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Via Federal eRulemaking Portal and U.S. Mail

Hon. Kirstjen M. Nielsen, Secretary
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, D.C. 20529-2140

Attention: Public Charge

Re: Comment of the County of Los Angeles on Proposed Rule: "Inadmissibility on Public Charge Grounds," 83 Fed. Reg. 51114 (Oct. 10, 2018), CIS No. 2499-10, DHS Docket No. USCIS-2010-0012, RIN 1615-AA22

Dear Secretary Nielsen:

I submit these comments on behalf of the County of Los Angeles (the "County") to the U.S. Department of Homeland Security ("DHS") and the Citizenship and Immigration Services regarding the Proposed Rule: Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114 (Oct. 10, 2018), CIS No. 2499-10, DHS Docket No. USCIS-2010-0012, RIN 1615-AA22 ("Proposed Rule").

EXECUTIVE SUMMARY

The County has a compelling interest in ensuring the health and safety of all people, including millions of immigrants, who reside within its borders. On their behalf, the County

therefore opposes the proposal by DHS to vastly expand the circumstances under which an individual applying for a visa or adjustment of status to obtain permanent residency may be considered a "public charge." The Proposed Rule seeks to redefine a public charge as "an alien who receives one or more public benefits," which for the first time would include noncash supplemental benefits from Supplemental Nutrition Assistance Program ("SNAP," formerly called "Food Stamps"), Section 8 Housing Assistance, Section 8 Project-Based Rental Assistance, Medicaid, premium and cost sharing subsidies for Medicare Part D, and subsidized housing under the Housing Act of 1937. The Proposed Rule also proposes that certain factors, including the use of public benefits or an immigrant's income level, may "weigh in favor of finding that an alien is likely to become a public charge."

The County opposes this unprecedented expansion of the public charge doctrine. It violates the Administrative Procedure Act ("APA") because decades of administrative decisions, the 1999 INS Field Guidance, and other agency statements have engendered strong reliance interests among immigrants who come to the United States or seek to adjust their status, and the Proposed Rule fails to supply a reasoned analysis why DHS is now abandoning this body of prior policy. Because each major prong of the Proposed Rule fails to engage meaningfully with over a century of precedent, or to fully balance the harm that the Proposed Rule will cause, DHS's action is arbitrary and capricious.

The Proposed Rule jeopardizes the health, well-being, and safety of local communities. To consider noncash supplemental benefits in the public charge determination is to undermine the County's and other local governments' public health, safety, and other priorities. Noncash supplemental benefits by their nature reach and assist more than just the recipient; they impact the entire community. By discouraging immigrants from accessing such benefits, the Proposed Rule places everyone's health, well-being, and safety at risk. If immigrants, for instance, forgo enrollment in Medi-Cal (California's implementation of Medicaid), the health of the broader Los Angeles community is at risk, and hospitals will be forced to address rising uncompensated care rates. Indeed, immigrants will likely forgo participation even in those programs exempted or not explicitly targeted by the Proposed Rule. As the Immigration and Naturalization Service[1]

[1] INS ceased to exist in 2003, when its functions were transferred to three new entities (United States Citizenship and Immigration Services, Immigration and Customs Enforcement, and customs and Border Protection) established within the then-newly created DHS.

("INS") itself observed nearly 20 years ago, expanding the definition of "public charge" beyond primary dependence on *cash* benefits will create a chilling effect on *all* noncash supplemental benefit programs that benefit the community at large, even if a particular program is not named in the Proposed Rule.

The expansion of the public charge rule and the harms that flow from it are not justified. The Proposed Rule departs from DHS's and its predecessors' longstanding policy of not considering the receipt of noncash supplemental benefits in the public charge determination. Because such benefits promote self-sufficiency and advance the interests of the entire community, the receipt of noncash supplemental benefits does not demonstrate that an immigrant is likely to become a public charge—i.e., primarily dependent on the government for support. Indeed, the opposite is true. Although DHS claims that the Proposed Rule is consistent with Congress's intent in passing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), as the INS found in its own post-PRWORA field guidance and proposed rule, noncash supplemental benefits *promote and sustain* self-sufficiency, and PRWORA does not require consideration of noncash supplemental benefits in the public charge analysis. The post-PRWORA field guidance has been the policy of the agency for the last 20 years, without contradiction by Congress. DHS cannot justify the sea change in the Proposed Rule simply by relying on PRWORA. Nor can it rely on a flawed cost-benefit analysis that is plagued with methodological errors and fails to consider fully the Proposed Rule's chilling effects or indirect costs to communities.

The Proposed Rule puts children at risk. Many noncash supplemental benefits, including healthcare and nutrition programs, support the well-being of children. Although the preamble indicates that a child's receipt of such benefits will not be considered in his or her parent's public charge determination, that assurance is not given clear force in the proposed regulatory text. This lack of clarity and resulting chilling effect will discourage immigrant parents from accessing programs meant to benefit their children, and put at risk the well-being and long-term self-sufficiency of our most vulnerable population. DHS also requests comment as to "whether and to what extent DHS should weigh past or current receipt of benefits" by children in the child's public charge determination. DHS should not. *Any* consideration of a child's receipt of public benefits in an inadmissibility determination will likely discourage immigrant parents from accessing those services. Such an outcome would be a stark and tragic

departure from the long history of administrative decisions both pre- and post-PRWORA, which do not consider a child's use of benefits in determining whether she was likely to become a public charge. DHS offers no justification for considering a child's use of supplemental benefits or threatening the well-being and long-term self-sufficiency of children.

The Proposed Rule penalizes hard-working families. By introducing an income test, the Proposed Rule will disproportionately harm many hard-working families who form the foundation of our communities and economies. DHS proposes that a family must make more than 250 percent of the federal poverty guidelines ("FPG") (roughly $62,750 a year for a family of four) for income to be a heavily weighed positive factor in the public charge analysis. DHS also proposes that a family income of less than 125 percent of the FPG ($31,375 a year for a family of four) will be a negatively weighed factor. These thresholds, even in a totality of the circumstances analysis, penalize working class households, not just those individuals who are unable to work and likely to become primarily dependent on public assistance. There is no reason to believe that these households cannot support themselves or that they will become primarily dependent on the government for cash support. Indeed, these working-class households are the norm. In the County, about half of all residents (and more than two-thirds of residents living in a family with a noncitizen) have family incomes below 250 percent of the federal poverty level[2] ("FPL"). One-quarter of all County residents (and more than one-third of residents living in a family with a noncitizen) have family incomes below 125 percent of the FPL.[3]

This income test is also inconsistent with prior administrative decision-making, which has focused on an immigrant's *ability* to obtain gainful employment to support herself, more than her current income level.

The Proposed Rule's exceptions underscore its flaws. Finally, although the County supports DHS's decision to exclude certain noncash supplemental benefits from the Proposed Rule, those limited exceptions cannot save the Proposed Rule from its misguided overall

[2] FPL is a poverty threshold issued by the U.S. Census Bureau for statistical purposes, while FPG is a poverty threshold issued by DHS for administrative purposes. *Poverty Thresholds and Poverty Guidelines*, OFF. OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., https://aspe.hhs.gov/frequently-asked-questions-related-poverty-guidelines-and-poverty (last visited Dec. 8, 2018).
[3] *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard*, MANATT, https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population (last visited Dec. 8, 2018).

approach. The exceptions show that noncash supplemental benefits should be treated, as they have been throughout the history of the public charge rule, as categorically different from primary dependence on cash assistance, because noncash supplemental benefits promote and sustain self-sufficiency and also serve the community as a whole. The internally inconsistent explanations that DHS uses to justify excepting some noncash supplemental programs and not others are illogical and insufficient.

* * *

For these reasons, the County urges DHS to continue to adhere to its longstanding policy of excluding noncash supplemental benefits and benefits to children from consideration in the public charge analysis. The County also urges DHS to reject the proposed income test that would use the public charge rule to penalize virtually any working class immigrant who applied for admission or adjustment of status. These extreme policy shifts in the Proposed Rule would penalize immigrants' long-term self-sufficiency, and would harm the communities in which immigrants live, work, and invest.

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I. BACKGROUND

A. The County of Los Angeles

Home to 10.2 million people, the County of Los Angeles is the most populous county in the nation.[4] It is also one of the most diverse. The County serves as a gateway to immigrants from all over the world who seek better lives for themselves and their families.[5] Over one-third of the County's population—approximately 3.5 million people—was born outside the United States.[6] Nearly 1.9 million County residents (almost 19 percent) are noncitizens, including lawful permanent residents, refugees granted asylum, immigrants granted temporary relief under the Deferred Action for Childhood Arrivals ("DACA") program, and other groups.[7]

The County's dynamic immigrant population is deeply integrated, both socially and economically, into the larger community. Although only 1 in 14 Los Angeles County children is an immigrant, 58 percent of County children (over 1.2 million children in total) have at least one immigrant parent, and 44 percent of County households are headed by an immigrant.[8] Overall, over 3.4 million County residents (roughly one third of all County residents) live in a noncitizen or mixed status (citizen and noncitizen) family.[9] An estimated 70 percent of the County's undocumented immigrants are living with at least one citizen in their household, and 34 percent are living with their own citizen children.[10] The County's immigrants have worked tirelessly to build businesses and careers that have grown their communities and that have energized the County's economic life. Immigrants contribute nearly $300 billion to the County's Gross Domestic Product ("GDP") annually and pay billions of dollars in federal taxes every year, which helps to fund many government programs.[11]

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[4] *Read the Trump administration's draft proposal penalizing immigrants who accept almost any public benefit*, WASH. POST, https://apps.washingtonpost.com/g/documents/world/read-the-trump-administrations-draft-proposal-penalizing-immigrants-who-accept-almost-any-public-benefit/2841 (last visited Dec. 8, 2018).
[5] *History of County Communities*, CTY. OF LOS ANGELES, https://www.lacounty.gov/government/about-la-county/history (last visited Nov. 6, 2018).
[6] *Los Angeles*, CTR. FOR THE STUDY OF IMMIGRANT INTEGRATION, USC DORNSLIFE COLLEGE OF LETTERS, ARTS & SCIENCES, https://dornsife.usc.edu/assets/sites/731/docs/LOSANGELES_web.pdf (last visited Oct. 10, 2018).
[7] *See id.*
[8] *Id.*
[9] *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard*, *supra* note 3.
[10] *Los Angeles*, *supra* note 6.
[11] *New Americans in Los Angeles*, NEW AM. ECON., http://www.newamericaneconomy.org/wp-content/uploads/2017/03/LA.pdf (last visited Dec. 3, 2018).

The County seeks to foster vibrant and resilient communities and improve the quality of life for the millions of people who call the County home.[12] To further these goals, many County agencies work to promote the health, well-being, and safety of all County residents.

- The Los Angeles County Department of Public Social Services ("DPSS") is the largest social service agency in the United States.[13] It provides various cash and noncash supplemental benefits to one in every three County residents.[14] DPSS plays a critical role in administering cash benefit programs such as General Relief, as well as critical noncash supplemental benefit programs such as Medi-Cal and CalFresh (California's implementation of SNAP).[15]

- The Los Angeles County Department of Health Services ("LADHS") is the second-largest municipal health system in the United States.[16] LADHS provides high-quality, patient-centered, cost-effective healthcare to all County residents, through a network of 19 health centers and four hospitals.[17] The health system serves nearly 500,000 unique patients per year, including more than 100,000 individuals who are uninsured or whose coverage is limited to emergency care, and other low-income individuals covered by Medi-Cal and other public health programs.

- The Los Angeles County Department of Public Health ("DPH") protects health, prevents disease, and promotes the well-being of all people in Los Angeles County.[18] DPH focuses on the County's population as a whole, working closely with a wide range of stakeholders throughout the community to create and promote policies that aim to protect and improve health.[19] Marshaling a network of public health professionals, Community Based Organizations ("CBOs"), and other partners, DPH provides immunizations and

[12] *See Strategic Plan and Goals*, CTY. OF LOS ANGELES, https://www.lacounty.gov/strategic-plan-and-goals (last visited Nov. 6, 2018).
[13] *About Us*, DEP'T OF PUB. SOC. SERVS., http://dpss.lacounty.gov/wps/portal/dpss/main/about-us (last visited Nov. 7, 2018).
[14] *Id.*
[15] *Programs and Services*, DEP'T OF PUB. SOC. SERVS., http://dpss.lacounty.gov/wps/portal/dpss/main/programs-and-services (last visited Nov. 7, 2018).
[16] *About DHS*, HEALTH SERVS. LOS ANGELES CTY., http://dhs.lacounty.gov/wps/portal/dhs/moredhs/aboutus (last visited Nov. 7, 2018).
[17] *Id.*
[18] *About Us*, CTY. OF LOS ANGELES PUB. HEALTH, http://publichealth.lacounty.gov/phcommon/public/aboutus/aboutdisplay.cfm?ou=ph&prog=ph&unit=ph (last visited Nov. 7, 2018).
[19] *Id.*

testing services through its network of fourteen community health clinics, provides both care management services and other support to children with special healthcare needs and their families, facilitates substance abuse treatment and prevention programs, and plays a critical role connecting children and families to needed programs and benefits provided by other agencies. DPH directly serves hundreds of thousands of County residents each year through its various programs and services.

- The Los Angeles County Department of Mental Health ("DMH") is the largest county-operated mental health department in the United States, directly operating programs in more than 85 sites, and providing services through contract programs and DMH staff at approximately 300 sites co-located with other County departments, schools, courts and various organizations. Each year, the County contracts with close to 1,000 organizations and individual practitioners to provide a variety of mental health-related services. On average, more than 250,000 County residents of all ages are served every year.[20]

- The Community Development Commission ("CDC") and the Housing Authority of the County of Los Angeles ("HACoLA") provide subsidized housing, housing development and preservation, community development, and economic development programs to County residents. HACoLA serves tens of thousands of County families to meet their needs for affordable housing, including public and affordable housing placements as well as Section 8 housing vouchers.[21]

- The Los Angeles County Department of Children and Family Services ("DCFS") serves an ethnically and culturally diverse community of children and families countywide. Each day, DCFS social workers travel across the County to ensure that the County's 2.3 million children thrive in safe families and supportive homes. In addition to investigating referrals of suspected child abuse or neglect, DCFS administers foster care and adoption programs that support establishing permanent homes and permanent family relationships

[20] *About*, LOS ANGELES CTY. DEP'T OF MENTAL HEALTH, https://dmh.lacounty.gov/about/ (last visited Nov 28, 2018).
[21] *About*, HOUSING AUTHORITY OF LOS ANGELES CTY., https://www.hacola.org/about-us/agency-overview (last visited Nov 28, 2018).

for children, and hosts events and activities that promote family reunification, sibling visitations, and holiday or special events.[22]

- The Los Angeles County District Attorney's Office, Bureau of Victims Services ("DA-BVS") provides critical support to crime victims, crime witnesses, and their families. Victim services representatives work in courthouses and police stations, providing an array of services and support to tens of thousands of victims each year. District Attorney personnel also assist crime victims and their family members with submitting claims for emergency support to the California Victim Compensation Board ("CalVCB").[23]

- The Los Angeles County Sheriff's Department ("LASD") is the largest sheriff's department in the world, with approximately 18,000 employees.[24] The LASD is proactive in its approach to crime prevention, working closely with the communities it serves to ensure that all County residents can enjoy the highest possible quality of life.[25]

These and many other County departments, commissions, and related agencies provide a wide range of public benefits and essential services to millions of County residents every year. Communities benefit when all members are healthy, thriving, and safe; the County therefore remains committed to serving all residents, regardless of immigration status. By creating its Office of Immigrant Affairs and pursuing immigration-focused programs and policies, the County has made engagement, integration, and cooperation with its immigrant communities a top priority.

B. The History of Public Charge

1. The Public Charge Concept Has for More Than a Century Focused on *Ability* to Work.

The concept of public charge has existed for more than a hundred years. Since the term was first introduced into U.S. immigration law, it has been interpreted to describe a person who is primarily dependent on the government for subsistence. An immigrant who is determined

[22] *About Us*, LOS ANGELES CTY. DEP'T OF CHILDREN & FAMILY SERVS., http://dcfs.lacounty.gov/aboutus/index.html (last visited Nov. 7, 2018).
[23] *Victim Services*, LOS ANGELES CTY. DISTRICT ATTORNEY'S OFF., http://da.lacounty.gov/victims (last visited Nov. 28, 2018).
[24] *About Us*, LOS ANGELES CTY. SHERIFF'S DEP'T, http://www.lasd.org/about_us.html (last visited Nov. 7, 2018).
[25] *Our Mission, Creed, and Core Values*, LOS ANGELES CTY. SHERIFF'S DEP'T, http://www.lasd.org/about_us.html (last visited Nov. 7, 2018).

likely to become a public charge may be denied admission to the United States or lawful permanent resident status. The question whether an immigrant is likely to become *primarily* dependent on the government for subsistence has never depended on whether an immigrant receives any public benefit, or even any cash benefit. Indeed, for virtually all of the public charge doctrine's history, the analysis has focused on the immigrant's *ability* to work, including whether the immigrant is able-bodied, and not on his or her receipt of any public benefit.

A "public charge" provision was included in the Immigration Act of 1882, which excluded from entering the United States any immigrant "unable to take care of himself or herself without becoming a public charge."[26] In 1952, Congress enacted the Immigration and Nationality Act ("INA"), which provides for the exclusion and removal of any immigrant deemed a "public charge." 8 U.S.C. § 1182(a)(4). The INA does not define what a "public charge" is or who "is likely . . . to become" one because Congress intended to leave that "interpretation [to] the administrative officials and the courts." *See* S. Rep. No. 1515. 81st Cong., 2d Sess., at 349 (April 20, 1950).

Across these and other immigration acts, the federal immigration agencies and the courts have applied the public charge provision to exclude applicants who were institutionalized or who were unable to work and financially support themselves. *E.g.*, *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922) ("[A] person 'likely to become a public charge' is one who, by reason of poverty, insanity, or disease or disability, will probably become a charge on the public."); *Matter of Harutunian*, 14 I. & N. Dec. 583, 588 (BIA 1974) ("[T]he alien's physical and mental condition, as it affects ability to earn a living, is of major significance."); *In the Matter of T-----*, 3 I. & N. Dec. 641, 644 (BIA 1949) (not likely to be public charge where applicant was "capable of earning her own livelihood"); *In the Matter of R----*, 1 I. & N. Dec. 209, 210–11 (BIA 1942) (not likely to be public charge where "[n]othing in the record indicate[d] that [the applicant] was not able to work"). Where an applicant had the capacity to obtain gainful employment and support herself without relying on cash benefits from the government, she was not a likely public charge, even if she was poor. *See Matter of A----*, 19 I. & N. Dec. 867, 870 (BIA 1988) (INS erred in placing "undue weight" on applicant's income and ignoring "more important factors; namely, that the applicant has now joined the work force, that she is young, and that she has no

[26] E. P. Hutchinson, LEGIS. HIST. OF AM. IMMIGRATION POL'Y. 1798–1965, 410 (Philadelphia: University of Pennsylvania Press, 1981).

physical or mental defects which might affect her earning capacity."); *Matter of Perez*, 15 I. & N. Dec. 136, 137–38 (BIA 1974) (applicant not a public charge where she was "in good health, and capable of finding employment"); *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421–22 (BIA, 1962) ("A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge.").

Accepting a public benefit has never been a factor in deciding whether one is a public charge. In 1948, the Board of Immigration Appeals (BIA) ruled the acceptance by an immigrant of "services for which no specific charge is made, does not in and of itself make the alien a public charge." *In the Matter of B---*, 3 I. & N. Dec. 323, 324 (BIA 1948). If an immigrant participates in "an adult education program," or a child "attends public school [or] takes advantage of the free-lunch program," or the immigrant or child participates in "countless" other programs that "are provided to all residents, alien and citizen alike," that immigrant or child does not become a public charge." *Id.* at 324–25.

Decision-makers generally excluded noncash supplemental aid aimed to benefit the larger community. *E.g.*, *Harutunian*, 14 I. & N. Dec. at 589 (cash aid is "distinguish[able] from essentially supplementary benefits, directed to the general welfare of the public as a whole," which are not properly considered). Instead, the inquiry focused on factors that made the applicant unable to work, and whether the immigrant was primarily dependent on government cash aid. *See id.* (focusing on the applicant's old age and likely future receipt of cash public assistance); *Matter of Vindman*, 16 I. & N. Dec. 131, 132–33 (BIA 1977) (applicants who were receiving cash benefits, had never been employed, and had no employment prospects were likely to be public charges).

Demonstrating that *ability* to work is the focus of the public charge inquiry, and not income, federal agencies have ruled that an immigrant could not be determined to be a likely public charge simply because that immigrant currently lacked employment. *Matter of Martinez-Lopez*, 10 I. & N. Dec. at 423 (concluding that an immigrant's misrepresentation of an employment offer was immaterial because immigrant could not have been found to be a public charge because he lacked employment). The Attorney General in *Martinez-Lopez* reviewed precedent dating back to the Immigration Act of 1882, and focused not on the immigrant's employment at the time, but on the immigrant's ability to work, concluding that "[s]ome specific

circumstance, such as mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present. A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge." *Id.* at 421.

2. The 1996 Amendment to the INA and Public Welfare Reform.

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which amended the INA. IIRIRA reflected what was then more than 40 years of public charge analysis by articulating certain "minimum considerations" for the public charge determination—age; health; family status; assets, resources, financial status; and education and skills. *See* Div. C., Pub. L. 104-208, section 531, 110 Stat. 3009, 3009-546, 3009-674 (1996) (amending 8 U.S.C. § 1182(a)(4)). These factors were consistent with administrative decisions preceding the amendment, in that they focused on whether someone was able to work or support herself.

Earlier that same year, Congress enacted PRWORA, which was part of its attempt to reform cash assistance programs to promote self-sufficiency. *See* 8 U.S.C. §§ 1601(1)–(2). PRWORA imposed a number of restrictions on immigrants' eligibility to receive certain federal, state, and local "public benefits," but did not go so far as to direct that either restricted or non-restricted benefits be considered in a public charge analysis. *See* 8 U.S.C. §§ 1611(a), (c), 1621(a), (c).

3. The INS's 1999 Public Charge Field Guidance and Proposed Rule.

In 1999, the INS further clarified that PRWORA's self-sufficiency goals did not require consideration of noncash supplemental benefits in the public charge analysis. The agency issued "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 Fed. Reg. 28689 (May 26, 1999) (the "1999 Field Guidance"), and a proposed rule, "Inadmissibility and Deportability on Public Charge Grounds," 64 Fed. Reg. 28676 (May 26, 1999) (the "1999 Proposed Rule"). Although the 1999 Proposed Rule was never finalized, the 1999 Field Guidance was immediately implemented and has remained in effect over the past twenty years. *See* 64 Fed. Reg. at 28698 ("Before the proposed rule becomes final, the [INS] is publishing its field guidance on public charge issues . . . to provide additional information to the public on the [INS's] implementation of the public charge provisions of the immigration laws.).

The 1999 Field Guidance and the 1999 Proposed Rule addressed the fear and confusion that followed PRWORA about what benefits would be considered for public charge determinations. *See* 64 Fed. Reg. at 28680; *see also* 64 Fed. Reg. at 28692. The INS noted that PRWORA had, in and of itself, caused a chilling effect. Many immigrants withdrew from or did not enroll in public benefits for "fear [of] the negative immigration consequences of potentially being deemed a 'public charge.'" 1999 Proposed Rule, 64 Fed. Reg. at 28676. The INS also recognized that immigrants' withdrawal from or fear of enrolling in noncash supplemental benefits programs "creat[ed] significant, negative, public health consequences across the country," which "jeopardiz[ed] the general public." *Id*.

The INS sought to alleviate these fears by defining public charge as the agency had previously interpreted it—to mean an immigrant who is likely to become "*primarily* dependent on the Government for subsistence, as demonstrated by either (i) the receipt of public *cash assistance* for income maintenance or (ii) institutionalization for long-term care at Government expense." 1999 Field Guidance, 64 Fed. Reg. at 28689 (emphasis added). It explicitly rejected the approach contemplated in today's Proposed Rule—which would consider the receipt of many noncash supplemental benefits—stating that "[p]ast receipt of non-cash benefits . . . should not be taken into account" in determining whether an immigrant is a public charge because those benefits "are by their nature supplemental" and frequently support the "general welfare." *Id.* at 28690, 28692. Although it recognized that it was "not possible to list all the supplemental non-cash [public] benefits . . . that should *not* be considered for public charge purposes," the 1999 Field Guidance listed several common examples, including (i) Food Stamps (now SNAP); (ii) Medicaid and other health insurance and health services (including public assistance for immunizations and for testing and treatment of symptoms of communicable diseases; use of health clinics, short-term rehabilitation services, and emergency medical services) other than support for long-term institutional care; (iii) Children's Health Insurance Program ("CHIP"); (iv) the Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC") and similar nutrition programs; (v) emergency disaster relief; (vi) housing benefits; (vii) child care services; (viii) energy assistance; (ix) foster care and adoption assistance; (x) transportation vouchers); (xi) educational benefits; (xii) noncash benefits under TANF; (xiii) job training programs, and (xiv) community-based programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter). *Id.* at 28692 n.17, 28693.

To justify the 1999 Field Guidance and 1999 Proposed Rule, the INS considered the plain meaning of the term "public charge," precedential INS and BIA decisions construing the term, and Congress's intent in enacting PRWORA several years earlier. *See, e.g.*, 1999 Proposed Rule, 64 Fed. Reg. at 28677. It reaffirmed that the definition of public charge should be based on primary dependence on government assistance. *See id.* ("[A] definition based on primary dependence on the Government is consistent with the facts found in the deportation and admissibility cases."). The INS reasoned that the term "public charge" "unambiguously [applies] to . . . a person or thing committed or entrusted to the care, custody, management, or support of another." *Id.* Nowhere has the government defined "public charge" to suggest inclusion of noncash supplemental benefits, which are aimed to *supplement* a primary source of income. *See id.* at 28677–78; *see* 1999 Field Guidance, 64 Fed. Reg. at 28689. The INS also explained that its prior decisions followed this plain meaning, because they too focused on whether an immigrant would likely become dependent on government financial assistance if she was institutionalized or unable to support herself. *See* 1999 Proposed Rule, 64 Fed. Reg. at 28677 ("[A] definition based on primary dependence on the Government is consistent with the facts found in the deportation and admissibility cases.") (collecting cases).

Finally, the INS determined that the 1999 Field Guidance and 1999 Proposed Rule were consistent with PRWORA's intent to promote immigrants' self-sufficiency. *See* 1999 Field Guidance, 64 Fed. Reg. at 28691; 1999 Proposed Rule, 64 Fed. Reg. at 28686. It reasoned that, unlike cash aid, noncash supplemental benefits "are often provided to low-income working families to *sustain and improve* their ability to remain self-sufficient." 1999 Proposed Rule, 64 Fed. Reg. at 28678 (emphasis added). By receiving noncash supplemental assistance in the form of direct services to support nutrition, health, and living conditions, immigrants are better able to work, go to school, and generally contribute to society. *See id.* The INS noted that Congress, in enacting PRWORA, "determined that certain aliens remain eligible for some forms of medical, nutrition, and child care services, and other public assistance" by carving out many noncash supplemental aid programs. *Id.* at 28676. Notwithstanding their eligibility, many immigrants had, in the time period between the enactment of PRWORA and the 1999 Field Guidance and 1999 Proposed Rule, avoided receiving such benefits because of confusion related to the public charge doctrine, a result that INS found directly "undermin[es] the Government's policies of . . . helping people to become self-sufficient." *Id.* at 28677.

C. The Proposed Rule

On October 10, 2018, DHS published in the Federal Register a notice of proposed rulemaking for the Proposed Rule. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114 (Oct. 10, 2018). The Proposed Rule departs from over a half-century of precedent, including the 1999 Field Guidance, in several key ways. The Proposed Rule defines public charge as "an alien who receives one or more public benefits," as defined in 8 C.F.R. 212.21, including cash assistance for income maintenance and "non-cash benefits." *Id.* at 51289–90; *see also id.* at 51157–58 (noting that the Proposed Rule considers "noncash medical care, housing, and food benefit programs" in the public charge analysis). Specifically, under the Proposed Rule, DHS could consider an immigrant's application for, approval for, or receipt of SSI; TANF; federal, state, or local General Assistance benefits; SNAP; Medicaid; Section 8 Housing Assistance; Section 8 Project-Based Rental Assistance, any benefit provided for institutionalization for long-term care at government expense, premium and cost sharing subsidies for Medicare Part D, and subsidized housing under the Housing Act of 1937, *see id.* at 51290, as factors that would "weigh heavily in favor of a finding that an alien is likely to become a public charge," *id.* at 51292.

The Proposed Rule also penalizes immigrants' participation in programs aimed to support children and families, even where such programs are explicitly exempted from PRWORA's definition of "public benefit." Under the Proposed Rule, current or recent use of SNAP, for example, may be considered a "heavily weighed negative factor" in the public charge determination, *see id.* at 51290, 51292, even though PRWORA explicitly exempted children's use of such benefits, *see* 8 U.S.C. § 1612(a)(2)(J).[27] DHS also requests comment regarding whether to consider in the public charge analysis additional programs that benefit children, such as CHIP, as well as "whether and to what extent DHS should weigh past or current receipt of benefits" by children, or an adult's receipt of benefits as a child, in the public charge determination. Proposed Rule, 83 Fed. Reg. at 51188. And although the preamble of the Proposed Rule states that an immigrant or U.S. citizen child's "direct receipt of public benefits . . . would not factor into the public charge inadmissibility determination" of that child's parent, *id.* at 51175, the text of the Proposed Rule contains no explicit textual prohibition assuring

[27] Under the Proposed Rule, benefits received more than three years prior to the public charge determination would be a negative factor rather than a heavily weighed negative factor. *See* Proposed Rule, 83 Fed. Reg. at 51292.

immigrants that a child's receipt of benefits will not be taken into consideration in her parents' public charge determination.

The Proposed Rule, like PRWORA, carves out an immigrant's receipt of Medicaid benefits for an emergency medical condition. *See id.* at 51290. It also specifically exempts an immigrant's receipt of school-based health benefits funded by Medicaid, Medicaid benefits provided under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, and certain Medicaid benefits for foreign-born children with U.S.-citizen parents. *See* Proposed Rule, 83 Fed. Reg. at 51170, 51290. In the preamble of the Proposed Rule, DHS suggests that certain other programs exempt under PRWORA, such as short-term, noncash, in-kind emergency disaster relief, public health assistance for immunizations and the treatment of communicable diseases, and programs that provide in-kind services to the community that are necessary for the protection of life and safety "would not be part of the public charge determination under the proposed rule" because they were determined by Congress to "benefit all," and to relate to "public health" and the "public interest." *See id.* at 51132; *see also* 8 U.S.C. § 1611(b) (exceptions under PRWORA). But other than exceptions for certain Medicaid benefits, the actual text of the Proposed Rule does not make reference to any of the preamble's other exceptions. *See* Proposed Rule, 83 Fed. Reg. at 51289–90.

The preamble also states that "[t]he definition of the term 'public charge' would not include receipt of any non-cash public benefit not listed under the proposed 8 CFR 212.21(b)," which would exempt Social Security retirement benefits, general Medicare, veterans' benefits, social insurance programs, such as workers' compensation, and noncash benefits that provide education, child development, and employment and job training. *Id.* at 51173. But these exceptions are missing from the text of the Proposed Rule, as is any operative provision that ensures that *only* those benefits listed in the proposed § 212.21(b) will in fact be considered in the public charge analysis. In fact, the Proposed Rule specifically seeks comment as to "whether it should expand the list of designated public benefits in a final rule," to include other public benefits "similar in nature" to the benefits listed in proposed § 212.21(b), and whether "an alien's receipt of [unenumerated] benefits" should "be considered in the totality of the circumstances." Proposed Rule, 83 Fed. Reg. at 51173. The Proposed Rule's limited exceptions are thus unclear and uncertain and do little to blunt the Proposed Rule's negative consequences.

DHS acknowledges that the Proposed Rule's expanded definition of "public charge" is likely to discourage many immigrants from using public benefits programs for which they are eligible. *See id.* at 51266. As the Proposed Rule notes, this chilling effect may lead to serious consequences for the public at large, including: worse health outcomes; increased use of emergency rooms as a method of primary health care; increased prevalence of communicable diseases; uncompensated care; and increased rates of poverty and housing instability. *See id.* at 51270.

The Proposed Rule also departs from precedent by subjecting an immigrant's income and financial resources to new DHS scrutiny. DHS proposes to consider it a "heavily-weighed positive factor" in the public charge analysis if an immigrant has income of at least 250 percent of FPG, or $62,750 a year for a family of four. *Id.* at 51204. In the case of immigrants with income less than 125 percent of FPG, or $31,375 a year for a family of four, DHS will consider the applicant more likely to be a public charge. *See id.* at 51291. DHS's proposed approach for any immigrant making between 125 and 250 percent of FPG is unclear. Although the preamble states in a footnote that "[i]ncome between 125 and 250 percent of the FPL is considered a positive factor," *id.* at 51204 n.584, this language is not codified in the operative text of the Proposed Rule, *see id.* at 51291–92.

To justify its decision to set the threshold for immigrants' household income at 125 percent of FPG, DHS provides only a conclusory statement that this threshold "has long served as a touchpoint for public charge inadmissibility determinations" and a reference to the standard for affidavits of support as it concerns an applicant's *sponsor*. *Id.* at 51187. But DHS provides no analysis regarding why this threshold is relevant to the *applicant's* public charge determination or why it should influence whether an immigrant is more likely to become a public charge. Further, the Proposed Rule does not acknowledge that a threshold of 125 percent of FPG would reach the vast majority of immigrants, nor does it address why such a result is justified when, in the past, the agency had declined to significantly increase the number of immigrants determined to be likely public charges. *See* 1999 Field Guidance, 64 Fed. Reg. at 28692.

DHS acknowledges that today's Proposed Rule will likely lead to fewer immigrants receiving benefits for which they are eligible and more immigrants being denied an adjustment of status, *see* 83 Fed. Reg. at 51230, 51270, but nevertheless contends that the new definition of

"public charge" merely interprets the "minimum considerations" set forth in the INA in a manner consistent with congressional policy statements regarding self-sufficiency principles, *see id.* at 51122–23. The Proposed Rule claims to "align[] public charge policy with the self-sufficiency principles set forth in" PRWORA. *Id.* at 51123. The Proposed Rule then sets forth an interpretation of PRWORA that dramatically departs from the agency's prior pronouncements and decision-making, on which the County has relied for almost twenty years, without substantively addressing that break from precedent.[28] *See, e.g.*, *id.* at 51123 (acknowledging the departure from prior agency policy and stating merely that the Proposed Rule "improve[s] upon" the prior INS policies).

II. THE PROPOSED RULE SHOULD NOT BE ADOPTED

The County opposes the Proposed Rule's unprecedented, unjustified expansion of the public charge doctrine for four reasons. *First*, by considering the receipt of certain noncash supplemental benefits in the public charge determination, the Proposed Rule will cause many eligible immigrants to forgo such benefits, which will jeopardize the health, safety, and well-being of *all* County residents. *Second*, the Proposed Rule will have a particularly negative impact on the County's most vulnerable population—its children—because it gives insufficient assurances that benefits for children will not imperil public charge determinations of the children, their parents, or both. *Third*, the Proposed Rule will disproportionately harm the working-class families that are the lifeblood of our communities by imposing what amounts to an income test for admissibility or adjustment of status. *Fourth*, the Proposed Rule's exceedingly

[28] In another departure from longstanding policy and practice, the Proposed Rule also proposes to change the longstanding "primarily dependent" standard that has applied to receipt of government cash assistance to negatively weigh cash assistance that exceeds 15 percent of the FPG threshold in a year. *See* Proposed Rule, 83 Fed. Reg. at 51163–64. The Proposed Rule also states that in "certain limited circumstances" a lawful permanent resident returning from a trip abroad will be considered an applicant for admission and therefore subject to an inadmissibility determination, despite the longstanding precedent that permanent residents are not subject to public charge determinations. *See id.* at 51135. It even creates a new self-sufficiency test for applicants who want to extend a visa or a change of status, even though there is no statutory authority in the INA to apply the public charge doctrine to these types of immigration benefits. *See id.* at 51135–36. The Proposed Rule concedes that DHS lacks statutory authority to import public-charge principles to these contexts, relying instead on only a conclusory statement that doing so is "sound policy." *Id.* DHS cannot just make up "sound policy" without a grant of statutory authority by Congress. *Orca Bay Seafoods v. Nw. Truck Sales, Inc.*, 32 F.3d 433, 436 (9th Cir. 1994) ("But rationality is not enough. The Secretary needed authority."). Although they are not the primary focus of this comment, the County submits that extending the public charge doctrine in these unprecedented and unauthorized ways is arbitrary, ultra vires, and unlawful. *See Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 59 (1st Cir. 2007) ("The basic premise behind nonstatutory review is that, even after the passage of the APA, some residuum of power remains with the district court to review agency action that is ultra vires.").

narrow exclusions are illogical, internally inconsistent, and insufficient to offset the broad risk of harm from its misguided and unjustified approach.

DHS may not make rules that are arbitrary, capricious, or manifestly contrary to the statute that grants the agency authority. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 844 (1984). Requirements for administrative action are "strict and demanding," to ensure that agency discretion is exercised appropriately. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 48 (1983). An agency must offer a "rational connection between facts and judgment … to pass muster under the arbitrary and capricious standard." *Id.* at 56. And it must "cogently explain why it has exercised its discretion in a given manner." *Id.* at 48.

Although a departure from precedent is not *per se* arbitrary and capricious, "[a]n agency's departure from past practice can . . . if unexplained, render regulations arbitrary and capricious." *Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012). An agency decision is also arbitrary if it "runs counter to the evidence before the agency," or if an agency has "failed to consider an important aspect of the problem" before it. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Further, an agency may not "treat like cases differently." *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985). "And when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable." *Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1040 (D.C. Cir. 2012).

A. The Proposed Rule Does Not Adequately Consider the Harm that the Consideration of Noncash Supplemental Benefits will Cause to Immigrants' Long Term Self-Sufficiency and the Public's Well-Being.

DHS should abandon its proposal to weigh an immigrant's receipt of certain noncash supplemental benefits in determining whether the immigrant is likely to become a public charge. Noncash supplemental aid programs protect the general welfare and benefit the community at large, as well as the individual recipient. Considering the receipt of such benefits in the public charge analysis will lead many eligible immigrants to forgo such benefits, which will negatively impact the health, well-being, and safety of not only those individuals but also the general public, causing harm that vastly outstrips the limited costs that DHS identifies. DHS offers no good justification for subjecting the community to such harm, and cannot do so—the Proposed Rule

departs from both decades of administrative decision-making and congressional intent in enacting PRWORA and improperly weighs the costs and benefits of the Proposed Rule's misguided approach.

1. The Proposed Rule Undermines Public Health, Well-Being, and Safety Priorities by Discouraging the Use of Noncash Supplemental Benefits.

At the core of our federalist system of government is the principle that state and local jurisdictions bear primary responsibility for ensuring the safety and well-being of their communities. *See generally Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012). In exercising its sovereign duty to promote the safety and general welfare of its residents, the County has determined that the community as a whole is better off when noncash supplemental benefits are offered to, and accessed by, all eligible members of the community, regardless of their immigration status. The Proposed Rule disregards this principle in favor of a short-sighted and ill-considered policy goal of dissuading immigrants from using the public benefits for which they qualify. Because these benefits promote the well-being of the entire community, immigrants should be *encouraged* to enroll, not frightened into withdrawing. The Proposed Rule will leave our communities less healthy and less safe.

As DHS itself recognizes but does not fully address, the consideration of noncash supplemental benefits will have a chilling effect on immigrants, leading many to withdraw from or not enroll in programs for which they are eligible. *See* Proposed Rule, 83 Fed. Reg. at 51266–67 ("Research shows that when eligibility rules change for public benefits programs there is evidence of a 'chilling effect' that discourages immigrants from using public benefits programs for which they are still eligible"). This chilling effect will be significantly greater than DHS contemplates in its analysis of the costs and benefits of the Proposed Rule. Because the Proposed Rule is unclear and complex—both in terms of which noncitizen or immigrant categories and which benefits are implicated—it is likely that "many more immigrants, including many who are not actually subject to the public charge requirement because they have an exempt status, are likely to avoid coverage due to fear of negative immigration consequences," even for benefits not specifically contemplated by the Proposed Rule.[29] Indeed, fearful immigrants began withdrawing from public benefits programs even before DHS issued the Proposed Rule in

[29] Wendy E. Parmet, *The Health Impact of the Proposed Public Charge Rules*, HEALTH AFFAIRS (Sept. 27, 2018), https://www.healthaffairs.org/do/10.1377/hblog20180927.100295/full.

response to drafts leaked in February and March 2018.[30] DHS has requested comment on other possible consequences of the Proposed Rule and on the appropriate methodologies for quantifying non-monetized potential impacts. Proposed Rule, 83 Fed. Reg. at 51270. Accordingly, the County submits that the Proposed Rule will harm all County residents because the Proposed Rule discourages the County's 1.9 million noncitizen residents, and the larger universe of 3.4 million noncitizens and their family members, from enrolling in a wide range of public benefits and services that benefit the entire community.

a. *Health*

Millions of County residents are touched each year by programs that promote both personal and public health. These programs enable individuals to work and, consequently, support self-sufficiency. These programs also support hospitals and other providers that deliver health care services, and ultimately strengthen everyone's health. DHS acknowledges that the Proposed Rule is likely to discourage individuals from using public benefits programs for which they are eligible, *id.* at 51266, but fails to grapple with the scope of the chilling effect and the variety of the negative health-related impacts. These include: worse health outcomes; increased use of emergency rooms as a method of primary health care; increased prevalence of communicable diseases; and uncompensated care. DHS also acknowledges the potential for impacts that may be a cause or consequence of poor health, including increased rates of poverty and housing instability, along with reduced productivity and educational attainment. *Id*. at 51270. Here too, the impact on entire communities including the County will be severe.

Services likely to suffer from the chilling effect include both Medicaid, which is a noncash supplemental benefit for which current or recent use is a "heavily weighed negative factor" under the Proposed Rule, *see id.* at 51168, 51198–99, and CHIP, regarding which the Proposed Rule has requested comment, *see id.* at 51173–74.[31] Based on federal Survey of Income and Program Participation data, the Henry J. Kaiser Family Foundation found that over

[30] "Agencies in at least 18 states say they've seen drops of up to 20 percent in enrollment, and they attribute the change largely to fears about the immigration policy." Helena Bottemiller Evich, *Immigrants, fearing Trump crackdown, drop out of nutrition programs,* POLITICO (Sept. 3, 2018), https://www.politico.com/story/2018/09/03/immigrants-nutrition-food-trump-crackdown-806292.

[31] *E.g.*, *Proposed Changes to "Public Charge" Policies for Immigrants: Implications for Health Coverage*, KAISER FAM. FOUND. (Sept. 24, 2018), https://www.kff.org/disparities-policy/fact-sheet/proposed-changes-to-public-charge-policies-for-immigrants-implications-for-health-coverage (noting that healthcare usage through Medicaid, CHIP, and marketplace coverage is likely to decline if the Proposed Rule is implemented).

14 million Medicaid enrollees and CHIP children live in a household with at least one noncitizen.[32] Based on its analysis of studies documenting the chilling effect of PRWORA, the Kaiser Family Foundation estimated that Medicaid and CHIP could be abandoned by between 15 and 35 percent of eligible participants.[33] In other words, between 2.1 million and 4.9 million Medicaid enrollees or CHIP children would likely miss out on crucial benefits because of the Proposed Rule.[34]

In the County alone, Medi-Cal covers more than 3.9 million people,[35] including at least 900,000 noncitizens and 1.5 million people in families with a noncitizen.[36] If even a small percentage forgo coverage, it will result in coverage losses in the tens of thousands. Using conservative estimates of the Medi-Cal enrollee population likely to be chilled by the Proposed Rule, a recent UCLA analysis (the "UCLA study") estimates withdrawal from Medi-Cal in the County by between 106,000 and 248,000 individuals (assuming withdrawal rates between 15 and 35 percent).[37] Children would account for approximately two-thirds of the estimate, and most would be U.S.-citizen children of noncitizen parents.[38] The resulting federal funds loss associated with reduced enrollment in Medi-Cal is estimated to range from $174 million to $406 million for the County.[39] As these federal dollars are removed from the local economy, the County is estimated to see a ripple effect of up to 4,600 lost jobs and $723 million in reduced

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[32] Samantha Artiga et al., *Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid*, KAISER FAM. FOUND. (Oct. 2018), http://files.kff.org/attachment/Issue-Brief-Estimated-Impacts-of-the-Proposed-Public-Charge-Rule-on-Immigrants-and-Medicaid.

[33] *Id.*; *see also* Neeraj Kaushal & Robert Kaestner, *Welfare Reform and Health Insurance of Immigrants,* Health Servs. Res. 40(3) (June 2005), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1361164; Michael Fix & Jeffrey Passel, *Trends in Noncitizens' Use of Public Benefits Following Welfare Reform 1994–97*, The Urban Inst. (Mar. 1, 1999), *available at* https://www,urban.org/sites/default/files/publication/69781/408086-Trends-in-Noncitizens-and-Citizens-Use-of-Public-Benefits-Following-Welfare-Reform.pdf; Namratha R. Kandula, et al., *The Unintended Impact of Welfare Reform on the Medicaid Enrollment of Eligible Immigrants*, Health Servs. Res. 39(5) (Oct. 2004), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1361081; Rachel Benson Gold, *Immigrants and Medicaid After Welfare Reform,* THE GUTTMACHER INST. (May 1, 2003), https://222.guttmacher.org/gpr/2003/05/immigrants-and-medicaid-after-welfare-reform.

[34] Artiga et al., *supra* note 32.

[35] *County Certified Eligibles as of May 2018*, CAL. DEP'T OF HEALTH CARE SERVS., https://www.dhcs.ca.gov/dataandstats/statistics/Pages/Medi-Cal-Certified-EligiblesRecentTrends.aspx (last visited Nov. 30, 2018).

[36] Analysis of data provided by the Los Angeles County Department of Public Social Services.

[37] Ninez Ponce et al., *How Proposed Changes to the 'Public Charge' Rule Will Affect Health, Hunger and the Economy in California*, UCLA CTR. FOR HEALTH POL'Y RES., at 33 (Nov. 29, 2018), https://healthpolicy.ucla.edu/newsroom/Documents/2018/public-charge-seminar-slides-nov2018.pdf.

[38] *Id.* at 31.

[39] *Id.* at 33.

economic output; it would also realize a share of associated tax revenue losses that total up to $105 million statewide.[40]

Penalizing enrollment in these noncash supplemental and preventative programs will hurt, not help, immigrants' self-sufficiency and ability to work. The rate of uninsured among legal immigrant families will likely rise.[41] Without access to a general care physician and regular preventive care, these individuals will likely delay treatment until conditions become critical. Chronic diseases like diabetes and hypertension, which "require regular follow-up visits to be effectively managed and kept from turning into acute episodes of illness," will go untreated and become more debilitating.[42] Patients may incur higher out-of-pocket costs and medical debt if they seek care while uninsured, leading to economic instability for families.[43] The Proposed Rule could also lead to significant negative impacts to the local economy due to lost productivity associated with increased uninsurance among the County's workforce.[44]

Abandonment of these programs by immigrants will also impact the health of the community as a whole. Public health strategies, by their nature, are successful only when they address the needs of entire communities. As the 1999 Field Guidance observed, "reluctance to access [noncash supplemental benefits such as health and nutrition services] has an adverse impact not just on the potential recipients, but on public health and the general welfare." 64 Fed. Reg. 28692; *see also* 1999 Proposed Rule, 64 Fed. Reg. at 28686 ("non-cash services often have a primary objective of supporting the overall community or public health, by making services generally available to everyone within a community.").[45] If the County's immigrant population avoids the available healthcare benefits because of the Proposed Rule, the Proposed Rule will

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[40] *Id.* at 40.
[41] *Proposed Changes to "Public Charge" Policies for Immigrants: Implications for Health Coverage*, *supra* note 31.
[42] Michael Hiltzik, *A punitive Trump proposal stokes panic among immigrants—even before it's official*, LOS ANGELES TIMES (Aug. 24, 2018), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-public-charge-20180824-story.html.
[43] Liz Hamel et al., *The Burden of Medical Debt: Results from the Kaiser Family Foundation/New York Times Medical Bills Survey*, KAISER FAM. FOUND. (Jan. 2016), https://www.kff.org/report-section/the-burden-of-medical-debt-section-1-who-has-medical-bill-problems-and-what-are-the-contributing-factors.
[44] Peter Harbage & Ben Furnas, *The Cost of Doing Nothing on Health Care*, CTR. FOR AM. PROGRESS (May 2009), https://www.americanprogress.org/wp-content/uploads/issues/2009/05/pdf/cost_doing_nothing.pdf.
[45] *See also The Role of Public Health in Ensuring Health Communities*, AM. PUB. HEALTH. ASS'N (Jan. 1, 1995), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/30/10/48/the-role-of-public-health-in-ensuring-healthy-communities ("The public health system focuses on prevention through population-based health promotion—those public services and interventions which protect entire populations from illness, disease, and injury and protection.").

compromise the health of all County residents.[46] Not only will disease go untreated longer thereby endangering the rest of the community, but health care costs will rise for everyone.[47]

The Proposed Rule will also frustrate the County's efforts to lower overall healthcare costs and strengthen its healthcare delivery system. This attack on public health in the County comes at a time when California has, as a result of the Affordable Care Act, made significant progress at ensuring access to quality, affordable healthcare to its residents. For example, "as California's uninsured rate shrank from 16.4% in 2013 to 8.5% in 2015, the cost of providing uncompensated care at hospitals shrank from $20.5 billion to $6.7 billion, a decrease of 67%."[48] Efforts to penalize or chill usage of important noncash supplemental benefits programs such as Medi-Cal will significantly hurt California's healthcare system and likely lead to more uncompensated, emergency room care.

In Los Angeles, County hospitals will see an increase in uncompensated care. Among 130 public and private hospitals in the Los Angeles metropolitan area, it is estimated that nearly $2 billion in Medicaid/CHIP payments are subject to a chilling effect under the Proposed Rule.[49] Without a new financing source to replace lost Medi-Cal revenues, uncompensated care costs will increase.

Rising uncompensated care could destabilize the health care infrastructure that serves the entire community, threatening not only the broader immigrant population but all County residents. These financial challenges will likely have a negative impact on the way hospitals deliver services to their entire communities, as many operate with thin margins and will need to make changes that could impact all patients, not just immigrants targeted by the new rules.[50] Community health centers and other providers in areas that serve large immigrant populations

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[46] *See* Rick Pollack, President and CEO Am. Hosp. Ass'n, *AHA Statement on Public Charge Proposal*, AM. HOSP. ASS'N (Sept. 24, 2018) ("The public charge proposal . . . could jeopardize access to health services for millions of legal immigrants . . . [which] could threaten both their individual and public health."); 1999 Proposed Rule, 64 Fed. Reg. at 28686 ("lack of access to critical [public] services may lead to negative health outcomes for immigrant families and children, as well as potentially undermining public health.").

[47] *See* Pollack, *supra* note 46 ("Forgoing care can exacerbate medical conditions leading to sicker patients and higher reliance on hospital emergency departments. In turn, this could drive up costs for all purchasers of care.").

[48] Letter from Xavier Becerra, Attorney General, to Director Mick Mulvaney and Administrator Neomi Rao of the Office of Management and Budget (May 10, 2018).

[49] Cindy Mann et al., *Medicaid Payments at Risk for Hospitals Under the Public Charge Proposed Rule*, MANATT (Nov. 2018), https://www.manatt.com/Insights/White-Papers/2018/Medicaid-Payments-at-Risk-for-Hospitals-Under-Publ.

[50] *Id.*

would also see negative financial impacts.[51] Within the County, health care facilities run by the Department of Health Services ("LADHS") could be particularly hard hit, as 68 percent of the 486,000 patients served by LADHS have Medi-Cal coverage—including 70 percent of the patients seen at County hospitals and 67 percent of patients at the County's outpatient clinics.[52] Given the large number of Medi-Cal enrollees served by LADHS, even a small percentage of LADHS Medi-Cal enrollees forgoing coverage would translate to a large number of uninsured patients. The end result would add strain on the LADHS budget and stretch limited resources even further than they are stretched today. Gains that have been made in treating patients at appropriate times and in cost-efficient outpatient settings would also be lost as individuals delay or defer care. There would also be trickle-down effects on public health as individuals delay or defer treatment for communicable diseases, for example. One study estimates the annual economic impact in Los Angeles County of influenza alone at nearly $1 billion in direct and indirect costs, a figure that would be even higher if individuals drop coverage and forgo treatment as a result of the Proposed Rule.[53]

DHS fails to consider fully these public health impacts and their consequences on the workforce and economy. DHS recognizes that "[w]orse health outcomes" will flow from the Proposed Rule, but fails to recognize that they will make individuals less able to work and be self-sufficient. Proposed Rule, 83 Fed. Reg. at 51270. And although DHS acknowledges that there will be a reduction in federal and state transfers that "may have downstream and upstream impacts on state and local economies, large and small businesses, and individuals," *see id.* at 51228, the Proposed Rule does not purport to quantify the cost-shift to states, localities, and private entities as people withdraw from federal benefits but continue to need services, nor does it fully acknowledge the Proposed Rule's likely impact on state or local services and infrastructure. By merely referring to these indirect effects but not quantifying them in any meaningful way, DHS does not provide a comprehensive picture of the Proposed Rule's impact.

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[51] Leighton Ku et al., *How Could the Public Charge Proposed Rule Affect Community Health Centers?*, GEIGER GIBSON / RCHN CMTY. HEALTH FOUND. RES. COLLABORATIVE (Nov. 2018), https://publichealth.gwu.edu/sites/default/files/downloads/GGRCHN/Public%20Charge%20Brief.pdf.

[52] Analysis of data provided by the Los Angeles County Department of Health Services.

[53] Liang Mao et al., *Annual Economic Impacts of Seasonal Influenza on U.S. Counties: Spatial Heterogeneity and Patterns*, 11 Int. J. Health Geographics 1 (2012), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3479051/pdf/1476-072X-11-16.pdf.

b. *Nutrition*

The Proposed Rule will also directly and indirectly impact immigrants' participation in nutrition programs. Nearly 1.1 million people in the County receive CalFresh assistance.[54] Three-quarters of CalFresh families in California include children.[55] The UCLA study conservatively estimates that in Los Angeles County, the number of people losing benefits could range from 43,000 to 99,000 individuals (assuming withdrawal rates between 15 and 35 percent).[56] The resulting federal funds loss is estimated to range from $71 million to $165 million for the County.[57] As these federal dollars are removed from the local economy, the County is estimated to see a ripple effect of up to 1,600 lost jobs and $269 million in reduced economic output.[58] The County would also lose its share of associated tax revenue of up to $151 million statewide.[59] For families, the loss of support for food—one of the most basic human needs—rivals the negative consequences of health coverage and other benefit program losses, and endangers low-income families in the County.

c. *Housing*

The County's housing programs play a critical role in helping tens of thousands of County residents achieve stable, affordable housing. Housing stability is associated with a wide range of benefits to health, well-being, educational outcomes, public safety, and economic stability. And stable housing is a critical support for individuals' ability to gain and maintain employment, helping families to achieve and sustain economic self-sufficiency, the purported primary goal of the Proposed Rule.

HACoLA administers three programs: public housing, affordable housing, and Section 8 housing. Overall, roughly 60,000 County residents (roughly 25,000 families) live in housing administered by the County, or receive Section 8 housing vouchers to help them pay rent. Of the individuals currently receiving housing benefits through HACoLA, five percent are noncitizens, and more than ten percent of households have one or more noncitizen family members. Roughly

[54] Data provided by the Los Angeles County Department of Public Social Services.
[55] Ponce et al., *supra* note 37 at 23.
[56] *Id.* at 26.
[57] *Id.*
[58] *Id.* at 38.
[59] *Id.* at 40.

2,000 citizen children are currently living with one or more noncitizen parents in public or supported housing in Los Angeles County.

The Proposed Rule presents noncitizen and mixed status families with a difficult choice—to give up their housing and significantly undermine their economic stability (potentially becoming homeless), or to risk severe immigration consequences. If HACoLA program participation is chilled at rates between 15 and 35 percent, at least 1,000 and as many as 2,500 individuals in noncitizen or mixed status families could choose to forgo housing benefits to avoid immigration consequences.[60] This would result not only in potentially dire results for chilled individuals, potentially forcing them off of paths to self-sufficiency, but it would also create significant new costs for HACoLA to address the increased turnover of affordable housing units as chilled families move out and new residents move in. The County would also likely bear additional costs to provide temporary or shelter housing for many of these newly homeless individuals and families.

d. *Social Safety Net*

The impact of losing any one benefit implicated by the Proposed Rule would be destabilizing to an individual; losing multiple benefits at the same time could be devastating. Many low-wage workers rely on supplemental cash or noncash benefits to support and sustain their ability to support themselves. Individuals or families who withdraw from programs or forgo enrollment would experience an abrupt strain on household finances that could drive economically productive immigrants into poverty and homelessness. In 2018, there were over 50,000 homeless individuals in the County.[61] This year was the first time in four years that the County experienced a reduction in homelessness over the prior year.[62] The Proposed Rule could set back the County's progress. DHS fails to consider and appropriately weigh such downstream costs.

[60] Data provided by the Housing Authority of the County of Los Angeles.
[61] *2018 Greater Los Angeles Homeless Count Presentation: 2018 Results*, LOS ANGELES HOMELESS SERVS. AUTH. (May 31, 2018), https://www.lahsa.org/documents?id=2059-2018-greater-los-angeles-homeless-count-presentation.pdf.
[62] *Id*.

The destabilizing impact of the Proposed Rule could affect the well-being of future generations of Americans.[63] In the County, there are over half a million citizen children living with noncitizen parents.[64] If parents are not deemed able to provide appropriately for the well-being of their children, more children could end up in the County's foster care system. If parents with children in the foster care system are fearful of accessing government-provided services that would help them achieve stability and meet court-mandated requirements, their children could end up staying in foster care longer. More than 20,000 children are in the foster care system at any time, at a monthly cost of more than $2,400 per child per month.[65] If the average length of stay in foster care for children with noncitizen parents increased by a single month, it would cost the County an additional $15 million per year in increased foster care costs.[66]

The chilling effect could also foreseeably extend to benefits that are not listed in the Proposed Rule. The County offers job training programs, employment assistance, support for consumers and businesses, and services for seniors, among others, that are intended to ensure the well-being and productivity of the entire community. If part of the County community is too fearful to access these essential services, the community's well-being and productivity will suffer. The resulting destabilizing effects on productivity would likely trickle through the economy, threatening tax revenues to local, state, and federal governments. This risk is significant. Foreign-born residents contribute 35.7 percent of the County's GDP and contribute $37.3 billion in federal, state and local taxes.[67]

e. *Public Safety*

The Proposed Rule will also undermine the County's public safety priorities. Law enforcement officials agree that building community trust is integral to promoting public safety.

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[63] Catalina Amuedo-Dorantes & Esther Arenas-Arroyo, *Split Families and the Future of Children: Immigration Enforcement and Foster Care Placements*, 108 AEA Papers & Proceedings 368 (May 2018), *available at* https://www.aeaweb.org/articles?id=10.1257/pandp.20181104 (showing that the average yearly increase in interior immigration enforcement during the 2001-2015 period has significantly contributed to the share of Hispanic youth entering foster care).

[64] *Potential Effects of Public Charge Changes on California Children*, THE CHILDREN'S P'SHIP (2018), https://www.childrenspartnership.org/wp-content/uploads/2018/11/Potential-Effects-of-Public-Charge-Changes-on-California-Children-FINAL-1.pdf (last visited Dec. 8, 2018).

[65] Data provided by the Los Angeles County Department of Children and Family Services.

[66] Estimates assume that the share of children in foster care with one or more noncitizen parents is roughly equivalent to the share of children with a noncitizen parent in the County overall (42 percent). U.S. Census, 2012-2016 American Community Public Use Microdata Sample, custom tabulation by Manatt Health (Dec. 3, 2018).

[67] *Immigrants and the Economy in: Los Angeles Metro Area*, NEW AM. ECON., https://www.newamericaneconomy.org/city/los-angeles (last visited Dec. 1, 2018).

A policy that bars noncitizens from safely accessing public benefits will increasingly cause immigrant communities to fear, mistrust, and avoid government agencies and officials. When immigrants fear that the use of public services or any interaction with government officials could expose them or a loved one to immigration consequences, they are less likely to assist law enforcement or call upon law enforcement for help.[68] In the County, where the LASD relies on cooperation with its communities to prevent crime and promote the general welfare, the result is obvious—public safety will suffer. Both the LASD and the County Bureau of Victim Services expect that the Proposed Rule will hamper these agencies' ability to serve the public because victims will be less willing to report crimes and request services.

These concerns are not theoretical. In a survey conducted by the Police Foundation, law enforcement personnel and public officials from across the country widely reported that aggressive enforcement of immigration policies would decrease community trust of police (74 percent of respondents), trust among community residents (70 percent), reporting of victimization (85 percent), and reporting of criminal activity (83 percent).[69] In a recent study by the National Immigrant Women's Advocacy Project, approximately 40 percent of the law enforcement officials confirmed that "federal immigration policies have affected their relationships with immigrant communities in 2017 compared with 2016." Seventy-one percent said that, as a result, "officers were less able to hold criminals accountable."[70] The County is already grappling with this challenge: today, when the District Attorney's Office asks witnesses why they did not come forward sooner, they say, "Because I am not a citizen."[71]

The Proposed Rule will have other consequential impacts on public safety in the County. It could have serious implication for crime victims who need services to support emergency relocation, funeral and burial costs for murder victims, and other services provided by CalVCB.

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[68] *See, e.g.*, Craig E. Farrell, Jr., et al., *M.C.C. Immigration Committee Recommendations For Enforcement of Immigration Laws by Local Policy Agencies*, Major Cities Chiefs Ass'n (2006) ("Immigration enforcement by local police would likely negatively affect and undermine the level of trust and cooperation between local police and immigrant communities . . ."); Samantha Artiga & Petry Ubri, *Living in an Immigrant Family in America: How Fear and Toxic Stress are Affecting Daily Life, Well-Being, & Health*, KAISER FAM. FOUND. (Dec. 2017), http://files.kff.org/attachment/Issue-Brief-Living-in-an-Immigrant-Family-in-America.

[69] Anita Khashu, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties*, NAT'L POLICE FOUND., at 24 (Apr. 2009), https://goo.gl/DoKdWs.

[70] Bernice Yeung, *Police: Immigration Policies Making It Harder to Catch Criminals*, REVEALNEWS.ORG (Feb. 5, 2018), https://goo.gl/hNMaBW.

[71] As relayed by the Director, Los Angeles Cty., District Attorney's Office – Bureau of Victim Servs., on Nov. 19, 2018.

Currently, over 12,000 individuals in the County receive one or more victims compensation benefits each year (more than $20 million in total benefit payments), and roughly two thirds of these applications are assisted by DA-BVS. If the distribution of noncitizens and their family members among the population of crime victims is roughly proportional to the population of the County, the Proposed Rule could put at risk more than $6 million paid to 4,000 potentially chilled crime victims per year.

DPH also expects that the Proposed Rule will prevent it from adequately providing substance abuse services to County residents. The County's substance abuse services divert County residents from criminal activity or punishment associated with substance abuse, and also provide better health outcomes. The anticipated decline in the number of clients who seek and enroll in programs dedicated to recovery and prevention will likely lead to an increase in crime, child abuse, and violence in communities where substance abusers are less likely to seek treatment. DMH similarly reports that the Proposed Rule will likely discourage individuals from seeking mental health services, posing further risks to public safety.

In short, the Proposed Rule undermines the County's interests in promoting the health, well-being, and safety of its 10 million-plus residents, and should be rejected on that basis alone.

2. Treating Noncash Supplemental Benefits Like Primary Dependence on Cash Assistance Is Inconsistent with DHS's and Its Predecessors' Longstanding View of Public Charge.

The Proposed Rule's consideration of receipt of noncash supplemental benefits as a factor in the public charge analysis is also inconsistent with DHS's own longtime recognition that noncash supplemental aid has salutary benefits both for self-sufficiency and to the greater community, and thus should not be considered in the public charge analysis. In its quest to justify the Proposed Rule's departure from a long line of agency precedent, DHS comes up short.

For over half a century, the public charge analysis has focused on an immigrant's ability to work and whether the immigrant was likely to become primarily dependent on *cash* assistance from the government for income maintenance. As the BIA explained in *Harutunian*, the public charge inquiry long assigned primary importance to "the alien's physical and mental condition as it affects ability to earn a living." 14 I. & N. Dec. at 588; *see also Matter of T-----*, 3 I. & N. Dec. at 644 (applicant not likely to be public charge where "capable of earning her own

livelihood"); *Matter of R----*, 1 I. & N. Dec. at 210–11 (applicant not likely to be public charge where "[n]othing in the record indicate[d] that [the applicant] was not able to work").

DHS contends that these cases mean that an immigrant "who is incapable of earning a livelihood, who does not have sufficient funds in the United States for support, and who has no person in the United States willing and able to assure the alien will not need public support generally is inadmissible as likely to become a public charge." Proposed Rule, 83. Fed. Reg. at 51122. DHS argues from there that an individual needing public benefits of any kind, including noncash supplemental benefits, is more likely to be found a public charge. *Id.* at 51122–23. But this contention totally disregards the longstanding distinction between *primary* dependence on cash benefits and the use of noncash *supplemental* benefits that promote self-sufficiency, benefit the public, and avoid the need for greater dependence on government assistance.

Each of the cases cited by DHS to justify the Proposed Rule's consideration of noncash supplemental benefits involved an applicant's receipt of *cash benefits*. *Id.* at 51122; *see also Vindman*, 16 I. & N. Dec. at 132–33 (considering applicant's receipt of cash benefits in public charge analysis); *Harutunian*, 14 I. & N. Dec. at 586 (same). DHS *does not identify a single decision* where an immigrant was deemed a public charge based on his receipt of noncash supplemental benefits. DHS's own authority thus undermines the novel interpretation that supposedly justifies the Proposed Rule. Indeed, in *Harutunian*, the BIA expressly distinguished cash benefits from "supplementary benefits, directed to the general welfare of the public as a whole"; it considered the former in the public charge analysis but ruled that it was inappropriate to consider the latter. 14 I. & N. Dec. at 589. These cases do not support DHS's position or the Proposed Rule. They stand for the proposition that noncash supplemental benefits should be *excluded* from the public charge analysis, and they undermine the Proposed Rule.

The 1999 Field Guidance and 1999 Proposed Rule reaffirmed that noncash supplemental benefits should be excluded from the public charge analysis. They define a "public charge" as an individual who is "primarily dependent on the government, as demonstrated by either the receipt of *public cash assistance for income maintenance* or institutionalization for long term care." 64 Fed. Reg. at 28689 (emphasis added); 64 Fed. Reg. at 28677 (emphasis added). The INS explained that "[i]t has *never* been [its] policy that *any* receipt of services or benefits paid for in whole or in part from public funds renders an alien a public charge, or indicates that the

alien is likely to become a public charge." 1999 Field Guidance, 64 Fed. Reg. at 28692 (emphasis in original). Instead, "[t]he nature of the program must be considered." *Id.* The INS explained that it was appropriate to consider the receipt of cash benefits because such benefits permitted the government to "identify those who are *primarily dependent* on the Government for subsistence without inhibiting access to non-cash benefits that serve important public interests." *Id.* at 28692 (emphasis added). The receipt of noncash supplemental benefits, therefore, did not indicate whether the recipient was likely to be primarily dependent on the government because such benefits "are by their nature supplemental and frequently support the general welfare." *Id.* As a result, the 1999 Field Guidance directed that "current receipt of non-cash benefits or the receipt of special-purpose cash benefits not for income maintenance should not be taken into account under the totality of the circumstances test in determining whether the alien is likely to become a public charge." *Id.* at 28690.

DHS does not consider or engage with the 1999 Field Guidance or the 1999 Proposed Rule in any meaningful way, noting only that "the current policy's focus on cash benefits [is] insufficiently protective of the public budget, particularly in light of significant public expenditures on non-cash benefits," a concern that has nothing to do with the meaning of the term "public charge" nor the self-sufficiency principles underlying PRWORA. Proposed Rule, 83 Fed. Reg. at 51164. It does not, for example, attempt to address the INS's interpretation in 1999 of the self-sufficiency principles underlying PRWORA, despite the fact that DHS premises the Proposed Rule on a new, conflicting interpretation of PRWORA. It does not attempt to address DHS's 1999 statement that it has *never* been agency policy or agency interpretation to consider receipt of *any* public service or benefit. 1999 Field Guidance, 64 Fed. Reg. at 28692. Nor does DHS attempt to engage with the INS's interpretation of public benefits or offer any explanation for how changed circumstances may support the agency's change in policy.

The law requires more. "The APA constrains an agency's ability to change its practices or policies without acknowledging the change or providing an explanation." *Ramos v. Nielsen*, No. 18-CV-01554-EMC, 2018 WL 4778285, at *9 (N.D. Cal. Oct. 3, 2018) (appeal filed). "[A]gencies must give a reasoned analysis for departures from prior agency practice." *United Mun. Distribs. Grp. v. F.E.R.C.*, 732 F.2d 202, 210 (D.C. Cir. 1984) (citing *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970)); *see also Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) ("[A]n agency

changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. Failing to supply such analysis renders the agency's action arbitrary and capricious.") (internal quotations and citations omitted). DHS's failure to meaningfully engage with its own predecessors' policy and reasoning falls far short of the reasoned analysis required by the law.

This failure is fatal, particularly because decades of administrative decisions, the 1999 Field Guidance, and the 1999 Proposed Rule have engendered strong reliance interests among immigrants who come to the United States or seek to adjust their status.

As the 1999 Field Guidance recognized, it has *never* been the agency's policy that the mere receipt of noncash supplemental benefits would make one a public charge. *See* 64 Fed. Reg. at 28692 (emphasis in original). The INS contemplated that immigrants would rely on the 1999 Field Guidance and prior administrative decisions in utilizing noncash supplemental benefits, and explicitly sought to alleviate any confusion or concern that might cause immigrants to forgo noncash supplemental benefits to which they were entitled. *See id.* (seeking to alleviate "confusion about the relationship between the receipt of public benefits and the concept of 'public charge' [that] has deterred eligible aliens and their families, including U.S. citizen children, from seeking important health and nutrition benefits that they are legally entitled to receive."). In defining "public charge" and specifying the benefits that would be considered in that determination, the INS intended to "make public charge determinations simpler and more uniform, while simultaneously providing greater predictability to the public." *Id.*

As courts have recognized, an agency's longstanding practice and guidance documents may lead to foreseeable reliance by those impacted by the policy or administrative decision-making. *See, e.g.*, *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1046 (N.D. Cal. 2018) ("Defendants' attempt to portray DACA as a program that did not generate reliance interests is unconvincing. . . . DACA recipients, their employers, their colleges, and their communities all developed expectations based on the possibility that DACA recipients could renew their deferred action and work authorizations for additional two-year periods."); *United Student Aid Funds, Inc. v. Devos*, 237 F. Supp. 3d 1, 5–6 (D.D.C. 2017) (Department of Education's Dear Colleague Letter and prior actions consistent with that letter may have led those impacted to rely on the department's continued compliance with that practice). As a result

of the Agency's consistent position excluding noncash supplemental benefits from the public charge determination, many immigrants who are eligible for such benefits reasonably expected that they could receive them without fear that they may in the future become ineligible for adjustment of status or removable.

As the Supreme Court has explained, "an agency must [ ] be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). In such cases, an agency must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, 556 U.S. at 515–16. Here, although DHS recognizes the detrimental effects that the Proposed Rule may have on immigrants eligible to receive noncash supplemental benefits, *see* Proposed Rule, 83 Fed. Reg. at 51270, it makes no attempt to provide a "reasoned explanation" for disregarding immigrants' justifiable reliance on the agency's longstanding policy, practice, and precedent.

3. The Proposed Rule's Unprecedented Departure from Prior Agency Practice Is Not Justified by PRWORA.

A formulation of "public charge" that treats supplemental benefits differently from primary dependence on government cash assistance is also consistent with PRWORA's self-sufficiency goals. Noncash supplemental benefits promote self-sufficiency—by their nature, they are meant to be a supplement to a recipient's own resources and income, not a primary substitute for earned income. DHS's attempt now to use PRWORA to justify the Proposed Rule's unprecedented broadening of the public charge definition does not withstand scrutiny. DHS offers two arguments for why the Proposed Rule is purportedly consistent with Congressional intent under PRWORA. Neither holds up.

First, DHS argues that the self-sufficiency principles underlying PRWORA support inclusion of the noncash supplemental benefits enumerated in the Proposed Rule, and that the distinction between cash and noncash benefits is "artificial." *See* Proposed Rule, 83 Fed. Reg. at 51123. But as the INS stated in the 1999 Field Guidance and the 1999 Proposed Rule, there is good reason for the distinction between cash benefits and noncash supplemental benefits: noncash supplemental benefits do not undermine self-reliance, they sustain and improve reliance.

See 1999 Field Guidance, 64 Fed. Reg. at 28692 (explaining that noncash supplemental benefits "assist[] working-poor families in the process of becoming self-sufficient"); *see also* 1999 Proposed Rule, 64 Fed. Reg. at 28677–78 (discussing benefits exempted from PRWORA and noting that the benefits "are often provided to low-income working families to sustain and improve their ability to remain self-sufficient"). Moreover, such aid often benefits the public at large, not just the individual recipient. *See, e.g.*, 142 Cong. Rec. S3282 (daily ed. Apr. 15, 1996) (statement of Sen. Kennedy), *available at* https://www.congress.gov/crec/1996/04/15/CREC-1996-04-15-pt1-PgS3276.pdf (noncash supplemental benefits "benefit all, because they relate to the public health and are in the public interest"). Had Congress believed that the receipt of such benefits undermines an immigrant's self-reliance and that access to such benefits should be tantamount to becoming a public charge, it could have said so in PRWORA. It did not.

Second, DHS argues it may "take into consideration . . . receipt of public benefits even if an alien may receive such benefits under PRWORA" because Congress did not expressly say that such benefits are exempt from the public charge analysis. Proposed Rule, 83 Fed. Reg. at 51131. This argument misses the point. Just because PRWORA does not explicitly exclude noncash supplemental benefits, it does not follow that they *should be included* to fulfill PRWORA's self-sufficiency goals. Indeed, agency policy since PRWORA has been the exact opposite, as made clear by the 1999 Field Guidance and Proposed Rule, which explicitly addressed the self-sufficiency principles underlying PRWORA and PRWORA's treatment of noncash supplemental benefits, and which clearly determined that Congress in enacting PRWORA did not intend to treat noncash supplemental benefits the same as cash benefits for purposes of public charge.

Shortly after PRWORA was enacted, Congress made changes to the public charge analysis through IIRIRA, articulating certain "minimum considerations" for the public charge determination—age; health; family status; assets, resources, financial status; and education and skills. *See* Div. C., Pub. L. 104-208, section 531, 110 Stat. 3009, 3009-546, 3009-674 (1996) (amending 8 U.S.C. § 1182(a)(4)). These factors were consistent with administrative decisions preceding IIRIRA, in that they focused on whether someone was able to work or support herself. In enacting IIRIRA, Congress did not amend the INA to equate use of noncash supplemental benefits to becoming a public charge.

Furthermore, in subsequent years, Congress acted several times to restore eligibility for benefits that were limited by PRWORA, recognizing the importance of access to preventive care and nutrition benefits for immigrants, all without making any change to the public charge doctrine. The 1998 Agricultural Research, Extension, and Education Reform Act of 1998 restored eligibility for food stamps (now SNAP) to children, seniors, and individuals with disabilities who had been qualified immigrants as the date of enactment of PRWORA. *See* Pub. L. 105-185, sections 504, 506, 507, 112 Stat. 523, 578–79 (1998) (amending 8. U.S.C. § 1612(a)(2)). In 2002, the Farm Security and Rural Investment Act of 2002 restored access to food stamps to immigrant children, immigrants receiving disability benefits, and qualified immigrants living in the U.S. for more than five years. *See* Pub. L. 107-171, section 4401, 116 Stat. 134, 333–34 (2002) (amending 8 U.S.C. § 1612(a)(2)). Finally, in 2009, the Children's Health Insurance Program Reauthorization Act ("CHIPRA") gave states the option to extend Medicaid and CHIP coverage to lawfully residing pregnant women and children during their first five years in the U.S., effectively rolling back the five-year waiting period established by PRWORA. *See* Pub. L. 111-3, section 214, 123 Stat. 8, 56−57 (2009) (amending 42 U.S.C. §§ 1396(b)(v) and 1397gg(e)(1)). All of these targeted actions to restore eligibility for previously restricted noncash supplemental benefits indicate that Congress recognized the importance of noncash supplemental benefits for low-income children and families.

Had Congress at any point intended DHS to consider these benefits in a public charge analysis, it could have and would have amended the statute to make that clear. Congress did not make any such changes. DHS cannot now ignore nearly 20 years of post-PRWORA history to use PRWORA to justify the Proposed Rule's unprecedented and flawed approach. Instead, it should defer to Congress's intent to retain the longstanding public charge framework that has remained undisturbed in the nearly 20 years following PRWORA.

4. The Proposed Rule Is Not Justified by DHS's Flawed Cost-Benefit Analysis, which Underestimates Both the Number of Immigrants Likely To Forgo Benefits and the Rule's Broader Impacts.

DHS's flawed cost-benefit analysis is insufficient to justify the Proposed Rule's treatment of noncash supplemental benefits. DHS acknowledges some of the Proposed Rule's potential negative impacts, but then leaves them out of the cost-benefit analysis, failing to adequately consider either the effects that the Proposed Rule could have on enrollment in

noncash supplemental benefit programs or the downstream impacts of these changes for communities, local governments, and local economies.

At the outset, the cost-benefit analysis is riddled with methodological and logical errors that result in a profound undercount of the number of persons directly impacted by the Proposed Rule. DHS's analysis reveals that it assumed that the number of individuals who would forgo benefits would be equal to the estimated number of people using public benefits in households with an immigrant who actually adjusts status in a given year. Put differently, because about 2.5 percent of the noncitizen population seeks to adjust their status over a five-year period, DHS assumes that only 2.5 percent of individuals who use public benefits and live in a household with a noncitizen would forgo or withdraw from those benefits. Logically, however, any noncitizen who anticipates a future public charge determination might forgo benefits. DHS also severely underestimated the Medicaid population living in a household with a noncitizen by several million individuals, and therefore underestimates the at-risk Medicaid population included in its analysis of impacts.[72] Analysis by the Kaiser Family Foundation yields a much larger number of Medicaid enrollees who are noncitizens or residing in a household with a noncitizen (14.1 million) compared to less precise methods used by DHS (yielding 5.7 million).[73] This undercount misrepresents the number of people who could forgo Medicaid coverage, and thus provides a faulty basis for other calculations that flow from impact on enrollment.

DHS also fails to adequate consider immigrants who might be chilled from accessing noncash supplemental benefits because of the uncertainty in the Proposed Rule. The Proposed Rule is unclear in a number of respects described herein, each of which may cause immigrants and their family members—even if they are not clearly subject to a public charge determination by the Proposed Rule—to withdraw from public benefits—even if they are not clearly included by the Proposed Rule. And immigrants have insufficient assurance that DHS, which now proposes to abandon nearly a century of public charge precedent, will not later penalize other types of noncash supplemental benefits or other groups of immigrants.

Indeed, DHS admits that the Proposed Rule's chilling effect may extend beyond those directly impacted, Proposed Rule, 83 Fed. Reg. at 51266, but makes no attempt to estimate it or

[72] Due to the way in which survey questions are asked and the nature of the administrative data cited for estimates, CHIP-funded enrollees are presumed to be included in all figures cited in this section.
[73] Artiga et al., *supra* note 32.

consider it. DHS instead indicates without basis that its methodology may lead to an *overestimate* of the Proposed Rule's effect on enrollment because it is unknown how many foreign-born noncitizens adjusting status are actually using benefits. *See id.* at 51266, 51269. This is illogical, given the Proposed Rule's chilling effect on groups like the following, which DHS admits but does not consider:

- Noncitizens may forgo noncash supplemental benefits not included in the Proposed Rule, due to confusion about whether or not that benefit would carry public charge consequences.
- Noncitizens who may not be seeking to adjust status (for example, individuals who already have their green cards) and may not be subject to a public charge determination, may forgo benefits out of fear of other immigration consequences.
- Family members of noncitizens may forgo benefits because they are confused about whether their use of benefits will impact a family member's public charge determination.
- A noncitizen parent may forgo benefits for their child because they are confused about whether their child's use of benefits would carry immigration consequences for the parent.
- Family members of noncitizens could also be harmed if a noncitizen family member curtails their use of needed benefits. For example, a parent's withdrawal from Medi-Cal could harm his or her U.S. citizen children if that parent becomes ill, is unable to obtain treatment without coverage, and becomes unable to support his or her family as a result.

That failure to estimate any of these chilling effects properly vastly undercounts the number of immigrants who will withdraw from or fear enrolling in noncash supplemental benefits programs.

The failure to estimate properly the numbers of immigrants who will forgo noncash supplemental benefits in turn leads DHS to underestimate all of the other costs to the public, where DHS attempts to estimate them at all. DHS's attempts are woefully inadequate, particularly because DHS itself views these indirect effects as significant. Indeed, DHS states that the "primary sources of the consequences and indirect impacts of the proposed rule would be costs to various entities that the rule does not directly regulate, such as hospital systems, state

agencies, and other organizations that provide public assistance to aliens and their households." *Id*. at 51260. DHS estimates a reduction in transfer payments from the federal and state governments of approximately $2.27 billion annually due to forgone benefits, *see id.* at 51117,[74] and observes that these reductions "may have downstream and upstream impacts on state and local economies, large and small businesses, and individuals." *See* Proposed Rule, 83 Fed. Reg. at 51228. However, the Proposed Rule fails to quantify these impacts.

The Proposed Rule also includes a litany of "qualitative, unquantified effects" of the proposed policy, including lost productivity, adverse health effects, medical expenses due to delayed health care, and increased disability claims. *Id.* at 51234–35 tbl.37. The Proposed Rule also notes the following "non-monetized potential consequences," which could result as individuals forgo enrollment:

- Worse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children, and reduced prescription adherence;
- Increased use of emergency rooms and emergent care as a method of primary health care due to delayed treatment;
- Increased prevalence of communicable diseases, including among U.S. citizens who are not vaccinated;
- Increases in uncompensated care in which a treatment or service is not paid for by an insurer or patient;
- Increased rates of poverty and housing instability; and
- Reduced productivity and educational attainment.

See id. at 51270. Here too, DHS seems barely to consider these negative consequences when weighing the benefits of the Proposed Rule against its cost and harms. The Proposed Rule fails to even attempt to quantify the cost-shift to states, localities, and private entities as people stop

[74] DHS estimated that the 10-year discounted transfer payments of this Proposed Rule would be approximately $19.3 billion at a 3 percent discount rate and about $15.9 billion at a 7 percent discount rate. *Id.* (The federal-level share of annual transfer payments would be about $1.51 billion and the state-level share of annual transfer payments would be about $756 million.). DHS also estimated that about 142,000 people would forgo enrollment from Medicaid per year, and that this would lead to a $1.1 billion annual decrease in federal Medicaid expenditures. *Id*. at 51268 tbl.52.

signing up for federal benefits but continue to need services, and thus it does not fully acknowledge the impact the Proposed Rule could have on state or local services and infrastructure. By merely referring to these indirect effects on the public, but not attempting to quantify them in any meaningful way, the Proposed Rule does not provide a comprehensive picture of how it could impact individuals, community organizations, and states and localities. DHS therefore does not give sufficient analytic attention or weight to the negative consequences that DHS itself predicts the Proposed Rule could generate, even though they go to the core of the public health, well-being, and safety goals of communities like the County.

DHS also acknowledges—but does not attempt to quantify comprehensively—the various administrative costs and burdens that the Proposed Rule will impose on federal agencies as well as on state and local governments. *See* Proposed Rule, 83 Fed. Reg. at 51270. For almost twenty years, agencies have worked under the consistent and clear rules about when a consumer's use of benefits could result in a negative finding in their public charge determination. Consumer communications will have to be identified, reviewed, and revised. In response to DHS's request for comments, *id.* at 51174, the County states that the regulation would create both one-time and on-going costs for County operations related to the development of new processes, forms, and potentially new information technology systems, and to training at least 8,000 benefits counselors, health care staff, and program administrators on the Proposed Rule so that they are equipped to provide accurate information to consumers, update administrative processes, and respond to documentation requests. The opportunity cost of this staff time can likely be measured in the hundreds of thousands of dollars for the County alone. And all of these programmatic adjustments will be highly disruptive to the County's operations, demanding significant attention and distracting management and front-line staff from the pressing community priorities articulated in the County's strategic plan.[75] DHS acknowledges that there are familiarization costs associated with the Proposed Rule, but estimates them at just 8 to 10 hours per person to read it. *Id.* at 51118.

DHS's failure to adequately quantify enrollment impact, combined with its meager attempts to calculate all of the Proposed Rule's costs to local communities and public welfare, is totally inadequate and, consequently, arbitrary. DHS undercounts direct enrollment effects by

[75] Cty. of Los Angeles, 2016–2021 Strategic Plan, *available at* https://www.lacounty.gov/wp-content/uploads/2016-2021-County-Strategic-Plan-Final.pdf (last visited Nov. 30, 2018).

assuming that only immigrants subject to a public charge determination *that year* will forgo benefits. DHS acknowledges a chilling effect, but fails to address it either qualitatively or quantitatively. DHS lists a litany of impacts on the public as a whole, but makes no attempt to quantify them or explain why they are justified. Without a more complete and methodologically sound cost-benefit analysis, DHS's decision-making is ill-considered, arbitrary, and unlawful. *See Nat'l Ass'n of Home Builders*, 682 F.3d at 1040 ("when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable."). In light of the significant unconsidered harms to communities and burden on local governments like the County, DHS should refrain from finalizing the Proposed Rule and maintain the longstanding 1999 Field Guidance.

B. The Proposed Rule Will Harm Children, Including U.S. Citizens, and Entire Communities, Because It Does Not Unequivocally Foreclose Consideration of Benefits to Children, Including Programs Like CHIP.

The Proposed Rule should also be rejected because it will harm children, including millions of children in the County. Parents are likely to avoid the use of critical benefits, including healthcare and supplemental nutrition programs, out of concern that their child's receipt of such benefits may impact their child's immigration status or their own. This will result in serious negative consequences for both children and communities at large. There is no justification for such a rule in either the long history of agency interpretation of the public charge rule, or in PRWORA.

1. The Proposed Rule's Failure to Unequivocally Exclude Consideration of a Child's Receipt of Benefits in the Public Charge Analysis Harms the County's Most Vulnerable Population.

Because the text of the Proposed Rule does not clearly exclude from consideration a child's receipt of noncash supplemental benefits, the Proposed Rule creates the risk and the fear that if parents enroll their children in noncash supplemental benefits to which their children are entitled, that either they or their children could suffer immigration consequences. This in turn harms children, depriving them of vital health, nutrition, and other services that promote and sustain their self-sufficiency as adults and the well-being of entire communities. DHS should minimize the harm by abandoning the Proposed Rule.

Risk and uncertainty are created both by the structure of the Proposed Rule and DHS's request for comments. Although the preamble of the Proposed Rule states that an immigrant or U.S. citizen child's "direct receipt of public benefits . . . would not factor into the public charge inadmissibility determination" of her parent, Proposed Rule, 83 Fed. Reg. at 51175, the operative text of the Proposed Rule contains no such assurance. There is therefore insufficient certainty in the Proposed Rule that a parent will not jeopardize her own or her immigrant children's immigration status if she enrolls her child in a noncash supplemental assistance program. *See id.* at 51289–90 (failing to address whether the receipt of benefits by an applicant's child will be considered in any public charge determination). Indeed, a leaked prior draft of the Rule indicated that DHS *would* consider a child's receipt of such benefits as a negative factor whether the parent should be considered a likely public charge, *even if that child was a U.S. citizen*.[76] Moreover, DHS also requested comment as to "whether and to what extent DHS should weigh past or current receipt of benefits" by children, or an adult's receipt of benefits as a child, in the public charge determination *for that child*. *See* Proposed Rule, 83 Fed. Reg. at 51174. DHS has also requested comment as to whether it should add CHIP to the list of benefits considered in the public charge determination. *Id.* at 51173–74. Because any provision that considers children's receipt of noncash supplemental benefits harms children and entire communities and is inconsistent with the history of the public charge doctrine and PRWORA, the County opposes

[76] *Read the Trump administration's draft proposal penalizing immigrants who accept almost any public benefit*, *supra* note 4.

any consideration of a child's receipt of benefits as a negative factor, and opposes inclusion of CHIP among the benefits that would be considered negatively in the public charge analysis.

Even when the negative consequences of the Proposed Rule do not explicitly discriminate by age, consideration of certain benefits in the public charge analysis is likely to disproportionately impact children because many noncash supplemental programs listed in the Proposed Rule are specifically aimed to benefit children or families with children. If there is insufficient certainty that a child's receipt of noncash supplemental benefits will not be included as a negative factor for either parent or child, that uncertainty will have a chilling effect that may cause parents to forgo crucial noncash supplemental benefits, resulting in negative impacts on their children's health, development, and future chances of success. Noncash supplemental benefits programs provide critical assistance to our most vulnerable population. They provide regular healthcare and treatment for children, and they ensure that low-income children have access to sufficient nutrition.

These noncash supplemental benefit programs include SNAP, which offers nutrition assistance to millions of eligible, low-income individuals and families,[77] and Medicaid, which provides health and long-term care to over 66 million low-income adults and children.[78] As many studies attest, proper healthcare and nutrition are essential to a child's development.[79] Research shows that noncash supplemental nutrition benefits like SNAP improve children's health outcomes.[80] The developmental and educational benefits of good childhood nutrition also benefit the entire community, because they help children become productive, self-sufficient adults. Indeed, studies by the Brookings Institute, the National Bureau of Economic Research, and the Executive Office of the President of the United States, catalog findings that children who receive supplemental nutrition benefits through SNAP are likely to experience a statistically

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[77] *Supplemental Nutrition Assistance Program (SNAP)*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap (last updated Apr. 25, 2018).
[78] *Medicaid*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.medicaid.gov/medicaid/index.html (last visited Dec. 5, 2018).
[79] *See, e.g.*, *Long-Term Benefits of The Supplemental Nutrition Assistance Program*, NUTRITION EXEC. OFF. OF THE PRES. OF THE U.S.: COUNCIL OF ECON. ADVISORS, at 8, 24–30, https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/SNAP_report_final_nonembargo.pdf; Hilary W. Hoynes et al., *Long Run Impacts of Childhood Access to the Safety Net*, NAT'L BUREAU OF ECON. RES., at 6–10, https://www.nber.org/papers/w18535.pdf.
[80] Diane Whitmore Schanzenbach & Lauren Bauer, *Food Insecurity Among Children in 2015*, BROOKINGS INST., https://www.brookings.edu/blog/up-front/2017/06/19/food-insecurity-among-children-in-2015; *Long-Term Benefits of The Supplemental Nutrition Assistance Program*, *supra* note 79 at 3, 21, 24–30; Hoynes et al, *supra* note 79.

significant reduction in the incidence of "metabolic syndrome," i.e., obesity, high blood pressure, heart disease, and diabetes, throughout their lives, and show statistically significant increases in economic self-sufficiency (measured by increases in educational attainment, earnings, income, and decreases in welfare participation) over those who did not receive such benefits.[81]

[81] Schanzenbach & Bauer, *supra* note 80; *Long-Term Benefits of The Supplemental Nutrition Assistance Program*, *supra* note 79 at 3, 21, 24-30; Hoynes et al., *supra* note 79.

CHIP, which provides low-cost health coverage to children in families who are not sufficiently low-income to qualify for Medicaid,[82] is not currently included in the list of benefits that would be considered negatively in the public charge analysis, but DHS has stated that it "is considering adding [CHIP] to the list of included benefits." Proposed Rule, 83 Fed. Reg. at 51173. Although CHIP coverage differs from state to state, "all states provide comprehensive coverage, like routine check-ups, immunizations, doctor visits, and prescriptions." *Id.* at 51174.

Like SNAP and Medicaid benefits for children, penalizing CHIP benefits would result in devastating harm to both vulnerable children and their families, and also the community at large. More than 300,000 children are enrolled in Medi-Cal through the CHIP program in the County.[83] This covers 12 percent of all children in the County.[84] Just like Medi-Cal enrollees, parents are more likely to withdraw them from coverage because of the Proposed Rule's chilling effect.[85] The Kaiser Family Foundation estimates that 15 to 35 percent of immigrant parents will withdraw their children from Medicaid and CHIP as a result of the Proposed Rule.[86] In California, this would leave between 269,000 and 628,000 children without health care.[87] Indeed, administrators at community clinics, school-based health centers, and agencies serving children report that some parents in California are already choosing to withdraw or not enroll their children because they are afraid and confused about the immigration consequences.[88]

Denying children insurance and depriving them of necessary primary care, leaves them more susceptible to contracting communicable diseases and spreading them to others. It also leaves children and their parents without access to valuable education and support from their primary care physicians that can prevent much more serious and costly illnesses and health consequences.

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[82] *The Children's Health Insurance Program (CHIP)*, HEALTHCARE.GOV, https://www.healthcare.gov/medicaid-chip/childrens-health-insurance-program (last visited Dec. 3, 2018).
[83] *Medi-Cal Statistical Brief: Medi-Cal's Children's Health Insurance Program*, CAL. DEP'T OF HEALTH CARE SERVS., at 7 (Oct. 2017), https://www.dhcs.ca.gov/dataandstats/statistics/Documents/CHIP_Paper_FINAL-ADA.pdf.
[84] *Id.*
[85] Artiga et al., *supra* note 32.
[86] *Id.*
[87] Zaidee Stavely, *Trump's Proposed Regulations Limiting Benefits for Immigrants Could Hurt Many US-Born Children*, EDSOURCE (Nov. 14, 2018), *available at* https://edsource.org/2018/trumps-proposed-regulations-limiting-benefits-for-immigrants-could-hurt-many-u-s-born-children/604645.
[88] *Id.*

The County recognizes these harms, and its policy choices reflect the County's commitment to preventing children from going hungry, from becoming malnourished, and from suffering developmentally from hunger to the detriment of the entire community. Indeed, DHS itself recognizes these consequences, but does not and cannot justify them. *See, e.g.*, Proposed Rule, 83 Fed. Reg. at 51270.

2. The Notions of Self-Sufficiency Underlying the Public Charge Doctrine Do Not Support Considering a Child's Receipt of Benefits.

No purpose consistent with the public charge analysis or its history justifies penalizing benefits to children. Considering noncash supplemental benefits for children in the analysis of whether they or their parents are likely public charges is unjustified by prior administrative practice or Congressional intent. Indeed, it represents a sea change in the law. The County is unaware of any case where anyone was determined to be a public charge based on noncash supplemental benefits that she received as a child. Nor is the County aware of any authority ruling that a parent is a public charge because her child received noncash supplemental aid to which the child was entitled. Case law has instead focused on whether adult applicants are able to work and are capable of earning a living. *E.g.*, *Matter of A----*, 19 I. & N. Dec. at 870 (INS erred in placing "undue weight" on applicant's income and ignoring "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."); *Matter of Perez*, 15 I. & N. Dec. at 137–38 (applicant not a public charge where she was "in good health, and capable of finding employment"); *Matter of T-----*, 3 I. & N. Dec. at 644 (not likely to be public charge where applicant was "capable of earning her own livelihood"); *Matter of R----*, 1 I. & N. Dec. at 210–11 (not likely to be public charge where "[n]othing in the record indicate[d] that [the applicant] was not able to work"). These cases and concepts do not justify a rule that penalizes benefits to children (who we do not yet expect should be self-sufficient) that will make those children *more able* to work and be self-sufficient when they are adults. *See* Memorandum on Eligibility if Foster Children for Legalization of Benefits, Office of Examinations (Mar. 23, 1988) (noting that a child who has not yet reached an "employable age" cannot reasonably be expected to demonstrate a history of employment without receipt of public cash assistance).

This makes sense. After all, children are not supposed to be self-reliant; they are necessarily dependent on their caregivers and community. In fact, when individuals receive

noncash supplemental benefits as children, they are more likely to be self-sufficient in their adulthood.[89] Any proposal to penalize benefits to children in either the parent or child's public charge determination is therefore illogical and unjustified.

For similar reasons, there is no support in prior administrative decision-making or in PRWORA for including CHIP, which exclusively benefits children in families that earn too much money to qualify for Medicaid, but which need assistance to pay for children's healthcare. CHIP beneficiaries are children in working class families that are not primarily dependent on the government, and CHIP benefits are by their nature supplemental. DHS acknowledges that "46 States and the District of Columbia cover children [under CHIP] up to or above 200 percent [of] the Federal Poverty Level," and that "24 of these states offer coverage to children in families with income at 250 percent of the FPL or higher." Proposed Rule, 83 Fed. Reg. at 51174. Nevertheless, DHS contends that receipt of this benefit "suggests a lack of self-sufficiency." *Id.* Such a contention makes no attempt to deal with the facts or with nearly a century of agency decision making that instructs that noncash supplemental benefits such as CHIP support and sustain self-sufficiency. *See, e.g.*, *Harutunian*, 14 I. & N. Dec. at 586 (reasoning that receipt of noncash supplemental benefits does not impact the public charge analysis). Indeed, as discussed below, it is both inconsistent with the history of the public charge doctrine and illogical to suggest that families with income at 200 or 250 percent of the FPL are not self-sufficient—those income levels sweep in large percentages of American citizen households.[90]

C. The Proposed Rule's New Income Test Penalizes Working-Class Families Rather Than Supporting Concepts of Self-Sufficiency.

The Proposed Rule should also be rejected because it sets what amounts to an income test that excludes the working class. Although the notion of considering an immigrant's financial resources in the public charge analysis is not new, the Proposed Rule raises the specter that income level could be treated as a deciding factor for immigrants who have incomes as high as 125 percent of FPG. The Proposed Rule also does not treat income as a heavily weighed positive factor until an immigrant has income of at least 250 percent of FPG—which is more than the median income level for all U.S. households. This rule means that a large number of

[89] *See* Hoynes et al., *supra* note 79.
[90] *Income and Poverty in the United States 2017*, U.S. CENSUS BUREAU (Sept. 2018), https://www.census.gov/data/tables/2018/demo/income-poverty/p60-263.html.

immigrants could be excluded simply because they are low-income, even though they work to support themselves, contribute to their community, pay taxes, and contribute to GDP. Such an approach is a total departure from past practice. It is wholly unsupported.

The Proposed Rule creates an income test for immigrants whose income, assets, and resources do not reach a threshold of 125 percent of FPG (approximately $31,375 a year for a family of four), because it sets that threshold, below which income is considered a negative factor for the public charge analysis. *See* Proposed Rule, 83 Fed. Reg. at 51291. The Proposed Rule also provides that DHS will consider it a "heavily weighed positive factor" if the immigrant's household has financial assets, resources, and support of at least 250 percent of FPG (approximately $62,750 a year for a family of four). *Id.* at 51292. If an immigrant has income less than 250 percent of FPG, income will not be a positive factor, and may therefore be a negative factor in the public charge analysis. These new income thresholds therefore make it more likely that the working class will be inadmissible or ineligible to adjust status, because they were deemed likely public charge, even though they are or are able to be gainfully employed. *Id.* at 51291–92.

Nearly 65 million households in the United States earn incomes below $62,750 a year, over 50 percent of *all* U.S. households.[91] Approximately 35 million fall below 125 percent of FPG, over 25 percent of all U.S. households.[92] Immigrants in the County have an average household income of $45,564, which means most of them are among the working class.[93] In the County, there are 677,000 noncitizens, and 1.3 million total residents living in noncitizen or mixed status families with income below 125 percent of FPG.[94] There are 1.2 million noncitizens and over 2.3 million residents living in noncitizen or mixed status families with income below 250 percent of FPG (roughly one-quarter of all County residents).[95] These immigrant families nevertheless contribute nearly $300 billion to the GDP annually and pay billions of dollars in federal taxes every year, which helps to fund many government programs.

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[91] *See Current Population Survey (CPS)*, U.S. CENSUS BUREAU, https://www.census.gov/cps/data/cpstablecreator.html; *see also Income and Poverty Data in the United States: 2017*, U.S. CENSUS BUREAU, https://www.census.gov/library/publications/2018/demo/p60-263.html.
[92] *See Current Population Survey (CPS)*, *supra* note 91; *see also Income and Poverty Data in the United States: 2017*, *supra* note 91.
[93] *See Los Angeles*, *supra* note 6.
[94] *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard*, *supra* note 3.
[95] *Id.*

Far from being public burdens, working-class families are the norm in America. They have long been the backbone of this country, and they are essential to thriving, successful communities. Many are small business owners who bring growth and innovation to their community. Others work tirelessly at multiple jobs to improve their communities and improve the prospects of their children. A significant number have always been immigrants. Some come to the United States alone and with nothing, fleeing violence or natural disasters in their home countries. Others arrive with their families, an education, and resources from their homes. But almost all arrive with the ability to work, and with the hope, like millions of immigrants who have come before them, for opportunities to work hard to make a better life for themselves and their families. The data reveals that immigrants are largely successful in that pursuit—they do work hard to build wealth, become self-sufficient, and create even better prospects for their children. A study by Pew's Economic Mobility Project that evaluated economic mobility of immigrants in the United States found that first generation immigrants receive a "huge boost" in upward mobility by coming to the U.S. and joining the workforce here.[96] The study concluded, for example, that moderately skilled Mexican immigrants earned as much as seven times more in the U.S. as they did in their home country.[97] The data for second-generation immigrants is even more compelling: the Pew Research Center observed that second-generation immigrants were likely to match or outpace their U.S.-born counterparts in terms of earnings and educational attainment.[98]

The public charge doctrine has never included an income test that would sweep in large numbers of the working class. Never, in over a century of immigration law and application, has any court or agency suggested that an immigrant who is gainfully employed is a public charge. *See e.g.*, *Matter of T*-----, 3 I. & N. Dec. at 644 (not likely to be public charge where applicant was "capable of earning her own livelihood"). If the Proposed Rule is adopted, the public charge analysis will turn from an analysis of who has the *ability* to be self-sufficient, and indeed perhaps

[96] Ron Haskins, *Immigration: Wages, Education, and Mobility*, THE PEW CHARITABLE TRUSTS ECON. MOBILITY PROJECT, https://www.brookings.edu/wp-content/uploads/2016/06/07useconomics_haskins.pdf.
[97] *Id.*; *see also* Mark R. Rosenweig, *Global Wage Differences and International Student Flows*, Brookings Trade Forum (2006), *available at* http://muse.jhu.edu/article/211316.
[98] *Second-Generation Americans: A Portrait of the Adult Children of Immigrants*, PEW. RES. CTR., http://www.pewsocialtrends.org/2013/02/07/second-generation-americans (last visited Dec. 8, 2018); *see also* George J. Borjas & Rachel M. Friedberg, *Recent Trends in the Earnings of New Immigrants to the United States*, NAT'L BUREAU OF ECON. RES., https://sites.hks.harvard.edu/fs/gborjas/publications/working%20papers/w15406.pdf (last visited Dec. 8, 2018) (observing that second-generation immigrants' wages grow at a rate matching or exceeding non-immigrants).

wildly successful and supportive of many others, to an income test that penalizes the working class because they are low-income. There is no justifiable reason for such a result. Indeed, it is antithetical to the immigrant experience in America, and to the American dream itself.

To determine whether an immigrant is likely to become a public charge, agency decision-makers have long looked to whether an immigrant is capable of obtaining gainful employment and have *rejected* any attempt to limit that analysis to a strict consideration of income level. For example, in *Matter of A--*, the BIA ruled that the INS had erred in finding that the immigrant was likely to become a public charge because her income was low. 19 I. & N. Dec. at 870. The Board explained that the INS should have considered the "more important factors" that indicated that the immigrant was *able* to support herself, including that she had "joined the work force, that she is young, and that she has no physical or mental defects that might affect her earning capacity." *Id.* Other administrative cases reach similar results. *E.g.*, *Matter of Perez*, 15 I. & N. Dec. at 137–38 (applicant not a public charge where she was "in good health, and capable of finding employment"); *Matter of R----*, 1 I. & N. Dec. at 210–11 (not likely to be public charge where "[n]othing in the record indicate[d] that [the applicant] was not able to work").

DHS nevertheless justifies the Proposed Rule's income test with the argument that an income level of 125 percent of FPG has "long served as a touchpoint for public charge inadmissibility determinations." Proposed Rule, 83 Fed. Reg. at 51187. The regulation that DHS relies on for this proposition, though, speaks not to requirements for an *immigrant*, but rather those wishing to *sponsor* an immigrant who seeks admission or to adjust her status. *See* 8 U.S.C. § 1189a(f)(1)(E) (a sponsor must "demonstrate[ ] the means to maintain an annual income equal to at least 125 percent of the Federal poverty line"). DHS articulates no reason why the threshold for a sponsor ought to translate to a public charge threshold for an immigrant.

To the extent that the requirements for a sponsor are relevant at all, they do not support the income thresholds in the Proposed Rule. A sponsor must demonstrate *not only* that she is self-sufficient and capable of supporting her household, *but also* that she can pay for certain public benefits that the immigrant-sponsoree uses. *See* 8 C.F.R. § 213a.2(c)(ii)(C); *see also* H.R. Rep. No. 104-828, 104th Congress, 2d. Sess., at 241 (Sept. 24, 1996) ("This section creates a new, legally-binding affidavit of support in order to seek reimbursement from sponsors for the costs of providing public benefits."). But for the public charge analysis, the question has always

been whether the immigrant herself is likely to become *primarily* dependent on public benefits. If a sponsor is *presumed* be both self-sufficient and able to provide some support to another with an income of 125 percent of FPG, it necessarily follows that an individual making that amount, or even less, is likely self-sufficient (i.e., capable of supporting *only* herself). At the very least, an individual with an income greater than 125 percent of FPG should be presumed to be self-sufficient, if a sponsor with that income is presumed able to support himself and others. Instead, the Proposed Rule makes incomes below that threshold a negative factor, and requires an income of twice that—250 percent of FPG, which is above the median income for all U.S. households—to be a heavily weighed positive factor in the public charge analysis. This is illogical and the sponsorship guidelines cannot justify it.

DHS articulates no justification why income less than 125 percent of FPG should be treated as a negative factor, and why immigrants should not receive the benefit of a heavily weighed positive factor until they have income of at least 250 percent of FPG. To say that a person, immigrant or not, is likely to become a public charge because she has income at 125 percent or 100 percent of FPG is an insult to working-class Americans, who work hard to maintain those income levels, support their families, and contribute the national economy. The 125 percent and 250 percent thresholds are totally unjustified, illogical, and arbitrary. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

DHS should abandon any use of income levels as negative factors in the public charge analysis and instead follow over a century of administrative decision-making that focuses on ability to work.

D. The Proposed Rule's Narrow Exceptions Do Not Save It and Instead Show the Flaws in its Overall Approach.

The Proposed Rule identifies a few narrow exceptions in its operative text and hints at the possibility of others in its preamble. But these exceptions do not save the Proposed Rule from the harms that result from including noncash supplemental benefits in the public charge definition. Indeed, the exceptions demonstrate the flaws of that approach. DHS justifies the exceptions using the arguments that apply with equal force to exempt all noncash supplemental benefits programs from consideration, just as the INS concluded in its post-PRWORA 1999 Field Guidance and Proposed Rulemaking. DHS also treats like programs differently, creating

exceptions for some programs while leaving in others that serve similar goals and provide similar aid to similar populations, but its justifications do not support its pick-and-choose approach. The exceptions should become the rule: all noncash supplemental benefits should be excluded from the public charge determination. That conclusion is supported by a century of precedent and the conclusions of the INS in 1999.

The first problem with the exceptions is their lack of clarity. The Proposed Rule promotes uncertainty by listing only a very narrow set of certain benefits in the operative text, *see* Proposed Rule, 83 Fed. Reg. at 51290, but suggesting other exclusions in the preamble. The preamble states that an immigrant's receipt of short-term, noncash, in-kind emergency disaster relief, public health assistance for immunizations and the treatment of communicable diseases, and programs that provide in-kind services to the community that are necessary for the protection of life and safety "would not be part of the public charge determination under the proposed rule." *Id.* at 51132. It also states that the "definition of the term 'public charge' would not include receipt of any non-cash public benefit not listed" explicitly in the text of the Proposed Rule, which would except additional programs such as Social Security retirement benefits, Medicare, WIC, veterans' benefits, social insurance programs, such as workers' compensation, and noncash supplemental benefits that provide education, child development, and employment and job training. *Id.* at 51173. Neither of these statements, however, are reflected in an operative provision of the Proposed Rule.

These unclear and inconsistent provisions leave immigrants with too little certainty regarding what will and will not be held against them in the public charge analysis. This lack of clarity blunts the effectiveness of any exceptions on the Proposed Rule's chilling effect on participation in noncash supplemental benefit programs that promote and sustain self-sufficiency and public well-being. The ills from this type of uncertainty are exactly what the INS was trying to avoid in the 1999 Field Guidance and 1999 Proposed Rule by providing a detailed explanation and list of the benefits programs that would be considered in the public charge determination and those that would be excluded, and by providing a clear line differentiating noncash supplemental benefits from government cash assistance for maintenance. *See* 1999 Field Guidance, 64 Fed. Reg. at 28689, 28692–93; 1999 Proposed Rule, 64 Fed. Reg. at 28676, 28684–86.

To make matters worse, DHS has requested comment as to whether the Proposed Rule "should expand the list of designated public benefits in the final rule" to include currently unenumerated benefits, and whether "an alien's receipt of [unenumerated] benefits" should "be considered in the totality of the circumstances" in the public charge analysis. The County states in no uncertain terms that receipt of currently unenumerated benefits should not be included as either a negative factor or part of the totality of the circumstances analysis. The proposed expansion would grossly exacerbate the confusion about what would or would not be considered and how it would be weighed, *cf.* 1999 Field Guidance, 64 Fed. Reg. at 28689, and would therefore also grossly exacerbate the chilling effects on enrollment by eligible immigrants in noncash supplemental programs and services.[99] At a minimum, the Proposed Rule should state in plain terms what is indicated in the preamble: that receipt of any non-cash public benefit that is not listed in the text of the Proposed Rule may *not* be considered in the totality of the circumstances to determine whether an immigrant is or is likely to become a public charge.

Although the County agrees that the excepted programs should not be considered in the public charge analysis, it submits that they demonstrate the flaws in the Proposed Rule's overall approach to noncash supplemental benefits. This is the second problem with the Proposed Rule's narrow exceptions. The very reasons that DHS offers to justify the exceptions—that promote PRWORA's self-sufficiency goals and that they benefit the entire community—apply equally to all noncash supplemental benefit programs, as the agency has long recognized. DHS justifies the Proposed Rule's carve-out for Medicaid benefits for emergency medical conditions, for example, on the basis that PRWORA excluded those benefits from eligibility restrictions because they "benefit all" and "relate to the public health and [be] in the public interest." Proposed Rule, 83 Fed. Reg. at 51132; *see also id.* at 51169. Similarly, DHS supports certain exceptions because the programs support, rather than undermine, self-sufficiency principles. *See id.* at 51173. But by this logic, the Proposed Rule should exclude *all* noncash supplemental assistance programs. The agency came to this very conclusion in the 1999 Field Guidance and the 1999 Proposed Rule, *e.g.*, 64 Fed. Reg. 28693, 64 Fed. Reg. at 28678, and DHS does not explain why it now departs from nearly twenty years of precedent except in certain narrow cases.

[99] *See* Artiga et al., *supra* note 32 ("Proposed changes to federal 'public charge' policies may lead to fear and uncertainty among immigrant families about using public programs, which likely would drive down enrollment in Medicaid [and] CHIP, potentially by millions of people.").

DHS's flawed approach to the Proposed Rule also appears to treat similar benefits differently and different benefits programs similarly, without rhyme or reason. DHS offers no coherent justification for its pick-and-choose approach or for the exceedingly narrow scope of the exceptions in the Proposed Rule. Such agency decision-making is unlawful. *See generally Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 216 (D.C. Cir. 2013) ("Agency action is arbitrary and capricious if 'the agency offers insufficient reasons for treating similar situations differently.'"); *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) ("If [an] agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases."). Instead of trying to solve the Proposed Rule's problems with exceptions, DHS should continue to exclude noncash supplemental benefits from the public charge analysis and to focus instead on primary dependence on government cash assistance for maintenance. As explained above, such an interpretation is consistent with prior agency action, Congress's intent in enacting PRWORA, and the 1999 Field Guidance and 1999 Proposed Rule, both of which interpreted PRWORA and rejected the approach to public charge determinations advanced in today's Proposed Rule.

III. CONCLUSION

With over 3.5 million immigrants living within its borders, the County has a compelling interest in ensuring the health and well-being of immigrants and their families because our communities, economies, and democracy thrive when *all people* are supported and given an opportunity to succeed. The County recognizes this principle and remains committed to serving all of its residents, regardless of immigration status.

Rather than promote self-sufficiency, DHS seeks to punish and deter immigrants for receiving various noncash supplemental benefits to which they are entitled under the law, benefits that federal, state, and local officials have all recognized *support and sustain* self-sufficiency and that assist *entire communities*. The Proposed Rule departs from over a half-century of decision-making without considering the harm to immigrants' long-term self-sufficiency and the entire community's well-being. It is as ill-considered as it is dangerous. DHS's self-contradictory justifications for the Proposed Rule reveal the Administration's true intent—to stoke immigrants' fear at any cost, even at the expense of the greater public good. If adopted, the Proposed Rule will have a devastating impact on children and families in the

County, particularly working-class households, who are entitled to receive the noncash supplemental benefits that the Proposed Rule penalizes. Because this extreme policy shift would jeopardize the public health, safety, and well-being of the 10.2 million people who call Los Angeles County home, the County urges DHS not to adopt the Proposed Rule.

Very truly yours,

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