

# William E. Morris Institute for Justice

3707 North Seventh Street, Suite 300, Phoenix, Arizona 85014

Phone 602-252-3432

Fax 602-257-8138

---

December 10, 2018

*Submitted via regulations.gov*

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

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

Dear Ms. Deshommes:

The William E. Morris Institute for Justice (“the Institute”) is a non-profit organization dedicated to protecting the rights of low-income Arizonans, including immigrants and their families. The Institute’s work focuses on important systemic issues in several areas, including Medicaid, food stamps, housing, and cash assistance.

The Institute appreciates this opportunity to share our views on this potential policy change in public charge determinations. We write to express strong opposition to the U.S. Department of Homeland Security’s (“the Department”) proposed rule on public charge determinations. For almost two decades, U.S. immigration officials have explicitly reassured immigrant families, who have relied on that reassurance, that participation in programs like Medicaid and the Supplemental Nutrition Assistance Program (“SNAP” or “food stamps”) would not affect their ability to become lawful permanent residents.<sup>1</sup> The proposed rule would drastically deviate from this practice and

---

<sup>1</sup> U.S. Citizenship and Immigration Services, *Public Charge*, <https://www.uscis.gov/greencard/public-charge> (last accessed Nov. 12, 2018).

change the current definition of what it means to be a “public charge” by considering immigrants’ use of public benefits beyond those used for subsistence. It would also improperly penalize immigrants who use public benefits to augment their standard of living, impose arbitrary income standards, and disproportionately weigh immigrants’ education, skills and English proficiency. Moreover, it would create a broad chilling effect whereby immigrants would disenroll or forego enrollment in needed public benefits. The proposed rule is arbitrary, unfair, discriminatory, and bad policy for this country, and we urge that it be withdrawn in its entirety.

We provide specific comments below.

**I. The Proposed Rule Represents a Radical Change in Current Policy That is Inconsistent with Our Country’s Values**

The proposed rule would drastically increase the scope of who would be considered a public charge to preclude otherwise eligible immigrants from entering the country or changing their immigration status. Currently, immigration officials consider only cash assistance, such as Supplemental Security Income (“SSI”) and Temporary Assistance for Needy Families (“TANF”), comparable state or local programs, and government-funded long-term institutional care, in the “public charge” test – and only when it represents the majority of a person’s support. If the proposed rule is finalized, immigration officials could consider a much wider range of government programs in the public charge determination, including:

- Medicaid (with limited exceptions including Medicaid coverage of an “emergency medical condition,” and certain disability services related to education);
- SNAP;
- Medicare Part D Low Income Subsidy (assistance in purchasing medicine); and
- Federal Public Housing, Section 8 housing vouchers and Section 8 Project Based rental assistance.

In making the public charge determination, the proposed rule would also negatively consider certain factors, including whether a person:

- Has income of less than 125% of the Federal Poverty Level (“FPL”);
- Is younger than 18 or older than 60;
- Has a large family; and
- Has a critical medical condition without insurance coverage.

In addition, the proposed rule would positively consider other factors, including whether a person:

- Has income above 250% of the FPL;
- Has a higher education; and
- Demonstrates English proficiency.

These radical changes in the proposed rule undermine our country's values. It would skew our immigration system in favor of the wealthy, and against those with less resources seeking opportunity in this country and people of color.

Immigrants are part of our national fabric and part of every community – they are our coworkers, our classmates, and our neighbors. Almost every family has an immigration story. As a country, we have long aspired to be a land of opportunity that welcomes individuals seeking a better life for themselves and their families. Because we believe in opportunity, we value how people live their lives and what they contribute to their communities once they are here, not how much wealth they have when they come to this country, the color of their skin, or the language they speak.

## **II. The Proposed Rule is Inconsistent with How Public Charge Has Been Historically Understood**

While the Institute is opposed to any policy that limits immigrants' access to public benefits, including the current public charge rule, the proposed expansion is a historical and unprecedented departure from current policy and would reverse more than a century of existing law, policy, and practice. The 1996 Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") limited eligibility for "federal means-tested public benefits" to "qualified immigrants" and limited eligibility of lawful permanent residents for "means-tested public benefits" to their first five years in the United States. In response to concerns that some consular officials and employees of the then-Immigration and Naturalization Service ("INS") were inappropriately taking into account the use of health care and nutrition programs, and the strong evidence of chilling effects from the 1996 law, INS issued an administrative guidance in 1999.<sup>2</sup> The preamble to the guidance clearly acknowledged that the reluctance to access benefits has an adverse impact not just on the potential recipients, but on public health and the general

---

<sup>2</sup> Immigration and Naturalization Service, *Inadmissibility and Deportability on Public Charge Grounds, A Proposed Rule by the Immigration and Naturalization Service*, 64 Fed. Reg. 28676 (May 26, 1999).

welfare of the public.<sup>3</sup> Some of the evidence relied upon by the Department when it wrote the guidance included detailed accounts of pregnant immigrant women with gestational diabetes terrified of seeking care; a child with seizures rushed to the hospital whose parents were afraid to enroll in Medicaid at the hospital so the child could continue treatment; and farmworker women afraid to enroll in a state-funded perinatal case management program.<sup>4</sup> The administrative guidance has been relied upon by immigrant families for years, and it should continue to be used.

### **III. The Proposed Rule's Expanded Range of Government Programs in the Public Charge Determination Will Adversely Affect Low-Income Immigrants**

The proposed rule distorts the totality of circumstances test used in public charge determinations by expanding the criteria to include public benefits that have never before been factors in public charge determinations, including Medicaid, SNAP, and federal housing rental assistance. The proposed rule also goes further by subjecting to its scope individuals who have simply applied or been certified for such public benefits. The expansion of the public benefit definition in this context is unreasonably broad and will harm millions of low-income immigrants and families.

#### **A. Medicaid as a Public Benefit**

People eligible for Medicaid will be particularly impacted by the broad inclusion of Medicaid-funded services as part of the public charge consideration. The unprecedented consideration of Medicaid as part of the public charge determination poses a dire threat to the health of immigrants and to other people in their communities. Medicaid is the largest insurer for long-term services and supports, mental health care and substance use disorder treatment in this country, filling the gaps left by other insurance plans that are not required to cover many of these services. Medicaid is a critically important program for low-income Arizonans. As of November 2018,

---

<sup>3</sup> Immigration and Naturalization Service, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999).

<sup>4</sup> Note: The following report is an example of the data that was collected and shared at the time the Field Guidance was written. Claudia Schlosberg et. al, National Immigration Law Center, *The Impact of INS Public Charge Determinations on Immigrant Access to Health Care* (1998) <https://www.montanaprobono.net/geo/search/download.67362>.

1,866,753 Arizona residents rely on Medicaid services.<sup>5</sup> Yet, under this proposed rule, immigrants who are eligible for Medicaid<sup>6</sup> and to whom the proposed rule would apply face having their use of Medicaid counted against them. This puts them in the untenable situation of having to choose between critical health coverage that keeps them healthy, and in some cases, alive, and being able to change their immigration status. The following persons would be particularly impacted by this proposed change:

### **1. Persons with Disabilities**

About one-third of adults under age 65 enrolled in Medicaid have a disability, compared with about 12 percent of adults in the general population.<sup>7</sup> Many of these individuals are eligible for Medicaid, and unable to obtain private insurance, precisely because of their disability. Medicaid is the *only* source for critical community living supports (like personal care services, nursing services, respite, intensive mental health services and employment supports) for people with disabilities; these community services are not generally available under private insurance. Many people with disabilities rely on Medicaid to live, work, attend school and participate in their communities. Because many critical disability services are only available through Medicaid, the proposed rule would prevent immigrants with disabilities from getting needed services that allow them to manage their medical conditions and participate in the workforce.

### **2. Seniors**

The number of seniors in the United States who are immigrants is growing. Between 1990 and 2010, the number of immigrants age 65 and older grew from 2.7

---

<sup>5</sup> Arizona Health Care Cost Containment System, *AHCCCS Population Highlights* (November 2018), <https://www.azahcccs.gov/Resources/Downloads/PopulationStatistics/2018/Nov/AHCCCSPopulationHighlights.pdf>.

<sup>6</sup> With certain, limited exceptions, immigrants are barred from obtaining Medicaid for five years after they obtain “qualified” status. 8 U.S.C. § 1613. This means, for example, that an immigrant must wait five years after becoming a lawful permanent resident before they are eligible to receive Medicaid benefits.

<sup>7</sup> See, e.g., Nationwide Adult Medicaid CAHPS, *Health Care Experiences of Adults with Disabilities Enrolled in Medicaid Only: Findings from a 2014-2015 Nationwide Survey of Medicaid Beneficiaries* (2016), <https://www.medicaid.gov/medicaid/quality-of-care/downloads/performance-measurement/namcahpsdisabilitybrief.pdf>.

million to nearly 5 million.<sup>8</sup> This is due in part to the rise in naturalized citizens who sponsor their parents to immigrate to the U.S. In fact, the number of parents of U.S. citizens who have been admitted as lawful permanent residents nearly tripled between 1994 and 2017; they now account for almost 15 percent of all admissions and almost 30 percent of family-based admissions.<sup>9</sup>

Over 1.1 million noncitizens age 62 and older live in households with low incomes,<sup>10</sup> meaning that public benefits programs likely play an important role in meeting their basic needs. Health care is particularly important for older adults. Nearly 7 million seniors 65 and older are enrolled in both Medicare and Medicaid, and 1 in 5 Medicare beneficiaries relies on Medicaid to help them pay for Medicare premiums and cost-sharing.<sup>11</sup> The proposed rule's targeting of Medicaid coverage as part of the public charge determination will risk older adults' ability to obtain services such as long-term care, home and community-based services, dental, transportation, and other services not covered by Medicare.

### 3. Pregnant Women and Children

Medicaid's impact is even more pronounced for pregnant women and children. Medicaid covers nearly half of all births in the U.S.<sup>12</sup> Pregnant women on Medicaid

---

<sup>8</sup> Jeanne Batalova, Migration Policy Institute, *Senior Immigrants in the United States* (2012), <https://www.migrationpolicy.org/article/senior-immigrants-united-states>.

<sup>9</sup> *Comparing* Dept. of Homeland Security, Office of Immigration Statistics, 2017 *Yearbook of Immigration Statistics*, Table 7, [www.dhs.gov/sites/default/files/publications/2016%20Yearbook%20of%20Immigration%20Statistics.pdf](http://www.dhs.gov/sites/default/files/publications/2016%20Yearbook%20of%20Immigration%20Statistics.pdf) with Immigration & Naturalization Service, Office of Policy & Planning, *Legal Immigration, Fiscal Year 1997*, Table 1, [www.dhs.gov/sites/default/files/publications/INS\\_Annual\\_Report\\_LegalImmigration\\_1997\\_1.pdf](http://www.dhs.gov/sites/default/files/publications/INS_Annual_Report_LegalImmigration_1997_1.pdf); see also Stacy Torres and Xuemei Cao, N.Y. Times, *The Immigrant Grandparents America Needs*, (Aug. 20, 2018), [www.nytimes.com/2018/08/20/opinion/family-immigration-grandparents.html](http://www.nytimes.com/2018/08/20/opinion/family-immigration-grandparents.html).

<sup>10</sup> Manatt Phelps & Philips LLP, *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard* (2018), <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population#DataDashboard>.

<sup>11</sup> Kaiser Family Foundation, *Medicaid Enrollment by Age*, [www.kff.org/medicaid/state-indicator/medicaid-enrollment-by-age/?dataView=1&currentTimeframe=0&sortModel=7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D](http://www.kff.org/medicaid/state-indicator/medicaid-enrollment-by-age/?dataView=1&currentTimeframe=0&sortModel=7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D).

<sup>12</sup> Kaiser Family Foundation, *Role of Medicaid for Women*, <https://www.kff.org/womens-health-policy/fact-sheet/medicaids-role-for-women/>.

receive vital prenatal care, labor and delivery services, and postnatal support for breastfeeding mothers. A child's well-being is inseparable from their parents' and family's well-being. Pregnant women who gained Medicaid coverage generated short- and long-term improvements in their children's health and well-being.<sup>13</sup> Prenatal Medicaid coverage leads to better health and socioeconomic mobility for children, allowing them to reduce their use of public benefits and to better contribute to society later in life. Furthermore, research shows that the more years a child is eligible for Medicaid as compared to being uninsured, the fewer hospitalizations they are likely to have as an adult.<sup>14</sup> These effects are due to Medicaid's nullification of the potential exposure to toxic stress, substandard health care, and other adverse experiences that can affect health later in life as a result of child poverty.<sup>15</sup>

## **B. The Children's Health Insurance Program ("CHIP")**

The proposed rule does not include CHIP in the public charge determination, but the Department has indicated that revisions may include it in the final rule. For many of the same reasons that the Institute opposes the inclusion of Medicaid, we adamantly oppose the possible inclusion of CHIP. CHIP is a program for working families who earn too much to be eligible for Medicaid without a share of cost. Making the receipt of CHIP a negative factor in the public charge assessment, or including it in the public charge definition, would extend the problematic reach of the proposed rule further to exclude moderate income working families and applicants likely to earn a moderate income at some point in the future.

Including CHIP in a public charge determination would likely lead to many eligible children foregoing health care benefits, both because of the direct inclusion in the public charge determination as well as the chilling effects detailed elsewhere in these

---

<sup>13</sup> Sarah Miller and Laura R. Wherry, *The Long-Term Effects of Early Life Medicaid Coverage* (Aug. 2015) [http://www-personal.umich.edu/~mille/MillerWherry\\_Prenatal2015.pdf](http://www-personal.umich.edu/~mille/MillerWherry_Prenatal2015.pdf).

<sup>14</sup> Julia Paradise, *Data Note: Three Findings about Access to Care and Health Outcomes in Medicaid*, Washington, DC: Kaiser Family Foundation (March 2017), <https://www.kff.org/medicaid/issue-brief/data-note-three-findings-about-access-to-care-and-health-outcomes-in-medicaid/>.

<sup>15</sup> Karina Wagerman et. al., *Medicaid Is A Smart Investment in Children* (Mar. 2017), <https://ccf.georgetown.edu/wp-content/uploads/2017/03/MedicaidSmartInvestment.pdf>.

comments. Nearly 9 million children across the U.S. depend on CHIP for health care.<sup>16</sup> Yet many eligible citizen children likely would forego CHIP – and health care services altogether – if their parents think receipt of CHIP coverage would subject someone in their family to a public charge determination.

In addition, the inclusion of CHIP in a public charge determination would be counter to Congress' explicit intent in expanding coverage to lawfully present children and pregnant women. Section 214 of the 2009 Children's Health Insurance Program Reauthorization Act ("CHIPRA") gave states a new option to cover under Medicaid and CHIP, with regular federal matching dollars, lawfully residing children and pregnant women during their first five years in the U.S. CHIPRA was enacted because Congress recognized the public health, economic, and social benefits of ensuring access to care. Lawfully present children and pregnant women receiving CHIP pursuant to CHIPRA would not be subject to a public charge determination if CHIP is excluded. However, this also points out another consequence of the proposed rule – Congress certainly did not intend to subject these individuals to a public charge determination, yet the proposed rule would subject some to a public charge determination and others not, determined solely by whether the individual is enrolled in Medicaid or CHIP.

Since its inception in 1997, CHIP has enjoyed broad, bipartisan support based on the recognition that children need access to health care services to ensure their healthy development. CHIP has been a significant factor in dramatically reducing the rate of uninsured children across the U.S. According to the Kaiser Family Foundation, between 1997 when CHIP was enacted, through 2012, the uninsured rate for children fell by half, from 14 percent to seven percent.<sup>17</sup> Medicaid and CHIP together have helped to reduce disparities in coverage that affect children, particularly children of color. A 2018 survey of the existing research noted that the availability of CHIP coverage for children has led to improvements in access to health care and to improvements in health over both the short-run and the long-run.<sup>18</sup>

---

<sup>16</sup> See Medicaid.gov, <https://www.medicaid.gov/chip/index.html>, based on 2017 Statistical Enrollment Report.

<sup>17</sup> Kaiser Family Foundation, *The Impact of the Children's Health Insurance Program (CHIP): What Does the Research Tell Us?*, <https://www.kff.org/medicaid/issue-brief/the-impact-of-the-childrens-health-insurance-program-chip-what-does-the-research-tell-us/>.

<sup>18</sup> *CHIP and Medicaid: Filling in the Gap in Children's Health Insurance Coverage*, Econofact 2018-01-22, <https://econofact.org/filling-in-the-gap-of-childrens-health-insurance-coverage-medicaid-and-chip>.

Continuous, consistent coverage without disruptions is especially critical for young children. Child health experts recommend 16 well-child visits (more heavily concentrated in the first two years) before the age of six to monitor development and address any concerns or delays as early as possible.<sup>19</sup> As noted by the Center for Children and Families, a child's experiences and environments early in life have a lasting impact on his or her development and life trajectory. The first months and years of a child's life are marked by rapid growth and brain development.<sup>20</sup>

The Department notes that the reason it does not include CHIP in the proposed rule is that CHIP does not involve the same level of expenditures as other programs that it proposes to consider in a public charge determination and that noncitizen participation is relatively low.<sup>21</sup> The question of which programs to include should not at all consider government expenditures. Whether or not there is a large government expenditure on a particular program is irrelevant to the assessment of whether a particular individual may become a public charge. A public charge determination must be an individualized assessment, as required by the Immigration and Nationality Act, and not a backdoor way to try to reduce government expenditures on programs duly enacted by Congress.

We believe the benefits of excluding CHIP and Medicaid certainly outweigh their inclusion in a public charge determination. We recommend that the Department continue to exclude CHIP from consideration in a public charge determination in the final rule but also exclude receipt of Medicaid for the same reasons.

### **C. Other Public Benefits**

Low-income immigrants will also be disproportionately impacted by the inclusion of other programs, including housing and food assistance, in the public charge test. Accessible and affordable housing is critical to helping many people live in the community; receipt of SNAP ensures children and adults eat nutritious food and reduces sickness in communities. Programs such as Section 8 rental assistance and SNAP help

---

<sup>19</sup> Elisabeth Wright Burak, Georgetown Center for Children and Families, *Promoting Young Children's Healthy Development in Medicaid and the Children's Health Insurance Program (CHIP)*, Oct. 2018, <https://ccf.georgetown.edu/wp-content/uploads/2018/10/Promoting-Healthy-Development-v5-1.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> 83 Fed. Reg. at 51174.

low-income immigrants meet their basic needs.<sup>22</sup> In Arizona, SNAP benefits reach approximately 919,000 low-income individuals,<sup>23</sup> and over 45,000 low-income households use federal rental assistance.<sup>24</sup> If immigrant families are afraid to access nutrition assistance programs, more people will be at risk of food insecurity. If immigrant families are afraid to seek housing assistance, they will live in substandard housing at a, often, higher cost and will have fewer resources to spend on other basic needs, including food, medicine, transportation, and clothing. In short, the proposed rule would cause significant hardship to immigrants.

The impact of the loss of critical food, health care, and housing assistances falls particularly hard upon the children in a family. Children in immigrant families are already more likely to face certain hardships and are already less likely to secure help, due in part to complex eligibility rules that create barriers for immigrant families.<sup>25</sup> Research shows that not having the essentials of food, shelter, and health care can have life-long, irreparable negative impacts on developing children.<sup>26</sup> In addition, the constant

---

<sup>22</sup> See Justice in Aging, *Supporting Older Americans' Basic Needs: Health Care, Income, Housing and Food* (2018), [www.justiceinaging.org/wp-content/uploads/2018/04/Supporting-Older-Americans%E2%80%99-Basic-Needs\\_Health-Care-Income-Housing-and-Food.pdf](http://www.justiceinaging.org/wp-content/uploads/2018/04/Supporting-Older-Americans%E2%80%99-Basic-Needs_Health-Care-Income-Housing-and-Food.pdf).

<sup>23</sup> Center on Budget and Policy Priorities, *A Closer Look at Who Benefits from SNAP: State-by-State Fact Sheets* (Dec. 3, 2018), <https://www.cbpp.org/research/a-closer-look-at-who-benefits-from-snap-state-by-state-fact-sheets#Arizona>.

<sup>24</sup> Center on Budget and Policy Priorities, *Arizona: Fact Sheet: Federal Rental Assistance* (Mar. 30, 2017), <https://www.cbpp.org/sites/default/files/atoms/files/4-13-11hou-AZ.pdf>.

<sup>25</sup> Tanya Broder, Avidah Moussavian, & Jonathan Blazer, National Immigration Law Center, *Overview of Immigrant Eligibility for Federal Programs* (2015), <https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/>; Kinsey Alden Dinan, National Center for Children in Poverty, *Federal Policies Restrict Immigrant Children's Access to Key Public Benefits*, (2005), [http://www.nccp.org/publications/pdf/text\\_638.pdf](http://www.nccp.org/publications/pdf/text_638.pdf).

<sup>26</sup> See, e.g., Food Res. Action Ctr., *The Impact of Poverty, Food Insecurity, and Poor Nutrition of Health and Well-Being* (2017), <http://frac.org/wp-content/uploads/hunger-health-impact-poverty-food-insecurity-health-well-being.pdf>; Kate Marcal & Patrick J. Fowler, Center for Social Development, *Housing and Child Well-Being* (2015), <https://csd.wustl.edu/Publications/Documents/RB15-40.pdf>; David Murphey, Child Trends, *Health Insurance Coverage Improves Child Well-Being* (May 12, 2017), <https://www.childtrends.org/publications/health-insurance-coverage-improves-child-well>.

stress of struggling to access basic needs can be toxic to young brains and bodies.<sup>27</sup> Moreover, parents' stress and consequent health challenges impede effective caregiving and can undermine children's development. Therefore, we strongly oppose the consideration of other public benefit programs in the public charge determination.

Finally, the proposed rule ignores the positive impact of public benefits in facilitating economic self-sufficiency. There is lots of research demonstrating positive long-term effects of receipt of many of the benefits that are included in the public charge determination, including SNAP and Medicaid. In particular, the use of these benefits often enables workers (especially those in the low-wage workforce) to remain employed.<sup>28</sup> This is because it is difficult, if not impossible, for low-income immigrants working in such jobs to support themselves and their families on their wages alone. Discouraging the receipt of these benefits would be especially problematic for working persons whose employment may already be destabilized by discrimination, harassment, domestic violence, or caregiving responsibilities.

#### **IV. The Proposed Rule's Use of Income Standards Is Arbitrary, Unreasonable, and Will Impact Low-Income Workers Who Are Disproportionately Women**

The Department proposes to treat income below 125 percent of the federal poverty guidelines ("FPL") for the applicable household size as a negative factor in the public charge determination test. Conversely, the rule proposes that income above 250 percent of the FPL be counted as a heavily weighed positive factor. We strongly oppose the use of these arbitrary and unreasonable thresholds. No statutory basis exists for either threshold, and the statement that 125 percent of the FPL has long served as a "touchpoint" for public charge inadmissibility determinations is misleading and incorrect. Even less justification is offered for the 250 percent of FPL threshold. A standard of 250

---

<sup>27</sup> See, e.g., Priyanka Boghani, Frontline, *How Poverty Can Follow Children Into Adulthood* (Nov. 22, 2017), <https://www.pbs.org/wgbh/frontline/article/how-poverty-can-follow-children-into-adulthood/>.

<sup>28</sup> See, e.g., Matthew Desmond & Carl Gershenson, Social Problems, *Housing and Employment Insecurity among the Working Poor* (2016), <https://scholar.harvard.edu/files/mdesmond/files/desmondgershenson.sp2016.pdf?m=1452638824>; Nat'l Women's Law Ctr., *Medicaid Is Vital for Women's Jobs in Every Community* (2017), <https://nwlc.org/resources/medicaid-is-vital-for-womens-jobs-in-every-community/>; Ctr. On Budget & Pol'y Priorities, *Chart Book: The Far-Reaching Benefits of the Affordable Care Act's Medicaid Expansion* (2018), <https://www.cbpp.org/research/health/chart-book-the-far-reaching-benefits-of-the-affordable-care-acts-medicaid>.

percent of the FPL is nearly \$63,000 a year for a family of four – more than the median household income in the U.S.<sup>29</sup> A single individual who works full-time year round – who does not miss a single day of work due to illness or inclement weather – but is paid the federal minimum wage would fail to achieve the 125 percent of FPL threshold. Under Arizona’s current minimum wage of \$10.50 per hour, most immigrant households with minor children would fail to meet this threshold. These clearly are not the people that Congress envisioned when they directed the Department to deny permanent status to those at risk of becoming a public charge.

Moreover, these arbitrary income standards will make it more likely that women will receive a negative assessment than men. Among recent lawful permanent residents, 65 percent of women had incomes less than 125 percent of the FPL.<sup>30</sup> Approximately two-fifths of immigrant women are low-wage workers and are overrepresented in low-wage occupations such as domestic work, retail, personal care aides, and nursing, psychiatric, and home health aides.<sup>31</sup>

#### **V. The Proposed Rule’s Consideration of Education, Skills, and English Proficiency will Disparately Impact Low-Income Immigrants and Immigrants of Color**

The Department’s proposal to consider whether an applicant has a high school diploma and other skills will make the prospects of lawful permanent residency more difficult for immigrants. While there is variation in educational attainment among countries of origin, immigrants from certain countries such as Mexico, El Salvador, and China are less likely to have completed high school, and are therefore less likely to be

---

<sup>29</sup> U.S. Census, *Income and Poverty in the United States: 2017*, <https://www.census.gov/library/publications/2018/demo/p60-263.html>.

<sup>30</sup> Migration Policy Institute, *Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration* (Nov. 2018), <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>.

<sup>31</sup> American Immigration Council, *The Impact of Immigrant Women on America’s Labor Force* (Mar. 2017), <https://www.americanimmigrationcouncil.org/research/impact-immigrant-women-americas-labor-force>.

able to overcome a negative assessment based on this factor.<sup>32</sup> In Arizona, 56.1 percent of immigrants list Mexico as their country of origin.<sup>33</sup>

In addition to specific education and skills, the Department proposes, for the first time, to add English proficiency as a weighed factor. This poorly justified addition disproportionately harms immigrants with limited English proficiency. We believe the presence of any person in this country, regardless of their English skills, is not a burden but rather a contribution to the vibrant and rich landscape that makes up this nation.

The current public charge rule does not include English proficiency as a factor to be considered in an individual's assessment and the Department offers a limited, yet erroneous number of justifications for its proposal to add English proficiency to the list of factors. For example, the Department states that those who cannot "speak English may be unable to obtain employment in areas where only English is spoken." First, we know of no place in the United States where only English is spoken. If any exist, there are few and away from metropolitan areas like New York, Chicago, Los Angeles, Houston, and Phoenix. There is a significant difference between English proficiency and having no ability to speak the language, which the Department appears to conflate here. Second, the Department conflates English proficiency and the ability to work with no support. Many individuals have limited, but some English proficiency, and are able to fulfill the full range of employment roles. Thus, a person who speaks a non-English language can meaningfully contribute both in employment and civic society, and we strongly oppose the consideration of English proficiency in the proposed rule.

The proposed rule stands in stark contrast to federal civil rights laws prohibiting discrimination on the basis of English proficiency. Our country does not have a national language, and there is no law that allows the federal government to prefer those who speak English over those who are limited English proficient ("LEP"). In contrast to this proposal, numerous federal civil rights laws protect LEP persons from discrimination on the basis of English proficiency. Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.<sup>34</sup> Title VII of the Civil Rights Act prohibits discrimination in

---

<sup>32</sup> *Id.*

<sup>33</sup> American Immigration Council, *Immigrants in Arizona* (Oct. 4, 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants\\_in\\_arizona.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_arizona.pdf).

<sup>34</sup> 42 U.S.C. § 2000d.

employment on the basis of race, color, national origin, sex, or religion.<sup>35</sup> In addition, the Affordable Care Act's nondiscrimination provision prohibits discrimination on the basis of race, color, national origin, sex, disability, and age, in health care.<sup>36</sup> The Supreme Court has interpreted that discrimination on the basis of language or English proficiency is a form of national origin discrimination.<sup>37</sup> These protections are also embedded in Executive Order 13166, which provides that all LEP persons should have meaningful access to federally conducted and federally funded programs and activities and directs federal agencies to ensure they are in compliance.<sup>38</sup>

Further, the proposed rule would have a disproportionate impact on people of color. Approximately 25.9 million people, or an estimated 8 percent of the U.S. population, would potentially be impacted.<sup>39</sup> While people of color account for approximately 36 percent of the total U.S. population, of the 25.9 million people who would potentially be impacted by the proposed rule, approximately 90 percent are people from communities of color (23.2 million). Among people of color who could potentially be affected by the rule, an estimated 70 percent are Latino (18.3 million), 12 percent are Asian American and Pacific Islander (3.2 million), and 7 percent are African American (1.8 million). To put this in perspective, among all people of color in this country, approximately 33 percent of Latinos, 17 percent of Asian Americans and Pacific Islanders, and 4 percent of African American people would potentially be impacted by

---

<sup>35</sup> 42 U.S.C. § 2000e.

<sup>36</sup> 42 U.S.C. § 18116.

<sup>37</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>38</sup> Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency* (Aug. 11, 2000), <https://www.gpo.gov/fdsys/pkg/FR-2000-08-16/pdf/00-20938.pdf>.

<sup>39</sup> This number represents individuals and family members with at least one non-citizen in the household and who live in households with earned incomes under 250 percent of the federal poverty level. Custom Tabulation by Manatt Phelps & Philips LLP, *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard* (2018), [https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population\\_\(using\\_2012-2016\\_5-Year\\_American\\_Community\\_Survey\\_Public\\_Use\\_Microdata\\_Sample\\_\(ACS/PUMS\);\\_20122016\\_5-Year\\_American\\_Community\\_Survey\\_\(ACS\)\\_estimates\\_accessed\\_via\\_American\\_FactFinder;\\_Missouri\\_Census\\_Data\\_Center\\_\(MCDC\)\\_MABLE\\_PUMA-County\\_Crosswalk\)](https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population_(using_2012-2016_5-Year_American_Community_Survey_Public_Use_Microdata_Sample_(ACS/PUMS);_20122016_5-Year_American_Community_Survey_(ACS)_estimates_accessed_via_American_FactFinder;_Missouri_Census_Data_Center_(MCDC)_MABLE_PUMA-County_Crosswalk)).

the proposed rule.<sup>40</sup> This is a huge concern in Arizona, which has a large Latino community. As of the 2016 Census, 31.4 percent of Arizonans identify as Latino.<sup>41</sup>

## **VI. The Proposed Rule Would Have a Chilling Effect**

If finalized, the proposed rule will make - and has already made - immigrant families afraid to seek out and utilize programs that support their basic needs. In the current climate of hostility towards immigrants, immigrant families have already begun foregoing critical services and benefits. Health and nutrition service providers noticed an increase in canceled appointments and requests to disenroll from means-tested programs in 2017.<sup>42</sup> Researchers also found that early childhood education programs reported drops in attendance and applications, reduced participation from immigrant parents in classrooms and at events, and an uptick in missed appointments at health clinics.<sup>43</sup>

Disincentivizing the use of the public benefits cited in the proposed rule will likely have a further chilling effect upon the use of other critical benefits by immigrant families. This “chilling effect,” which causes families to withdraw from a wide variety of benefits programs due to fear, has already resulted from draft versions of the proposed rule being leaked to the press prior to its publication.<sup>44</sup> The fear created by these proposed rules, moreover, would extend far beyond any individual who may be subject to the public

---

<sup>40</sup> *Id.*

<sup>41</sup> United States Census Bureau, *Quick Facts Arizona* (2016), <https://www.census.gov/quickfacts/az>.

<sup>42</sup> Jennifer Laird et al., Columbia Population Research Center, *Foregoing Food Assistance Out of Fear Changes to “Public Charge” Rule May Put 500,000 More U.S. Citizen Children at Risk of Moving into Poverty* (2018), [https://static1.squarespace.com/static/5743308460b5e922a25a6dc7/t/5af1a2b28a922db742154bbe/1525785266892/Poverty+and+Social+Policy+Brief\\_2\\_2.pdf](https://static1.squarespace.com/static/5743308460b5e922a25a6dc7/t/5af1a2b28a922db742154bbe/1525785266892/Poverty+and+Social+Policy+Brief_2_2.pdf).

<sup>43</sup> Hannah Matthews et al., The Center for Law and Social Policy, *Immigration Policy’s Harmful Impacts on Early Care and Education* (2018), [https://www.clasp.org/sites/default/files/publications/2018/03/2018\\_harmfulimpactsece.pdf](https://www.clasp.org/sites/default/files/publications/2018/03/2018_harmfulimpactsece.pdf).

<sup>44</sup> Leaked versions of drafts of the public charge expansion rule earlier in the year have had a demonstrable chilling effect on immigrants’ use of WIC benefits, for example, resulting in vulnerable women and children foregoing essential nutrition assistance. *See, e.g.,* Helena Bottemiller Ulrich, Politico, *Immigrants, Fearing Trump Crackdown, Drop Out of Nutrition Programs* (Sept. 3, 2018), <https://www.politico.com/story/2018/09/03/immigrants-nutrition-food-trump-crackdown-806292>.

Samantha Deshommes  
December 10, 2018  
Page 16

charge determination, harming entire families, their communities, and the infrastructure that serves all of us, such as schools, hospitals and clinics.

If finalized, the proposed rule would only make things worse for immigrants in precarious economic circumstances and their families by discouraging them from using the programs for which they are eligible, and preventing access to essential health care, healthy and nutritious food, and decent housing. It would increase poverty, hunger, poor health and unstable housing by discouraging enrollment in programs that have profound consequences for families' well-being and long-term success.

### **Conclusion**

The Department's proposals are a drastic change from current policy. The proposed rule is arbitrary, discriminatory and inconsistent with fundamental American principles. For the reasons above, we urge that the Department withdraw this proposed rule.

Please feel free to contact us with any questions about these comments, or for additional information.

Sincerely,

/s/Brenda Muñoz Furnish  
Brenda Muñoz Furnish  
Staff Attorney