FELDESMAN + TUCKER + LEIFER + FIDELL LLP
1129 20th Street, NW
Suite 400
Washington, DC 20036
T. 202.466.8960
F. 202.293.8103
www.ftlf.com

Phillip A. Escoriaza PEscoriaza@FTLF.com
April 22, 2022

The Hon. Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
5900 Capital Gateway Dr.
Camp Springs, MD 20746

Re: DHS Docket No. USCIS-2021-0013, Comments to *Notice of Proposed Rulemaking, Public Charge Ground of Inadmissibility*, 87 Fed. Reg. 10570 (Feb. 24, 2022)

Dear Secretary Mayorkas:

The individuals who have signed this public comment are Deans, Department chairs, and scholars at many of the nation's leading schools of public health and public policy. Among the signers are individuals known both nationally and internationally for their expertise in health policy, including policies affecting U.S. immigrants. Numerous signers have devoted much of their careers to academic scholarship related to policies affecting immigrants and the communities in which immigrants live. We are copying this letter to Assistant Secretary Rena Bitter of the Bureau of Consular Affairs at the U.S. Department of State, so they are aware of these discussions about public charge policy and can make similar modifications to the policies used by consular officials in reviewing applications outside the United States.

We write in support of DHS's proposal to adopt an approach to the question of who can be considered a public charge that differs fundamentally from the policies previously in place under the now-vacated 2019 Final Rule.[1] Since that rule was vacated, DHS has reverted to guidelines that had been effective since 1999,[2] which the 2019 rule had sought to replace. Your agency's proposed rules would restore a degree of certainty to U.S. law governing the definition of public charge and the process for making public charge determinations at the point of adjustment to permanent legal status. This step is urgently needed if the nation is to begin to repair the considerable damage done by the 2019 rule, to reduce the unnecessary and harmful "chilling effect" of its policies and to improve immigrants' ability to make economic progress and contribute to the United States.

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[1] DEPT. OF HOMELAND SECURITY, *Final Rule, Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292 (Aug. 14, 2019), as amended, *Inadmissibility on Public Charge Grounds, Correction*, 84 Fed. Reg. 52357 (Oct. 2, 2019).
[2] DEPT. OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (eff. May 21, 1999).

The 2019 Rule

DHS rightfully reviews in considerable detail the factual and legal bases for its decision to adopt a new approach to public charge determinations, which so decisively moves away from its recent predecessor.

The 2019 rule did nothing less than weaponize U.S. immigration law. In doing so, the rule turned longstanding immigration policy on its head, reversing this nation's fundamental interest in lawful immigration, as evidenced by policies and practices spanning many decades.[3] Indeed, the critical assumptions that underlay the 2019 rule – that legal immigrants are a detriment to American society rather than one of our greatest assets – provided the foundation for a rule that used the threat of reprisal as a means for forcing millions of immigrants to forgo essential government services for which they are eligible, not only for themselves but their families as well. Furthermore, the prior administration pursued this punitive approach in the middle of the worst global health pandemic in over a century, a decision that ultimately threatened the health of entire communities. Your agency now readily admits its error, but at the time it adopted the prior rule, DHS went so far as to deny responsibility for the health impact of its rule and to assert that immigrants who were forced to forgo vital services out of fear of the consequences simply were making a personal choice. This refusal to consider and weigh the consequences of agency action represented a complete departure from established administrative law principles.

The 2019 rule adopted several strategies to achieve its basic aim of driving legal immigrants from public programs available to them. First, the regulation dramatically broadened the classes of public benefits the use of which could trigger a public charge determination; DHS did so by extending the definition of public benefits to encompass most forms of Medicaid, Supplemental Nutrition Assistance Program ("SNAP") benefits, and public housing. The 1999 policy had considered these benefits as supplemental services rather than as evidence of dependence on the government for subsistence. As important as food, health care, and housing are, they cannot substitute for basic income. Thus, the 1999 policy confined the scope of public benefits to dependence on cash welfare assistance or institutionalization at government expense.

Second, the 2019 rule introduced a durational test for measuring dependence on the unprecedented, expanded set of benefits: 12 benefit months out of the preceding 36 months, with benefits stacked, and with even discrete use of benefits exponentially elevating the risk of a public charge determination.

Third, the rule penalized the mere application for benefits, with no safe harbor to exempt applications filed on behalf of an eligible family member, such as a citizen child, not covered by the public charge test.

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[3] Torrie Hester *et al.*, *Historian's Comment, DHS Notice of Proposed Rule "Inadmissibility on Public Charge Grounds" FR 2018-21106 (Oct. 5, 2018)* (Oct. 25, 2018), https://www.ilcm.org/wp-content/uploads/2018/10/Historians-comment-FR-2018-21106.pdf.

Fourth, the 2019 rule replaced the flexible "totality of circumstances" test used in public charge determinations with a rigid formula that required immigration officials to treat as "highly negative factors" low family income, limited formal education, speaking a primary language other than English, the presence of health conditions, and one's age as a child or an older adult. Over centuries, immigrants have arrived at our shores to build new and productive lives. They were likely to arrive speaking a language other than English, and, like many of the signatories to this public comment, many necessarily arrived with parents or children.

In all respects, the 2019 rule stood as a direct refutation of generations of immigrants who built this nation.

The NPRM

It is not enough that the 2019 rule was eliminated or that the 1999 standard was reinstated. A strong, new set of policies is essential if the nation is to begin to rectify the harm to legal immigrants and their families, as well as to entire communities – brought about by the 2019 rule. The proposed rule, in our view, represents an important effort to advance the national interest in a legal immigration policy that strengthens our social and economic base, as well as promote our overarching interest in protecting the public health and welfare. Any new public charge standard must advance America's goal of promoting a policy that ensures that legal immigrants who become permanent U.S. residents will contribute meaningfully to the national health and well-being. At the same time, the rule must advance our collective interest in ensuring that people have access to essential health care, nutrition, housing, and other public health services the government offers because of their strong association with individual, family, and ultimately, national health. In its discussion of the broader foundations on which the proposed rule rests, DHS acknowledges the crucial balancing test on which its proposal rests.

DHS also rightfully acknowledges how far astray its previous policy went from this balance, and its own statistics show how ineffectual the 2019 rule was in its misbegotten mission to root out people considered to be public charges. Indeed, as the evidence shows, the 2019 rule succeeded in rooting out virtually no evidence of governmental dependence. Indeed, the evidence reflects what research has long revealed about immigrants. During the year that the 2019 rule was in effect, the agency received 47,555 applications from covered individuals, yet issued only 3 denials of adjustment of status (which subsequently were reopened and approved), as well as two Notices of Intent to Deny (which later were rescinded, with approval of the applications in question).[4] Far from uncovering large patterns of immigrant dependence on means-tested public benefits, implementation of the rule identified no such cases.

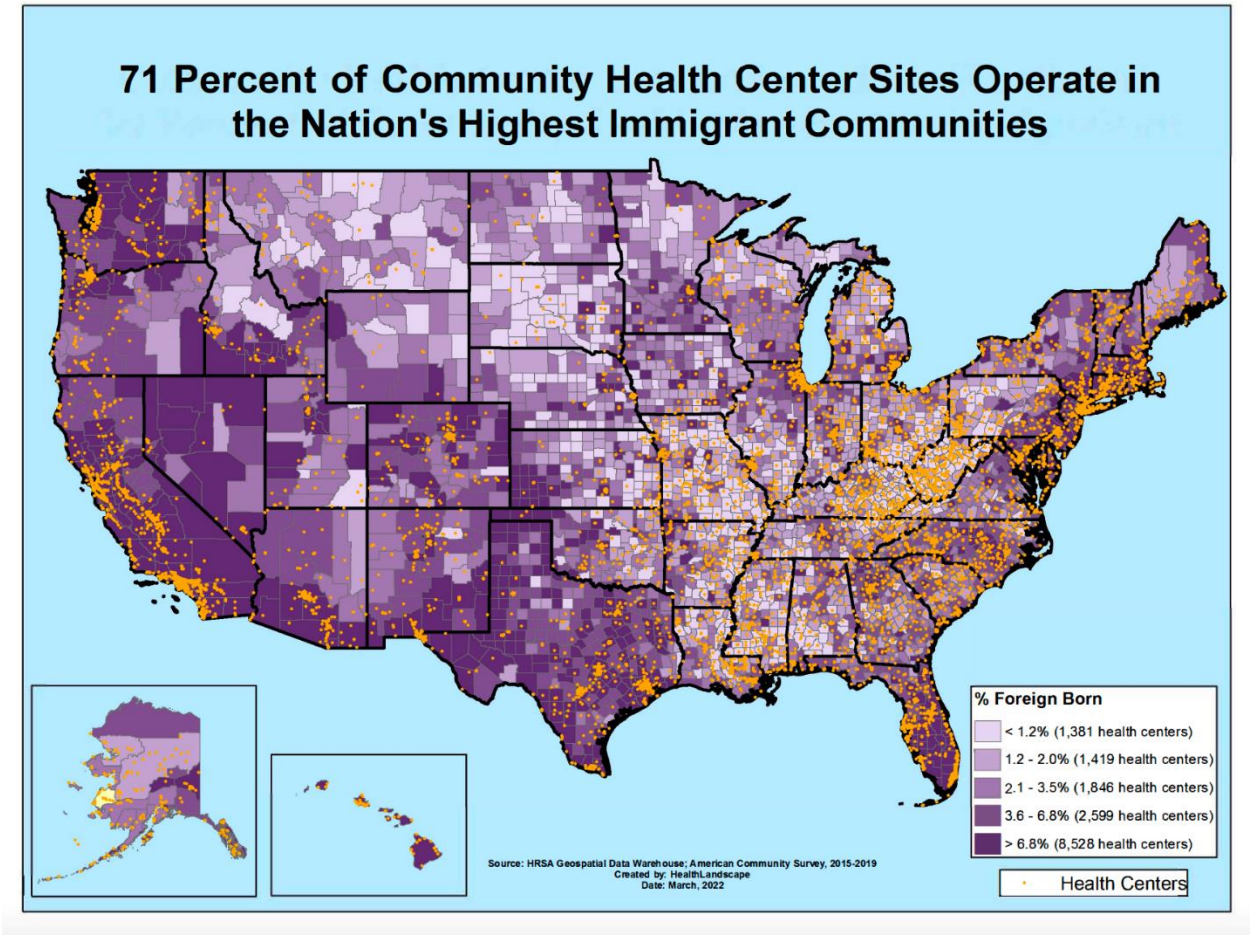
The importance of the Department's proposed rule extends beyond those directly affected who seek adjustment in status. There is substantial evidence (included in the preamble to the proposed rule) that the 2019 rule also harmed members of immigrants' families, many of

[4] 87 Fed. Reg. 10570, 10607 (Feb. 24, 2022).

whom are U.S. citizens or already are legal permanent residents ("green card" holders). The repercussions extended to all residents in communities with high-immigrant density, as well as the public health programs and providers charged with promoting health and preventing disease in their midst. Dr. Mitchell Katz, who has directed health agencies for New York City and Los Angeles and is a foremost authority on public health and health care systems anticipated that the "public charge provision could decrease access to medical care and worsen the health of individuals, threaten public health, and undercut the viability of the health care system."[5] It is these providers, as revealed in multiple judicial challenges brought against the 2019 rule, and whose impact evidence was summarized in the NPRM, that directly bore the brunt of the rule's misguided approach.

Community health centers, whose experiences figure prominently in DHS's discussion of the 2019 rule's impact, offer a case in point. As the figure below illustrates, in 2022, over half of all community health center service locations (8,528 service locations out of a total of 15,773 sites) are found in communities that are among the nation's top quintile in terms of the percentage of foreign-born residents. The 2019 rule had a measurable effect on the extent to which immigrant patients declined seeking care or maintaining Medicaid enrollment despite the urgency of care and treatment during the pandemic. The rule also significantly affected health centers' ability to care for immigrants and their families, with spillover implications for all residents of their service areas. The proposed rule, once finalized, will enable community health centers and other trusted community providers and programs to begin the critical work of restoring a greater level of willingness among immigrants to use services essential to health, both their own and others'.

[5] Katz M. & Chokshi D., *The "Public Charge" Proposal and Public Health: Implications for Patients and Clinicians*, 320 J. AM. MED. ASSOC. 20 (Nov. 27, 2018) at 2075-2076.



Source: Sara Rosenbaum, Peter Shin, Jessica Sharac & Feygele Jacobs, *What is at Stake for Community Health Centers and the Communities They Serve under the Biden Administration's Proposed Public Charge Rule?,* GEO. WASH. HEALTH POL'Y & MGM'T MATTERS (Mar. 23, 2022), http://gwhpmmatters.com/what-stake-community-health-centers-and-communities-they-serve-under-biden-administrations-proposed.

The proposed rule will lay the groundwork for a national effort to rebalance immigration and public health policy and help advance our economic health as a country. Extensive research has documented immigrants' economic contribution to American society, their strong record of upward mobility over time, and their particularly strong value in an aging nation facing a considerable workforce shortage.[6] Research examining the economic contributions of immigrants and their upward mobility finds that immigrants are overrepresented among small business owners, representing 28 percent of "Main Street" businesses – retail, food services, and neighborhood services – compared to 16 percent of the labor force and 13 percent of the population.[7] Immigrants are 80 percent more likely than native-born people to start a business

[6] Blau, F.D. & Mackie,C., eds., *The Economic and Fiscal Consequences of Immigration,* NATIONAL ACADEMY OF SCIENCES (2017).

[7] AMERICAS SOCIETY/COUNCIL OF THE AMERICAS & FISCAL POLICY INSTITUTE, *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 14, 2015), https://www.as-coa.org/articles/bringing-vitality-main-street-how-immigrant-small-businesses-help-local-economies-grow#:~:text=This%20report%20by%20Americas%20Society,to%20neighborhood%20growth%20and%20vitality.

and their businesses create more jobs than those established by native-born Americans.[8] They are more likely to work non-traditional hours[9] and are more likely to take on high-risk work.[10] In fact, proper functioning of the nation's health care system would be impossible without immigrants. One study showed that 17.3 percent of all health care professionals were born outside the U.S.; further, non-U.S.-born professionals worked more hours, were more likely to work at night and in institutional and in-home long-term care settings, and were more likely to reside in medically underserved communities.[11]

A new study[12] prepared by researchers at The George Washington University, Milken Institute School of Public Health, adds to the evidence of immigrants' upward mobility and declining need for benefits over time. The study employed data from the 2020 *American Community Survey* and found that, although immigrants age 25 tend to have lower incomes than their U.S.-born peers when they first arrive in the country, their hard work and ability to assimilate into the economic mainstream leads them to catch up, often surpass their U.S.-born peers, and generally reach incomes well above the poverty line. This study also used longitudinal data from the 2014-2017 *Survey of Income and Program Participation* (SIPP) to find that immigrants are far less likely than similar U.S.-born adults to use benefits, including Temporary Assistance to Needy Families (TANF), Supplemental Security Income (SSI), Medicaid, and SNAP. Even among adults that receive assistance, immigrants transitioned off the programs faster than U.S.-born adults. Only 0.6 percent of low-income immigrant adults received TANF in 2014, less than half the level of similar U.S.-born citizens (1.4 percent). Moreover, virtually no immigrants continued to use TANF in the following three years. Similarly, only 0.8 percent of low-income immigrant adults received SSI in 2014, compared to 7 percent of U.S.-born low-income adults; also, immigrants' use of SSI benefits in the next three years declined much faster than citizens' use. This evidence underscores the very minimal use of means-tested cash assistance among immigrant workers. More importantly, the data about income growth and waning use of public benefits among immigrants demonstrate the fallacy of relying on past (or even current) use of cash subsistence benefits to make predictions on whether an individual is "likely at any time to

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[8] Pierre Azoulay *et al.*, *Immigration and Entrepreneurship in the United States (Working Paper 27778)*, NATL. BUREAU OF ECON. RESEARCH (Sept. 2020), https://www.nber.org/papers/w27778.

[9] NEW AMERICAN ECONOMY RESEARCH FUND, *On the Clock: How Immigrants Fill Gaps in the Labor Market by Working Nontraditional Hours* (July 11, 2017), https://research.newamericaneconomy.org/report/on-the-clock-how-immigrants-fill-gaps-in-the-labor-market-by-working-nontraditional-hours/#:~:text=The%20report%2C%20On%20the%20Clock,than%20similar%20U.S.%2Dborn%20workers.

[10] Pia M. Orrenius & Madeline Zavodny, *Do immigrants work in riskier jobs?*, 46 DEMOGRAPHY 3 (Aug. 2009), at 535-51, https://pubmed.ncbi.nlm.nih.gov/19771943/#:~:text=The%20results%20indicate%20that%20immigrants,language%20ability%20and%20educational%20attainment.

[11] Yvonne Commodore-Mensah *et al*., *Prevalence and Characteristics of Non-U.S.-Born and U.S.-Born Health Care Professionals, 2010-2018*, 4 JAMA NETWORK OPEN 4 (April 29, 2021), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2779302#:~:text=Approximately%201%20in%203%20physicians,CI%2C%209.5%2D10.8).

[12] Ku, L. & Brantley, E., *Immigrants' Progress: Changes in Public Charge Policies Can Promote The Economic Mobility of Immigrants and Their Contribution to the U.S. Economy*, SOCIAL SCIENCE RESEARCH NETWORK (Apr. 18, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4086782.

become a public charge." Past use of benefits appears to be of virtually no value in predicting the future.

Bearing the above considerations in mind, we submit the comments that follow.

Comments in Response to the NPRM

Consideration of the Five Statutory Factors:

"DHS requests public comments on how each of the statutory minimum factors should be considered in the totality of the circumstances in a public charge inadmissibility determination." 87 Fed. Reg. 10617.

We agree with the view of various organizations on record that the five statutory factors and the totality of circumstances test were not intended to be a list of negative and positive factors to be weighed individually. For instance, in *New York v. Department of Homeland Security*,[13] the Second Circuit reviewed judicial and administrative decisions that addressed the public charge ground of inadmissibility from 1922 onward. These decisions in turn informed passage of the *Illegal Immigration Reform and Immigrant Responsibility Act* ("IIRIRA"),[14] where Congress incorporated the five statutory factors to the public charge inquiry. Notably, the majority of those cases found that immigrants were not excludable upon consideration of one or more of the factors in the totality of the circumstances.

In explaining the "settled meaning of 'public charge,'" the Second Circuit stated that "…our review of the historical administrative and judicial interpretations of the ground over the years leaves us convinced that there was a settled meaning of 'public charge' well before Congress enacted IIRIRA. The absolute bulk of the caselaw, from the Supreme Court, the circuit courts, and the BIA interprets 'public charge' to mean a person who is unable to support herself, either through work, savings, or family ties…. Indeed, we think this interpretation was established early enough that it was ratified by Congress in the INA of 1952. But the subsequent and consistent administrative interpretations of the term from the 1960s and 1970s remove any doubt that it was adopted by Congress in IIRIRA." *Id*. at 71 (internal citations omitted).

Consequently, the five factors should be considered as exculpatory or mitigating elements in the analysis that help an applicant overcome any adverse public charge issues. None of the factors should be treated as individual barriers applicants must overcome in succession. Thus, in the event one or more of the five statutory factors tends to weigh against an individual's admissibility, adjudicators should be directed to look at all factors holistically, consistent with the settled meaning of public charge and, on balance, give due weight to all circumstances that demonstrate an individual would not be excludable as a public charge.

[13] 969 F.3d 42, 67, 71 (2d Cir. 2020), n.22 and accompanying text.
[14] Pub. L. 104-208, div. C, 110 Stat. 3009-546 (1996).

Consideration of the Affidavit of Support:

"**DHS welcomes public comments or data regarding the connection between being a sponsored noncitizen who has submitted a sufficient affidavit of support under section 213A of the INA and the likelihood of being primarily dependent on the government for subsistence. Current/Past receipt of public benefits." 87 Fed. Reg. 10619.**

A sufficient affidavit of support under Section 213A of the INA should create a presumption that the sponsored noncitizen is unlikely to become a public charge as they would not be primarily dependent on the government for subsistence. Indeed the *USCIS Policy Manual* explains that certain individuals "are inadmissible as likely to become a public charge unless they submit an Affidavit of Support (Form I-864) with their adjustment application."[15] Likewise, the current Department of State's *Foreign Affairs Manual* instructs consular officials that "[a] properly filed, non-fraudulent Form I-864 [the Affidavit of Support], should normally be considered sufficient to satisfy" the public charge determination.[16]

A presumption for admissibility upon presentation of a valid affidavit of support would be an administratively neutral, straightforward approach. To ensure fair, effective consideration of the affidavit of support consistent with its statutory purpose in Section 213A of the INA, adjudicators should be instructed to review the Form I-864 solely for compliance with the form's objective criteria, refraining from questioning sponsors' motivations or commitment. This approach would be consistent with, for instance, State's guidance to consular officials that "…the intent of a qualified sponsor to actually provide support is not a factor, if the person meets the definition of a sponsor and has verifiable resources, because the affidavit is enforceable regardless of the sponsor's actual intent. Consequently, you should not consider sponsor intent, unless there are significant public charge concerns relating to the specific case…."[17]

The Effects of Public Charge Policy on Children:

"DHS also notes that it remains particularly concerned about the potential effects of public charge policy on children, including children in mixed-status households. DHS welcomes public comments on ways to mitigate unintended adverse impacts on children, while remaining faithful to the public charge statute, which does not contain an exemption for children and requires consideration of age." 87 Fed. Reg. 10611.

While the statute requires DHS to consider age among the public charge factors, it does not limit DHS's discretion to take notice of the fact that minors are not expected to support themselves and have no control over life's fundamental matters or decisions others make on behalf of children about travel, housing, health and nutrition, education or financial resources.

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[15] DEPT. OF HOMELAND SECURITY, *USCIS Policy Manual,* Vol. 7 (Adjustment of Status), Ch. 6 (Adjudicative Review), § D.2, https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-6.

[16] DEPARTMENT OF STATE, *Foreign Affairs Manual*, 9 FAM 302.8(U) (Effect of Form I-864 on Public Charge Determinations), https://fam.state.gov/FAM/09FAM/09FAM030208.html.

[17] *Id*.

In view of the value of children to any society, and inasmuch as children have strong prospects for integrating successfully into society, age should be a positive factor in the totality of circumstances analysis of their admissibility. We urge DHS to implement adequate safeguards to ensure public charge determinations do not penalize children, regardless of immigration status or whether they live in mixed-status households, solely on account of their age. DHS is rightfully concerned about the status of immigrant children in mixed status families. Because of policies like public charge and other policies that affect immigrants, researchers have shown that non-citizen children fare much worse than their U.S.-born siblings in terms of access to health care.[18]

In order to minimize the chilling effect on access to child-specific benefits by children (whether U.S. citizen or noncitizen), DHS policy should reflect an understanding that the receipt of public benefits during periods when children are vulnerable and economically needy are economically and socially helpful for their development. For example, research has shown that childhood receipt of insurance contributes to healthier adults with better employment outcomes.[19] Similarly, research has shown that alleviating childhood poverty, through programs like TANF and SNAP, can improve the lives of children and lead to better health, social and economic outcomes.[20]

The nation is strengthened when it helps all children grow up healthy. Indeed, in many cases, lawmakers have expressly designed governmental benefit programs to encourage all eligible families to embrace services for their children, not flee them in fear. Consider, for example, Express Lane Eligibility, a special feature which was built into Medicaid and CHIP by the CHIPRA amendments of 2009 and which HHS actively encourages states to adopt as a strategy for maximizing casefinding among children, whose receipt of benefits such as school lunch is used as evidence of entitlement to Medicaid and CHIP.[21] Or consider the fact that federal health officials actively post information about options and strategies for states to use in order to strengthen the performance of public health insurance benefits for immigrant families with children.[22]

The federal government has actively pursued such strategies when it comes to children because public health benefits for children, particularly nutrition and housing assistance, and public health insurance benefits, promote healthy development, make it less likely that children

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[18] Jewers, M. & Ku, L., *Noncitizen Children Face Higher Health Harms Compared With Their Siblings Who Have U.S. Citizen Status*, 40 HEALTH AFFAIRS 7 (July 2021) at 1084-89.

[19] Bacon A.G., *The Long-Run Effects of Childhood Insurance Coverage: Medicaid Implementation, Adult Health, and Labor Market Outcomes*, 11 AM. ECON. REV. 8 (2021) at 2550-93.

[20] Sherman, A. & Mitchell, T., *Economic Security Programs Help Low-Income Children Succeed Over Long Term, Many Studies Find*, CTR. BUDGET POL'Y PRIORITIES (July 2017), https://www.cbpp.org/research/poverty-and-inequality/economic-security-programs-help-low-income-children-succeed-over.

[21] Medicaid.gov, *Express Lane Eligibility for Medicaid and CHIP Benefits*, https://www.medicaid.gov/medicaid/enrollment-strategies/express-lane-eligibility-medicaid-and-chip-coverage/index.html.

[22] *See, e.g.*, Medicaid.gov, *Medicaid and CHIP Coverage of Lawfully Residing Children and Pregnant Women,* https://www.medicaid.gov/medicaid/enrollment-strategies/medicaid-and-chip-coverage-lawfully-residing-children-pregnant-women.

will have unmet healthcare needs, correlate with better composite health scores, lower incidences of high blood pressure, lower obesity rates, fewer emergency room visits and fewer adult hospitalizations, and are directly associated with better high school graduation rates, college attendance, and higher income prospects as adults.[23] In any public charge determination, DHS should weigh use of services by children in mixed-status households as a *positive* factor, because it underscores a positive parental commitment to the types of long-term investment in children that families make. Evidence of this approach to parenting should be viewed as a major positive in any admissibility determination. Furthermore, the presence of children in a household, whether citizen or noncitizen, should be a positive factor in weighing admissibility. We believe that were the government to underscore what it considers to be the benefits for children and families of using the range of government programs and services specifically designed with children in mind, this would help immeasurably in overcoming the damage caused by the 2019 rule's "chilling effect."

Furthermore, children should not be penalized for previous or current use of benefits by their adult caregivers or other household members, particularly in light of significant evidence that receipt of public benefits enables immigrant adults to increase their job skills and experience as they enhance their capacity to generate income and close the immigrant-native income gap, eventually catching-up to their U.S.-born peers within seven years, which in turn promotes better living conditions for children in mixed-status households.[24] In this vein, we appreciate that the NPRM's preamble acknowledges that "[m]any modern public assistance programs take the form of payments or in-kind benefits to help individuals meet particular needs and are not limited to individuals without a separate primary means of support. The Medicaid program, subsidized housing, and SNAP provide benefits to millions of individuals and families across the nation, many of whom also work. … 'Looking at benefit receipt at any point over a 20-year period, approximately 41 to 48 percent of U.S.-born citizens received at least one of the main benefits in the public charge definition.' … [I]t would seem not to comport with common usage to describe so many Americans as being public charges."[25]

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[23] *See* Christine Percheski & Sharon Bzostek, *Public Health Insurance and Healthcare Utilization for Children in Immigrant Families*, 21 MATERNAL & CHILD HEALTH J. 2153-2160 (July 12, 2017), https://link.springer.com/article/10.1007/s10995-017-2331-y; Alisa Chester & Joan Alker, *Medicaid at 50: A Look at the Long-Term Benefits of Childhood Medicaid*, GEORGETOWN UNIVERSITY HEALTH POLICY INSTITUTE CENTER FOR CHILDREN AND FAMILIES (July 2015), https://ccf.georgetown.edu/wp-content/uploads/2015/08/Medicaid-at-50_final.pdf; Sarah Miller & Laura R. Wherry, *The Long-Term Effects of Early Life Medicaid Coverage*, Working Paper, SOCIAL SCIENCE RESEARCH NETWORK (Aug. 25, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466691; Karina Wagnerman *et al.*, *Medicaid & CHIP are Long-Term Investments in Children's Health and Future Success*, GEORGETOWN UNIVERSITY CENTER FOR CHILDREN AND FAMILIES (Mar. 3, 2017), https:////ccf.georgetown.edu/2017/03/13/medicaid-is-a-smart-investment-in-children/.

[24] *See* Leighton Ku & Drishti Pillai, *The Economic Mobility of Immigrants: Public Charge Rules Could Foreclose Future Opportunities* (Nov. 15, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285546.

[25] 87 Fed. Reg. 10608, *citing* Danilo Trisi, *Administration's Public Charge Rules Would Close the Door to U.S. Immigrants Without Substantial Means*, CTR. BUDGET & POL'Y PRIORITIES (Nov. 11, 2019), https://www.cbpp.org/research/immigration/administrations-public-charge-rules-would-close-the-door-to-us-to-immigrants.

In light of the foregoing, public charge determinations must consider that public benefits have been designed to protect families and, importantly, that children's opportunities to grow healthy and thrive increase to the extent that their adult caregivers do as well. Given the predictive nature of public charge analysis, the presence of children, who cannot be expected to demonstrate ability to provide for themselves, and whose well-being, and that of their families, is an asset to this country, should be given every favorable presumption under each of the five statutory factors.

Alternative Definition of "Likely at any time to become a public charge":

"DHS therefore proposes that an individual is likely at any time to become a public charge if the individual is likely to become primarily dependent on the government for subsistence, as demonstrated by either receipt of public cash assistance for income maintenance or long-term institutionalization at government expense. DHS welcomes comment on whether it should use "primarily" dependent on the government for subsistence, as opposed to a greater or lesser level of dependence. DHS also believes that it is appropriate, and consistent with DHS's broad discretion and historical practice in administering the public charge ground of inadmissibility, to not specify a specific numerical formula or threshold associated with this standard. DHS welcomes comment on alternative approaches, however." 87 Fed. Reg. 11608.

We recommend that DHS use "exclusively and persistently" dependent on the government for subsistence. The vague formulation "primarily" dependent lacks clear standards to evaluate benefits received. Further, it provides no guidance on concrete time periods, or objective elements to assess the reasons why a person would have obtained benefits. In this regard, "primarily" dependent invites arbitrary and inconsistent public charge adjudications. A clear, bright line rule, not subject to unfettered interpretation, would correct this deficiency.

Reliance on government benefits should count negatively only in those narrow situations where there simply is no probability that the candidate would ever be capable of self-support under any scenario, independent of government benefits, in a totality of circumstances review. This approach would comport with the Second Circuit's view that "the settled meaning of 'public charge,' as the plain meaning of the term already suggests, is dependency: being a persistent 'charge' on the public purse….the mere receipt of benefits from the government does not constitute such dependency."[26] People may receive government benefits for a period of time, until they overcome temporary illness or economic dislocation and are capable to resume providing for themselves, or as critical supports that supplement insufficient earnings. Individuals should not be penalized for obtaining benefits designed to help people make ends meet when wages are insufficient (or nonexistent) to secure adequate housing, nutrition, health services or even training and education.

Furthermore, the INA has never required analysis of public benefits receipt in public charge determinations, which supports a narrow inquiry.

[26] *New York v. DHS*, 969 F.3rd at 74.

Finally, dependency on public benefits that is "exclusive and persistent" as a criterion in public charge determinations would mitigate the risk of arbitrariness and would reflect, for instance, the extremely limited probative value (if not futility) of considering receipt of TANF benefits in the analysis, given that program's well-known time and eligibility restrictions. Indeed, TANF is now so restrictive that in a single month, only about 1 million families receive TANF nationwide according to the most recent statistics.[27]

As noted previously, low-income noncitizen immigrants are much less likely to receive TANF or SSI benefits than similar U.S.-born adults and their use of benefits declines over time.[28] Based on data from the Census Bureau's longitudinal *Survey of Income and Program Participation*, in 2014 only 0.6 percent of low-income noncitizen immigrant adults received TANF, less than half the level for similar US-born citizens (1.4 percent). Moreover, in the following years essentially none of the immigrants who received TANF in the first year continued to receive TANF, while roughly a third of the citizen TANF recipients continued to receive welfare benefits. The differences in the use of SSI benefits were even larger. In 2014, 0.8 percent of low-income noncitizen immigrant adults received SSI, less than one-seventh the level of similar U.S.-born citizens (7.0 percent). Three years later, four-fifths of citizens were still receiving SSI, while benefits to immigrants had fallen to less than half of the original group. The likelihood of receiving cash assistance is much smaller for noncitizen immigrants and the probability that they will still get benefits in subsequent years is smaller. It is noteworthy that many legal immigrants are ineligible for TANF benefits until they have resided in the U.S. for 5 years or longer. Moreover, as noted above, there are strict time limits, usually five years, for how long anyone – citizen or immigrant – can receive cash assistance from TANF.[29] To the extent that immigrants are eligible for state or local general assistance benefits, these benefits are typically extremely limited in duration, allowing, perhaps, a brief period assistance to meet emergency bills.

In sum, the ability to predict future public benefit use is extremely weak. Assessment of public charge status based on TANF receipt seems particularly quixotic because people generally cannot receive TANF benefits for more than five years. The longer someone participates in TANF, the less time they may have to use it in the future.

To focus the inquiry into "exclusive and persistent" dependency on federal benefits would be consistent with "[t]he prevailing administrative and judicial interpretation of 'public charge' ratified by Congress [which] understood the term to mean a non-citizen who cannot support himself, in the sense that he 'is incapable of earning a livelihood, … does not have sufficient funds in the United States for his support, and has no person in the United States willing and able to assure that he will not need public support."[30]

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[27] CONGRESSIONAL RESEARCH SERVICE, *The Temporary Assistance For Needy Families Block Grant: Frequently Asked Questions* (March 2022) https://sgp.fas.org/crs/misc/RL32760.pdf.
[28] Ku & Brantley, *supra*, n.12.
[29] CTR. BUDGET & POL'Y PRIORITIES, *Policy Basics: Temporary Assistance for Needy Families* (Mar. 1, 2022, updated), https://www.cbpp.org/research/family-income-support/temporary-assistance-for-needy-families.
[30] *New York v. DHS*, 969 F.3rd at 74-75 (internal citations omitted).

Excluding Non-Federal Programs:

"Although this proposed rule covers Federal, State, Tribal, territorial, or local cash benefit programs for income maintenance (consistent with past policy and the original function of the public charge ground of inadmissibility), DHS welcomes comment on this proposal, particularly as it relates to non-Federal programs targeted at individual populations." 87 Fed. Reg. 10613. "DHS welcomes public comments on whether DHS should define government in this rule and, if so, whether it should be limited to Federal, State, Tribal, territorial, and local entities, and why or why not. DHS also welcomes public comments on whether there is an alternative definition for government that better captures the benefits indicative of primary dependence for subsistence." 87 Fed. Reg. 10616.

We recommend DHS define government to mean the United States government and its agencies exclusively, and that States be excluded along with Tribal governments, Territories, local governments, or foreign government entities. This approach would be consistent with the NPRM preamble's statement that "insofar as the focus of the public charge ground of inadmissibility and related statutory provisions appears to be minimizing the burden on the United States public, DHS believes it reasonable to consider only expenditures by U.S. government entities…."[31]

To include local governments in the rule's definition of "government" would turn federal immigration policy into a barrier to states' and other localities' legitimate exercise of sovereign, police powers to protect the health and wellbeing of immigrants and their families. The diversity of state, local and tribal cash assistance programs will generate problems, since some cash assistance programs may be targeted for specific non-cash purposes, such as housing assistance or assistance to help with searching for jobs, even though DHS deliberately has excluded such functions among federal assistance. These jurisdictions undertake independent public health and safety net policy determinations, opting, for example, to fund cash assistance or institutional long-term care benefits with local resources in response to local realities and challenges. Given the variety of benefit programs from state to state, including consideration of local benefit programs in public charge determinations would irremediably result in inconsistent outcomes with no real gain in minimizing the burden on the United States public. To facilitate consistent and efficient administration, as well as to increase accountability and promote uniformity of determinations, public charge determinations should focus exclusively on federal cash assistance.

"Chilling Effect" Considerations:

"Since the publication of the 2019 Final Rule, several studies have been published that discuss the impact of the 2019 Final Rule on the rate of public benefit disenrollment or forgone enrollment, i.e., a chilling effect. Studies conducted between 2016 and 2020 show reductions in enrollment in public benefits programs due to a chilling effect ranging from 4.1 percent to 36.1 percent. The results of these studies depend on several factors, such as the sample

[31] 87 Fed. Reg. 10616, n.437 and accompanying text; *citing* 8 U.S.C. § 1601(4).

examined or the period or method of analysis….DHS uses the estimates of the chilling effect by Bernstein et al. (2019; 2020) as a proxy because their population closely matches the population of interest for this analysis whereas the other studies looked at a smaller subset of the population. DHS welcomes public comments on the estimation of the disenrollment or foregone enrollment rate used in this analysis." 87 Fed. Reg. 10656-10658.

We commend DHS for acknowledging and seeking to mitigate the chilling effect of the 2019 rule, which created fear among legal immigrants and their families about using benefits for which they are eligible. Crucially, this will help immigrants integrate into their new homeland. Immigration is essential to the future of the nation. American births have fallen below the "replacement rate," the level at which there are enough births for a generation to replace itself, so immigrants must replenish the supply of working age adults.[32] Immigration restrictions and the COVID pandemic contributed to a reduction in the number of immigrant workers in the U.S. in recent years.[33] Immigrants are needed to supply the labor and skills to fuel the economy and help restore the nation's vitality. Policies that present an unwelcoming face to newcomers and deter legal immigrants from remaining in the United States threaten to stifle the nation's future. Improving immigration and the condition of immigrants in the U.S. would ease labor shortages currently common across the nation.[34] As immigrants remain in the U.S., their economic status improves rapidly and their use of public benefits, if any, shrinks. Thus, policies that make it harder for recent immigrants to stay in the U.S. can short circuit their economic progress. This shortsighted policy can limit the contributions that immigrants and their families make to the United States.

The confusion and fear the 2019 rule generated went far beyond the number of noncitizen immigrants seeking to adjust status, who might be subject to a public charge determination. Instead, fear and confusion meant that many members of immigrant families avoided public benefits like Medicaid or SNAP – benefits for which they were legally entitled — even if they were naturalized citizens or were already permanent residents ("mixed-status households"). Benefit use even declined among U.S.-born children in immigrant families. A study clearly documented the uptick in publicity and media coverage about potential public charge changes in 2018, and found that fear and confusion over the impending changes led to a decline in children's use of safety net programs such as the Women, Infants and Children Nutrition program (WIC, a program that was not considered in public charge determinations under the 2019 rule) and Medicaid, even before the 2019 rules were proposed or finalized.[35]

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[32] *See* Hamilton, J. *et al*., *Births: Provisional Data for 2020,* NATIONAL CENTER FOR HEALTH STATISTICS, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 2021), https://www.cdc.gov/nchs/data/vsrr/vsrr012-508.pdf.

[33] U.S. BUREAU OF LABOR STATISTICS, *Labor Force Characteristics of Foreign-born Workers Summary* (May 20, 2021), https://www.bls.gov/news.release/forbrn.nr0.htm/labor-force-characteristics-of-foreign-born-workers-summary#:~:text=%2D%2DForeign%2Dborn%20men%20continued,percent%20for%20native%2Dborn%20women.

[34] Narea, N., *Immigrants could fix the U.S. labor shortage*, VOX (Oct. 26, 2021), https://www.vox.com/business-and-finance/2021/10/26/22733082/labor-shortage-inflation-immigration-foreign-workers.

[35] Barofsky, J. *et al*., *Spreading Fear: The Announcement of the Public Charge Rule Reduced Enrollment in Child Safety-Net Programs*, 39 HEALTH AFFAIRS 10 (Oct. 2020) at 1752-61.

There is ample evidence of the harm and the "chilling effect" of the fear and confusion engendered by public charge policies. In 2017, a widely publicized leak of draft rules foreshadowed the Trump Administration's plans to count non-cash benefits such as SNAP, Medicaid or public housing as benefits that would be used in making a public charge determination.[36] DHS finally issued proposed regulations in October 2018.[37] After receiving hundreds of thousands of comments, mostly opposed to the proposal, DHS issued its final regulation in August 2019, which largely tracked the proposed rule despite the overwhelmingly negative comments. Unsurprisingly, a nationally representative survey the Urban Institute released found that about one-seventh of all adults in immigrant families reported that they avoided non-cash public benefits in the past year because of concerns that they or a family member could be disqualified from obtaining a green card (lawful permanent resident status).[38]

Hispanics, low-income members of immigrant families, and immigrant families with children were more likely than other groups to avoid such benefits. Based on these data, it is estimated that between one and three million members of immigrant families, including citizen members of the families, were potentially deprived of Medicaid coverage.[39] The chilling effects continued to persist in 2020, during the first year of the COVID-19 pandemic.[40]

The harmful effects extended not only to immigrants and their families, but health care providers. For example, as we have noted, negative effects were reported by community health centers. Members of immigrant families seeking services were less willing to enroll in Medicaid, which meant that health centers had to provide care for them as uninsured patients, increasing the health centers' financial burdens.[41] It is ironic that, as DHS itself points out, the 2019 rule netted exactly three denials, which were reopened and granted, and two Notices of Intent (which

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[36] Fix, M. & Capps, R., *Leaked draft of possible Trump executive order on public benefits would spell chilling effects for legal immigrants*, MIGRATION POLICY INSTITUTE (Feb. 2017), https://www.migrationpolicy.org/news/leaked-draft-possible-trump-executive-order-public-benefits-would-spell-chilling-effects-legal.

[37] DEPT. OF HOMELAND SECURITY, *Inadmissibility on Public Charge Grounds, Notice of Proposed Rulemaking*, 83 Fed. Reg. 51114 (Oct. 10, 2018).

[38] Bernstein, H. *et al.*, *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018*, URBAN INSTITUTE (May 2019), https://www.urban.org/sites/default/files/publication/100270/one_in_seven_adults_in_immigrant_families_reported_avoiding_publi_2.pdf.

[39] Ku, L., *Declaration in Support of Plaintiffs' Motion for a Preliminary Injunction (regarding public charge regulation)*, *La Clinica de la Raza, et al. v. Donald Trump, et al.* (N.D. Cal. Sept. 1, 2019), https://healthlaw.org/resource/declaration-of-leighton-ku-in-la-clinica-de-la-raza-v-trump/.

[40] Bernstein, H. *et al*., *Immigrant Families Continued Avoiding the Safety Net during the COVID-19 Crisis*, URBAN INSTITUTE (Feb. 2021), https://www.urban.org/sites/default/files/publication/103565/immigrant-families-continued-avoiding-the-safety-net-during-the-covid-19-crisis.pdf.

[41] Tolbert, J., Pham, O. & Artiga, S., *Impact of Shifting Immigration Policy on Medicaid Enrollment and Utilization of Care among Health Center Patients*, KAISER FAMILY FOUNDATION (Oct. 19, 2019), https://www.kff.org/medicaid/issue-brief/impact-of-shifting-immigration-policy-on-medicaid-enrollment-and-utilization-of-care-among-health-center-patients/; Ku, L., Sharac, J., Gunsalus, R., Shin, P. & Rosenbaum, S., *How Could the Public Charge Proposed Rule Affect Community Health Centers? Policy Brief # 55*, GEIGER GIBSON RCHN COMMUNITY HEALTH RESEARCH COLLABORATIVE (Nov 2018), https://publichealth.gwu.edu/sites/default/files/downloads/GGRCHN/Public%20Charge%20Brief.pdf.

DHS rescinded), while prompting millions of individuals to disenroll from, or forgo critical public benefits as the nation faced the ravages of COVID-19.[42]

The 2022 NPRM, which removes SNAP and most of Medicaid from public charge repercussions, is an appropriate step in the right direction. However, a key lesson from implementation of the 2019 rule is that much of the damage of the public charge rule came not from the actual details of the regulation, but from the fear and confusion they created. Very few of those individuals who avoided health insurance, nutrition or other benefits understood the details of the public charge rule or, when it went into effect, they were more fearful that using government benefits might hurt them or their families. This apprehension remains to this day. We urge DHS to respond with clear, simple, heavily publicized rules, and to be vigilant to the dangers that remain in crafting and implementing the new policy.

Public Communications Around the Final Rule to Mitigate Chilling Effects:

"DHS remains interested in public comment regarding ways to shape public communications around the final rule to mitigate chilling effects among U.S. citizens and among the great majority of noncitizens who are either ineligible for the public benefits covered by this rule prior to admission or adjustment of status or are exempt from a public charge determination under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). Although such communications materials are not part of the rulemaking, DHS is keenly aware of the established effects of its actions in this policy area and wishes to ensure that the final rule faithfully applies the public charge statute without causing undue confusion among the public." 87 Fed. Reg. 10592.
"In addition, as discussed elsewhere in this preamble, DHS welcomes public comments regarding the most effective ways to communicate to the public that, with respect to Federal public benefits covered by this rule, DHS would only consider past or current receipt of SSI, TANF for cash assistance for income maintenance, or Medicaid (only for long-term institutionalization at government expense) by those categories of noncitizens identified in Table 3, above. For instance, DHS welcomes comments on how to communicate to parents of U.S. citizen children that the receipt of benefits by such children would not be considered as part of a public charge inadmissibility determination for the parents." 87 Fed. Reg. 10615.

The NPRM includes a number of elements that may allow the confusion created by the now rescinded 2019 rule to persist. For example, there are the provisions around Medicaid benefits, with certain uses subject to public charge analysis and most others not. Likewise, the exact role of the Affidavit of Support and concepts such as "totality of circumstances" and "primarily dependent" foster persistent confusion, not less.

We offer a different strategy, aligned with the underlying goals of public charge policy, that provides noncitizens tools to assist them in the path to self-sufficiency and relative independence from public benefits. DHS could develop a positive framework, which could be considered

[42] 87 Fed. Reg. 10617, n.456.

comparable to Express Lane eligibility for Medicaid or CHIP[43] or the TSA Precheck system for boarding airplanes, as a simpler and effective way to show how legal immigrants can become authorized for permanent residency or adjustment of status.[44] This approach would emphasize factors than can be used to approve adjustment of status or permanent residency by demonstrating positive qualifications that are associated with gainful employment and self-sufficiency, such as:

- 20 hours per week or more of employment,
- equivalent levels of self-employment, or
- acceptance of an offer of equivalent employment.

Similar positive qualifying factors could be having levels of education associated with employment and financial success, such as:

- completion of at least one year of college or
- appropriate vocational education for a trade.

These would be factors that could demonstrate that an applicant can meet the "totality of circumstances" test, as envisioned under public charge policy, and would provide positive steps immigrants could follow to be better prepared if subject to public charge determination. Moreover, DHS should provide sufficient resources to fund appropriate community outreach programs to combat misinformation and mitigate the risk of improper public charge determinations with public information sessions, clear written guidance and appropriate adjudicator training.

Estimating the Value of "Unpaid Time":

"Even when an individual is not working for wages, their time has value. For example, if someone performs childcare, housework, or other activities without paid compensation, that time still has value. Due to the wide variety of non-paid activities an individual could pursue, it is difficult to estimate the value of that time. DHS requests public comment on ways to best estimate the value of this non-paid time. DHS assumes the effective minimum wage for this non-paid time. DHS requests comments on using effective minimum wage." 87 Fed. Reg. 10644.

A fair assessment of unpaid, volunteer and other activities individuals undertake without paid compensation may be based on effective minimum wage or rates consistent with those paid

[43] *See* CENTERS FOR MEDICARE AND MEDICAID SERVICES, *Express Lane Eligibility for Medicaid and CHIP Coverage*, https://www.medicaid.gov/medicaid/enrollment-strategies/express-lane-eligibility-medicaid-and-chip-coverage/index.html.
[44] TRANSPORTATION SECURITY ADMINISTRATION, *TSA Precheck*, https://www.tsa.gov/precheck.

for similar work in the candidate's relevant labor market, whichever is highest. In either case, paid fringe benefits that are reasonable should be included in the valuation.[45]

Due Respect to Laws Against Discrimination:

"The public charge ground of inadmissibility is designed to render inadmissible those persons who, based on their own circumstances, would need to rely on the government for subsistence, and not those persons who might be confined in an institution without justification. The possibility that an individual will be confined without justification thus should not contribute to the likelihood that the person will be a public charge, and to this end, DHS proposes to direct adjudicators who are assessing the probative value of past or current institutionalization to take into account, when applicable and in the totality of the circumstances, any evidence that past or current institutionalization is in violation of Federal law, including the Americans with Disabilities Act or the Rehabilitation Act. DHS seeks comment about what specific types of evidence it should consider for this purpose." 87 Fed. Reg. 10614.

Protecting the right of individuals with disabilities against discrimination, and to live integrated lives through community alternatives that reduce the risk of unjustified segregation in institutions or other segregated settings, is the law of the land under the *Americans with Disabilities Act*, the *Rehabilitation Act*, and the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999). These protections apply regardless of national origin or immigration status. The best evidence for purposes of public charge determinations begins with the individuals themselves. Adjudicators must ascertain whether a covered candidate had the opportunity to understand choices and make informed decisions and to voice concerns or objections to institutionalization. Also, the informed, professional judgment of qualified specialists knowledgeable of the candidate's circumstances ought to be considered along with inputs from relevant sources, including community-based organizations that provide services to individuals with disabilities outside of institutional settings.[46]

Public charge determinations must take into account that "the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings."[47] Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent. For

[45] This approach is consistent with the *Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards*, 2 C.F.R. § 200.306(e). DHS adopted these requirements. 2 C.F.R. § 3002.10.
[46] *See* DEPT. OF JUSTICE, *Questions and Answers on the ADA's Integration Mandate and Olmstead Enforcement* (June 22, 2011), Q.4, https://www.ada.gov/olmstead/q&a_olmstead.htm.
[47] U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, DISABILITY RIGHTS SECTION, *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.* (last updated Feb. 25, 2020), https://www.ada.gov/olmstead/q&a_olmstead.htm#:~:text=Do%20the%20ADA%20and%20Olmstead,institutional%20or%20other%20segregated%20settings.

example, a plaintiff could show sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity's failure to provide community services, or its cut to such services, will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution."[48] We recommend DHS provide adjudicators appropriate training to ensure public charge determinations support robust compliance with the ADA, the Rehabilitation Act and *Olmstead*.

Conclusion

We appreciate the opportunity to assist DHS in its efforts to rectify the harms of the 2019 rule and restore a measure of equity, respect and humanity to our nation's public charge immigration policy. The names of all individuals associated with these comments follow.

Phillip A. Escoriaza for
Public Health and Public Policy Deans, Chairs and Scholars

cc: The Hon. Rena Bitter
Assistant Secretary for Consular Affairs
U.S. Department of State
600 19th Street, N.W.
Washington, D.C. 20036

[48] *Id*. at Q.6. *See also* DEPT. OF JUSTICE, *Statement on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.* (June 22, 2011), https://www.ada.gov/olmstead/q&a_olmstead.htm, *cited in* 87 Fed. Reg. 10614, n.420.

Deans

1. Ayman El-Mohandes, MBBCh, MD, MPH, Dean, CUNY Graduate School of Public Health & Health Policy
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3. Julia Zoe Beckerman, JD, MPH, Teaching Associate Professor & Vice Chair, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University
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4. Andrea Lopez, PhD, MPH, Assistant Professor, California State University, Bakersfield
5. Andy Schneider, JD, Research Professor of the Practice, McCourt School of Public Policy, Georgetown University
6. Becky Slifkin, PhD, Professor, Department of Health Policy and Management, UNC Gillings School of Global Health
7. Claire D. Brindis, DrPH, Distinguished Professor and Emerita Director, Philip R. Lee Institute for Health Policy Studies, University of California, San Francisco
8. Colleen M. Grogan, PhD, Professor, School of Social Service Administration, University of Chicago

9. Daniel Skinner, PhD, Associate Professor of Health Policy, Ohio University
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11. David Michaels, PhD, MPH, Professor, Department of Environmental and Occupational Health, Milken Institute School of Public Health, The George Washington University
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13. Harold Pollack, PhD, Helen Ross Professor of Social Services Administration, University of Chicago School of Social Service Administration
14. Janet Heinrich, DrPH, RN, FAAN, Research Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University
15. Jeffrey Levi, PhD, Professor of Health Policy and Management, Milken Institute School of Public Health, The George Washington University
16. Jillian Catalanotti, MD, MPH, FACP, Associate Professor of Medicine, Associate Professor of Health Policy and Management, Director, Internal Medicine Residency Programs, The George Washington University
17. Joan Alker, M.Phil, Research Professor, McCourt School of Public Policy, Georgetown University
18. Katherine Horton, RN, MPH, JD, Research Professor in the Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University
19. Katherine Swartz, PhD, Professor of Health Economics and Policy, Harvard T.H. Chan School of Public Health
20. Krista M. Perreira, PhD, Department of Social Medicine, UNC School of Medicine
21. Leighton Ku, PhD, MPH, Professor and Director of the Center for Health Policy Research, Department of Health Policy and Management, The George Washington University
22. Leo Cuello, JD, Research Professor, McCourt School of Public Policy, Georgetown University
23. Lynn A. Blewett, PhD, MA, Professor of Health Policy, University of Minnesota School of Public Health
24. Mark A. Peterson, PhD, Professor of Public Policy, Political Science, and Law, Department of Public Policy, UCLA Meyer and Renee Luskin School of Public Affairs
25. Maureen Byrnes, MPA, Teaching Instructor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University
26. Melissa M. Goldstein, JD, Associate Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University
27. Michael R. Ulrich, JD, MPH, Assistant Professor, Center for Health Law, Ethics, & Human Rights, Boston University School of Public Health, Distinguished Visiting Scholar, Solomon Center for Health Law & Policy, Yale Law School

28. Naomi Seiler, JD, Associate Research Professor, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University
29. Neal Halfon, MD, MPH, Professor of Pediatrics, Public Health and Public Policy, Director, UCLA Center for Healthier Children, Families & Communities, UCLA
30. Nicolas P. Terry, Hall Render Professor of Law & Executive Director, Hall Center for Law and Health, Indiana University Robert H. McKinney School of Law
31. Nicole Huberfeld, JD, Edward R. Utley Professor of Health Law, Boston University School of Public Health, Professor of Law, Boston University School of Law
32. Pam Silberman, JD, DrPH, Professor, Director, Executive Doctoral Program in Health Leadership, Department of Health Policy and Management, UNC Gillings School of Global Public Health
33. Paula Lantz, PhD, James B. Hudak Professor of Health Policy, Professor of Public Policy, Gerald R. Ford School of Public Policy, Professor of Health Management and Policy, School of Public Health, University of Michigan
34. Rand E. Rosenblatt, JD, Professor Emeritus of Law, Rutgers University School of Law
35. Ross D. Silverman, JD, MPH, Professor of Health Policy & Management, Indiana University Richard M. Fairbanks School of Public Health, Professor of Public Health & Law, Indiana University Robert H. McKinney School of Law
36. Sara Rosenbaum, JD, Harold and Jane Hirsh Professor of Health Law and Policy, Department of Health Policy and Management, Milken Institute School of Public Health, The George Washington University
37. Sylvia A. Law, JD, Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry, Emerita Co-Director, Arthur Garfield Hays Civil Liberties Program, NYU Law School
38. Timothy Stoltzfus Jost, JD, Emeritus Professor, Washington and Lee University School of Law
39. Timothy M. Westmoreland, JD, Professor from Practice, Georgetown University School of Law
40. Wendy K. Mariner, JD, LLM, MPH, Edward R. Utley Professor of Health Law, Boston University School of Public Health, Professor of Law, Boston University School of Law, Professor of Medicine, Boston University School of Medicine