	183.9	\$32,480	2
Waiters and waitresses	182.5	\$20,820	1
Nursing assistants	173.4	\$27,520	1
Construction laborers	150.4	\$34,530	2
Cooks, restaurant	145.3	\$25,180	1
Accountants and auditors	139.9	\$69,350	5
Market research analysts and marketing specialists	138.3	\$63,230	5
Customer service representatives	136.3	\$32,890	2
Landscaping and groundskeeping workers	135.2	\$27,670	1
Medical secretaries	129.0	\$34,610	2
Management analysts	115.2	\$82,450	7
Maintenance and repair workers, general	112.5	\$37,670	2

Source: CAP analysis of Bureau of Labor Statistics, "Employment Projections," available at <https://data.bls.gov/projections/occupationProj> (last accessed December 2018). Poverty thresholds (250 percent of federal poverty guidelines) calculated from Department of Health and Human Services, "Annual Update of the HHS Poverty Guidelines," 82 FR 8831, January 31, 2017.

Yet, the agency provides no reason or evidence for a standard that effectively classifies millions of full-time, year-round workers in high-demand occupations as public charges, or as not self-sufficient.

### DHS is Proposing to Use Poverty Guidelines the Administration Has Said Overstate Poverty

A related issue with the agency's use of a standard set at 250 percent of poverty (as well as its use of 125 of poverty as a factor) is that the Trump administration itself has argued repeatedly that the poverty standard the agency is proposing to use substantially overstates the level of poverty in the United States, in part because, the administration claims, the current poverty guidelines have been over-adjusted for inflation over the past half century.<sup>56</sup> According to the Council of Economic Advisers (CEA), one of the flaws of the official poverty measure:<sup>57</sup>

... is its use of the general consumer price index (CPI) for adjusting its poverty thresholds to account for inflation each year. The CPI overstates rising prices, and so poverty thresholds grow faster than they should in order to maintain a constant level of real resources (for more discussion of these points, see for example, Burkhauser 2009, Meyer and Sullivan 2012a, and Meyer and Sullivan 2012b).

According to CEA, when measured "properly"—i.e., by not using the federal poverty guidelines that the agency proposes to use in this regulatory action—poverty has declined by more than 90 percent since 1961, and material hardship is an issue for less than five percent of the U.S. population.<sup>58</sup>

CEA goes on to note that "the [poverty] threshold is arbitrary ...".<sup>59</sup> This raises a number of questions that DHS must consider. In particular, if President Trump's Council of Economic Advisers views the federal poverty guidelines as either arbitrary or inaccurately overestimating the income needed to avoid poverty in the United States, is DHS's use of these same guidelines arbitrary in making LPC predictions? Alternatively, will DHS's use of poverty guidelines that (according to CEA) overstate the extent of poverty in the United State result in a substantial overestimate by immigration officials of the share of otherwise-eligible admission applicants who are predicted to become public charges?

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<sup>56</sup> President's Council of Economic Advisers, "Expanding Work Requirements in Non-Cash Welfare Programs," July 2018, <https://www.whitehouse.gov/wp-content/uploads/2018/07/Expanding-Work-Requirements-in-Non-Cash-Welfare-Programs.pdf>.

<sup>57</sup> Ibid at page 27-29.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

There is no reason to think that Congress intended immigration officials to classify evidently non-destitute or non-indigent person as public charges. The fact that over the last century Congress has increasingly used federal funds to extend public benefits to people with incomes in the middle and upper deciles of the income and wealth distribution does not support an inference that they raised the very low bar for being classified as a public charge, or that they intended this very low bar to be ratcheted upward in order to encompass larger and larger shares of the income distribution, and more and more people. Congress could have rewritten the scope of the LPC provision in this fashion, but it didn't, even as it expanded the scope of government concern from a minimalist focus on the "very poor" and "entirely destitute" to the security and well-being of people at all points on income distribution.<sup>60</sup>

Consistent with the plain meaning of the LPC provision and congressional intent, any rules governing LPC determinations must treat the following factor as "heavily weighted positive factors":

- ability to demonstrate a reasonable prospect of future employment; and
- having an enforceable affidavit of support.

Past receipt of benefits should receive no weight. As we noted earlier in these comments, Congress has created and expanded Medicaid, SNAP, and other programs to accomplish a number of public goals, including improving Americans' health, nutrition, well-being, and employability over their life courses. Economists and other social scientists have extensively documented that Medicaid, SNAP, and other benefits work as intended.<sup>61</sup>

### Congress Did Not Hide a Quasi-Points-Based Immigration System in the Public-Charge Mousehole

Finally, an overarching problem with the agency's proposal is that it appears to be an

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<sup>60</sup> For additional perspective on the expansive nature and multi-fold purposes of "welfare" today, see, e.g., Peter Lindert, *Growing Public: Volume 1, The Story: Social Spending and Economic Growth Since the Eighteenth Century* (Cambridge, UK: Cambridge University Press, 2004); Suzanne Mettler, *The Submerged State: How Invisible Government Policies Undermine American Democracy* (Chicago: University of Chicago Press, 2011) (documenting "submerged" public benefits, like the mortgage interest deduction, that mostly provide benefits to middle- and upper-income people); Jacob Hacker, *The Divided Welfare State: The Battle Over Public and Private Social Benefits in the United States* (Cambridge, UK: Cambridge University Press, 2002) (what is truly distinctive about the U.S. welfare state is that so many social welfare duties are handled not by the state, but by the private sector with government support).

<sup>61</sup> See, e.g., comments on this rule submitted by the Center on Law and Social Policy, Center on Budget and Policy Priorities, and others.

unreasonable attempt to transform the LPC provision into the kind of points-based admission system the administration has unsuccessfully attempted to persuade Congress to adopt. The table below compares the factors that DHS proposes to require immigration officers to consider when making LPC decision with the points system proposed in the Reforming American Immigration for a Strong Economy (RAISE) Act, legislation introduced in 2017 by Senators Tom Cotton (R-AR) and David Perdue (R-GA).<sup>62</sup>

Table 2. Factors Considered Under DHS' Proposed Rule and S. 1720

Factor	Considerations under 2018 proposed rule	S. 1720 points system
<b>Age</b>	— between 18-62 — whether age impacts ability to work	0-10 points depending on age
<b>Education</b>	— high school degree or higher — any occupational skills, certifications, or licenses	0-13 points depending on education level
<b>English language proficiency</b>	— proficient in English — proficient in English in addition to other languages	0-12 points depending on proficiency
<b>Extraordinary achievement</b>	Not specifically included but relevant to various factors	Up to 40 points
<b>Employment</b>	History of employment	5-13 points if job offer at 150% or higher of state median income
<b>Investment &amp; management of certain new U.S. enterprises</b>	Not explicitly mentioned, but presumably relevant	6 or 12 points for investment of \$1.35 million or more
<b>Applied for or received a fee waiver</b>	Negative	Not a factor
<b>Health</b>	Whether the immigrant has been diagnosed with a medical condition that is likely to require extensive medical treatment, institutionalization, or interfere with the immigrant's ability to provide and care for him/herself, to attend school, or to work upon admission or adjustment of status.	Not a factor
<b>Family income</b>	— above or below 125 of the federal poverty guideline — heavily weighted if above 250 percent of federal poverty guideline — whether the immigrant has private health insurance or the financial resources to pay for any reasonably foreseeable medical costs related to a medical condition that is likely to require extensive medical treatment, institutionalization, or interfere with ability to work	Not a factor, except as part of employment factor above
<b>Past receipt of public benefits</b>	Negative if above threshold	Not a factor
<b>Family status</b>	— applicant's household size	2 points if valid offer of admission under family preference category

<sup>62</sup> RAISE Act of 2017, S. 1720, 115th Cong. (August 2, 2017), available at <https://www.congress.gov/bill/115th-congress/senate-bill/1720/text>.

<b>Credit history and credit score</b>	“Good” score is positive, “bad” score may be negative	Not a factor
<b>Financial liabilities</b>	Negative	Not a factor
<b>Affidavit of support</b>	—sponsor’s annual income, assets, and resources; —sponsor’s relationship to the applicant; —likelihood sponsor would provide the statutorily required amount of financial support sponsored immigrant —any other related considerations	Not a factor.

As this comparison show, the agencies proposed LPC rule is more complex and less transparent than the points-based system proposed by the RAISE Act. (Similarly, the proposed LPC test lacks the more transparent and bounded [in terms of factors] nature that existing points-based systems typically have.)<sup>63</sup>

There is no reason to believe Congress intended the LPC provision to authorize DHS to create a system for selecting among family-based applicants for admission and adjustment that is akin to a points-based system, especially one that include more factors, more complexity and less transparency than a typical points-based immigration. As the Supreme Court has observed, Congress “... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”<sup>64</sup>

### ***DHS Must Consider the Possibility of Sponsor Reimbursement***

Federal courts have long held that a person committed to a state institution is not a public charge “when the state receives from the relatives what it has fixed as adequate compensation for such support ....”<sup>65</sup> In *Ex Parte Kichmiriantz*, 283 F. 697 (N.D. Ca 1922), the court concluded that “when the state receives from the relatives what it has fixed as adequate compensation for such support, I do not think the individual so cared for is a public charge, within the meaning of the act.”<sup>66</sup> Similarly, in *Nocchi v. Johnson*, 6 F.2d 1 (1st Cir. 1925), a case involving a 10-year-old boy who was “sent to the Wrentham State School for Defective Children” the court concluded that “Congress never intended that

<sup>63</sup> For example, Canada has a point system for certain economic immigrants (but not for family class immigrants). Library of Congress, “Points-Based Immigration Systems,” available at <http://loc.gov/law/help/points-based-immigration/canada.php> (last accessed December 2018). Their Federal Skilled Workers Program has six selection criteria. Points are awarded based on objective criteria. Health and disability are not factors.

<sup>64</sup> *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001).

<sup>65</sup> *Ex Parte Kichmiriantz*, 283 F. 697 (N.D. Ca 1922), p. 698, available at <https://www.ravellaw.com/opinions/5e12d64d08936daa7bb5572a72494cd0>.

<sup>66</sup> *Ibid.*

an unfortunate alien defective child or insane wife, committed to a state institution for curative treatment, having, respectively, parents or husband financially able to pay all proper charges, should thereby become pauperized, 'a public charge,' and on that ground deported."<sup>67</sup>

Consistent with these and similar rulings, any reasonable regulatory definition of public charge must take the possibility of compensation or reimbursement into account. Thus, if DHS adopts a final rule that defines "public charge" to include a child receiving one month too many of Medicaid (above the 12-month threshold) or a \$100 too much in SNAP benefits in a single year, then they must also take into account whether these benefits above the threshold are likely to be reimbursed. Even if costly long-term institutional care is unlikely to be reimbursed in most cases, there is no reason to think that very modest amounts of Medicaid or SNAP benefits will not be reimbursed if the public entity providing the benefits seeks reimbursement.

DHS may argue that consideration of the likelihood of reimbursement is contrary to *Matter of Harutunian* (1974).<sup>68</sup> In this case, the Board held that a 70-year-old applicant who "lacks means of supporting herself, who has no one responsible for her support, and who expects to be dependent for support on old-age assistance is ineligible for a visa under 212(a)(15), as likely to become a public charge, even though the state from which she will receive old-age assistance does not permit reimbursement."<sup>69</sup>

It would be unreasonable to conclude that *Matter of Harutunian* allows DHS to ignore *Nocchi* and related federal court decisions in adopting a regulatory definition of public charge for inadmissibility purposes. Since 1996, the affidavits of support (AOS) required by section 213A of the Act, 8 U.S.C. 1183a, are "legally enforceable" contracts.<sup>70</sup> In addition, "the appropriate entity" that provided any means-tested benefit to a sponsored immigrant must "request reimbursement" from the sponsor.<sup>71</sup> If the sponsor refuses to reimburse the agency, the agency may bring an action for reimbursement against the sponsor.<sup>72</sup> Several courts have upheld lawsuits by sponsored immigrants to enforce the support duties of the 213A AOS.<sup>73</sup>

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<sup>67</sup> *Nocchi v. Johnson*, 6 F.2d 1 (1st Cir. 1925), p. 2, available at <https://www.ravellaw.com/opinions/5f8819a0a54c38265750791b02ccdbba?query=NOCCHI%20v.%20JOHNSON%20>.

<sup>68</sup> *Matter of Harutunian*, 14 I&N Dec. 583, 589 (Reg'l Comm'r 1974).

<sup>69</sup> *Ibid* at 590.

<sup>70</sup> Section 214(a)(1) of the Act, 8 U.S.C. 1183a. Under section 212(a)(4)(C) of the Act, family-sponsored immigrants generally must have a section 213 AOS to be admissible.

<sup>71</sup> Section 213A(b)(1).

<sup>72</sup> Section 213A(b)(2).

<sup>73</sup> John Patrick Pratt and Ira J. Kurzban, "The Affidavit of Support Creates a Legally Enforceable Contract by the Sponsored Foreign National: Efforts to Collect Damages as Support Obligations



Moreover, the government has an additional way to obtain reimbursement for TANF and certain other forms of assistance. Since 1975, federal law has required parents seeking TANF (then Aid to Families with Dependent Children [AFDC]) to assign their right to receive child support payments to the state agency providing assistance, and to cooperate with the state agency in establishing paternity and securing support.<sup>74</sup> The agency will then retain child support payments made by a non-custodial parent of the child up to the amount of assistance it has provided. In 2017 the Child Support Enforcement program collected \$1.2 billion in child support payments that were retained as reimbursement of current or past assistance paid.<sup>75</sup>

In short, unlike the program considered in *Harutunian*, the current SNAP, Medicaid, SSI, and TANF programs *permit* reimbursement. Thus, the agency must consider reimbursement as part of any regulatory action on public charge. Moreover, the agency's consideration of reimbursement as part of this regulatory action must be done in a way that gives the public the opportunity to comment and provide input on such a major aspect of the public-charge regulation. Finally, it is worth noting that the lower the public-charge thresholds proposed by DHS, the more significant reimbursement becomes as an issue, requiring advance consideration by the agency in this regulatory action. This is because lower thresholds increase the likelihood of receiving reimbursement of benefits that push the amount of benefits received below the public-charge threshold set by DHS.

## DHS' Process for this Regulatory Action Has Been Deeply Flawed

According to E.O. 12866, "agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people."<sup>76</sup> The agency has failed to show that its proposed regulations are required by law, are necessary to interpret the law, or are made necessary by a

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Against Divorce Spouses," *The Federal Lawyer*, November/December 2010, available at [http://www.fedbar.org/Resources\\_1/Federal-Lawyer-Magazine/2010/The-Federal-Lawyer-November-and-December/Features/Support-Affidavit.aspx?FT=.pdf](http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2010/The-Federal-Lawyer-November-and-December/Features/Support-Affidavit.aspx?FT=.pdf).

<sup>74</sup> Public Law 93-647, the Social Security Amendments of 1974, created part D of title IV of the Social Security Act (sections 451, et seq.; 42 U.S.C. 651, et seq.).

<sup>75</sup> Table P-1 in Office of Child Support Enforcement, Preliminary Report, FY2017, available at [https://www.acf.hhs.gov/sites/default/files/programs/css/fy\\_2017\\_preliminary\\_data\\_report.pdf?nocache=1529610354](https://www.acf.hhs.gov/sites/default/files/programs/css/fy_2017_preliminary_data_report.pdf?nocache=1529610354).

<sup>76</sup> "Executive Order 12866: Regulatory Planning and Review," 58 F.R. 190 (October 4, 1993).

compelling public need. In fact, as the agency concedes, its proposed regulation would harm the health, safety, and well-being of the American people. Moreover, DHS claims it is unable to quantify the impact its proposed rule will have on immigrant admissions. This is an extraordinary failure on the agency's part.

### *DHS Has Not Shown a Compelling Public Need for these Regulations*

In the 1999 proposed rule, the INS and Department of Justice said that public-charge regulation was needed to address:<sup>77</sup>

“... whether the receipt of Federal, State, or local public benefits for which an alien may be eligible renders him or her a “public charge” under the immigration statutes governing admissibility, adjustment of status, and deportation.

Although Congress has determined that certain aliens remain eligible for some forms of medical, nutrition, and child care services, and other public assistance, numerous legal immigrants and other aliens are choosing not to apply for these benefits because they fear the negative immigration consequences of potentially being deemed a “public charge.” This tension between the immigration and welfare laws is exacerbated by the fact that “public charge” has never been defined in statute or regulation. Without a clear definition of the term, aliens have no way of knowing which benefits they may safely access without risking deportation or inadmissibility.

Additionally, the Service has been contacted by many State and local officials, Members of Congress, immigrant assistance organizations, and health care providers who are unable to give reliable guidance to their constituents and clients on this issue. According to Federal and State benefit-granting agencies, this growing confusion is creating significant, negative public health consequences across the country.

Concern over the public charge issue is further preventing aliens from applying for available supplemental benefits, such as child care and transportation vouchers, that are designed to aid individuals in gaining and maintaining employment. In short, the absence of a clear public charge definition is undermining the Government's policies of increasing access to health care and helping people to become self-sufficient. The Department seeks to remedy this problem with this proposed rule.”

At the same time, INS issued comprehensive field guidance on inadmissibility and deportation. It is clear in retrospect that the INS field guidance remedied the problems the 1999 NPRM was proposed to address.

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<sup>77</sup> 1999 proposed rule at page 28676.

By contrast, DHS's current proposed rule is an attempt to manufacture a *new* problem, which DHS uses in a circular fashion to justify its regulatory redefinition of the longstanding LPC provision along the lines of a points-based immigration system. In addition, the current proposed rule creates new confusion that is already likely causing citizens and lawfully residing immigrants to not apply or disenroll from supplemental benefits that promote health, well-being, and employment.<sup>78</sup> If DHS issues final rules that are substantially similar to these proposed rules, the resulting fear and confusion will likely be amplified far beyond the level in the late 1990s that led INS to issue the current Field Guidance.

The agency has failed to show that there is currently a "public-charge" problem among immigrants admitted to the United States who have passed the longstanding LPC test.

According to USCIS Director Francis Cissna these regulations are needed because:<sup>79</sup>

Uhh, Congress passed that [the LPC provision], you know, forever ago, it's been sitting on the books, it's hardly ever been enforced, and if the law is to mean anything, and the will of Congress is to mean anything, we should enforce it.

This is a puzzling statement to say the least, and suggests that the Director may be misinformed both about how the provision is regularly enforced by DHS and the State Department and about the precise circumstances in which Congress meant for the inadmissibility ground to be applied when it was first enacted into law. In fact, the LPC provision has been enforced for over a century and is currently being enforced in a manner consistent with the intent of the Congress that passed it. The agency has failed to show that the LPC provision is not being enforced, or that the 1999 guidance is contrary to the intent or will of Congress.

To show that the LPC provision is not being enforced or is even being under-enforced, DHS would need, at a minimum, to document the number of LPRs in the United States who:

- have passed the LPC test since 1996 (after Congress established sweeping new restrictions on immigrants' eligibility for public benefits and instituted new AOS requirements); and

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<sup>78</sup> See, e.g., Zaidee Stavely, "Proposed 'public charge' rule change stirs confusion over green card eligibility," PRI's The World, November 28, 2018 available at <https://www.pri.org/stories/2018-11-28/proposed-public-charge-rule-change-stirs-confusion-over-green-card-eligibility>.

<sup>79</sup> "A Conversation with USCIS Director Francis Cissna," National Press Club, August 15, 2018 available at <https://www.youtube.com/watch?v=784pGCMnXrU>.

- are now living in a long-term care institution at government expense, or are primarily dependent on public cash assistance for income maintenance and unemployable.

The agency's failure to make such basic estimates in order to justify the need for this regulatory action show that it has entirely failed to consider a central aspect of the problem it claims this regulatory action is needed to address.

The agency might argue that too few applicants are currently found inadmissible on LPC grounds. But absent a reasonable estimate of how many recently admitted immigrants who pass the test later become public charges, as that term has been consistently and historically understood, the current failure rate for people taking the LPC test has no significance.

Table 12 in the proposed rule is the closest the agency comes to making this kind of estimate. In this table the agency estimates the percent of non-citizens receiving certain benefits.<sup>80</sup> The table distinguishes between non-citizens who were LPRs at admission and those who were not LPRs at admission. A fundamental problem with the agency's analysis is that it does not distinguish between non-citizens who were subject to the LPC test at admission and those who were exempt from the LPC test at admission. In other words, the agency has failed to show that *any* immigrants who passed the LPC test subsequently become public charges on the basis of benefit receipt. In addition, DHS also makes no attempt to estimate the duration or value of benefits received by LPRs who previously passed the LPC test.

Moreover, as Table 12 shows, the overall number of non-citizens who receive "cash assistance for income maintenance" is extraordinarily low. Among non-citizen who were LPRs at admission—a group that presumably includes humanitarian immigrants who are exempt from the LPC test—DHS estimates that only 131,000 received SSI benefits. (DHS provides no estimate of the number of non-citizens who are institutionalized for long-term care, but it is almost certainly even lower.)<sup>81</sup> Given the eligibility restrictions for SSI, nearly all of these non-citizen beneficiaries have been exempt from the LPC test at admission, have a substantial work history (40 quarters of Social Security from past work), or have a military connection. Despite having

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<sup>80</sup> Proposed rule at 51162.

<sup>81</sup> More generally, the share of the U.S. who are institutionalized in public hospitals and similar institutions (other than prisons and jails) is much lower today than in the early 1900s. In 1934, over 500 people per 100,000 adults were institutionalized in mental hospitals alone, compared to under 50 per 100,000 today. Figure 2 at page 42 of Bernard Harcourt, "An Institutionalization Effect: The Impact of Mental Hospitalization on Homicide in the United States, "1934-2001, 40 *Journal of Legal Studies* 1 (January 2011).

somewhat less restrictive non-citizen eligibility rules than SSI, the numbers for TANF and GA are so low, and the standard errors so high, that the agency is unable to make reliable estimates. In short, the agency's own estimates can only support a conclusion that the LPC test, as historically understood and enforced, is working as originally intended.

If Congress wants to rewrite the LPC provision to mean something other than what it has consistently and historically been understood to mean, they (and they alone) have the opportunity to do so. The executive branch, however, does not have that ability. In other words, expanding the grounds of inadmissibility to deny admission or adjustment to people who immigration officials predict are likely to receive supplementary benefits like Medicaid or SNAP at any point in the future, is something only Congress can authorize.

Even if DHS had the legislative power to reinterpret the LPC, it has failed to show that regulations that do so are required by law or are made necessary by compelling public need. While DHS estimates the number of non-citizens receiving the supplemental benefits it targets (with the exception of Medicare Part D, which it provides no estimate for), these estimates do not distinguish between non-citizens who are subject to the LPC test and the substantial number who are not. This agency failure is even more problematic because immigrants who are not subject to the LPC test—including refugees, asylees, and a long list of other humanitarian immigrants—are more likely to receive means-tested benefits than other recent immigrants.

DHS provides no reasons for failing to make proper estimates. There are no reasons for this failure because DHS could produce reasonably accurate estimates. While it will take DHS more time to produce such estimates and provide the public with notice and the opportunity to comment on them, DHS certainly has sufficient time to get this right. After all, as Director Cissna notes, Congress passed the LPC provision “you know, forever ago ....”<sup>82</sup> Having gone over a century without public-charge regulations, there can be little harm to taking the time necessary to get such regulations right, especially given that 1999 Field Guidance successfully addressed the only credible need for regulation. Moreover, considering the radical nature of this major proposal and the substantial costs and irreparable harms DHS has conceded it will cause, DHS must take the time needed to make the necessary estimates and publish them for notice and comment.

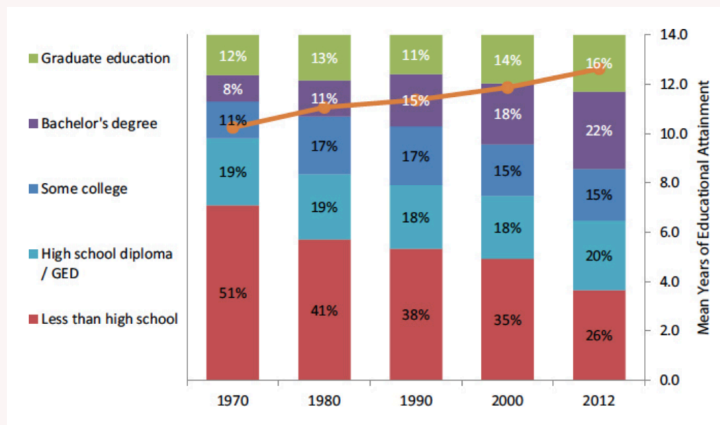
If anything, any conceivable public-charge “problem” DHS claims regulations are

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<sup>82</sup> Cissna, *infra*, at note 38.

necessary to address has diminished considerably over time. This is because of steady increases in the educational level of admitted immigrants, high employment levels of working-age immigrants, and because of the extensive restrictions Congress placed on sponsored LPRs' eligibility for various means-tested benefits in 1996.

The figure below, from the National Academy of Sciences report *The Economic and Fiscal Consequences of Immigration*, shows the steady increase in the education attainment of recent immigrants.<sup>83</sup> This analysis doesn't exclude immigrants who are not subject to, or have not taken, the LPC test, so it likely underestimates the educational attainment of recent immigrants who have passed the existing test.



**FIGURE 3-1** Educational attainment of recent immigrants (those who entered in the 5 years prior), by Decennial Census year 1970-2000, and in 2012 (in percentages).  
 SOURCE: Analyses of 1970-2000 Decennial Census data and 2010-2012 American Community Survey data, accessed through the Integrated Public Use Microdata Series.

**Figure 4** Educational attainment of recent immigrants (those who entered in the five years prior). National Academy of Sciences, *The Economic and Fiscal Consequences of Immigration* (2007)

In 1996, Congress imposed extensive restrictions on lawful permanent residents' eligibility for SSI, SNAP, TANF, Medicaid, and various other means-tested benefits. Under the 1996 "Personal Responsibility and Work Opportunity Act," LPRs are generally ineligible for 1) SSI until they naturalize or have worked 40 quarters, 2) TANF, during their first five years after admission as an LPR, 3) SNAP, during their

<sup>83</sup> Page 87 of "3 Socioeconomic Outcomes of Immigrants." National Academies of Sciences, Engineering, and Medicine. 2017. *The Economic and Fiscal Consequences of Immigration*. Washington, DC: The National Academies Press. doi: 10.17226/23550. <https://www.nap.edu/read/23550/chapter/6#87>

first five years after admission, except for children who are qualified immigrants, and 4) Medicaid, during their first five years after entry, except for lawfully residing pregnant women and children living in states that take an option established by Congress in 2009. Moreover, even after the expiration of the five-year eligibility bar, LPRs with sponsors are generally subject to sponsor deeming—that is, having the income and assets of their sponsor counted in determining whether they are financially eligible for these benefits.

According to the National Academy of Science, the: “[r]egulations [Title IV of PRWORA] requiring documentation of legal status or minimum time in the United States to qualify for some benefit programs *have had the expected effect of decreasing immigrants’ participation* in those programs.”<sup>84</sup> (Italics added.)

Since the enactment of these restrictions, Congress has made no attempt to make them more stringent—in fact, on multiple occasions, it has passed bipartisan legislation making these restrictions less stringent. It is difficult to reconcile these Congressional actions with the belief that there is a "public charge" or "self-sufficiency" problem among immigrants who have passed the LPC test.

Moreover, after the Immigration and Naturalization Service (INS) issued its policy guidance on public charge in 1999, the Bush administration left the policy in place without modification, and there was no outcry from members of Congress about the policy, or Congressional attempts to rescind the policy.

The agency claims that:<sup>85</sup>

in general, 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. It is also difficult to determine whether immigrants are net contributors or net users of government- supported public assistance programs ....

Oddly, the agency fails to even acknowledge *The Economic and Fiscal Consequences of Immigration*, a 643-page consensus report that was published in 2017. Instead they cite George Borjas<sup>86</sup>—a long-time advocate of restrictive immigration policy and for the kind

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<sup>84</sup> Page 422 of NAS report available at: <https://www.nap.edu/read/23550/chapter/13#422>

<sup>85</sup> Page 51235.

<sup>86</sup> According to Borjas: “It is worrisome that, despite all the restrictions on immigrant welfare use, many immigrant-headed households receive some type of aid. The easiest fix is to do what Australia and Canada do—change the admission rules to select only high-skill applicants. Another might be to further tighten the welfare eligibility rules for immigrants.” George J. Borjas, “Immigration Economics and Immigration Policy” (April 2018) available at <https://www.law.berkeley.edu/wp-content/uploads/2018/04/Immigration-Economics-and-Immigration-Policy.pdf>.

of reinterpretation of the LPC provision that the agency is proposing—for their claim that there is a lack of research that informs their regulatory action.

### ***DHS Must Model and Quantify the impact its Proposal Will Have on Immigrant and Nonimmigrant Admissions, and on Undocumented Immigration***

DHS claims that the “primary benefit of the proposed rule would be to help ensure that aliens who are admitted to the United States, seek extension of stay or change of status, or apply for adjustment of status are not likely to receive public benefits and will be self-sufficient ....”<sup>87</sup> In other words, the “primary benefit” of the proposed rule would be an increase in the share of *otherwise-eligible* applicants for admissions—who are excluded solely on LPC grounds. (What we will call the “LPC exclusion rate” in these comments.)

Yet, DHS claims it is unable to quantify the impact its proposed rule will have on immigrant admissions. This is an extraordinary failure on the agency’s part. DHS is proposing regulations that create a framework that front-line immigration officials will be required to use to predict whether someone is likely to become a public charge. “Yes” predictions will mean exclusion from the United States and separation from citizen spouses and other close family members. At the very minimum, DHS should be able to estimate within some reasonable range: 1) how many otherwise eligible applicants for admission will be excluded as a result of such predictions; and: 2) how many US-citizen and LPR family members will be negatively impact by exclusion of family members under the new standard DHS is proposing.

Moreover, by making it harder for otherwise eligible family members and employment-based immigrants to obtain visas or adjust status, the rule would likely increase undocumented immigration.<sup>88</sup> Some otherwise eligible immigrants will decide the risks of having their application denied on the new, more expansive LPC grounds are too great, and will opt instead to enter or remain without being admitted under section 212(a)(4) of the Act. Others will take the risk, have their applications denied on the expansive LPC grounds, and opt to enter or remain regardless. DHS has failed to consider this foreseeable backfire effect as a quantitative or qualitative cost of the rule.

If DHS is truly unable to make these kinds of basic impact estimates, this by itself should be a compelling reason for DHS go back to the drawing board. Instead of regulating at this time, DHS should conduct research to determine whether substantial

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<sup>87</sup> Page 51229 of proposed rule.

<sup>88</sup> Douglas Massey, Jorge Durand, and Karen Pren, “Why Border Enforcement Backfired,” *American Journal of Sociology* 121(5): 1557-1600 (March 2016).



numbers of people who pass the current test subsequently end up primarily dependent on public cash assistance or living in an LTC institution at government expense. Any changes proposed based on such research should be tested before full implementation to determine whether they produce more accurate predictions.

## DHS Has Failed to Consider the Fundamental Public Purposes of Federal Immigration Law and the Public Programs the Proposed Rule Targets

DHS states that the singular purpose of the rule is to:<sup>89</sup>

... better ensure that applicants for admission to the United States and applicants for adjustment of status ... who are subject to the public charge of inadmissibility are self-sufficient, *i.e.*, do not depend on public resources to meet their needs, but rather rely on their own capabilities, and the resources of their family, sponsor, and private organizations.

The term “self-sufficiency” does not appear in section 212(a)(4) of the Act or in any of the case law interpreting the LPC provision. Moreover, DHS lacks expertise when it comes to the definition and promotion of self-sufficiency.

The term “self-sufficiency” did not appear anywhere in connection with federal immigration law until 1996, when it was added as section 400 of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) (codified as 8 U.S.C. 1601).<sup>90</sup> In this section, the 104<sup>th</sup> Congress made general “statements concerning national policy with respect to welfare and immigration ...”. Section 400 was likely inserted to justify sections 401-451 of PRWORA.<sup>91</sup> In contrast to section 400, these were the substantive provisions in Title IV PRWORA and created an extensive new statutory scheme regulating “unqualified and “qualified” immigrants’ eligibility for “federal public benefits” and “federal means-tested public benefits.” Although Congress did amend section 1182(a)(4) of the Immigration and Nationality Act in certain ways in both PRWORA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>92</sup> that year, it did not amend section 212(a)(4) of the Immigration and Nationality Act. If the PRWORA-era Congress had intended to change “likely to become a public charge” in section 212(a)(4) to mean “not likely to become self-sufficient”, it would have done this expressly by amending section 212(a)(4).

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<sup>89</sup> Page 51122 of 2018 proposed rule.

<sup>90</sup> Public Law 104-193, 104th Congress (August 22, 1996).

<sup>91</sup> 8 U.S.C. 1602-1646

<sup>92</sup> Division C of Pub.L. 104-208, 110 Stat. 3009-546, 104th Congress (September 30, 1996).

Similarly, Congress did not use the term “public charge” in Title IV of PRWORA (or anywhere else in PRWORA for that matter). The general statements in section 400 of PRWORA may be relevant to the interpretation of the rest of Title IV of PRWORA, but they are irrelevant to the interpretation of the longstanding LPC test. Despite this, the agency is relying on the mention of “self-sufficiency” in section 400 of PRWORA to justify its expansive redefinition of a term added to federal immigration 114 years before PRWORA. In fact, the agency is taking the even more extreme position that “self-sufficiency” is the *only* purpose it can consider in this regulatory action, and that all other purposes of federal immigration law as well as the purpose of the federal programs targeted in the regulation are irrelevant to its regulation.

As we explain below, this is not reasonable. In any regulatory action in this area, DHS must consider several explicitly defined purposes of federal immigration law, including the promotion of family reunification.<sup>93</sup> In addition, the agency must also consider the purposes of the various programs it is targeting in the regulatory action.

### *Family Reunification and Other Purposes of Federal Immigration Law*

Under federal law, the Secretary of DHS is responsible for carrying out “immigration enforcement functions” and “[e]stablishing national immigration enforcement policies and priorities.”<sup>94</sup> In “carrying out [these] responsibilities” the Secretary is also responsible for “ensuring the speedy, orderly, and efficient flow of lawful traffic and commerce.”<sup>95</sup> The proposed regulation is a major rule with an economic impact that includes the imposition of substantial new costs on applicants, businesses, states, and other individuals and entities.<sup>96</sup> In other words, the regulation will disrupt the “speedy, orderly, and efficient flow of lawful traffic and commerce.” The agency has failed to consider any number of less burdensome alternatives to the current regulatory action (other than not regulating at all).

More generally, the purposes of family-based, employment-based, and diversity-based immigration must be taken into account and heavily weighted in this regulatory action. The family-reunification and anti-discrimination purposes of federal immigration law

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<sup>93</sup> Philip E. Wolgin, “Family Reunification is the Bedrock of U.S. Immigration Policy” (Washington: Center for American Progress, 2018), available at: <https://www.americanprogress.org/issues/immigration/news/2018/02/12/446402/family-reunification-bedrock-u-s-immigration-policy/>.

<sup>94</sup> 6 U.S.C. 202(3) and 6 U.S.C. 202(5).

<sup>95</sup> 6 U.S.C. 202(8).

<sup>96</sup> See, e.g., Alex Leary, Business Leaders Voice Concern About Trump Plan, Wall Street Journal, December 12, 2018.

are especially important to take into account.

In 1953, the Presidential Commission on Immigration and Naturalization called for an end to the national origins system, an increase in overall immigration, and a preference system that included a “family reunion” category.<sup>97</sup> Under the category of “reunion of families,” the Commission explained that “a great part of our moral and spiritual fiber grows out of the sacred place of the family in American life,” and recommended that family play a prominent role in admissions policy.

The Immigration and Nationality Act of 1965 ended the race-based national origins quota system, and implemented a new preference system even more heavily weighted toward family reunification than earlier proposals. In fact, the act granted 74 percent of all permanent visas to family reunification categories.<sup>98</sup> Prior to 1965, visas were split equally between employment and family reunification categories.<sup>99</sup> There is little question that Congress viewed family reunification and anti-discrimination as two of the most important purposes of this fundamental reform of federal immigration law. According to Senator Edward Kennedy (D-MA) in 1965: the “entire concept has been changed in the pending legislation to one emphasizing the reunification of families.”<sup>100</sup>

Yet, under the proposed rule, substantial numbers of U.S. citizens who file immigration visa petitions for their spouses, children, and other eligible family members would be unable to reunite with these immediate family members simply because an immigration or consular official predicts that those family members are likely at some point in the future to receive one of the supplemental benefits that DHS would now treat as equivalent to being institutionalized or having “the burden of supporting [them]... to be cast upon on the public ....”<sup>101</sup> There is little question that the proposed rule would undermine family cohesion and marriage for millions of U.S. citizens and lawful permanent residents in a way that it is inconceivable Congress could have intended. As

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<sup>97</sup> U.S. President’s Commission on Immigration and Naturalization, *Whom We Shall Welcome* (Washington, D.C.: U.S. Gov’t Printing Office, 1953), 111-122. Quote on 119.

<sup>98</sup> Wolgin, “Family Reunification.”

<sup>99</sup> *Ibid.*

<sup>100</sup> *Congressional Record*, 89th Congress, 1st Session: 24775 and 24747. Quoted in Philip Eric Wolgin, “Beyond National Origins: The Development of Modern Immigration Policymaking, 1948-1968” (University of California, Berkeley, Spring 2011) at page 83, available at: [http://digitalassets.lib.berkeley.edu/etd/ucb/text/Wolgin\\_berkeley\\_0028E\\_11224.pdf](http://digitalassets.lib.berkeley.edu/etd/ucb/text/Wolgin_berkeley_0028E_11224.pdf). See also Wolgin at p. 83 (“‘This system inflicts cruel and unnecessary hardship on the families of many American citizens and resident aliens,’ stated Representative William F. Ryan (D-NY), in 1964, ‘again and again they are deprived of the chance to bring brothers and sisters or other close relatives to this country.’) and p. 92 (quoting “soon-to-be-President Kennedy’s 1961 letter to Juvenal Marchisio of the American Committee on Italian Migration, ‘I believe that the most important immediate objective of immigration policy is the reuniting of families.’”)

<sup>101</sup> *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421 (Att’y Gen. 1962).

noted above, some 29.7 million non-elderly people in the United States lived in married-couple families that receive Medicaid in 2017.<sup>102</sup> The vast majority of them are U.S.-born citizens. It would be absurd for DHS to adopt a definition of public charge that implies most of them have become or are likely to become public charges.

Notably, DHS does take the importance of family reunification into account to create an exception to its proposed redefinition of public charge for one very specific type of family reunification. The proposed rule excludes consideration of all Medicaid benefits received by adopted foreign-born children.<sup>103</sup> DHS supports the exclusion by reasoning that it “would be consistent with Congress’[s] strong interest in supporting U.S. citizens seeking to welcome foreign-born children into their families.”<sup>104</sup> But if “Congress’[s] strong interest in supporting U.S. citizens seeking to welcome [adopted] foreign-born children into their families” is relevant to the rule, why isn’t Congress’s strong interest in supporting U.S. citizens seeking to welcome foreign-born spouses and other family members into their families equally or more relevant?

DHS claims that the families of adopted children “have been found to have the resources to care for them”, but if this is the case, then why would their families need Medicaid to pay for necessary health treatment?<sup>105</sup> If the general rule DHS has created is sound—someone is a public charge if they receive Medicaid for more than 12 months in a 36-month period—they why is there an exception for adoptive children and not biological children or spouses? And under the proposed totality of the circumstance test, if a biological child or a spouse must have private health insurance or financial resources to pay for reasonably foreseeable medical costs, why should there be an exception for adoptive children? The need for this special exclusion is evidence that agency’s expansive redefinition of public charge is unreasonable and unfair, including for biological children, spouses, and other non-adoptive family members.

### *Purposes of Medicaid, SNAP, and Other Programs Targeted by the Proposed Rule*

DHS “acknowledges the importance of increasing access to health care and helping people to become self-sufficient in certain contexts (such as with respect to other agencies’ administration of government assistance programs)” but then goes on to say that the Immigration and Nationality Act, or “INA, however, does not dictate advancement of those goals in the context of public charge inadmissibility

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<sup>102</sup> Census Bureau, *infra* note 32.

<sup>103</sup> Section 212.21(b)(2)(i)(D)-(E) of the 2018 proposed rule.

<sup>104</sup> Page 51117 of 2018 proposed rule.

<sup>105</sup> *Ibid.*

determinations.”<sup>106</sup> This is irrational. If self-sufficiency is (at least one of) the goal(s) of regulatory action, then DHS cannot refuse to consider the fact that Medicaid and other programs DHS targets in the proposed rule are intended to help people maintain and regain self-sufficiency.

The purpose of the Medicaid program is to “enabl[e] each State as far as practicable, under the conditions in such State, to furnish (1) medical assistance...and (2) rehabilitation and other services” designed to “help individuals retain a capacity for independence.”<sup>107</sup> More recently, the Affordable Care Act was designed to provide “quality, affordable health care for all Americans,” including by expanding the “role of public programs”—like Medicaid—in achieving that goal.<sup>108</sup>

The purpose of the SNAP program is detailed in 7 U.S.C. 2011:

It is declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation’s population by raising levels of nutrition among low-income households. Congress finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of the Nation’s agricultural abundance and will strengthen the Nation’s agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a *supplemental* nutritional assistance program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation. [italics added]

The purposes<sup>109</sup> of block grants to states for Temporary Assistance for Needy Families (TANF) include “promoting job preparation, work, and marriage”, “prevent[ing] ... out-of-wedlock pregnancies”, and “encourag[ing] the formation and maintenance of two-parent families.”<sup>110</sup>

DHS must consider these purposes (and the purposes of the other targeted programs) in this regulatory action. Considering these purposes in conjunction with the plain, historical, and legal meaning of what it means to be a public charge, requires the

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<sup>106</sup> Footnote 258 at page 51158 of the 2018 proposed rule.

<sup>107</sup> 42 U.S.C. 1396.

<sup>108</sup> See Pub. L. No. 111-148, 124 Stat. 119, 130, 271 (2010) (capitalization altered); see also *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (“[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.”) (internal quotation marks omitted)

<sup>109</sup> 42 U.S.C. 601.

<sup>110</sup> *Ibid.*

exclusion of SNAP, Medicaid, and (in the vast majority of cases) TANF from the rule. What the purposes of these programs make clear is that SNAP, Medicaid, and TANF are in no way equivalent to the almshouses and other institutions that warehoused orphans, the disabled, and elderly in late 1800s and early 1900s. Important considerations include:

- One of SNAP’s purposes is to “strengthen the Nation’s agricultural economy” and “result in more orderly marketing and distribution of food ....” The explicitly “supplemental” assistance it provides is also meant to help people maintain, increase, and regain their capacity for employment and self-sufficiency (however, defined). Yet, as currently drafted, the proposed rule will undermine all of these purposes of SNAP.
- Although TANF provides “cash assistance for income maintenance”, it is almost always “temporary” and conditioned on searching for work or being employed. Despite TANF’s explicit goal of promoting the “formation and maintenance of two-parent families”, DHS has defined public charge in an expansive way that would directly undermine the formation and maintenance of two-parent families.
- Medicaid provides health insurance as part of an effort to provide quality, affordable health care for all Americans, and includes “rehabilitation and other services” designed to “help individuals retain a capacity for independence.”

Moreover, Medicaid, SNAP, and other supplemental benefit programs are intended by Congress to act as “work supports.”<sup>111</sup> According to Ron Haskins, who was the lead Republican staffer on PRWORA in 1996:

Beginning roughly in the mid-1970s ... the federal government originated or expanded a series of programs that provide benefits to working families. Unlike welfare benefits, which are intended primarily for the destitute, these work support benefits are designed to provide cash and other benefits to working adults and their families. In addition to the EITC, the major benefits in the system include the child tax credit, the minimum wage, state income supplement programs, *food stamps*, *health insurance*, and child care. [italics added]

Such benefits also play Keynesian economic-stabilizer function in the U.S. economy.<sup>112</sup>

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<sup>111</sup> See, e.g., Isabelle Sawhill and Ron Haskins, *Welfare Reform and the Work Support System* (Washington: Brookings Institution, 2002) available at:

<https://www.brookings.edu/research/welfare-reform-and-the-work-support-system/>.

<sup>112</sup> See, e.g., Congressional Budget Office, “How CBO Estimates Automatic Stabilizers” (Washington: Congressional Budget Office, 2015), available at

<https://www.cbo.gov/publication/51005> (which includes Medicaid and SNAP among “automatic stabilizers” that dampen the size of cyclical movements in the economy; Ron

This makes these programs much more like Unemployment Insurance (a countercyclical program that expands during economic downturns to stabilize the economy) and the EITC—both of which are excluded from the proposed rule—than the almshouses and other total institutions of the late 1800s.

DHS acknowledges that the proposed rule would cause people to disenroll or forego enrollment in Medicaid, SNAP, and other specified benefits despite being eligible for these benefits. It also acknowledges that disenrollment and foregone enrollment would lead to: “worse health outcomes”; “increased use of emergency rooms” and “delayed treatment”; “increased prevalence of communicable diseases”; “increased rates of poverty and housing instability” and “reduced productivity and educational attainment.”<sup>113</sup> In short, the foreseeable disenrollment and foregone enrollment caused by the proposed rule will undermine the public purposes of the programs specified in the rule, yet DHS has not given any consideration or weight to these statutory purposes in its proposal.

### *Supporting Vital Workers*

Aside from the exception for adopted foreign-born children noted above, DHS departs from its exclusive focus on 8 U.S.C. 1601 at one other point in the rules. If an applicant is an active-duty service member or in the Ready Reserves, DHS would not consider any benefits received by them as part of the LPC test. DHS justifies this exclusion by saying service members “in no way burden the public; indeed, their sacrifices are vital to the public’s safety and security.”<sup>114</sup> This is not reasoned analysis. If Medicaid and the other benefits targeted by the rule “burden the public”, then benefits received by service members must also “burden the public.” It is certainly the case that service members’ “sacrifices are vital to the public’s safety and security”, but service members are not the only category of workers who are vital to the public’s safety and security.

Moreover, immigrant workers provide a vital role in delivering a long list of other vital services. Here we consider just two vital services: 1) direct care of the elderly and disabled, and 2) child care and early childhood education.

More than one million immigrants currently work in direct care occupations—personal

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Haskins, “Reflecting on SNAP: Purposes, Spending, and Potential Savings” (Washington: Brookings Institution, 2012), available at <https://www.brookings.edu/testimonies/reflecting-on-snap-purposes-spending-and-potential-savings/> (SNAP is a “stabilizer from the perspective of the American economy”).

<sup>113</sup> Page 51270 of 2018 proposed rule.

<sup>114</sup> Page 51173 of 2018 proposed rule.

care assistants, nursing assistants, and home health or personal care aides—in the United States.<sup>115</sup> One out of every four direct care workers<sup>116</sup> is an immigrant. Over the next decade, the Bureau of Labor Statistics projects that the demand for home health aides will increase by 47 percent and the demand for personal care aides by 39 percent, making them the 3<sup>rd</sup> and 4<sup>th</sup> fastest growing occupations in the United States.<sup>117</sup>

At least one-fifth of the approximately 2 million early childhood educators in the United States are immigrants.<sup>118</sup> According to CAP child care analyst Leila Schochet:

Immigrants are overrepresented in the informal child care industry and are more likely to work for private families or in home-based child care settings than in formal center-based settings. American families and the United States economy rely heavily on the important work of these workers each day, as they educate and nurture millions of children while enabling parents to work. Without access to child care, families face significant barriers to economic security, and employers struggle to retain a productive workforce. As with direct care, demand for quality child care in the United States is steadily growing: The vast majority of young children now have one or both parents in the workforce, and consensus about the importance of quality early childhood education continues to build. As demand for child care has increased, immigrants have played an outsized role in filling the need for early educators, taking positions that may otherwise remain unfilled. In the past 20 years, the number of immigrants in the early childhood workforce has tripled, while the number of native-born educators has grown by just 38 percent. Child care is a growing industry and supporting immigrant educators is critical for bolstering a dedicated, qualified early childhood workforce.

Immigrants in direct care, child care, and early education occupations make sacrifices that are vital to the safety, security, well-being, and self-sufficiency of millions of Americans they care for and educate. Even though many of them receive health insurance through Medicaid, they in no way burden the public. The need for a special exclusion for active-duty service members is evidence that the agency's expansive redefinition of public charge is unreasonable and unfair, including for other vital workers in the American economy.

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<sup>115</sup> Robert Espinoza, "Immigrants and the Direct Care Workforce" (New York: PHI, 2018), available at <https://phinational.org/resource/immigrants-and-the-direct-care-workforce-2018/>.

<sup>116</sup> *Ibid.*

<sup>117</sup> Bureau of Labor Statistics, Fastest Growing Occupations, <https://www.bls.gov/ooh/fastest-growing.htm> (last accessed December 2018).

<sup>118</sup> Leila Schochet, "Trump's Attack on Immigrants is Breaking the Backbone of America's Child Care System" (Washington: Center for American Progress, 2018).



## The Proposed Rule Will Increase Unfair and Invidious Discrimination

DHS has failed to report—or even consider—the distributional effects of its proposal, including the impacts of its proposed rule across the population and economy, divided up in various ways (e.g., income groups, race, sex, industrial sector, geography). “Those who bear the costs of a regulation and those who enjoy its benefits often are not the same people.”<sup>119</sup> DHS acknowledges, and claims to be unable to quantify various costs of the rule, including “potential lost productivity”, “adverse health effects”, “additional medical expenses due to delayed health care treatment”, and “increased disability insurance claims as a result of this proposed rule”.

Even if it not reasonably possible to provide quantitative estimates of these social costs, DHS must be able to provide some assessment of the likely distributional effect of the costs.<sup>120</sup> In general, it seems likely that the costs will fall heaviest on the following groups: working-class people; Latinos, Asians, and blacks; women; people with disabilities; LGBTQ people, children and their families; older people; and people in employed in direct care, child care, and other poorly compensated occupations. If this is correct, DHS should acknowledge it, and explain why a rule having these distributional effects is justified.

### *The Agency Can and Must Define "Public Charge" to Limit Discrimination Against People with Disabilities to the Greatest Extent Possible Consistent with Federal Law*

Over the last several decades, “[t]he US Congress has passed many laws that support disability rights either directly or by recognizing and enforcing civil rights.”<sup>121</sup> Yet, the agency’s proposal to expand the definition of public charge to include Medicaid, SNAP, Medicare Part D LIS, and housing assistance will substantially increase the number of applicants with disabilities who are excluded on LPC grounds.<sup>122</sup> Moreover, as we

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<sup>119</sup> Office of Information and Regulatory Analysis, “Regulatory Impact Analysis: A Primer”, available at: [https://reginfo.gov/public/jsp/Utilities/circular-a-4\\_regulatory-impact-analysis-a-primer.pdf](https://reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf).

<sup>120</sup> Page 51234-51235.

<sup>121</sup> National Park Service, “Disability History: The Disability Rights Movement” available at: <https://www.nps.gov/articles/disabilityhistoryrightsmovement.htm> (last accessed December 2018).

<sup>122</sup> A table showing public by disability status is conspicuously absent from the 2018 proposed rule, even though the Survey of Income and Program Participation (SIPP) and other nationally representative public data sources include several disability variables. DHS does provide tables showing participation by age, family size, education, professional licensure, English proficiency, income, and self-reported health. However, disability is generally understood today as the

explain below, the agency has failed to consider whether alternative, less restrictive regulatory approaches would cause less harm to people with disabilities.

With only two very narrow exceptions, DHS fails to take any provision of federal disability law—including the Rehabilitation Act,<sup>123</sup> the Americans with Disabilities Act (ADA),<sup>124</sup> and the Individuals with Disabilities Education Act (IDEA)<sup>125</sup>—or the overall spirit and purpose of these laws into account in its expansive redefinition of what it means to be a public charge (proposed section 212.21). (The narrow exceptions are: 1) the exclusion of “services or benefits funded by Medicaid but provided under” the IDEA and “school-based benefits provided [under Medicaid] to children who are at or below the oldest age of children eligible for secondary education as determined under State law”;<sup>126</sup> and 2) the exclusion of Medicaid received by children adopted abroad by U.S. citizen parents.<sup>127</sup>)

Similarly, DHS fails to take anti-discrimination considerations into account in its expansive redefinition of the factors relevant to an LPC inadmissibility determination (proposed section 212.22) or in any of the other sections of the proposed rule. The agency’s failure to consider the letter, purposes, and spirit of federal anti-discrimination laws in a regulatory action taking place in the 21st century is more than unreasonable, it is unusually harsh and shocking to the conscience.<sup>128</sup>

Section 212(a)(4) of the Act requires the consideration of “health” in LPC determinations, but does not say how health should factor into the definition of what it means to be a “public charge.” By contrast, Section 212(a)(1), 8 U.S.C. 1182(a)(1),

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interaction between individuals with a health condition (e.g., cerebral palsy, Down syndrome, and depression) and personal and environmental factors (e.g., inaccessible transportation and public buildings, and limited social supports). See, e.g., Centers for Disease Control and Prevention, “The ICF: An Overview,” available at [https://www.cdc.gov/nchs/data/icd/icfoverview\\_finalforwho10sept.pdf](https://www.cdc.gov/nchs/data/icd/icfoverview_finalforwho10sept.pdf) (last accessed December 2018).

<sup>123</sup> 29 U.S.C 701 et seq.

<sup>124</sup> 42 U.S.C. 12101 et seq.

<sup>125</sup> 20 U.S.C. 1400 et seq.

<sup>126</sup> According to DHS, this exclusion “would better ensure that schools continue to receive financial resources to cover the cost of special education and related services, which they would be legally required to provide at no cost to the parents regardless of the outcome of this rulemaking.” Page 51170 of 2018 proposed rule.

<sup>127</sup> Page 51170 of 2018 proposed rule.

<sup>128</sup> See, e.g., Rebecca Cokley and Hannah Leibson, “Trump’s Public-Charge Rule Would Threaten Disabled Immigrants’ Health and Safety” (Washington: Center for American Progress, 2018), available at

<https://www.americanprogress.org/issues/disability/news/2018/08/08/454537/trumps-public-charge-rule-threaten-disabled-immigrants-health-safety/> and <https://www.nytimes.com/2018/11/29/opinion/trumps-disability-public-charge.html>.

provides considerable detail on the health-related grounds of inadmissibility. Therefore, the agency clearly has considerable leeway to interpret the LPC provision in a manner that is consistent with the letter and the spirit of the Rehabilitation Act and other federal anti-discrimination laws that passed after the LPC provision. Considering both the letter and the spirit of these laws requires DHS to limit, to the fullest extent possible under federal law, the extent to which people with health conditions and disabilities are denied admission or adjustment on LPC grounds, and the extent to which people with health conditions and disabilities disenroll from Medicaid, SNAP, and other programs that generally increase the social and economic inclusion of people with disabilities.

Incredibly, DHS seems to believe that its proposed rule is somehow minimally “consistent” with federal anti-discrimination laws because:<sup>129</sup>

... disability itself *would not be the sole basis* for an inadmissibility finding. In other words, as with any other factor and consideration in the public charge inadmissibility determination, DHS would look at *each of the mandatory factors*, and the affidavit of support, if required, as well as all other factors in the totality of the circumstances. [italics added]

What DHS fails to acknowledge here is that it has defined nearly all of the mandatory factors, including all three of the “heavily weighted negative” factors, in ways that are heavily correlated with disability or explicitly mention disability. It will generally be impossible under the proposed test for a consular or immigration officer to treat disability as distinct from other factors. Thus, many, if not most of the increase in negative decisions that will occur under the proposed test will be based solely or overwhelmingly on disability. Moreover, DHS fails to acknowledge that Medicaid, SNAP, and other federal benefits help promote equal opportunity and “self-sufficiency”, reasonably understood in today’s terms, for people with disabilities. In a recent literature review, researchers at the Kaiser Family Foundation concludes that “access to affordable health insurance and care [including Medicaid], which may help people maintain or manage their health, promotes individuals’ ability to obtain and maintain employment.”<sup>130</sup>

Moreover, assuming *arguendo* that DHS’s proposal is minimally consistent with anti-discrimination laws, DHS must acknowledge that it has the ability to adopt alternative, less restrictive regulatory approaches that are more consistent with both the letter and the spirit of federal anti-discrimination laws. Despite clearly having this ability, DHS has failed to consider whether no regulatory action is more consistent with federal anti-

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<sup>129</sup> Page 51183-84 of 2018 proposed rule.

<sup>130</sup> Larisa Antonisse and Rachel Garfield, “The Relationship Between Work and Health: Findings from a Literature Review” (Washington: Kaiser Family Foundation, 2018).

discrimination laws, or whether alternative, less restrictive regulatory approaches would cause less harm to people with disabilities. In addition to not redefining the LPC provision, DHS must consider various other less harmful alternatives, including:

- excluding any consideration of past receipt of Medicaid, SNAP, and other benefits provided to people with disabilities;
- explicitly requiring (in the text of the regulation) immigration officials to take the letter and spirit of federal anti-discrimination laws into account when determining whether an applicant is “likely to become a public charge”; and
- estimating the extent to which any regulatory changes will increase the number of otherwise eligible applicants with disabilities who fail the LPC test when compared to the current and historical baselines.

Of course, as a historical matter, the LPC provision was clearly intended to exclude immigrants lacking family or other support who were viewed by the odious norms of the time as too physical or mentally “defective”<sup>131</sup> to work. In the 1907 Annual Report of the Commissioner-General of Immigration, Commissioner-General F.P. Sargent explained that “[t]he exclusion from this country of the morally, mentally, and physically deficient is the principal object to be accomplished by the immigration laws.”<sup>132</sup> As Table IIIA in that report shows (figure 4 below), the vast majority of the 719 people deported as public charges that year were deported because they had “mental or physical afflictions.”

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<sup>131</sup> See Douglas Baynton, “The Undesirability of Admitting Deaf Mutes’: U.S. Immigration Policy and Deaf Immigrants, 1882-1924”, *Sign Language Studies* 6(4), 391-415 (2006) (LPC provision was intended to screen out those considered “physically defective”) and Douglas Baynton, *Defectives in the Land: Disability and Immigration in the Age of Eugenics* (Chicago: University of Chicago Press, 2016). The Century Dictionary defines “defective” as “a person who is characterized by some special mental, moral, or physical defect; specifically, one who is deficient in one or more of the physical senses or powers.”

<sup>132</sup> Page 13 and 62 of U.S. Department of Commerce and Labor, “Annual Report of the Commissioner-General of Immigration for the Fiscal Year Ended June 30, 1907” (Washington: Government Printing Office, 1907).

Public charges from causes existing prior to admission (showing mental or physical affliction, if any).					
Insanity.	Other mental afflictions.	Loathsome or dangerous contagious disease.	Dependent members of family.	All others.	Total.
360	30	84	55	190	719

Figure 4: Public charges deported in FY1907 by reason.

Page 12-13 of 1907 Annual Report of Commissioner-General of Immigration (details on "races" omitted)

In discussing the exclusion of deaf immigrants on LPC grounds, Douglas Baynton explains that:<sup>133</sup>

Deaf people were among the thousands of disabled immigrants turned back each year at U.S. ports as "defectives" and "undesirables." ... [The] explicit reason was that deaf people were culturally defined as social dependents rather than social contributors. This began with their schooling. Whereas public education for hearing children was considered a right and an investment, for deaf children it was seen as charity. In adulthood, deaf people were still assumed to be, like women and people with certain other disabilities, perpetual dependents. This assumption was never put to an empirical test by the Immigration Bureau, nor was any evidence ever adduced to show that deaf people were more likely to be unemployed and dependent upon public aid. It was at heart, however, not an empirical question but rather a long-standing cultural assumption that disability meant inability to work productively or to support oneself.

Similarly stereotypical and prejudicial attitudes were also applied to pregnant women and women generally:<sup>134</sup>

Women were similarly depicted as homebound nonworkers and dependents in spite of the legions of working women and families dependent on them. It was a kind of Platonic ideal, against which actual human beings were comparatively insubstantial and without weight. As the hearings for deaf immigrants made clear, responsibility for their financial support was generally assumed to rest not with them but with their families or communities, regardless of age.

<sup>133</sup> Baynton, *Immigration Policy and Deaf Immigrants* at p. 394.

<sup>134</sup> *Ibid* at 394-95.

.... pregnancy was explicitly considered a disability that made women “likely to become a public charge.” A pregnant woman was not admissible unless with a husband; assurances from other male family members to support her did not suffice. It sometimes happened that pregnant women were allowed to wed their intended husbands in ceremonies at Ellis Island and then to enter the country. This option was ruled out when Helene [a deaf immigrant seeking admission] further confided that the “author of her condition,” as an official quaintly wrote, was deaf. For the daughter of deaf parents to conceive a child with a deaf man would have been seen, at the height of the eugenics movement, as an act of reckless irresponsibility.

In justifying a proposed rule that it effectively concedes will have a massive disparate impact on people with disabilities, DHS argues that:<sup>135</sup>

... considering, as part of the health factor, an applicant’s disability diagnosis that, *in the context of the alien’s individual circumstances*, affects his or her ability to work, attend school, or otherwise care for him or herself, is not inconsistent with federal statutes and regulations with respect to discrimination, as the alien’s disability is treated just as any other medical condition that affects an alien’s likelihood, in the totality of the circumstances, of becoming a public charge. [italics added]

This is exactly the same faulty assumption about disability—that it is a mere matter of individual circumstance, rather than a social issue—that policymakers in the late 1800s made when they adopted the LPC provision. As Baynton notes:<sup>136</sup>

... the exclusion of deaf immigrants was based on an assumption that *disability was an individual rather than a social issue* and that it was defective bodies that were at fault rather than the relationship between particular bodies and particular social environments. [italics added]

In his remarks at the signing of the ADA, President George H.W. Bush explained that “With today’s signing ... every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”<sup>137</sup> By contrast, the agency is proposing to redefine what it means to be a public charge, and factors used in determining whether someone is a public charge, in a way that all but ignores Congressional directives against disability discrimination, and will slam shut the door to admission, adjustment, and ultimately citizenship for millions of otherwise eligible applicants.

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<sup>135</sup> Page 51184 of 2018 proposed rule.

<sup>136</sup> Baynton, *Immigration Policy and Deaf Immigrants*, p. 412.

<sup>137</sup> David Perry, “How George H.W. Bush Proved Himself to the Disability Rights Community,” *Pacific Standard*, December 6, 2018, available at <https://psmag.com/social-justice/how-george-h-w-bush-proved-himself-to-the-disability-rights-community>.

## *The Rule Will Increase Discrimination Against LGBTQ People*

The proposed rule will substantially increase the number of LGBTQ applicants for admission who are excluded on LPC grounds, and increase discrimination and bias based on sexual orientation and gender identity. The proposed rule will have particularly harmful impacts on immigrants living with HIV / AIDS. DHS has failed to consider these adverse distributional effects and whether alternative, less restrictive regulatory approaches would cause less harm to LGBTQ and immigrants living HIV / AIDS who have experienced employment and other forms of discrimination.

A 2017 survey found that 1 in 5 LGBTQ people in the United States experienced discrimination due to their sexual orientation or gender identity when applying for work. Roughly the same share (22 percent) reported experiencing discrimination in pay or promotions.<sup>138</sup> Similarly, sixteen percent of respondents to the 2015 U.S. Transgender Survey reported having lost at least one job because of their gender identity or expression.<sup>139</sup> Discrimination also routinely affects LGBT people beyond the workplace, sometimes costing them their homes, access to education, and ability to engage in public life.<sup>140</sup> For LGBTQ immigrants, the fact that they are foreign-born—and also often members of other protected minority classes on the basis of race, ethnicity, English proficiency—likely increases the odds of their experiencing employment and other forms of discrimination.

LGBTQ people are not explicitly protected by federal laws prohibiting discrimination in employment and other areas. While there are state and local laws that explicitly prohibit employment discrimination based on sexual orientation and gender identity, these cover only about half of the U.S. population.<sup>141</sup> As a result, LGBTQ people are likely to be particularly vulnerable to employment and other forms of discrimination that adversely impact their financial status.

The proposed rule does not explicitly include sexual orientation and gender identity as factors, but several of the factors it requires immigration officials to consider in LPC determinations are defined in ways that will have an adverse impact on the basis of

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<sup>138</sup> Sejal Singh and Laura E. Durso, “Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways,” (Center for American Progress, 2017) <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>.

<sup>139</sup> Page 148 of Sandy James and others, “The Report of the 2015 U.S. Transgender Survey” (December 2016) available at: <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

<sup>140</sup> Singh and Durso.

<sup>141</sup> Movement Advancement Project, “Local Employment Nondiscrimination Ordinances,” 2015. <http://lgbtmap.org/file/policy-spotlight-local-NDOs.pdf>

sexual orientation and gender identity. Due to family rejection and anti-LGBTQ discrimination in the workplace, education, housing, and healthcare, many LGBTQ people struggle to become economically secure in our country. Research shows that LGBTQ people, especially those who are black, transgender, and women, are more likely to live in poverty, be food insecure, and experience higher unemployment and homelessness than non-LGBTQ people.<sup>142</sup> According to CAP's research, LGBTQ people and their families are more likely to receive SNAP, Medicaid, unemployment insurance and public housing assistance than non-LGBTQ people.<sup>143</sup>

The Williams Institute found LGBT people are more likely than non-LGBT people to report experiencing food insecurity, and a CAP survey found LGBTQ survey respondents and their families are more than twice as likely to report receiving SNAP benefits.<sup>144</sup> The CAP survey also found that LGBTQ people and their families, especially those with disabilities, are more likely to receive Medicaid. While 12.9% of non-LGBTQ people surveyed reported receiving Medicaid benefits, 20% of LGBTQ people reported receiving Medicaid.<sup>145</sup> LGBTQ people with disabilities were over 3 times more likely to receive Medicaid than those without.<sup>146</sup> The survey also found LGBTQ respondents and their families relied on housing assistance at 2.5 times the rate of non-LGBTQ respondents.<sup>147</sup>

Penalizing immigrants for actual or predicted usage of a wide-range of supplementary assistance in their lifetimes as the proposed rule would do will likely disproportionately impact LGBTQ immigrants and their families. Access to programs to support LGBTQ immigrants are important safeguards, are critical to ensure basic living standards, and help LGBTQ immigrants and their families build a strong foundation in the U.S. and ensure that they are able to live, thrive, and be healthy, equal, and complete members of

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<sup>142</sup> Lourdes Ashley Hunter, Ashe McGovern, and Carla Sutherland, Eds, *Intersecting Injustice: Addressing LGBTQ Poverty and Economic Justice for All: A National Call to Action*, 2018 [https://static1.squarespace.com/static/5a00c5f2a803bbe2eb0ff14e/t/5aca6f45758d46742a5b8f78/1523216213447/FINAL+PovertyReport\\_HighRes.pdf](https://static1.squarespace.com/static/5a00c5f2a803bbe2eb0ff14e/t/5aca6f45758d46742a5b8f78/1523216213447/FINAL+PovertyReport_HighRes.pdf).

<sup>143</sup> Caitlin Rooney, "Protecting Basic Living Standards for LGBTQ People," (Center for American Progress 2018). <https://www.americanprogress.org/issues/lgbt/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/>.

<sup>144</sup> Taylor N.T. Brown, Adam P. Romero, and Gary J. Gates, "Food Insecurity and SNAP Participation in the LGBT Community," (The Williams Institute, 2016) <https://williamsinstitute.law.ucla.edu/research/lgbt-food-insecurity-2016/> ("LGBT" rather than "LGBTQ" is used to reference the study's findings, which were limited to LGBT individuals.); Caitlin Rooney, "Protecting Basic Living Standards for LGBTQ People," (Center for American Progress 2018).

<sup>145</sup> Rooney.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.



our communities. Use of these programs should not be used to bar them from becoming lawful permanent residents.

Approximately 1.1 million individuals in the U.S. are living with HIV / AIDS. Under the proposed rule, the Department will take an immigrant's health, including HIV status and disability status, into consideration when determining whether the applicant has a medical condition that could affect the applicant's ability to work, attend school, care for themselves, or require expensive care or institutionalization. While a person's health has long been a factor considered in the public charge analysis, the heightened burden imposed on immigrants by the proposed rule would cause disastrous health outcomes for those living with HIV and is reminiscent of the reasons publicly put forward for the discriminatory HIV travel ban.

During the floor debate over the travel ban in 1993, the ban's Senate sponsor, Senator Don Nickles, was explicit about the role of the assumed financial burden of immigrants living with HIV in the ban, stating "If we change this policy we are going to have countless thousands of people who will want to emigrate to the United States, knowing we have quality health care and knowing we will take care of them."<sup>148</sup> Senator Orrin Hatch also referred to exclusion of immigrants living with HIV as "a question of the need to evaluate properly the economic impact of immigration and AIDS."<sup>149</sup> Representative Cliff Stearns directly referenced public charge prohibitions, asking, "Before we open the doors to just anyone, would it not be a matter of sound public policy to take care of our own citizens, afflicted with the HIV / AIDS virus, before adding infected immigrants to the public charge?"<sup>150</sup> The proposed rule's inclusion of treatable medical conditions like HIV as a negative factor in public charge determinations effectively undoes Congress's express action lifting the HIV travel ban.

Forcing a person living with HIV to choose between subsidized healthcare and their immigration status will cause a public health disaster. HIV / AIDS treatment, known as anti-retroviral therapy, is prohibitively expensive in the United States without assistance. Individuals will forgo their medical regimen to avoid a public charge determination. This will not only be devastating to the health of the person, but will also have negative health consequences on the community at large, as disruptions in HIV care and treatment—especially resulting in reduced adherence or medication rationing—can lead to drug resistant strains of HIV. The proposed rule is terrible public health policy.

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<sup>148</sup> Congressional Record, 103rd Cong., 1st sess., February 19, 1993, 139, S1764.

<sup>149</sup> Congressional Record, S1765.

<sup>150</sup> Congressional Record, 103rd Cong., 1st sess. March 11, 1993, 139, H1208.

Confusion about the proposed rule may also lead U.S. citizens and permanent residents and groups of immigrants who are not subject to the public charge rule (such as refugees and asylees) to believe they would need to terminate their disenroll from Medicaid in order to remain eligible to petition for their family. There is strong evidence, cited in the proposed itself, that many people whose eligibility for benefits was not directly affected by the 1996 legislation nonetheless were deterred from participating in programs.

### *Credit Scores and Credit History Should Not Be Used as a Negative Factor*

The agency proposes to include credit scores and credit history as factors in LPC determinations. The agency says that a person with “a ‘good’ credit report ... may be self-sufficient and less likely to become a public charge.”<sup>151</sup> In addition, the agency asks for comments on whether credit reports and scores that are “categorized [as] less than ‘good’” should be considered.

The only evidence the agency provides for using credit reports and credits scores is a link to a booklet on the website of FICO, a global corporation that sells credit scores.<sup>152</sup> According to FICO’s booklet:<sup>153</sup>

FICO Scores allow lenders to more accurately evaluate potential borrowers’ credit risk. This means that instead of being limited to strictly yes/no credit decisions, lenders can offer different rates to different borrowers. Even if you’re a high-risk borrower with low FICO Scores, lenders can decide to extend you credit you’re more likely to be able to manage, at a higher interest rate.

FICO makes no claim in the booklet that credit scores are predictive of “self-sufficiency” or the likelihood of someone becoming a public charge. Absent such evidence, credit reports and scores should not be included in LPC determinations. Credit scores and credit reports are not designed to predict future likelihood of becoming a public charge. Using them as a negative factor in LPC determinations will likely increase the number of people who are denied admission in error, increase the arbitrariness of determinations, and have discriminatory impacts on members of various protected classes.

Although there has been no research (as far as we know) assessing the extent to which credit scores and credit reports are predictive of LPC status, there is Federal Reserve

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<sup>151</sup> Page 51189 of 2019 proposed rule.

<sup>152</sup> Ibid at footnotes 505 and 506.

<sup>153</sup> FICO, “Understanding FICO Scores,” available at [https://www.myfico.com/Downloads/Files/myFICO\\_UYFS\\_Booklet.pdf](https://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf).

research finding that credit scores and reports have an “inappropriately adverse effect on foreign born individuals, in particular on recent immigrants.”<sup>154</sup>

Our result suggests that the credit scores of the foreign born population benefits to the extent that the coefficients in the baseline model are dampened as a result of disparate impact. Nevertheless, the fact that this population has shorter credit histories reflected in U.S. credit bureau records appears to result in lower scores for these individuals. This contributes to the tendency of this population to perform better on credit obligations, on average, than other native-born individuals with identical credit scores (Board of Governors, 2007). While this result is not related to the disparate impact we find by age, it does reflect that this specific characteristic is unfairly disadvantaging this population.

Other research finds additional evidence of discrimination on the basis of gender and race:

- Among single men and women under 40, the “single women ... have, on average, somewhat lower credit scores than the single men with comparable demographic characteristics. The credit score gaps reflect the fact that single women have more intensive use of credit and have experienced more difficulties repaying their debt in the past. Such differences may reflect economic circumstances, labor market experiences, underlying potential gender differentials in attitudes toward borrowing, financial literacy levels, and men and women being potentially treated differently by the credit market and institutions.”<sup>155</sup>
- In a survey experiment conducted with 1,050 hiring professionals, researchers found that “including a bad credit report in an applicant’s file reduces respondents’ likelihood of hiring female (vs. male) applicants and reduces the recommended starting salary offered to black (vs. white) applicants.”<sup>156</sup>

Using credit reports also raises concerns about transparency and accountability. The credit reporting industry in the United States is controlled by three large global corporations: Equifax, Experian, and TransUnion. Credit scores are generally calculated

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<sup>154</sup> Page 28 of Robert Avery, Kenneth P. Brevoort, and Glenn B. Canner, “Does Credit Scoring Produce a Disparate Impact?”, Finance and Economics Discussion Series, Federal Reserve, October 2010, available at

<https://www.federalreserve.gov/pubs/feds/2010/201058/201058pap.pdf>.

<sup>155</sup> Geng Li, “Gender-Related Differences in Credit Use and Credit Scores,” Federal Reserve Board, June 2018, available at <https://www.federalreserve.gov/econres/notes/feds-notes/gender-related-differences-in-credit-use-and-credit-scores-20180622.htm>.

<sup>156</sup> Rourke O’Brien and Barbara Kivat, *Disparate Impact? Race, Sex, and Credit Reports in Hiring*, *Socius: Sociological Research for a Dynamic World* 4:1-20 (2018), available at: <https://journals.sagepub.com/doi/10.1177/2378023118770069>.

according to proprietary formulas that place different weight on the various pieces of information in someone's credit report. The methodology used to generate credit scores is vague, and the weights given to information can vary depending on how long an individual has been using credit.<sup>157</sup> In general, when government officials make decisions that affect people's lives in profound ways, they should be based on transparent evidence.

Moreover, there are an "astounding number of errors in ... credit reports that are the result of misaligned economic and legal incentives."<sup>158</sup> Aaron Klein, a fellow at the Brookings Institution attribute widespread inaccuracy to:<sup>159</sup>

Three reasons: size, speed, and economic incentives of the system. Each of the major bureaus has over 200 million credit files that, on average, contain 13 past and current credit obligations, resulting in 2.6 billion pieces of data. Each month, more than 1 billion pieces of data are updated, requiring a speedy system. With so much data coming from so many sources, so quickly, errors are inevitable (especially if you have a common name).

Considering credit scores and reports as negative factors is directly contrary to case law. In *Howe v. United States ex rel. Savitsky*, 247 F. 292 (2<sup>nd</sup> Cir. 1917), an immigration inspector subsequently found Savitsky "likely to become a public charge at the time of entry" in part because he had "drawn a check for \$113 before leaving Canada which proved bad, and that in a dispute with one Solomon Cohen arising out of the purchase of a milk route, Cohen charged him with having sold some of the equipment and kept the proceeds."<sup>160</sup> The 2<sup>nd</sup> Circuit reversed the decision explaining that "Congress meant [the LPC provision] to exclude persons who are likely to become occupants of almshouses for want of means with which to support themselves in the future."

Finally, although the text of the rule does not explicitly limit the consideration of credit scores and reports to US scores and reports, it appears the agency intends this

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<sup>157</sup> The Fair Isaac Corporation (FICO) score is by far the most common, capturing over three-quarters of the market for credit scores. FICO is not a credit reporting agency and generally does not sell its scores directly to lenders. Instead, it enters into agreements with the credit reporting agencies that allow them to sell scores using FICO's methodology. FICO then receives a royalty payment for each score sold. See Shawn Fremstad and Amy Traub, "Discrediting America" (New York: Demos, 2011) available at [https://www.demos.org/sites/default/files/publications/Discrediting\\_America\\_Demos.pdf](https://www.demos.org/sites/default/files/publications/Discrediting_America_Demos.pdf)

<sup>158</sup> Aaron Klein, "The Real Problem with Credit Reports is the Astounding Number of Errors" (Washington: Brookings Institution, September 2017) available at <https://www.brookings.edu/research/the-real-problem-with-credit-reports-is-the-astounding-number-of-errors/>.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

limitation.<sup>161</sup> While credit reporting in the United States is exclusively the province of private-sector corporations, this is not the case in many countries. According to the World Bank, at least 30 countries operate public credit registries, including seven nations in the European Union and 17 in Latin America and the Caribbean.<sup>162</sup> DHS should not include credit scores and reports as factors in LPC determinations, but if it does, DHS should not arbitrarily exclude non-US credit scores and reports.

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<sup>161</sup> Page 51189 of the proposed rule repeatedly refers to “U.S.” credit reports and scores.

<sup>162</sup> Margaret Miller, “Credit Reporting Systems Around the Globe” (Washington: World Bank, June 2000).