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U.S. Citizenship and Immigration Services
Department of Homeland Security
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RE: DHS Docket No. USCIS-2010-0012, RIN 1615-AA22, Comments in Response to Proposed Rulemaking: Inadmissibility on Public Charge Grounds

Dear Sir/Madam:

I am writing on behalf of the Immigrant Legal Resource Center (ILRC) in response to the Department of Homeland Security (DHS) Notice of Proposed Rulemaking, "Inadmissibility on Public Charge Grounds," which was published in the Federal Register on October 10, 2018.

The ILRC strongly opposes the proposed changes to the public charge rule, which, as we know from our years of experience in immigration law and training immigration professionals on complex legal matters, will cause uncertainty, inconsistency, and chaos in the adjudication of immigration benefits and a chilling effect in applying for immigration benefits. This stands in stark contrast to our country's commitment to family reunification and facilitating the inclusion and integration of immigrants into the United States.

The ILRC is a national non-profit that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profits in building their capacity. The ILRC also leads the New Americans Campaign, a national non-partisan effort that brings together a coalition of foundation funders, leading national immigration and service organizations, and over two hundred local services providers across more than 20 different regions to help prospective Americans apply for U.S. citizenship. We have extensive experience with fee waivers and have helped hundreds of thousands of lawful permanent residents with the naturalization process.

The proposed rule would dramatically expand the interpretation of public charge to include any individual who is likely to use more than a minimal amount of public

assistance and expands the types of benefits that could be considered in the public charge determination to include programs that support basic human needs, including Medicaid and Supplemental Nutrition Assistance Program. If finalized as written, this rule would facilitate a vision of America that a majority of Americans rejects: one that excludes from our country wide swaths of the population including immigrants with disabilities or health conditions and those who hold low-wage jobs or are just starting out on the path to financial stability. The rule would also have a disproportionately negative impact on women and people of color, preventing them from securing lawful immigration status and reuniting with their families. Our comments focus on the impact the proposed rule would have on the adjudication of applications and petitions for immigration benefits, the practice of immigration law, and fairness and justice within our immigration system.

I. Chilling Effect on Immigration Applications and Public Benefits

As immigration attorneys and organizations dedicated to improving access to legal information, we will seek to educate diverse communities about the proposed public charge rule and its impact. Notwithstanding these efforts, uncertainty and confusion about what the proposed rule means and how it will be implemented will prevent many qualified individuals from filing immigration applications out of fear of a denial based on public charge grounds. In addition, as has been well-documented, widespread misinformation and confusion created by drafts of the rule leaked to the press have resulted in a marked decline in the use of a wide variety of life-sustaining benefits by immigrant families.[1] This chilling effect will disproportionately impact applicants for lawful permanent residence through the family immigration system and unduly harm women and families of color. Additionally, the rhetoric surrounding this proposed change and the confusing standard proposed has chilled the submission of other applications that are not subject to a public charge determination. Notably, through the New Americans Campaign, we have received reports of eligible lawful permanent residents (LPRs) withdrawing applications for naturalization, or choosing not to apply, based on the perceived impact the proposed rule will have on their applications or future applications for their family members.

II. Burden on Attorneys, Organizations, and Pro Se Individuals

A. Adjudication Will Become More Unclear and Will Further Internal Inconsistencies

The proposed rule would replace clear, readily administrable public charge guidelines with a nebulous framework. Under current policy, a sufficient Form I-864, Affidavit of Support, demonstrating a commitment from a sponsor to support the immigrant at the legally required levels, generally establishes to U.S. Citizenship and Immigration Service's (USCIS) satisfaction that, under the totality of circumstances, an individual will not become a public charge. This adjudicative framework is straightforward and efficient and has largely yielded predictable, consistent public charge determinations.

By replacing a time-worn and effective standard with an incoherent framework, the proposed rule would make it next to impossible for immigration attorneys and accredited representatives to

[1] *See* Migration Policy Institute, *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use* (June 2018), https://www.immigrationresearch-info.org/system/files/Chilling_Effects_Public_Charge_Rule.pdf.

advise intending immigrants of their eligibility for lawful permanent residence or other immigration benefits. The statute at INA § 212(a)(4), with the addition of the I-864 process, was intended to create a straightforward and efficient process for adjudicators and immigrants alike. The process consistently utilized by DHS, the Department of Justice (DOJ), and the Department of State (DOS) for years, involving submission of a legally enforceable I-864 Affidavit of Support, is a straightforward and efficient process for adjudicators and immigrants. The proposed rule will add many layers of confusion to the process, to such an extent that what should be a clear adjustment of status case becomes riddled with uncertainty. This will make it almost impossible for an immigrant to navigate the system without legal help, and yet, lawyers will be hard-pressed to offer guidance without a clear legal standard. Thus, many people who are entitled to lawful permanent residence will be too afraid to apply and will instead remain in the shadows.

B. The Proposed Rule Replaces a Clear Standard with a Contradictory and Confusing Framework

Under the current process, individuals can clearly demonstrate that they are not a public charge by providing evidence that their sponsor has 1) signed a binding contract of support and 2) can demonstrate income or assets equal or greater than 125% of the federal poverty guidelines (FPG), which is easily accessible on the I-864P that USCIS posts on its website. The new standard requires balancing "weighted" factors and offers no guidance on how to adjudicate a case with both positively weighted and negatively weighted factors. In addition, this rule requires the applicant to apply speculative and complicated math to discern eligibility. The NPRM states that the determination of whether an individual has used benefits equal to or greater than 15% of the FPG will be based on the FPG at the time of adjudication. Processing times are unpredictable and so practitioners will be unable to predict whether the FPG, which is updated annually, will remain unchanged between the time that the client submits an I-485 and when the application is adjudicated. In addition, determining which factors or benefits might impact the applicant within a 36-month period requires knowing such figures and percentages with certainty, and in many cases will require calculating a household share of a shared program or support service. Many services are offered at the local and state level under uniquely named programs. It will be nearly impossible for an intending immigrant to decipher whether the programs in which they participate are included in the new rule.

C. DHS Grossly Underestimates the Time Burden of the Proposed Rule

DHS estimates the time burden associated with filing Form I–944, *Declaration of Self-Sufficiency*, is 4 hours and 30 minutes per applicant, "including the time for reviewing instructions, gathering the required documentation and information, completing the declaration, preparing statements, attaching necessary documentation, and submitting the declaration." However, this appears to be grossly underestimated. If the proposed rule is implemented as written, the time it will take to properly assess a case and advise immigrant families will increase substantially. In addition to preparing the form and gathering supporting documentation, lawyers must assess every factor and consideration under the new framework (including evaluating household members), identify other issues not listed in the rule that might impact the public charge assessment, and muddle out inconsistencies (such as positively weighted and negatively weighted factors) in real case scenarios in order to offer advice. In addition, to fully advise, an

immigration service provider would need to develop expertise in all public benefit programs that applicants may have used, not only in their state but in any state where the applicant resided. It will be virtually impossible for people to obtain proof that they did not trigger a negative factor for public charge test. In addition to the legal uncertainty this brings to every case, the time required to advise, document and fill out forms will increase by at least threefold. The proposed rule grossly underestimates the time burden.

The time and cost burden on ILRC would be significant, as we would need to educate the public on the changes through trainings and written materials. We estimate that the time burden would be an additional 170 hours, including time spent on creating and delivering legal trainings, community service trainings, webinars, and practice advisories. In addition, the ILRC will likely invest $500,000 to a million dollars in trainings to assist the legal and service provider sector to understand this change, and yet would still not be able to advise with any certainty.

III. Impact on USCIS Adjudications

A. Implementation of the Proposed Rule Would Consume Significant USCIS Resources and Deepen Delays in Immigration Benefit Form Processing

The proposed rule would impose an immense administrative burden on USCIS. Among other obligations, it would require the agency to conduct time-intensive public charge inadmissibility determinations, as well as process Forms I-944, *Declaration of Self-Sufficiency*, in connection with an estimated 382,264 adjustment of status applications annually. The proposed rule would require every USCIS adjudicator to develop expertise in areas outside of immigration law to ensure proper adjudication. This is in addition to the required training needed for every adjudications officer on how to adjudicate applications requiring a public charge assessment under the proposed confusing and inconsistent framework to evaluate factors. These operational demands would be levied upon an agency that already suffers profound capacity shortfalls. With nearly 6 million pending cases as of March 31, 2018, DHS has conceded that USCIS lacks the resources to timely process its existing workload.[2] In fact, processing times for many of the agency's product lines has doubled in recent years.[3]

Processing delays upend the lives of immigrants and their U.S. citizen families. Lengthy wait times can result in applicants losing their jobs, thus depriving their families—including families with U.S. citizen children—of income essential to necessities like food and housing.[4] Delays also prolong the separation of families dependent on case approval for their reunion. Delays also have negative economic impacts on communities.

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[2] USCIS, *Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status* (Jul. 17, 2018), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY18Q2.pdf. DHS, *Annual Report on the Impact of the Homeland Security Act on Immigration Functions Transferred to the Department of Homeland Security* (Apr. 13, 2018), https://www.uscis.gov/sites/default/files/reports-studies/Annual-Report-on-the-Impact-of-the-Homeland-Security-Act-on-Immigration-Functions-Transferred-to-the-DHS.pdf.

[3] *See* USCIS, *Historical National Average Processing Time for All USCIS Offices* (up to Aug. 31, 2018), https://egov.uscis.gov/processing-times/historic-pt.

[4] *See* AILA, "Deconstructing the Invisible Wall" (Apr. 24, 2018), http://www.aila.org/infonet/aila-report-deconstructing-the-invisible-wall.

Despite the Department's admission of USCIS's inability to accommodate its current inventory, the proposed rule would substantially increase the agency's workload. This would, in turn, deepen USCIS case processing delays and compound the resulting harm to the public through heightened job loss, food shortages, and family separation. In short, the proposed rule will make an operational crisis appreciably worse and immigrant families throughout the country will suffer the consequences.

B. The Proposed Rule Would Establish an Incoherent Adjudicative Framework Resulting in Inconsistent and Unfair Public Charge Determinations

The proposed rule would require adjudicators to implement an amorphous test which would require them to weigh a potentially unlimited number of "factors" and apply a host of unclear "considerations" without meaningfully distinguishing "factor" from "consideration" -- often the proposed rule refers to specific criteria as both a factor *and* a consideration. Moreover, a factor's weight can shift based on various circumstances and that factor's relationship with one or more factors, and DHS even appears to assert that factors not specifically identified "may be weighted heavily." In other words, not only would there exist an unknown and possibly infinite universe of factors that adjudicators could assess, it appears that adjudicators could find virtually *any* circumstance ultimately dispositive within the totality of circumstances in a given public charge determination.

This is a prescription for process and outcome ambiguity, rendering inconsistent adjudications a certainty, and leaving the regulated community completely in the dark. Public charge determinations will inevitably vary from adjudicator to adjudicator and case to case, with similarly situated applicants receiving contrary decisions. The vagueness inherent in the proposed rule, and resulting arbitrariness in adjudications, violate the most basic tenets of due process. The plasticity of the public charge analysis, furthermore, opens the door for political pressure, rather than dispassionate adjudication, to shape conclusions. In all, the proposed rule would transform a functional standard into an unworkable jumble that will ensure uneven and unjust outcomes.

C. The Proposed Bond Procedures and Penalties are Exceptionally Harsh and Create an Opportunity for Unscrupulous Private Bond Companies to Exploit Immigrant Families

The proposed rule not only establishes an excessive bond minimum of $10,000, it also authorizes USCIS to set a dramatically higher bond in its discretion—with no cap—and bars any appeal of that amount. The rule stipulates that the penalty for *any* bond breach is the full bond amount and that *any* use of a specified public benefit while the bond remains in effect constitutes such a breach. The proposed rule provides no limits on the ability of any USCIS adjudicator to impose such disproportionate consequences.

These harsh conditions would drive many noncitizens to accept crippling surety bond terms to avoid family separation. Under those terms, the bond "principal"—in many cases the noncitizen —would have to pay the bond company up to 15 percent of the bond up front. In the event of a breach, the principal would have to reimburse the bond company for the full amount of the breach penalty. For instance, if a $30,000 public charge bond is in effect for a noncitizen mother

who then uses only $1,500 worth of public benefits, the bond would be breached, and she would be liable for the entire $30,000—20 times more than what she received in benefits—and she would face potential separation from her family.

As this example illustrates, the proposed rule would impose strict bond requirements and severe penalties that prioritize the revenue streams of private bond companies over family unity, thus creating an opportunity for unscrupulous bond companies to take advantage of immigrant families.

D. Impact on Consular Processing

In January 2018, DOS implemented significant changes to the Foreign Affairs Manual that raised the public charge bar for immigrant visa applicants. This shift prompted numerous improper visa denials on public charge grounds, barring affected individuals from entering the United States and reuniting with their families.[5]

The proposed rule threatens to multiply these problems exponentially. DOS has indicated that it could further modify its own public charge guidance in response to DHS's final public charge rule.[6] If consulates begin applying a standard similar to the one proposed by DHS, the more than one million individuals that seek visas from DOS annually would be subject to burdensome and arbitrary standards, with many finding themselves unfairly shut out of the country and unable to join their families. Overall legal immigration could drop sharply, with severe consequences for family unity and the national economy.

IV. Discrimination

This rule attempts to discriminate against certain classes of individuals, including women, seniors, people with health conditions, people living with HIV/AIDS, and LGBT people.

A. Women

The proposed rule creates as a heavily weighted negative factor "the absence of current employment, employment history, or reasonable prospect of future employment," explaining that "[a] person who is capable and able to work but does not work demonstrates a lack of self-sufficiency." (at 201) This standard is vague and will lead to arbitrary denials, as it gives adjudicators and legal service providers no clear guidelines to explain how the agency will assess an applicant's employment history to predict the applicant's "reasonable prospect" of future employment. Specifically, this heavily weighted negative factor impermissibly discriminates against women who choose to stay home to care for children or who must stay home because of the increasingly unaffordable cost of out-of-home childcare in the United States.

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[5] *AILA, CLINIC, and NILC Express Concerns Over Improper Public Charge Determinations and I-601A Revocations* (Aug. 28, 2018), https://www.aila.org/advo-media/aila-correspondence/2018/aila-clinic-and-nilc-express-concerns-over.

[6] *See* Yeganeh Torbati, *Exclusive: Trump administration may target immigrants who use food aid, other benefits,* Reuters (Feb. 8, 2018 11:19 AM), https://www.reuters.com/article/us-usa-immigration-services-exclusive/exclusive-trump-administration-may-target-immigrants-who-use-food-aid-other-benefits-idUSKBN1FS2ZK.

In particular, pregnant women will be disproportionately affected by the following factors:

- Use of Medicaid: some states allow women with any status to use Medicaid for healthcare during a pregnancy and for the first months after giving birth. This means that every woman who has a child within the three years before applying for admission will have a heavily weighted negative factor.
- Employment history: pregnant women may be forced to leave the work force and stay home to deal with medical complications with a pregnancy or to care for a child during the first months. These women will also have a heavily weighted negative factor. For these same reasons, pregnant will women will also be less likely to show that they themselves earn 125% of the FPG, even though they may have other familial support.
- Because it is unclear how these two heavily weighted negative factors will interact with other factors in the totality of the circumstances, it will be more likely that pregnant women will be unable to demonstrate that they are unlikely to become a public charge (despite other sources of income, familial support, skills, or education) and will lead to more irrational denials by adjudicators.

B. Seniors

Many seniors immigrate to the United States in order to help care for children and other family members and thus many never intend to engage in wage work in the United States. These seniors may have retired and are therefore likely not working, have had no recent employment, or do not plan to work in the future due to their retired status. Because it is unclear whether the heavily weighted negative factors could be overcome by other evidence of self-sufficiency, this proposed change will likely deny admission and lawful status to an entire category of individuals. Doing so will deprive many families in the United States of the economically vital contribution of family-based child care. While DHS explains that it will review assets and other resources "in the totality of the circumstances," the agency does not explain how a heavily weighted factor is weighted against other non-heavily weighted factors. Therefore, it will be unclear to legal services providers and adjudicators what amount of assets or other resources will be sufficient to overcome this heavily weighted negative factor.

C. People with Health Conditions

Individuals with the misfortune of suffering serious health issues or living with a disability will be at risk of a high rate of application denials under this proposed rule. USCIS lays out no standards for determining whether a disability or other serious health condition will lead the agency to decide whether an applicant has a "reasonable prospect of future employment." Additionally, weighing heavily a lack of current or recent employment history will harm individuals with non-permanent health conditions who experience a temporary and unexpected health problem that requires their brief exit from the employment field to recuperate.

D. People Living with HIV/AIDS (PLWHAs) and LGBT individuals

PLWHAs will disproportionately be considered a public charge under the proposed rule. Medicaid is the largest source of insurance coverage for people with HIV, estimated to cover more than 40% of people with HIV in care.[7] As a result, most applicants with HIV will automatically have two heavily weighted negative factors – having a health condition without private insurance to cover the cost of treatment and receiving a public benefit in the form of Medicaid.

Additionally, although 67% of people living with HIV/AIDS (PLWHA) have a high school degree or above, 75% have incomes at or below the poverty line.[8] This is not because of an inability to work — indeed with proper care and treatment, many people living with HIV lead normal, healthy lives, including having a job — but instead because of the continued stigma of HIV/AIDS on people's ability to get work.[9] Furthermore, an applicant for admission that had HIV/AIDS may not have a consistent work history because of the possible debilitating effects of the disease if untreated, or because of the side-effects of treatment,[10] but may nonetheless be able to work with reasonable accommodations that are required by a variety of federal laws protecting PLWHAs.[11] Therefore, this group would be disqualified from admission because of the heavily weighted negative factor of being working age but not currently working. Finally, the lack of clear factors in the proposed rule will also allow adjudicators to arbitrarily find that a person living with HIV/AIDS is no "reasonable prospect" for future employment based on the stereotype that PLWHAs are unable to work.

Finally, this disproportionate negative impact on PLWHAs will also cause a disproportionate negative impact on LGBT immigrants who apply for admission to the United States. In 2016, gay and bisexual men accounted for 67% of all HIV diagnoses and 82% of diagnoses among males aged 13 and older.[12] Additionally, 22% of transgender women in the United States are living with HIV.[13] The public charge rule, therefore, will stack the cards against LGBT individuals and PLWHAs simply for using Medicaid to survive and experiencing the societal disadvantages of living with this deadly but treatable disease.

V. The Proposed Rule Attempts to Undermine Congressional Intent and Overreaches Agency Authority

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[7] Kaiser Family Foundation, *Medicaid and HIV* (Oct. 14, 2016), https://www.kff.org/hivaids/fact-sheet/medicaid-and-hiv.

[8] Paul Denning and Elizabeth DiNenno, *Communities in Crisis: Is There a Generalized HIV Epidemic in Impoverished Urban Areas of the United States?*, Centers for Disease Control and Prevention (Aug. 28, 2017), https://www.cdc.gov/hiv/group/poverty.html.

[9] *HIV Stigma and Discrimination in the U.S.: An Evidence-Based Report*, Lambda Legal (Nov. 2010), https://www.lambdalegal.org/sites/default/files/publications/downloads/fs_hiv-stigma-and-discrimination-in-the-us_1.pdf.

[10] *HIV Treatment Overview*, HIV.gov (May 15, 2017), https://www.hiv.gov/hiv-basics/staying-in-hiv-care/hiv-treatment/hiv-treatment-overview.

[11] *Civil Rights*, HIV.gov (Nov. 10, 2017), https://www.hiv.gov/hiv-basics/living-well-with-hiv/your-legal-rights/civil-rights.

[12] *HIV and Gay and Bisexual Men*, Centers for Disease Control and Prevention (Sept. 26, 2018), https://www.cdc.gov/hiv/group/msm/index.html.

[13] Jen Kates, et al., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender Individuals in the U.S.*, Kaiser Family Foundation (May 2018), http://files.kff.org/attachment/Issue-Brief-Health-and-Access-to-Care-and-Coverage-for-LGBT-Individuals-in-the-US.

A. The Proposed Rule to Require a Public Charge Assessment of Applicants to Extend/Change Status Is Unnecessary and a Waste of USCIS Resources

Under the proposed rule, USCIS would be required to conduct public charge assessments of an estimated 511,201 individuals seeking an extension or change of nonimmigrant status each year. In each of these cases, USCIS would have discretion to require the applicant to submit Form I-944, *Declaration of Self-Sufficiency*. In key respects, this is duplicative of work done by DOS and CBP. Consular offices already conduct public charge assessments of most nonimmigrants when processing their visas, and CBP conducts an admissibility determination when processing nonimmigrants at the port of entry.

In addition, many nonimmigrant classifications require the applicant to prove they can support themselves financially. F-1 and M-1 students, for example, must provide evidence of "sufficient funds available for self-support during the entire proposed course of study." B-1 and B-2 tourists also need to show that they have adequate means of financial support during the course of their stay in the United States. Meanwhile, by definition, most employment-based nonimmigrant visas mandate sponsorship and compensation by employers. Financial stability is therefore already widely built into most nonimmigrant visa categories. Given these existing safeguards, any investment of USCIS resources to assess nonimmigrants on public charge would be an unnecessary administrative burden assumed by an already overstretched agency.

In many instances, the rule may discourage nonimmigrants from coming to or remaining in the United States, regardless of their financial status. The breadth and depth of evidence required to respond to and complete an I-944, *Declaration of Self-Sufficiency* — including information on assets, resources, and financial status, to name a few — disproportionately tax persons seeking merely to visit, work, or study in the United States temporarily. Lastly, but not insignificantly, this proposed rule is yet another example of a needlessly restrictive and bureaucratic process imposed by the current administration that has fostered a growing perception among foreign nationals that the United States has become an undesirable and unwelcoming destination. The proposed rule will reinforce that view, damaging the long-held perception of the United States as a country of inclusion and chilling international travel and commerce.

B. The Definition of Public Charge as Centered Around Use of Public Benefits Overreaches as Neither INA § 212(a)(4), nor INA § 213, nor the Original Definition of Public Charge Mentions Public Benefits in its List of Factors

The original statutory language excluding individuals for being a public charge states that "any convict, lunatic, idiot or any person unable to take care of himself or herself without becoming a public charge . . . shall not be permitted to land" in the United States.[14] In the early 20th Century, after the passage of the Immigration and Nationality Act of February 5, 1917, a court held that "the natural meaning" of "persons likely to become a public charge" was "'those persons who

[14] Immigration Act of 1882, ch. 376, 1 Stat. 214 (1882), http://www.loc.gov/law/help/statutes-at-large/47th-congress/session-1/c47s1ch376.pdf.

are likely to become occupants of almshouses for want of means with which to support themselves in the future.'"[15]

The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), enacted on August 22, 1996, preexisted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) (enacted on September 30, 1996), but does not provide for the exclusion of noncitizens for receipt of public benefits. Sections 501-510 of IIRIRA directly discussed PRWORA by exempting certain classes of immigrants from PRWORA's prohibition on use of benefits by noncitizens. This section immediately precedes section 531 of IIRIRA, which lays out the current public charge provisions in § 212(a)(4), including the five factors to be considered in the totality of the circumstances assessment, and the requirement of the affidavit of support in INA § 213A. PRWORA shows that Congress is capable of creating and passing legislation related to penalizing noncitizens' use of public benefits. Lack of explicit inclusion of public benefits for consideration in the public charge analysis in IIRIRA indicates Congress knew how to include public benefits but chose not to include public benefits as a factor to be considered in the public charge analysis. Therefore, it is outside statutory intent for the agency to consider public benefits use as a proxy for public charge. Indeed, by inserting a definition that a "public charge is anyone who uses public benefits," the rule co-opts the intent of this statutory to provision to promulgate fear in our communities.

The proposed rule creates new heavily-weighted negative factors that, although completely unclear as written, seem to be able to trump consideration of all factors. By statute, the adjudicator must grapple with all factors listed. Creating heavily-weighted factors without a clear standard sets up bright-line rules for adjudicators which the statute does not permit. For instance, the past use of certain benefits should not be permitted to overshadow conducting the proper balancing of factors as required by the statute.

C. The Proposed Rule Arbitrarily Relegates to an Insubstantial Factor the Congressionally-Created I-864 Affidavit of Support Process

Congress created the affidavit of support process, which provides a clear standard for adjudication to avoid arbitrary and inconsistent adjudication. The proposed rule indicates that the affidavit of support is just one of the factors to be considered and allows for the possibility that heavily weighted factors would outweigh the contractual showing of sponsorship process outlined by Congress. The statute does not provide that any particular factor should be weighed more heavily than others.[16] Indeed, the affidavit of support by statutory definition requires the immigrant to demonstrate financial support to ensure that they are not a public charge. Without according this process any weight, the rulemaking effectively eviscerates this process as outlined by Congress. To the extent this proposed rule relegates consideration of the affidavit of support, it goes against congressional intent to establish clear guidelines and a meaningful measure of likelihood of becoming a public charge.

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[15] *Ex parte Mitchell*, 256 Fed. 229, 230 (N.D.N.Y. 1919). Interpreting subsequent versions of the INA, the BIA stated that "The fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge." *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974) (citing *Matter of Martinez–Lopez*, 10 I. & N. Dec. 409, 421–22 (BIA 1962).

[16] *See* INA § 213A.

VI. The Proposed Rule Would Compound the Immigration Court Backlogs and Create Inconsistencies in the Adjudication of Adjustment of Status in Immigration Court

Although immigration judges are not bound by DHS rules, DOJ is in the process of creating a public charge rule that is believed will parallel the DHS proposed rule.[17] However, until a DOJ rule is finalized, the DHS proposed rule will likely be used as persuasive authority by immigration judges tasked with making public charge assessments. This will occur in at least three scenarios: (1) individuals without lawful status who are seeking to adjust status; (2) returning lawful permanent residents who are treated as applicants for admission under INA § 101(a)(13)(C); and (3) lawful permanent residents placed in removal proceedings who are seeking to re-adjust status with a waiver under INA § 212(h).

Until a DOJ rule is promulgated, Immigration and Customs Enforcement (ICE) attorneys, who *are* bound by DHS regulations, will likely argue that immigration judges should apply this rule's heightened standards. Lacking any binding precedent on the interpretation of INA § 212(a)(4), some immigration judges will agree and will rely on the proposed rule as a guide, while other immigration judges will not.[18] This will create inconsistencies in adjudication that will increase administrative inefficiencies through additional appeals and motions. Cases that are before judges that rely on the DHS framework for assessing public charge will take significantly more court time, due to the heightened evidentiary requirements and need for more detailed testimony. These heightened evidentiary requirements will also impact ICE attorneys, who will be required to review that evidence and prepare a response, as well as the respondent and their counsel, if represented.

With an immigration court backlog that has topped over one million cases,[19] the public charge rule would further exacerbate an already record high case volume. Increased evidentiary requirements, heightened scrutiny, and uncertainty as to what standard to apply will delay adjudications, add to the backlog, and result in inconsistent court adjudications.

VII. Section 212.22(b)(4)(ii)(G) is Arbitrary and Capricious and Immaterial to a Determination of Self-Sufficiency

FR 51187-51188 invites comment as to whether it is reasonable for DHS to consider fee waivers for immigration benefits as part of the financial analysis under the public charge proposed rule. When reviewing whether or not an immigrant has any financial liabilities or past reliance on public benefits that would make the immigrant more or less likely to become a public charge, DHS proposes to review, and weigh negatively, any evidence that the immigrant has either *applied for or received* a fee waiver for immigration benefits.

The proposal to consider the use of, or application for, a fee waiver (Form I-912) for any immigration benefit as a factor in determining an immigrant's financial status is arbitrary and lacks an evidentiary basis. The absence of a rational, systematic, and demonstrated connection

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[17] *See Inadmissibility on Public Charge Grounds*, Office of Information and Regulatory Affairs, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1125-AA84.

[18] The BIA has not issued any precedent decisions interpreting public charge since Congress amended those provisions in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.

[19] *Immigration Court Backlog Surpasses One Million Cases*, TRAC, Syracuse University (Nov. 6, 2018), http://trac.syr.edu/immigration/reports/536.

between this proposal and the underlying statutory language pertaining to public charge leads to a conclusion that the proposal to consider the application for or receipt of an immigration fee waiver is motivated by nothing more than animus toward immigrants. Rather than implementing the statute, this proposed provision is capriciously designed to deter immigrants from applying for and securing the immigration status for which they qualify.

First, it is absurd to consider that non-payment of a one-time fee constitutes evidence of financial status, especially future financial status, which is what the underlying statute requires. DHS offers no evidence that the lack of cash on hand to pay a one-time, unusual fee has any bearing on self-sufficiency. In fact, the only data DHS presents are "concerns" noted in a Senate appropriations report, which cannot be considered material evidence. By contrast, a robust body of research has established that a majority of American families has no savings or insufficient savings to afford the equivalent of the fee for an immigration benefit, even though they support themselves, rely on their own capabilities, and are self-sufficient. Further, this country owes its success to the fact that opportunity, including the opportunity afforded by the fact of securing one's immigration status, has served as a pathway to economic achievement and an engine of growth. A one-time fee waiver is therefore more likely to predict future economic security than to be a valid indicator of public charge.

Second, DHS arbitrarily proposes to consider, and weigh negatively, not only use of a fee waiver for an immigration benefit, but also *application for* an immigration fee waiver, even if it is not granted. Most perniciously, DHS would consider as a negative factor application for a fee waiver that is not granted because the immigrant applied for a benefit that qualifies for a fee exception such that no payment is required. Applying for a fee waiver that is not granted cannot, under any logic, be considered evidence of financial status. Indeed, the very reason for the denial may be high income. Moreover, the proposal would penalize immigrants who apply for the fee waiver because they received bad legal advice to do so and were subsequently denied the fee waiver for not qualifying. Given the utter lack of coherence between this proposal and the concept of public charge, one can draw no conclusion from the proposal other than that it is motivated by hostility toward immigrants and a desire to chill immigrants from applying for immigration benefits and securing their status.

Moreover, including past use of a one-time fee waiver automatically creates an impermissible retroactive assessment within statutory confines that are strictly forward looking. Because a fee waiver is not a continuing benefit, the proposed rule's consideration of *prior* receipt of a fee waiver impermissibly penalizes applicants for their financial status on the date of the application for the fee waiver, which has no bearing on either their current or more importantly their future financial status. For instance, an applicant might have previously qualified for a fee waiver based on sudden job loss, such as due to a need to relocate for family reasons, but as soon as employment resumes would have no lasting factors to trigger a public charge concern.

Although under the proposal use of, or application for, an immigration fee waiver would be considered under the totality of the circumstances analysis, the proposed regulation gives no indication as to how much weight to accord to it as compared to other non-heavily-weighted factors. This promises to yield inconsistent application of the rule and generate unfair outcomes. Separate consideration of the use of a fee waiver means that proposed negative factors, such as income, would be impermissibly considered twice in the totality of the circumstances assessment — first as a standalone negative factor, and then again as the basis for the fee waiver. Including

the use of, or application for, an immigration fee waiver in an assessment of financial status is an unbalanced and unfair approach to interpreting the statute.

Finally, fee waivers are primarily available to categories of applications that are exempt from public charge determinations, such as U-Visas, VAWA self-petitions, and naturalization, which are not subject to the public charge ground of inadmissibility. Therefore, including fee waivers in the proposed rule provides further confirmation that the proposed rule is designed to chill applications for immigration pathways that are exempt from public charge determinations. Notably, fee waivers used in the naturalization process generally do not trigger a public charge concern, because naturalization applicants will not be subject to a public charge determination, yet the inclusions of fee waivers in public charge rhetoric has resulted in reported cases of individuals declining to file N-400s with fee waivers. As is well within the expertise of the agency tasked with immigration and naturalization adjudications to recognize, the inclusion of fee waivers is overall legally irrelevant to the agency's work, and therefore arbitrary or solely geared to chill the filing of bona fide applications.

The proposed consideration of an immigrant's past use of, or application for, a fee waiver for an immigration benefit as a factor in a of public charge determination constitutes a prime example of arbitrary and capricious rulemaking. DHS should immediately withdraw this proposal.

VIII. The Collection of Data Without Sufficient Privacy Protections, Particularly for Financial and Medical Records, Will Compromise Individuals' Privacy

DHS already collects vast amounts of personal, biographic, and biometric data on millions of Americans and foreigners. DHS manages over 10 billion biographic records and adds 10-15 million more each week.[20] Now DHS proposes that applicants for admission to the United States must supply a credit report with details of their financial history, or if they do not have credit history in the United States, provide other evidence of payments and loan balances. Furthermore, DHS will consider a wide variety of medical conditions as part of the totality of the circumstances of whether the person is likely to become a public charge and will collect further medical records from applicants who need to present additional evidence to overcome any medical issues they may have.

The ILRC is concerned about DHS' plans for collecting and managing this data. DHS has a dismal track record in providing clear and accountable information on its record systems and ensuring that Congress and the public have adequate oversight of how information is collected, stored, accessed, and protected. Copies of medical records provided by applicants may contain highly sensitive information unrelated to the immigration application or the likelihood of the person becoming a public charge. Additionally, applicants' credit histories will include private financial information as well as details on creditors, payments, and debts that may actually be attributable to the actions of current or former partners, spouses, or other family members or cohabitants. The ILRC is concerned about this dragnet of personal information and the lack of clarity on how it will be used, stored, and accessed.

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[20] *DHS Immigration Data Integration Initiative, Federal Identify Forum and Homeland Security Conference, DHS* (Sept. 14, 2017), https://www.eff.org/files/2018/06/06/14sep_1000_01_panel-dhs_immigration.pdf.

IX. Conclusion

The ILRC strongly opposes this rule. In addition to the arguments made above about the rule's impact on the practice of immigration law and more broadly, on the system, this rule will impose great damage on immigrant communities. Already, people are forgoing necessary, life-saving benefits because they fear being denied immigration benefits, despite the fact that this rule is not law. This proposed rule will unfairly penalize immigrants by holding against them factors beyond their control, such as their age, health, and family size. It will consider their socioeconomic status and how well they speak English in determining whether or not they are able to enter the United States or live with their families. This is vastly un-American and does not reflect our values as a nation. As an organization that works closely with immigrant communities, we encourage DHS to withdraw this harmful proposal.

Thank you for the opportunity to submit comments on the proposed rule. Please do not hesitate to contact me if you have any questions or need any further information.

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