

NATIONAL IMMIGRANT JUSTICE CENTER

December 10, 2018

Submitted via www.regulations.gov

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

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

Dear Ms. Deshommes:

I am writing on behalf of the National Immigrant Justice Center in response to the Department of Homeland Security's (DHS) Notice of Proposed Rulemaking (NPRM or proposed rule) to express our strong opposition to the proposed rule to promulgate and amend regulations relating to the inadmissibility on public charge grounds published in the Federal Register on October 10, 2018.

The National Immigrant Justice Center (NIJC) is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding more than three decades ago, NIJC has been unique in blending individual client advocacy with broad-based systemic change. NIJC is the largest legal service provider for unaccompanied immigrant children in Illinois, Indiana, and Wisconsin, including children held in or released from the custody of the Office of Refugee Resettlement (ORR). More broadly, NIJC provides legal services to more than 10,000 individuals each year, including children and their family members currently or formerly incarcerated by DHS, as well as numerous caregivers of citizen and noncitizen children.

Based on our expertise, we have determined that if finalized, this proposed rule would put the wellbeing of millions of families at risk and undermine the fundamental notion that wealth should not determine an individual's access to security and justice in American society. We urge you to rescind this rule in its entirety, and allow for long-standing principles clarified in the 1999 field guidance to remain in effect.

In this document we will address the following seven concerns: (1) the chilling effect implementation of the NPRM will have on access to legal representation, available resources and public benefits; (2) the capricious and arbitrary nature of the rule; (3) the undue burden implementation of the rule will place on

an already strained low-cost legal representation system; (4) the disproportionate impact the rule will have on poor immigrants with limited access to legal and resource supports; (5) the workability, lack of clarity, and arbitrary acts stemming from implementation of the rule; (6) negative impacts on affected parties such as U.S. citizens, lawful permanent residents, and noncitizen spouses, children, and parents; and (7) the impact of the NPRM on U.S. citizen liberty interests and denial of due process.

For these reasons, as detailed in the comments that follow, DHS should immediately withdraw the current proposal.

Thank you for the opportunity to submit comments on the NPRM. For further information, please contact Heidi Altman at haltman@heartlandalliance.org or (312) 718-5021.

/s/

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DETAILED COMMENTS in opposition to DHS Docket No. USCIS-2010-0012, RIN 1615-AA22, Proposed Rulemaking: Inadmissibility on Public Charge Grounds

1. Chilling effect on access to services, low-cost resources, and legal representation

The proposed rule would create a chilling effect, making individuals afraid to access programs and undermining access to critical health, food, and other supports for eligible immigrants and their families. Among the most harmed by the proposed rule are children, including U.S. citizen children, who would likely decrease participation in support programs despite remaining eligible.

Based on benefit enrollment patterns observed in the wake of welfare reform during the 1990s, social scientists report that immigrants' use of health, nutrition, and social services could decline significantly if the proposed public charge rule were finalized.¹ Historical comparisons suggest that the rates of disenrollment will be vastly larger than the pool of immigrants rendered ineligible by the rule, because of the chilling effect the rule will have on immigrant communities across the board.

¹ Jeanne Batalova, Michael Fix, and Mark Greenberg "Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use" (Washington, DC: Migration Policy Institute, 2018) <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>.

For instance, researchers found that after new eligibility restrictions were implemented for recent immigrants as part of welfare reform, there were 25% disenrollment rates among children of foreign-born parents from Medicaid even though the majority of these children were not affected by the eligibility changes and remained eligible.² The Kaiser Family Foundation estimates that disenrollment rates between 15% and 35% following implementation of the rule would mean an estimated 2.1 million to 4.9 million Medicaid/CHIP enrollees losing access to benefits.³ Since welfare reform in the 1990s did not affect immigration status directly, unlike the proposed public charge rule, these estimates may actually underestimate the impact of the rule on benefit usage.⁴ Further, given the current political climate, with efforts to reduce legal immigration for the first time in decades and increased arrests and deportations, fear of immigration consequences of using public benefits could be even greater.⁵

Approximately 25.9 million people would be potentially chilled by the proposed public charge rule, accounting for an estimated 8% of the U.S. population. 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% of the federal poverty level. Of these 25.9 million people, approximately 9.2 million are children under 18 years of age who are family members of at least one noncitizen or are noncitizen themselves, representing approximately 13% of our nation's child population.⁶

A large share of the people potentially chilled by the proposed public charge rule reside in five states – California, Florida, Illinois, New York, and Texas – that account for approximately 61% of the total impacted population (15.9 million). Among children potentially chilled, California and Texas account for approximately 70% of all children potentially chilled by the rule (3.9 million). Families in other regions of the United States, like those in the Midwest and Northeast, will also be among those potentially impacted. Altogether, approximately 2.8 million Midwesterners and 4.1 million Northeasterners may be potentially chilled by the proposed rule.⁷

The NPRM itself acknowledges, but does not quantify in any meaningful way, that the proposed rule would cause great harm to individuals, families, and communities. Specifically, the NPRM cites the following disastrous potential consequences as the expected and accepted consequences of the proposed rule:

1. “worse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant women, infants, or children, and reduced prescription adherence”;

² Neeraj Kaushal and Robert Kaestner, “Welfare Reform and health insurance of Immigrants,” Health Services Research, 40(3), (June 2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1361164/pdf/hesr_00381.pdf.

³ Samantha Artiga, Raphael Garfield, and Anthony Damico "Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid" (Washington, DC: Kaiser Family Foundation, 2018). <https://www.kff.org/disparities-policy/issue-brief/estimated-impacts-of-the-proposed-public-charge-rule-on-immigrants-and-medicaid/>.

⁴ Samantha Artiga, Raphael Garfield, and Anthony Damico "Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid" (Washington, DC: Kaiser Family Foundation, 2018) <https://www.kff.org/disparities-policy/issue-brief/estimated-impacts-of-the-proposed-public-charge-rule-on-immigrants-and-medicaid/>.

⁵ Jeanne Batalova, Michael Fix, and Mark Greenberg "Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use" (Washington, DC: Migration Policy Institute, 2018) <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>.

⁶ 2012-2016 5-Year American Community Survey Public Use Microdata Sample (ACS/PUMS); 2012-2016 5-Year American Community Survey (ACS) estimates accessed via American FactFinder; Missouri Census Data Center (MCDC) MABLE PUMA-County Crosswalk. Custom Tabulation by Manatt health, 9/30/2018. Found online at <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population>.

⁷ 2012-2016 5-Year American Community Survey Public Use Microdata Sample (ACS/PUMS); 2012-2016 5-Year American Community Survey (ACS) estimates accessed via American FactFinder; Missouri Census Data Center (MCDC) MABLE PUMA-County Crosswalk. Custom Tabulation by Manatt health, 9/30/2018. Found online at <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population>.

2. “increased use of emergency rooms and emergent care as a method of primary health care due to delayed treatment”;
3. “increased prevalence of communicable diseases”;
4. “increases in uncompensated care”;
5. “increased rates of poverty and housing instability”; and
6. “reduced productivity and educational attainment.”⁸

Furthermore, it is hard to accept that the USCIS could identify these six areas of concern but did not approximate the quantifiable/monetizable impacts of those consequences for federal, state or local units of government when other federal agencies have done so. For example, the Center for Disease Control has published publicly accessible studies regarding the costs to U.S. society of the lack of vaccinations⁹ - a precursor for the increase in communicable diseases. Academic studies estimate the cost of not getting vaccines to be \$7B annually.¹⁰ These estimates do not include the cost of losing herd immunity. Herd immunity kicks in when vaccination reaches a certain threshold.¹¹ The loss of herd immunity would impose even greater costs beyond those of treating the non-vaccinated individuals.¹² It is telling that the proposed rule does not attempt to provide monetized costs of various health care choices, which the proposed rule acknowledges will likely result from it. It is even more telling that the proposed rule ignores what could become the single largest potential cost from this rule to the public. Some of these costs would become burdens on states and local governments, which subsidize many health care costs, and would likely, cover even greater costs in the event of a major public health event. The federal government is mandated to consider the costs of proposed regulations on state and local governments.

The Boston Planning and Development Agency (BPDA) commissioned a report to identify the potential impact of the NPRM on the approximately 97,322 non-citizens who reside in Boston. The report posited two scenarios as viable consequences for their non-citizen residents if the NPRM is enacted as proposed:

“the large-scale disenrollment of directly affected individuals from public benefits programs and, on the other [hand], the deportation of all directly affected individuals, assuming they are unable to take action sufficient to prove that they are not likely to become public charges.”¹³

The BPDA report goes on to highlight in stark terms the likely monetized, non-monetized and incalculable consequences of implementing the NPRM for non-citizen Bostonians, which are consistent with the grotesque picture painted by USCIS. If a local unit of government and subsequent agencies can cost out such consequences, so can the federal government. USCIS should include reasonable estimates for those costs where available, to permit stakeholders and the public to comment on the rule with those estimates at hand.

⁸ Inadmissibility on Public Charge Grounds, Notice of Proposed Rulemaking, U.S. Citizenship and Immigration Services, DHS. 10/10/2018, 83 Federal Register 51270. Available at <https://www.gpo.gov/fdsys/pkg/FR-2018-10-10/pdf/2018-21106.pdf>.

⁹ Centers for Disease Control and Prevention. Vaccines for Children Program: Supplement. April 23, 2014, <https://www.cdc.gov/vaccines/programs/vfc/pubs/methods/index.html>

¹⁰ The University of North Carolina at Chapel Hill. “Unvaccinated Adults Cost the U.S. More Than \$7 Billion a Year.” October 12, 2016, <https://uncnews.unc.edu/2016/10/12/unvaccinated-adults-cost-u-s-7-billion-year/>

¹¹ Sebastian Funk. “Critical immunity thresholds for measles elimination.” Centre for the Mathematical Modeling of Infectious Diseases: London School of Hygiene & Tropical Medicine, October 19, 2017, http://www.who.int/immunization/sage/meetings/2017/october/2_target_immunity_levels_FUNK.pdf.

¹² Rane Seither, et.al., “Vaccination Coverage Among Children in Kindergarten – United States, 2013-14 School Year.” Morbidity and Mortality Weekly Report; October 17, 2014, 63(41); 913-920, https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6341a1.htm?s_cid=mm6341a1_w; See also Health and Human Services. “Vaccines Protect Your Community,” December 2017, <https://www.vaccines.gov/basics/work/protection/index.html>.

¹³ Impact of Proposed Federal Immigration Rule Changes on Boston: Public Charge Test for Inadmissibility. Boston Planning and Development Agency, page 3, 10/15/2018, <http://www.bostonplans.org/getattachment/e856c564-bf0f-47d4-9a44-75b430903f82>

In short, the acceptance of such devastating consequences, regardless of the measurable and immeasurable negative impacts, as the price this Administration is willing to accept in pursuit of their policy objectives highlights the wantonly cruel nature of this rule.

2. Capricious, arbitrary and wantonly cruel nature of the rule

The proposed rule is put forward with no rationale and in contradiction of the available evidence. The proposed rule would alter the public charge test dramatically, abandoning the enduring meaning of a public charge as a person who depends on the government for subsistence and changing it to include anyone who simply receives assistance with health care, nutrition, or housing. Under current policy, a public charge is defined as an immigrant who is “likely to become primarily dependent on the government for subsistence.” The proposed rule radically expands the definition to include any immigrant who simply “receives one or more public benefits.” This shift drastically increases the scope of who can be considered a public charge to include not just people who receive benefits as the main source of support, but also people who use basic needs programs to supplement their earnings from low-wage work.

Additionally, under longstanding guidance, only cash “welfare” assistance for income maintenance and government funded long-term institutional care can be taken into consideration in the “public charge” test – and only when it represents the majority of a person’s support. If the rule is finalized, immigration officials could consider a much wider range of government programs in the “public charge” determination. These programs include most Medicaid programs, housing assistance such as Section 8 housing vouchers, Project-based Section 8, or Public Housing, SNAP (Supplemental Nutrition Assistance Program, formerly Food Stamps) and even assistance for seniors who have amassed the work history needed to qualify for Medicare and need help paying for prescription drugs.

The rule also makes other massive changes, such as introducing an unprecedented income test and weighing negatively many factors that have not previously been considered relevant to the public charge determination. For example, the proposed rule provides that being a child or a senior, having a large family, or having a treatable medical condition could be held against immigrants seeking a permanent legal status. The rule also indicates a preference for immigrants who speak English, which would mark a fundamental change from our nation’s historic commitment to welcoming and integrating immigrants. Because this rule targets family-based immigration as well as low and moderate wage workers, it will also have a disproportionate impact on people of color. All of these changes amount to an unconscionable sea change in American immigration policy towards counting wealth and income as the primary indicators of a person’s future contribution.

Both research and Congressional actions over the nearly 20 years that the 1999 Field Guidance has been in effect provide ample evidence that there is no persuasive rationale for change. This proposed rule is a solution in search of a problem, motivated by a desire to change America’s system of family-based immigration to grant preference to the wealthy. This same motivation has manifested in legislative proposals supported by the Administration but rejected by Congress. It would create a multitude of ways for individuals to fail the public charge test, and very few ways to overcome it.

The 1999 Field Guidance was issued against a backdrop of recent legislative change resulting in the need for clarification of the “public charge” determination; no such need exists today. The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) limited immigrant eligibility for federal means-tested public benefits, but Congress did not amend the public charge law to change what types of programs should be considered. That same year, in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress codified the case law interpretation of public charge. After 1996, there was a lot of confusion about how the public charge test might be used against

immigrants who were eligible for and receiving certain non-cash benefits; as a result, legal immigrants' use of public assistance programs declined significantly.¹⁴

In response to concerns that some consular officials and employees of the then-Immigration and Naturalization Service (INS) were inappropriately scrutinizing 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 which remains in effect today. The Guidance clarifies that the public charge test applies only to those “primarily dependent on the government for subsistence”, demonstrated by receipt of public cash assistance for “income maintenance”, or institutionalization for long-term care at Government expense. The guidance specifically lists non-cash programs such as Medicare, Medicaid, food stamps, WIC, Head Start, child care, school nutrition, housing, energy assistance, emergency/disaster relief as programs NOT to be considered for purposes of public charge.¹⁵ The 1999 NPRM preamble makes clear that it was not seen as changing policy from previous practice, but was issued in response to the need for a “clear definition” so that immigrants can make informed decisions and providers and other interested parties can provide “reliable guidance.”¹⁶

The 1999 guidance is consistent with Congressional intent and case law, has been relied upon by immigrant families for decades, and should continue to be used in interpreting and applying the public charge law. Contrary to the rationale put forward in the proposed rule, in 1996 Congress made changes to program eligibility¹⁷, not to the public charge determination. Since that time, Congress has made explicit choices to expand eligibility¹⁸ (or permit states¹⁹ to do so) under these programs.

The governments flawed interpretation of past use of public benefits as an indicator of continued use and future reliance on such programs further demonstrates the extreme bias against poor and vulnerable immigrant populations. Although the proposed rule acknowledges that the public charge determination is supposed to be prospective, the proposed criteria used to determine whether an applicant will be a public charge are actually retrospective. They are offered without any evidence that they are relevant to the determination of whether an immigrant will become dependent on the government for support in the future. Past use of a government-funded program is not necessarily predictive of future use. If the specific circumstances that led to the use of public benefits no longer apply, the previous use of benefits is irrelevant. Consequently, inclusion of a retrospective test is fundamentally inconsistent with the forward-looking design of the current public charge determination.

Further, there is significant data on the history of immigrants' rising income and improved socioeconomic standing and contributions across generations.²⁰ In addition, discouraging families from receiving health, nutrition, housing, or educational supports for heads of households and their children will only make it harder for all of them to improve their educational, health and employment prospects in the short-term in order to achieve economic security and upward mobility in the long-term. The proposed rule penalizes

¹⁴ Fix, Michael and Jeffrey Passel, "Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform: 1994-97," (Washington, D.C.: The Urban Institute, 1999).

¹⁵ 64 Fed. Reg. 28689

¹⁶ Inadmissibility and Deportability on Public Charge Grounds, A Proposed Rule by the [Immigration and Naturalization Service](#) on 05/26/1999, 64 Federal Register 28676.

¹⁷ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, <https://www.congress.gov/104/plaws/publ193/PLAW-104publ193.pdf>

¹⁸ Farm Security and Rural Investment Act of 2002, Public Law 107-171, <https://www.congress.gov/107/plaws/publ171/PLAW-107publ171.pdf>. Restored SNAP eligibility to most lawfully present non-citizens, including individuals who resided in the United States for five years, children under 18, and individuals receiving disability-related assistance or benefits.

¹⁹ State Children's Health Insurance Program; Eligibility for Prenatal Care and Other Health Services for Unborn Children, A Final Rule by the Department of Health and Human Services on October 2, 2002, 67 Federal Register 61955-74.

²⁰ National Academies of Sciences, Engineering, and Medicine. (2017). *The Economic and Fiscal Consequences of Immigration*. Washington, DC: The National Academies Press, <https://doi.org/10.17226/23550>.

immigrants for their, overall, initial low incomes and undermines their ability to improve upon that over time by penalizing them for making use of public benefits legally allowed to them.

3. Massive new burdens on other stakeholders, such as U.S. citizen relatives, churches, charitable organizations, nonprofit legal service providers, employers, and others.

a. Incoherent adjudicative frameworks create confusion regarding eligibility for noncitizens and attorneys seeking to provide counsel

By replacing a timeworn and effective standard with an incoherent framework, immigration attorneys and accredited representatives will find it next to impossible to advise intending immigrants on their eligibility for lawful permanent residence or other immigration benefits. The process consistently utilized by DHS, DOJ, and DOS for years, involving submission of a legally enforceable I-864 Affidavit of Support, was a straightforward and efficient process for adjudicators and immigrants. The proposed rule will add many layers of confusion to the process, to such an extent that what should be a clear adjustment of status case becomes riddled with uncertainty. This will make it impossible in many cases for an immigrant to navigate the system without legal help, and yet, lawyers will be hard-pressed to offer guidance without a clear legal standard. Combined with USCIS's new policy for placing individuals in removal proceedings²¹, people who are entitled to lawful permanent residence will be too afraid to apply to adjust status, leading to more people in the U.S. without status.

The proposed rule would also likely expand delays in immigration benefit form processing by imposing a substantial new workload on USCIS and increase administrative costs. Such USCIS-related capacity challenges will undoubtedly negatively affect the ability of legal service providers such as NIJC to provide critical legal counsel to other vulnerable immigrants.

USCIS is already required to conduct time-intensive public charge inadmissibility determinations, as well as process the I-485 form, in connection with an estimated 382,264 adjustment of status applications annually.²² The proposed rule anticipates that USCIS would also have to process the I-944, Declaration of Self-Sufficiency, in connection with these adjustments of status as well. The current guidance also compels public charge assessments of an estimated 511,201 applications for extension or change of nonimmigrant status each year.²³ The proposed rule will likely add to the existing adjudication delays as it intends to radically expand the definition of public charge, increase governmental discretion under the totality of circumstances test, and add four (possibly five) new public benefits to the public charge test.

All these operational demands will be levied on an agency that has already suffered profound capacity shortfalls over the last decade. A review of data just since FY 2017 indicates lengthening processing times for applications for green cards, employment authorization, travel documents, and green card replacements, among others. By the end of FY 2017, 5,606,618 applications and petitions remained

²¹ U.S. Citizenship and Immigration Services. (2018). Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens. PM-602-0050.1, available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>

²² U.S. Department of Homeland Security. *Yearbook of Immigration Statistics* for years 2012 – 2016, 2018, available at <https://www.dhs.gov/immigration-statistics/yearbook>. See U.S. Department of Homeland Security. *Inadmissibility on Public Charge Grounds*. Docket No. USCIS-2010-0012, 2018. Table 40, available at https://www.dhs.gov/sites/default/files/publications/18_0921_USCIS_Proposed-Rule-Public-Charge.pdf.

²³ U.S. Department of Homeland Security. *Inadmissibility on Public Charge Grounds*. DHS Docket No. USCIS-2010-0012, 2018. Tables 42 and 44, available at https://www.dhs.gov/sites/default/files/publications/18_0921_USCIS_Proposed-Rule-Public-Charge.pdf. This includes an estimated 336,335 requests for extension of status or change of status through Form I-129 (Table 42), and an estimated 174,866 through Form I-539 (Table 44).

adjudicated by USCIS²⁴—23% more than one year earlier.²⁵ In February 2018, DHS conceded, “USCIS continues to face capacity challenges.”²⁶

The expected cascading impact of increased USCIS adjudication backlogs will likely mean cases would take more time to complete. With each case that drags on longer than expected or requires numerous responses to requests for evidence, capacity to take additional cases for legal service providers and individual immigration attorneys may decrease.

In short, the proposed rule will expand the agency’s case processing delays, make an operational crisis appreciably worse by radically changing the definition and scope of public charge inadmissibility, and likely place greater strain on the limited time and resources of those providing legal counsel and orientation to immigrants. As a result, individuals and families throughout the United States will suffer the consequences.

b. DHS grossly underestimates the time burden of the proposed rule for applicants and their attorneys

DHS estimates the time burden associated with filing Form I-944 and obtaining the needed certified documents is 4 hours and 30 minutes per applicant, “including the time for reviewing instructions, gathering the required documentation and information, completing the declaration, preparing statements, attaching necessary documentation, and submitting the declaration.”²⁷ However, this appears to be a gross underestimate. If the proposed rule is implemented as written, the time it will take to properly assess a case and advise immigrant families will increase substantially for NIJC. The time for considerably smaller legal service organizations will likely require a significantly greater outlay of staff time to properly assess and process cases.

In addition to preparing the form and gathering supporting documentation, lawyers and accredited representatives must assess every factor and consideration under the new framework (including evaluating household members), identify other issues not listed in the rule that might impact the public charge assessment, and muddle out inconsistencies in real case scenarios in order to offer advice. Aside from the legal uncertainty this brings to every case, the time to advise, document and complete forms will increase by at least threefold. The proposed rule grossly underestimates the time burden, and papers over the increased familiarization costs²⁸ to immigration lawyers, non-profit organizations, and immigration advocacy groups large and small. NIJC staff and clients already have to deal with excessively long wait times for USCIS to process routine paperwork and adjudicate cases. Adding yet another layer of bureaucracy and time burden for similar cases will create an undue burden on nonprofit organizations such as NIJC and create even more anxiety for clients as wait times for all manner of cases will likely increase as well. For example:

²⁴ U.S. Citizenship and Immigration Services. *Data set: All USCIS Application and Petition Form Types, 2017*, available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY17Q4.pdf. End of FY 2017 Pending Forms – 5,606,618.

²⁵ U.S. Citizenship and Immigration Services. *Data set: All USCIS Application and Petition Form Types, 2016*, available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/all_forms_performancedata_fy2016_qtr4.pdf. End of FY 2016 Pending Forms – 4,316,013.

²⁶ U.S. Department of Homeland Security. *Annual Performance Report: Fiscal Years 2017-2019, 2018*, available at https://www.dhs.gov/sites/default/files/publications/DHS%20FY%202017-2019%20APR_0.pdf.

²⁷ 83 Fed. Reg. 51114, 51254 (Oct. 11, 2018).

²⁸ Inadmissibility on Public Charge Grounds, Notice of Proposed Rulemaking, U.S. Citizenship and Immigration Services, DHS, 10/10/2018, 83 Federal Register 51118, available at <https://www.gpo.gov/fdsys/pkg/FR-2018-10-10/pdf/2018-21106.pdf>.

Ahmad²⁹ has been waiting for years for final adjudication of his I-130 Petition for Alien Relative, which was originally submitted in late 2016. NIJC has been working with Ahmad and his U.S. citizen spouse since early 2018, after he received a Notice of Intent to Deny the I-130. NIJC has spent extensive staff time working with Ahmad and his family on this case, submitted multiple status inquiries to USCIS, and even had to assign a second staff attorney to his case as Ahmad's original NIJC attorney has subsequently left the organization. Ahmad is currently in removal proceedings and becoming increasingly concerned about his case and his future in this country with his spouse. The proposed rule will only exacerbate the delays that already burden non-citizens and the attorneys representing them in their protracted application processes.

4. Disproportionate impact on marginalized immigrant groups

a. Unreasonable income thresholds

The Department proposes to treat income below 125 percent of the federal poverty guidelines (FPG, often referred to as the federal poverty level or FPL) for the applicable household size as a negative factor. Conversely, the Department proposes that income above 250 percent of the FPG be required to be counted as a heavily weighed positive factor. We strongly oppose the use of these arbitrary and unreasonable thresholds. There is no statutory basis for either threshold, and the statement that 125 percent of the FPG has long served as a “touchpoint” for public charge inadmissibility determinations is completely misleading. The cited statute refers to the income threshold for sponsors who are required to submit an affidavit of support, not to the immigrant subject to the public charge determination, and the Department provides no justification for why this threshold is appropriate. Even less justification is offered for the 250 percent of FPG threshold. In fact, at footnote 583 of the NPRM, the Department admits that the differences in receipt of non-cash benefits between noncitizens living below 125 percent of FPG and those living either between 125 and 250 percent of the FPG or between 250 and 400 percent of the FPG was not statistically significant.³⁰

Setting these standards goes well beyond reasonable interpretation of the law and is in fact an attempt to achieve by regulation a change to U.S. immigration policy that the Administration has sought but that would require Congressional action.³¹ A standard of 250 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.³² 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% of FPG threshold. This is clearly not the person that Congress envisioned when they directed DHS to deny permanent status to those at risk of becoming a public charge.

It is worth noting that the combination of these thresholds, which are based on household size, with the proposed rule's expansive definition of household, will have the perverse effect of discouraging people from supporting family members. For example, if a couple with one child who has income just over the 250 percent of poverty threshold for a family of 3 takes in a brother who is temporarily unemployed and do not charge rent, they will become a household of four and no longer qualify for the heavily weighed positive factor. These are choices no one should have to make.

²⁹ All NIJC client names changed to protect client confidentiality.

³⁰ 83 Federal Register 51204.

³¹ See S.354 (115th Congress), the RAISE Act, <https://www.congress.gov/bill/115th-congress/senate-bill/354> and Statement of President Donald J. Trump on August 2, 2017, available <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/>

³² Kayla Fontenot, Jessica Semega, and Melissa Kollar. "Income and Poverty in the United States: 2017." United States Census Board, 9/12/2018, <https://www.census.gov/library/publications/2018/demo/p60-263.html>

b. Consideration of prior application for a fee waiver creates double-counting problems and is impermissibly retroactive

Under the proposed rule, the use of a fee waiver (Form I-912) for any immigration benefit would be considered a factor in determining an immigrant's financial status. This is improper. Separate consideration of the use of a fee waiver means that factors such as income would be unfairly counted twice. For example, an immigrant who received a fee waiver based on their household income would have two strikes against them for what is essentially the same factor - once for the income and a second for the fee waiver granted because of the income. As a result, consideration of the use of a fee waiver has the unintended effect of double-counting negative factors related to financial status.

Second, the consideration of fee waiver usage is improperly retroactive. The statute calls for a forward-looking analysis of whether the immigrant is likely to become a public charge in the future. Because a fee waiver is not a continuing benefit, the proposed rule's consideration of *prior* receipt of a fee waiver impermissibly penalizes applicants for their financial status on the date of the application for the fee waiver and not on the date of application for admission, adjustment of status, or for a visa.

c. Impact on immigrants of color

The proposed rule will have a disproportionate impact on immigrants of color. While people of color account for approximately 36% of the total U.S. population, approximately 90% of the 25.9 million people who would be potentially chilled by the proposed rule are people from communities of color (23.2 million). Among people of color potentially chilled by the rule, an estimated 70% are Latino (18.3 million), 12% are Asian American and Pacific Islander (3.2 million), and 7% are Black people (1.8 million). Among people of color, approximately 33% of Latinos, 17% of Asian American and Pacific Islander, and 4% of Black people would be potentially chilled potentially by the proposed rule.³³

The proposed changes to limit the use by lawfully residing and eligible immigrants of critical programs that improve health, nutrition and well-being would significantly harm our nation's Latino community today and in the future. Today, the U.S. Hispanic population stands at more than 55 million and approximately one in four (23%) Latinos are non-citizens.³⁴ And by 2050, it is projected that nearly one-third of the U.S. workforce will be Latino.³⁵ Among Latino children, who account for a quarter of all U.S. children, the majority (52%) have at least one immigrant parent.³⁶ Access to federal programs like SNAP, Medicaid, and affordable housing have allowed millions of Latinos to lift themselves out of poverty: 21% of Latino households received SNAP in the last year;³⁷ approximately 32% of Latinos are covered by Medicaid;³⁸ and approximately 740,000 Latino households received federal rental assistance in 2015.³⁹ For progress to continue in the Latino community and our nation, immigrants should have an opportunity

³³ 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. Custom Tabulation by Manatt health, 9/30/2018. Found online at <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population>.

³⁴ U.S. Census Bureau, American FactFinder: Selected Population Profile in the United States: 2016 American Community Survey 1-Year Estimates; and UnidosUS tabulation of 2017 Current Population Survey, Annual Social and Economic Supplement.

³⁵ J. S. Passel & D. Cohn, "U.S. Population Projections: 2005-2050," Pew Research Center (February 2008) Found online at <http://www.pewhispanic.org/2008/02/11/us-population-projections-2005-2050/>

³⁶ Richard Fry and Jeffrey S. Passel "Latino Children: A Majority Are U.S.-Born Offspring of Immigrants" (Washington, DC: Pew Research Center, 2009) <http://www.pewhispanic.org/2009/05/28/latino-children-a-majority-are-us-born-offspring-of-immigrants/>.

³⁷ UnidosUS tabulation of 2017 Current Population Survey, Annual Social and Economic Supplement.

³⁸ *Id.*

³⁹ Center on Budget and Policy Priorities tabulation of Department of Housing and Urban Development (HUD) 2016 administrative data, produced by arrangement with HUD.

to support the resilience and upward mobility of their families. The proposed changes fail in this respect as Latino immigrant families would be limited in their use of support programs that help families put food on the table, access health care, and afford a roof over their heads.

The proposed rule would have a chilling effect on an estimated 1.8 million Black immigrants and their families. Nearly one in ten (7%) of all the people affected by the proposed rule, or one in twenty Black people in the U.S. (4%) would be potentially affected by the rule.⁴⁰ Although there are fewer total Black immigrants than Latinos or Asian Pacific Islanders, Black immigrants made up nearly one-quarter of people who became lawful permanent residents in one year.⁴¹ In the aftermath of the 1996 Welfare Reform Acts, cuts to public benefits had lasting and devastating repercussions on Black people, including Black immigrants.⁴² In the decade after these laws passed, extreme poverty doubled to 1.5 million.⁴³ The proposed public charge rule would have a similarly chilling effect on Black immigrants and their families. In addition, like all Black people in America, Black immigrants face chronic employment discrimination. This means that Black immigrant women and men also earn considerably lower wages than U.S.-born non-Hispanic white women and men.⁴⁴ This makes it more likely that they or their families would benefit from programs that support work by helping them access health care, nutritious food, and stable housing.

The following example encapsulates many of the expected threats to access to health care, stable housing, and family unity vulnerable immigrants and their families are facing because of the proposed public charge rule.

Emily and Jose⁴⁵ have been together for fifteen years and were recently married. Jose is originally from Mexico and Emily is a U.S. citizen. NIJC is representing Emily and Jose as they begin the process for Jose to obtain his green card. They are hopeful that securing Jose's permanent resident status will help them finally have a stable foundation on which they can build a future together.

Emily suffers from degenerative bone disease in her back, known as Spinal Osteoarthritis. Doing daily tasks without assistance is nearly impossible for Emily. Jose helps Emily with her day-to-day necessities while also working full-time. Even though he has a full-time job, he does not earn a household income of 250 percent above the federal poverty line and he is 60 years old. By the time an immigration officer reviews his green card application, he may likely have reached his 61st birthday. Based on the proposed changes to the Totality of Circumstances test, and the severity of Emily's degenerative bone disease, Jose would automatically have up to three factors negatively weighed against him in determining his potential status as a public charge.

Jose's ability to remain in the United States and work is critical for Emily's wellbeing. Her disease requires medication and constant physical assistance to maneuver even the lightest of activities. Just as

⁴⁰ 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. Custom Tabulation by Manatt health, 9/30/2018. Found online at <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population>.

⁴¹ D'Vera Cohn and Neil G. Ruiz. "More than half of new green cards go to people already living in the U.S.," Pew Research Center, July 6, 2017, <http://www.pewresearch.org/fact-tank/2017/07/06/more-than-half-of-new-green-cards-go-to-people-already-living-in-the-u-s/>

⁴² Clarke, V. (2004). Impact of the 1996 Welfare Reform and Illegal Immigration Reform and Immigrant Responsibility Acts on Caribbean Immigrants. *Journal Of Immigrant & Refugee Services*, 2(3/4), 147-166.

⁴³ May 2013, Rising Extreme Poverty in the United States and the Response of Federal Means-Tested Transfer Programs H. Luke Shafer, University of Michigan and Kathryn Edin, Harvard University, <http://npc.umich.edu/publications/u/2013-06-npc-working-paper.pdf>

⁴⁴ Randy Capps, Kristen McCabe and Michael Fix. "Diverse Streams: African Migration to the United States." Migration Policy Institute, April 2012, <https://www.migrationpolicy.org/research/CBI-african-migration-united-states?pdf=AfricanMigrationUS.pdf>

⁴⁵ All NIJC client names have been changed to protect client confidentiality.

*important, they love each other, and married so they could stay together. "I need him here," says Emily, "Not because I need him to go pick up my medicine...I love him so much and if they took him...I would be totally devastated."*⁴⁶

5. Workability, Lack of Clarity, and Arbitrary Acts

The proposed rule is not administrable by normal agency processes. Under the proposed rule, an individual would become a public charge if an adjudicator thought that the noncitizen might someday become reliant on government medical help in advanced age. It would be hard to the point of impossibility to guess who might eventually suffer from Alzheimer's or Parkinson's disease, or any other ailment in old age, which might result in institutionalization.

The impossibility of predicting future health outcomes renders arbitrary any guesstimates by agency adjudicators. This, in turn, would subject the regulations to legal challenge. "The touchstone of due process is protection of the individual against arbitrary action of government."⁴⁷

6. Negative impacts on affected parties such as U.S. citizens, Lawful Permanent Residents and noncitizen family members

The proposed rule is extremely dismissive of the likely deleterious impact on affected parties such as the U.S. citizen, Lawful Permanent Resident and noncitizen family members of applicants.

Investing in nutrition, health care, and other essential needs keeps children learning, parents working, families strong, and allows all of us to contribute fully to our communities. The policies articulated in the proposed rule have already begun to terrify immigrant families, discourage or prevent hard-working people from immigrating, and deter immigrant families from seeking the help they need to lead a healthy⁴⁸ and productive life.⁴⁹ By the Department's own admission, the rule *"has the potential to erode family stability and decrease disposable income of families and children because the action provides a strong disincentive for the receipt or use of public benefits by aliens, as well as their household members, including U.S. children."* Targeting low-income families will only exacerbate hunger and food insecurity, unmet health care needs, poverty, homelessness, and other serious problems. If it moves forward, the rule will have ripple effects on the health, development, and economic outcomes of generations to come. One in four children in the U.S. -- nearly 18 million children -- has at least one immigrant parent.⁵⁰ The vast majority of these children -- about 88 percent or 16 million -- are U.S. citizens.⁵¹ Children born in the United States to immigrant parents are U.S. citizens and therefore eligible for public benefits under the same eligibility standards as all other U.S. citizens.⁵² Currently more than eight million citizen children

⁴⁶ Dieppa, Isabel. "Can Love Defeat Public Charge? Emily and Jose's Journey." National Immigrant Justice Center. Nov. 2, 2018, <https://www.immigrantjustice.org/staff/blog/can-love-defeat-public-charge-emily-and-joses-journey>

⁴⁷ *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); see also *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) ("core" of due process is "protection against arbitrary action").

⁴⁸ Schencker, Lisa. *Chicago Tribune*. "Illinois doctors say Trump immigration proposal already scaring away patients." Dec. 2, 2018, available at <https://www.chicagotribune.com/business/ct-biz-immigration-proposal-scaring-people-from-medicaid-1202-story.html>

⁴⁹ Scott, Dylan. *Vox*. "Study suggests Trump is scaring immigrant families off food stamps." Nov. 15, 2018, available at <https://www.vox.com/policy-and-politics/2018/11/15/18094901/trump-immigration-policy-food-stamps-snap>

⁵⁰ Migration Policy Institute, Children in U.S. Immigrant Families 2016, <https://www.migrationpolicy.org/programs/data-hub/charts/children-immigrant-families>

⁵¹ *Id.*

⁵² Michael Fix and Ron Haskins. "Welfare Benefits for Non-citizens." Brookings Institute, Feb. 2, 2002, <https://www.brookings.edu/research/welfare-benefits-for-non-citizens/>

with an immigrant parent have Medicaid/CHIP coverage.⁵³ However, seven percent of citizen children with an immigrant parent still lack any health insurance coverage.⁵⁴ In 2006, 31 percent of children enrolled in WIC were citizen children of immigrant parents or immigrant children.⁵⁵ In 2009 eight percent of all SNAP participants and 17 percent of child participants were citizen children living with noncitizen adults.⁵⁶

Children in immigrant families are 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.⁵⁷ However, like all children, children in immigrant families benefit when they have access to programs and services that promote their development. Parents' and children's health are inextricably linked and children do better when their parents are mentally and physically healthy. Children whose parents are insured are more likely to have insurance themselves.⁵⁸ Research demonstrates that safety net programs such as SNAP and Medicaid have short and long-term health benefits and are crucial levers to reducing the intergenerational transmission of poverty.⁵⁹

The value of access to public benefits has been documented repeatedly. Multiple studies confirm that early childhood or prenatal access to Medicaid and SNAP improves health and reduces reliance on cash assistance. Children of immigrants who participate in the Supplemental Nutrition Assistance Program (SNAP, formerly food stamps) are more likely to be in good or excellent health, be food secure, and reside in stable housing. Compared to children in immigrant families without SNAP, families with children who participate in the program have more resources to afford medical care and prescription medications.⁶⁰ An additional year of SNAP eligibility for young children with immigrant parents is associated with significant health benefits in later childhood and adolescence.⁶¹ Children in immigrant families with health insurance coverage are more likely to have a usual source of care and receive regular health care visits, and are less likely to have unmet care needs.⁶² Children with access to Medicaid have fewer absences from school, are more likely to graduate from high school and college, and are more

⁵³ Samantha Artiga & Anthony Damico, Nearly 20 Million Children Live in Immigrant Families that Could Be Affected by Evolving Immigration Policies, Kaiser Family Foundation, (Apr. 18, 2018), <https://www.kff.org/disparities-policy/issue-brief/nearly-20-million-children-live-in-immigrant-families-that-could-be-affected-by-evolving-immigration-policies/>

⁵⁴ *Id.*

⁵⁵ Tracy Vericker, et al., Effects of Immigration on WIC and NSLP Caseloads, Urban Institute, (Sept. 2010), available at <https://www.urban.org/sites/default/files/publication/29156/412214-Effects-of-Immigration-on-WIC-and-NSLP-Caseloads.PDF>

⁵⁶ Curtis Skinner, SNAP Take Up Among Immigrant Families With Children, Columbia University National Center for Children in Poverty, (Mar. 2011), available at http://www.nccp.org/publications/pdf/text_1002.pdf

⁵⁷ Tanya Broder, Avidah Moussavian, and Jonathan Blazer, *Overview of Immigrant Eligibility for Federal Programs*, National Immigration Law Center, 2015, <https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/>; Kinsey Alden Dinan, *Federal Policies Restrict Immigrant Children's Access to Key Public Benefits*, National Center for Children in Poverty, 2005, http://www.nccp.org/publications/pdf/text_638.pdf.

⁵⁸ Julie L. Hudon and Asako S. Moriya, "Medicaid Expansion for Adults Had Measurable 'Welcome Mat' Effects on Their Children," *Health Affairs* 36 (2017), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2017.0347>; Joan Alker and Alisa Chester, *Children's Health Insurance Rates in 2014: ACA Results in Significant Improvements*, Georgetown University Health Policy Institute, Center for Children and Families, 2015, <http://ccf.georgetown.edu/wp-content/uploads/2015/10/ACS-report-2015.pdf>.

⁵⁹ Page, Marianne, "Safety Net Programs Have Long-Term Benefits for Children in Poor Households", Policy Brief, University of California, Davis, 2017 https://poverty.ucdavis.edu/sites/main/files/file-attachments/cpr-health_and_nutrition_program_brief-page_0.pdf

⁶⁰ Children's Health Watch, *Report Card on Food Security and Immigration: Helping Our Youngest First-Generation Americans To Thrive*, 2018, <http://childrenshealthwatch.org/wp-content/uploads/Report-Card-on-Food-Insecurity-and-Immigration-Helping-Our-Youngest-First-Generation-Americans-to-Thrive.pdf>

⁶¹ Chloe N. East, "The Effect of Food Stamps on Children's Health: Evidence from Immigrants' Changing Eligibility," Working Paper, 2017, http://www.chloeast.com/uploads/8/9/9/7/8997263/east_fskids_r_r.pdf.

⁶² Christine Percheski and Sharon Bzostek, "Public Health Insurance and Health Care Utilization for Children in Immigrant Families," *Maternal and Child Health Journal* 21 (2017).

likely to have higher paying jobs as adults.⁶³ Children whose families receive housing assistance are more likely to have a healthy weight and to rate higher on measures of well-being—especially when housing assistance is accompanied by food assistance.⁶⁴ Essential health, nutrition and housing assistance prepares children to be productive, working adults. Counting it as a negative factor in the public charge assessment is contrary to the purpose of the public charge ground of inadmissibility.

The proposed initiatives would change the lives of countless families across the United States. Children in immigrant families do not live in isolation. They live and grow up in communities where their individual success is critical to the strength of the country’s future workforce and collective economic security. When families have access to housing assistance, they have more resources to cover the cost of nutritious foods, health care, and other necessities.⁶⁵ Where families live is also directly tied to where they work. If parents lose access to affordable housing, they may also be at risk of losing their jobs. As compared to children without health insurance, children enrolled in Medicaid in their early years have better health, educational, and employment outcomes not only in childhood but as adults.⁶⁶ By making health insurance accessible to children and parents, Medicaid keeps families healthy and protects them from financial hardship. Likewise, a raft of studies show that SNAP improves food security, dietary intake, and health, especially among children, and with lasting effects.⁶⁷

For millions of families, Medicaid and SNAP are lifelines that keep them living above the poverty threshold.⁶⁸ America’s future depends on ensuring that all children succeed. We need to invest in children, rather than put their healthy development and education at risk by destabilizing their families. Forcing parents to choose between their ability to remain with or reunite their family and accessing critical benefits is shortsighted. In the immediate and long-term, this will harm all of us.

7. US citizen liberty interests and denial of due process

The explanation for the rule focuses almost entirely on the rule’s effects on noncitizens, but hundreds of thousands of U.S. citizens will be affected by this rule. The first and most obvious problem is that the rule does not consider them as “affected parties.” This is sufficient in itself to require re-analysis. The various costs to U.S. citizens – and related costs both economic and other – must be considered.

U.S. citizens have protected liberty interests implicated by their family members’ immigration. For instance, marriage is a fundamental right protected from arbitrary governmental restriction; “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the pursuit of happiness by free men,”⁶⁹ and the Supreme Court calls marriage “one of the ‘basic civil rights of man,’

⁶³ Karina Wagnerman, Alisa Chester, and Joan Alker, *Medicaid is a Smart Investment in Children*, Georgetown University Center for Children and Families, March 2017, <https://ccf.georgetown.edu/2017/03/13/medicaid-is-a-smart-investment-in-children/>.

⁶⁴ Kathryn Bailey, Elizabeth March, Stephanie Ettinger de Cuba, et al., *Overcrowding and Frequent Moves Undermine Children’s Health*, Children’s HealthWatch, 2011, www.issuelab.org/resources/13900/13900.pdf.

⁶⁵ Nabihah Maqbool, Janet Viveiros, and Mindy Ault, *The Impacts of Affordable Housing on Health: A Research Summary*, Center for Housing Policy, 2015, http://www.housingpartners.com/assets/creating_change/http_app.brnto.pdf.

⁶⁶ Rourke O’Brien and Cassandra Robertson, *Medicaid and Intergenerational Economic Mobility*, University of Wisconsin—Madison, Institute for Research on Poverty, 2015, <https://search.library.wisc.edu/catalog/9910223409002121>; Andrew Goodman-Bacon, *The Long-Run Effects of Childhood Insurance Coverage: Medicaid Implementation, Adult Health, and Labor Market Outcomes*, NBER Working Paper No. 22899, 2016, www.nber.org/papers/w22899.

⁶⁷ Hartline-Grafton, H. (2013). *SNAP and Public Health: The Role of the Supplemental Nutrition Assistance Program in Improving the Health and Well-Being of Americans*. Food Research & Action Center.

⁶⁸ <https://ccf.georgetown.edu/2017/03/09/medicaid-how-does-it-provide-economic-security-for-families/>

⁶⁹ *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

fundamental to our very existence and survival.”⁷⁰ “[D]ecisions of [the Supreme] Court confirm that the right to marry is of fundamental importance for all individuals.”⁷¹

Moreover, the Supreme Court has found that the term “liberty” includes “not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home, and bring up children.”⁷² The right of parents to establish a home and direct their children’s upbringing presupposes the underlying and basic freedom to choose to live together in doing so. The right of marital privacy presupposes an underlying right of association with one’s spouse; that is how the Court grounded the right in *Griswold*, and it is that very associational right that is burdened here.⁷³

The liberty interests asserted here – to live together with one’s spouse and to be free of arbitrary governmental restrictions on that union – are “[a]mong the historic liberties encompassed by the Due Process Clause,”⁷⁴ and supported by “our Nation’s history, legal traditions, and practices.”⁷⁵

Put simply, U.S. citizens have a protected liberty interest in being able to live with their spouses, children, parents, and other family members; an interest that merits some solicitude. Governmental procedures and rules must be constitutionally sufficient in light of the interests at stake.

Even if the nature of marriage did not itself suffice to give U.S. citizens liberty interests in being able to live with family members in this country, the Immigration and Nationality Act establishes a system of rights and duties that is sufficient to give rise to such constitutional interests. The statutory system requires and authorizes citizens to take several steps regarding the immigration status of family members. It requires filing of a “visa petition” (executed under penalty of perjury) on behalf of her husband. The rights and powers of the citizen spouse are ongoing until actual immigrant visa status is granted; a citizen petitioner may, at any time, withdraw the visa petition and prevent issuance of an immigrant visa.⁷⁶ The laws require the citizen to execute a binding and enforceable affidavit of support, which continues in force even if the couple divorced.⁷⁷

Taken together, and singly, these rules give U.S. citizen petitioners a legal role in the visa process which is sufficient to trigger protectable liberty interests.

“Once [a court] determines that due process applies, the question remains what process is due.”⁷⁸ In that assessment, the Court must “consider the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government’s interest.”⁷⁹ The government has undeniable interests at stake; but on the other “side[] of the scale,”⁸⁰ there are profoundly important interests in marital and family integrity. The risk of error and the value of procedural safeguards take on decisive importance:

⁷⁰ *Id.*, quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

⁷¹ *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

⁷² *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see also *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

⁷³ See also *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (“when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation”).

⁷⁴ *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).

⁷⁵ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

⁷⁶ 8 C.F.R. § 103.2(b)(6); *Matter of Cintron*, 16 I&N Dec. 9 (BIA 1976).

⁷⁷ See *Liu v. Mund*, 686 F.3d 418, 419–20 (7th Cir. 2012); *Erlor v. Erlor*, ___ F.3d ___, No. 14-15362, Slip. Op. at 8 (9th Cir. June 8, 2016) (“under federal law, neither a divorce judgment nor a premarital agreement may terminate an obligation of support.”).

⁷⁸ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

⁷⁹ *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁸⁰ *Hamdi*, 542 U.S. at 529

“The *Mathews* calculus * * * contemplates a judicious balancing of these concerns, through an analysis of ‘the risk of an erroneous deprivation’ of the private interest * * * and the ‘probable value, if any, of additional or substitute procedural safeguards.’”⁸¹

The fact that the proposed rule is so ambiguous and so amenable to differing interpretations renders it of doubtful legality. Any balancing of interests must account for the longstanding rule that “[t]he touchstone of due process is protection of the individual against arbitrary action of government.”⁸² The government must act “with fundamental procedural fairness” and may exercise its power only with “reasonable justification in the service of a legitimate governmental objective.”⁸³ In *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 246 (1957), due process precluded denying a person the opportunity to take the bar exam when there was “no evidence in the record” which rationally justified finding Schwartz morally unfit to practice law; *see also, e.g., Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam) (revocation of parole for failing to report an “arrest” that was actually only a traffic citation was “was so totally devoid of evidentiary support as to be invalid under the Due Process Clause”).

The indeterminate and subjective standards putatively created by this rule would make factual and legal errors inevitable. (By contrast, the current approach is workable and understood by all parties, which would reduce the risk of erroneous deprivation.) Moreover, this will function by post hoc denials, which by their nature do not give applicants advance warning. The current approach gives applicants and their families pre-deprivation notice. Given the weighty interests involved (separation from family members, even in cases where hardship may be extreme and undisputed) and the availability of alternate procedures, affording no procedural protections at all is unsustainable. The fact that the rule purports to bar appeal renders the rule even more indefensible.

⁸¹ *Id.* (quoting *Mathews*, 424 U.S. at 335).

⁸² *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (“core” of due process is “protection against arbitrary action”).

⁸³ *Id.*