



STATE OF WASHINGTON

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VIA FEDERAL eRULEMAKING PORTAL

The Honorable Kirstjen Nielsen
Secretary of the United States Department of Homeland Security
Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue NW
Washington, D.C. 20529-2140

RE: DHS Docket No. USCIS-2010-0012, Comments on Proposed Rule: *Inadmissibility on Public Charge Grounds*, RIN 1615-AA22 (October 10, 2018)

Dear Madam Secretary and Chief Deshommes:

The undersigned, Washington Governor Jay Inslee, Washington Attorney General Bob Ferguson, and City of Seattle Mayor Jenny Durkan, respectfully urge the Department of Homeland Security (the Department) to withdraw its Proposed Rule: *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114 (October 10, 2018) (the Proposed Rules). The Proposed Rules, if adopted, will gravely harm Washingtonians, causing children in our State – non-citizens and citizens alike – to forfeit meals, health insurance, and a roof over their heads. We have serious concerns with the legality of the Proposed Rules. Further, they are based on a distorted view of the United States' ideals and conflict with Congress' longstanding immigration policy as reflected in the Immigration and Nationality Act of 1965.

Congress created the "public charge" rule in 1882 to bar admission into the United States of prospective immigrants who would be unable to care for themselves without becoming wards of the state. The Department now proposes two sweeping changes to this rule. First, it proposes to redefine the term "public charge" to empower immigration officers to deny lawful status to any immigrant who has received the most common forms of government assistance, even if relatively minimal and temporary. Second, it proposes a preference for immigrants coming to this country with established assets, and it appears to authorize immigration officers to use low income, few educational opportunities, and lack of health insurance in prospective immigrants' countries of origin to categorize them as likely "public charges."

The Proposed Rules will cause great harm to our State. The Department concedes in the preamble that the Proposed Rules will deter legally present visa holders from using important assistance programs. Over 140,000 Washington residents could lose health insurance because of the Proposed Rules. Women will lose routine reproductive care services, resulting in more

unintended pregnancies, more high-risk deliveries, and increased costs for newborns whose health is compromised by the lack of adequate pre-natal care. Washingtonians will be forced into emergency rooms for routine medical care, jeopardizing our State's success in reducing uncompensated care and driving up state-funded alien emergency medical care. The Proposed Rules will cause residents of Washington to forego up to \$55.3 million annually in State food and cash benefits and \$198.7 million annually in medical care. If implemented, the Rules will reduce total economic output in Washington by up to \$97.5 million annually, cut Washingtonians' wages up to \$36.7 million annually, and eliminate anywhere from 334 to 782 jobs.

The Proposed Rules would not survive judicial review. They are inconsistent with federal immigration statutes and are arbitrary and capricious in violation of the Administrative Procedure Act. They are unconstitutionally vague and violate the guarantee of equal protection in the Fifth Amendment. They also fail to consider the financial impacts on states like Washington, as required by Executive Orders 13132, 12866, and 13563.

The Proposed Rules are transparently anti-immigrant. During the better parts of American history, we encouraged people to come to this country who could contribute to the American experiment and build a better life for themselves and their families. We welcomed people who left their land of birth because of the lack of opportunities, but who could take advantage of our resources and markets to build companies such as AT&T, Goldman Sachs, Apple, Google, eBay, and Pfizer – all of which were founded by immigrants or children of immigrants. Indeed, here in Washington State, an immigrant who came to the United States at age 16 with only \$5 in his pocket, John W. Nordstrom, founded our most famous retail clothing company.¹ The Proposed Rules abandon this fundamental ideal of the American Dream.

Unfortunately, the Proposed Rules perpetuate the stereotypes that pervade the current Administration's approach to immigration. They advantage immigrants entering with assets and penalize those without, expressing a bias towards those from countries with established economies. This will shift the origins of immigrants granted green cards away from Mexico and Central America and toward Europe, reinstating a long-discredited preference for Europeans.

The Proposed Rules unduly punish and discourage immigrants who receive almost any government assistance for longer than one year. They undercut Washington State public policies predicated on the belief that providing immigrants – especially children – with limited assistance now will promote long-term success and lead to greater contributions to our State in the future. It is ironic that many foreign-born families of the founders of iconic American companies, who were poor, young, and fleeing harsh economic and political conditions, would be denied green cards under the Proposed Rules.

The Proposed Rules force on green card applicants and visa holders a choice between health care, food, and a roof over their children's heads or pursuing their dream of becoming

¹ <https://shop.nordstrom.com/content/company-history> [last accessed 11/24/18].

Americans. We are deeply concerned that, in the Administration's zeal to choke off any helping hand for parents, families, and individuals aspiring to immigrate to our country, fewer children will receive food, vaccines, and shelter. For these reasons, and others explained below, the Department should withdraw the misguided and harmful Proposed Rules.

A. Relevant Background

1. History of the Public Charge Doctrine

Congress first enacted a public charge provision in 1882, barring from entry "any person unable to take care of himself or herself without becoming a public charge." Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 316. The Immigration and Nationality Act now provides that "[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A). In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress codified the factors relevant to a public charge determination, which include the immigrant's age, health, family status, assets, resources, and financial status, and education and skills, but it did not alter the fundamental meaning of the term. 8 U.S.C. § 1182(a)(4)(B)(i).² In addition to those requirements, family-sponsored immigrants must submit an enforceable affidavit of support. 8 U.S.C. § 1182(a)(4)(B)(ii). The public charge doctrine applies (as to admissibility) to immigrants applying for entry to the United States or, if they live in the U.S., to applications to change temporary status to permanent residency or to extend or make any other change in visa status. 8 U.S.C. § 1182(a)(4)(A).

For 19 years, the Department of Homeland Security, and the Immigration and Naturalization Service before it, has defined "public charge" to refer to a person who is or will become "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (March 26, 1999). "It has never been [Immigration and Naturalization] Service policy that *any* receipt of services or benefits paid for in whole or in part from public funds renders an alien a public charge, or indicates that the alien is likely to become a public charge." *Id.* at 28,692. These 1999 clarifications were necessary because, in the words of the Immigration and Naturalization Service:

This situation is becoming particularly acute with respect to the provision of emergency and other medical assistance, children's immunizations, and basic nutrition programs, as well as the treatment of communicable diseases. Immigrants' fears of obtaining these necessary medical and other benefits are not only causing them

² Likewise, Congress altered certain aspects of the public charge doctrine in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Pub. L. No. 104-193, § 1, 110 Stat. 2105 (codified at 42 U.S.C. § 1305 (2000)), but it did not alter the definition of public charge.

considerable harm, but are also jeopardizing the general public. For example, infectious diseases may spread as the numbers of immigrants who decline immunization services increase. Concern over the public charge issue is further preventing aliens from applying for available supplemental benefits, such as child care and transportation vouchers, that are designed to aid individuals in gaining and maintaining employment.³

Historically, the receipt of Supplemental Nutritional Assistance Program benefits or the typical use of Medicaid do not indicate that an immigrant is or is likely to become primarily dependent on the government for subsistence.

2. The Proposed Rules

On October 10, 2018, the Department issued the Proposed Rules. They float a massively expanded definition of “public charge” and will significantly change the character of legal immigration to the United States. The term would not simply encompass individuals who are “primarily dependent on the government for their subsistence,” but individuals who might obtain most any help at all from the government. The Rules expand the list of public benefits considered and increase the importance of the prospective immigrant’s existing income in the public charge analysis.

If finalized, the Proposed Rules would prevent many non-citizens from obtaining lawful permanent residence (*i.e.*, green cards) or renewing a temporary visa. Most applicants would be subject to the whims of immigration officers, who would be charged with predicting if the applicants in the future are “likely” to receive certain public benefits. Visa holders already in the U.S. also could be denied admission based on past use of these benefits.

The Proposed Rules reject the standard in which the immigration official must find that a public charge is or will become primarily dependent on government assistance for subsistence. Instead, “relying on dictionary definitions and a skimpy and selective reading of legislative history and case law,”⁴ the Department asserts that any person who receives “financial support from the general public through government funding (*i.e.*, public benefits)” is a public charge.⁵

³ Proposed Rule: *Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28676 (May 26, 1999).

⁴ A. Hammond, *The Immigration-Welfare Nexus In A New Era?*, 22 Lewis & Clark L. Rev. 501, 526 (2018).

⁵ 83 Fed. Reg. at 51,558.

The Proposed Rules would primarily affect people applying for lawful permanent residence, whether from inside or outside the United States.⁶ The Migration Policy Institute reported that, in fiscal year 2017, had the Proposed Rules been in place, the restrictive public charge test would have applied to 83 percent of all immigrants who received green cards, a figure largely composed of persons sponsored by relatives (66 percent of the total) and employers (12 percent of the total). The Proposed Rules also would affect the ability of the estimated 2.3 million nonimmigrants with temporary visas (*e.g.*, students, H-2A agricultural workers, and H-1B high-skilled workers) to extend their visas or change their immigration status.⁷

The Proposed Rules would substantially increase the types of public benefits that could be considered in the public charge test to include:

- Medicaid, subject to very limited exceptions such as emergency services and services provided to students with disabilities;
- the Supplemental Nutrition Assistance Program (SNAP, or food stamps);
- premium and cost-sharing subsidies for drug benefits under Medicare Part D;
- housing assistance under the Housing Choice Voucher Program or Section 8 Project-Based Rental Assistance; and
- subsidized housing under the Housing Act of 1937.

83 Fed. Reg. 51, 289-90 (proposed 8 C.F.R. § 212.21(b)). The Migration Policy Institute estimates that under the proposed policy changes, 43 percent of non-citizens may see benefits-use factor into a public charge decision, up from three percent under the 1999 public charge guidelines.⁸

In addition, the Department has asked for comment on whether to include the Children's Health Insurance Program (CHIP) in the group of benefits considered in deciding if a person will become a "public charge."⁹

⁶ Those who apply from outside the United States are subject to the rules in the U.S. State Department's Foreign Affairs Manual. On January 3, 2018, the State Department published an amendment to the Foreign Affairs Manual that radically expanded the meaning of "public charge" to be applied by consular officials, tracking (and in some respects going even farther than) the Proposed Rules. *Foreign Affairs Manual and Handbook*, U.S. Dep't of State, <http://fam.state.gov/>.

⁷ U.S. immigration law states that public charge tests do not apply to green card applicants who entered the country as refugees, were granted asylum, or received other humanitarian visas. With very narrow exceptions, the Proposed Rules would only apply to individuals applying for a green card, not those who already have one. The Rules do not apply to naturalization or green card renewals. They would apply, however, to green card holders who leave the country for more than six months and seek to be readmitted.

⁸ J. Batalova, Jeanne, Fix, M. Michael, and M. Greenberg, *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefit Use* (Migration Policy Institute June 2018), <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>.

⁹ 83 Fed. Reg. at 51,173-74.

The Proposed Rules create a preference for immigrants coming to this country with assets. Applicants' financial status counts against them if they have a household income below 125 percent of the federal poverty level, and they lack assets a multiple of five times greater than the difference between their income and the federal poverty level. 83 Fed. Reg. 51,291 (proposed 8 C.F.R. § 212.22(b)(4)). In contrast, coming to this country with wealth from a foreign country – with an income of at least 250 percent of the federal poverty level – is deemed a “heavily weighted positive factor.” 83 Fed. Reg. 51,292 (proposed 8 C.F.R. § 212.22(c)(2)). Other negative factors are if the applicant is a child or a senior citizen, has no high school diploma or equivalent, does not speak English proficiently, or applied for a fee waiver in applying for any immigration benefit. *Id.* (proposed 8 C.F.R. § 212.22(b)(1), (4), (5)).

The Proposed Rules' greatly expanded “public charge” definition will result in a dramatic increase in the numbers of applicants denied green cards. Most of these denials will not be based on current or recent benefit use, both because immigrants who are not yet lawful permanent residents are generally ineligible for these benefits and because individuals applying from outside the country are unlikely to have used U.S. public benefits. Instead, most denials will be based on immigration officers' predictions that individuals are likely to use benefits in the future.

While the Proposed Rules consider benefit use by the individual immigrant, not use by the applicant's dependents, they nevertheless target children, including U.S. citizen children. The Proposed Rules expand the list of potentially disqualifiable benefits to those granted to households, *i.e.*, an adult and his or her children, not merely to individuals. These include SNAP food assistance, housing assistance, and rental assistance. Thus, if an immigrant parent of U.S. citizen children is deterred from applying for food or rental assistance to avoid being deemed a “public charge,” the American children lose their access to help with food or shelter along with the immigrant parent.

B. The Proposed Rules Will Seriously Harm Washingtonians, and They Threaten Washington's Fiscal Health

In PRWORA, Congress made the judgment that state and local governments should be free to use their own funds to provide benefits to immigrants who were not eligible for federally-funded assistance. The Proposed Rules are fundamentally at odds with the investments and programs that Washington has made to support the health, well-being, and prosperity of our local communities, by encouraging all eligible immigrant families to participate in needed social programs.

As a result of the rules, immigrants will avoid health care, preventive coverage, contraception and family planning, and cancer screenings in order to preserve their claim to lawful status. They will refuse temporary housing assistance, leaving children in our State without shelter. The impact of the proposed changes will sharply reduce the number of immigrant families accessing benefits, which will increase the number of people living in poverty, illness and disease, unplanned pregnancies and costly deliveries, and the use of uncompensated care, and harm the economic stability, prosperity, and health of Washington's communities. The policy changes will

cause unintended consequences in the immigrant household population that we have estimated will cause serious impacts to our local economy, cost-shifts to other local, state, and other federal government programs, and especially negative impacts on jobs in industries like hospitals and grocery stores.

1. The Proposed Rules Will Have a Damaging Chilling Effect on Immigrants' Use of Benefits to Which They Are Legally Entitled

Evidence from prior changes in immigration policy strongly suggests that many immigrants who are *not* subject to the public charge test will nevertheless withdraw from a broad array of public programs and services out of confusion, fear, or an abundance of caution. Following the passage of PRWORA in 1996, thousands of immigrant families withdrew from public benefits programs *for which they were eligible*.¹⁰ If the Proposed Rules are adopted, it is reasonable to assume that this type of disenrollment will continue, and will include two types of erroneous disenrollment: (i) immigrants who are *not* subject to the public charge test, and (ii) immigrants who are disenrolling even from services that are not included in the public charge determination.

According to the Migration Policy Institute, changes in the behavior of immigrant families following the passage of the 1996 welfare law provide the best available evidence of the potential effects of the proposed public-charge rule.¹¹ A comprehensive review of studies done following the introduction of welfare reform found statistically significant evidence of a withdrawal from benefits among populations whose eligibility was unchanged by the law, including refugees and U.S. citizen children. The USDA found that food stamp use fell by 53 percent among U.S. citizen children in families with a non-citizen parent between 1994 and 1998. Fix and Passel found that it fell 60 percent among refugees even though the law did not restrict their eligibility for the program, even during their initial years in the country. Comparable figures for drops in Medicaid use were 17 percent among non-citizens and 39 percent among refugees; for TANF, 44 percent and 78 percent.¹²

2. The Proposed Rules Will Cause Washingtonians to Lose Health Coverage, Will Destroy Jobs, Will Reduce Wages and Economic Output, and Will Produce Significant Negative Health and Economic Consequences

¹⁰ M. Fix & J. Passel, *Trends in Non-citizens' and Citizens' Use of Public Benefits Following Welfare Reform* (March 1999), <https://www.urban.org/research/publication/trends-non-citizens-and-citizens-use-public-benefits-following-welfare-reform>. See also L. Ku & A. Freilich, *Caring for Immigrants: Health Care Safety Nets in Los Angeles, New York, Miami, and Houston* (Feb. 2001), <https://files.eric.ed.gov/fulltext/ED453330.pdf>.

¹¹ J. Batalova, Jeanne, Fix, M. Michael, and M. Greenberg, *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefit Use* (Migration Policy Institute June 2018), <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>.

¹² *Id.*

Washington has a large number of immigrants and immigrant households. In 2016, 1,020,394 people in Washington were foreign born, representing 14 percent of the total population.¹³ Approximately 52 percent are non-citizens and 47.2 percent are naturalized citizens. Many in Washington's immigrant households are children under age 18. Children make up 28 percent (or 494,800) of immigrant household members. They constitute 30 percent of all children in Washington. Nearly all of these children are U.S. citizens. One quarter of U.S. citizen children in Washington have at least one or more parents that are foreign born, and 38 percent of children in low-income families have one or more foreign-born parents.

Immigrant households are a significant part of Washington's economy. Seventy-three percent of all adults age 18-64 in immigrant households were employed in 2016. This means that one quarter (25 percent or 818,000 workers) of the state's workforce (3.3 million) comes from immigrant households. Fifty-eight percent of immigrant household members lived in 312,700 households that paid property taxes in 2016. Most of these households, 60 percent, had property tax bills for \$3,000 or more. Immigrant households accounted for 19 percent of all households in the state that paid property taxes in 2016. Washington immigrants are much more likely to work in the agricultural sector than immigrants nationally. The state's \$49 billion food and agriculture industry employs approximately 140,000 people. Thirteen percent of the state's economy comes from agriculture.

From 2014 to 2016, Washington ranked eighth among the states with the largest number of immigrants in benefits-receiving families. Using information from the American Community Survey from 2014-16, the Migration Policy Institute estimates that 48.3 percent (244,800) of Washington's non-citizen community (506,900) receive one of the four major public benefits programs implicated in the public charge policy, which include public cash assistance, food assistance, medical assistance, or supplemental security income (SSI).¹⁴ Nearly 20 percent of non-citizen foreign born individuals in Washington live below 200 percent of the federal poverty level (\$41,560 for a family of three), while 26.5 percent earned more than \$75,000 a year. Three-quarters of Washington's non-citizen community have health insurance, with 23.3 percent receiving Washington Apple Health or Medicaid.¹⁵

Most adult immigrants using one of the four major means-tested benefit programs are working. Fifty-eight percent of non-citizen and naturalized-citizen adults (ages 16 to 64) who received one or more benefits were employed.¹⁶ By comparison, 44 percent of U.S. born benefit recipients were employed. Washington State invests in providing employment and training programs to

¹³ Migration Policy Institute, "State Immigration Data Profiles," <https://www.migrationpolicy.org/data/state-profiles/state/demographics/WA> [last accessed 11/12/18].

¹⁴ Migration Policy Institute, "National and State-Level Estimates of Use of Means-Tested Public Benefits by U.S. Citizenship States," <https://www.migrationpolicy.org/sites/default/files/datahub/PublicCharge-StateEstimates.xlsx> [last accessed 11/12/18].

¹⁵ Migration Policy Institute, "State Immigration Data Profiles," <https://www.migrationpolicy.org/data/state-profiles/state/demographics/WA> [last accessed 11/12/18].

¹⁶ Migration Policy Institute, "National and State-Level Estimates of Use of Means-Tested Public Benefits by U.S. Citizenship States," <https://www.migrationpolicy.org/sites/default/files/datahub/PublicCharge-StateEstimates.xlsx> [last accessed 11/12/18].

help recipients of cash and food assistance to improve their education and skills to be able to move out of poverty.

3. Washington's Programs Harmed by the Proposed Rules

a. Programs Administered by the Washington Department of Social and Health Services

Washington's Department of Social and Health Services (DSHS) administers an array of programs designed to provide individuals and families with the resources and support they need to build better lives. In State Fiscal Year 2017, approximately one in four Washington residents turned to DSHS for assistance with cash, food, child support, child care, and other services. Each day, more than two million individuals receive the support and resources they need from DSHS to transform their lives.

Washington's public assistance programs administered by DSHS's Economic Services Administration draw from both federal and state resources. All public assistance programs have a number of eligibility requirements, which include income levels, residency in Washington State, and verification of citizenship status. All federally-funded programs are limited to non-citizens who meet the federally-defined eligibility standards.¹⁷ Washington invests general state funds to assist individuals and families who are ineligible for federal programs to include lawfully present non-citizens who fail to meet federal eligibility qualifications established in the PRWORA. Washington's programs include State Family Assistance; Food Assistance Program for Legal Immigrants; Aged, Blind, or Disabled cash assistance; Pregnant Women Assistance; Consolidated Emergency Assistance Program; Refugee Cash Assistance; Housing and Essential Needs Referral; Diversion Cash Assistance; and State Supplemental Payment.

The success of the important programs outlined below will be undermined by the Proposed Rules. This may be because the programs involve cash assistance or non-monetizable benefits that immigration agents, given their broad discretion, may interpret as making the recipient a public charge, causing qualified immigrants to refuse them. *See* proposed 8 C.F.R. § 212.21(b)(i)(C). Alternatively, even if the benefits do not fall within the letter of section 212.21, the discretion the Proposed Rules give to immigration officials is so broad that immigrants may not understand that the benefits cannot be considered in the public charge calculus. As a result, they may decline the benefits for fear of jeopardizing their hopes of lawful status and eventual citizenship.

(1) Cash Assistance Programs

The Temporary Assistance for Needy Families (TANF) program,¹⁸ which is funded by a blend of federal funds from the U.S. Department of Health and Human Services and state funding,

¹⁷ Wash. Admin. Code § 388-424-0001.

¹⁸ 8 U.S.C. § 1611(a), (c)(1)(B); 8 U.S.C. § 1612(b)(3)(C).

provides cash assistance to parents/caregivers with children and pregnant individuals to bolster their ability to meet their families' foundational needs, including a safe home, healthy food, reliable transportation, and school supplies. The average benefit for a family is \$13.43 per day. In State Fiscal Year 2017, the average monthly caseload for TANF recipients was 28,555 cases with a monthly average assistance of \$408.20.¹⁹ During the 2017-2019 Biennium, Washington projects to spend \$262,495,000 (\$244,127,000 federal and \$18,368,000 state) in service dollars and \$141,385,000 (\$69,070,000 federal and \$72,315,000 state) in administrative costs.

Washington operates a state-funded program titled State Family Assistance that makes income assistance available to individuals who are ineligible for TANF, including some non-citizens.²⁰ Some families may contain people with different immigration status that qualify them to receive both TANF and SFA. Out of the monthly average caseload of 28,555, 97.1 percent of cases were TANF only (meaning that they met the federal eligibility qualifications), 1.7 percent received a mix of TANF and State Family Assistance (SFA), and 1.3 percent received SFA only.²¹ DSHS estimates that approximately six to seven percent of the combined TANF and SFA caseload have someone who is a non-citizen.

Washington provides certain pregnant non-citizens who are ineligible for TANF with assistance through the state-funded Pregnant Women Assistance program.²² In addition, Washington provides certain non-citizen families and pregnant residents with emergency income assistance through the state-funded Consolidated Emergency Assistance Program.²³ This funding is used to alleviate emergency conditions by providing cash to assist with food, shelter, clothing, medical care, or other necessary items. Another state-funded cash program is the State Supplemental Program which helps certain clients who the Social Security Administration determines are eligible for Supplemental Security Income.

(2) Food Assistance

The Supplemental Nutrition Assistance Program (SNAP) was created in 1977. SNAP provides food purchasing assistance to low-income individuals and families. *See* 7 U.S.C. § 2013 (2018). SNAP benefits are provided on a "household" basis. In federal law, a SNAP "household" means "an individual who lives alone or who, while living with others, customarily purchases food and prepares meals for home consumption separate and apart from the others; or a group of individuals who live together and customarily purchase food and prepare meals together for home consumption." 7 U.S.C. § 2012(m). SNAP households may use the benefit to purchase food at one of the quarter million retailers authorized by the Food and Nutrition Service to participate in the program.

¹⁹ [DSHS, Econ. Servs. Admin., Program Briefing Book for State Fiscal Year 2017, TANF/SFA/WorkFirst, https://www.dshs.wa.gov/sites/default/files/ESA/briefing-manual/2017TANF_WorkFirst.pdf.](https://www.dshs.wa.gov/sites/default/files/ESA/briefing-manual/2017TANF_WorkFirst.pdf)

²⁰ Wash. Rev. Code § 74.08A.100.

²¹ [DSHS, Econ. Servs. Admin., Program Briefing Book for State Fiscal Year 2017, TANF/SFA/WorkFirst, https://www.dshs.wa.gov/sites/default/files/ESA/briefing-manual/2017TANF_WorkFirst.pdf.](https://www.dshs.wa.gov/sites/default/files/ESA/briefing-manual/2017TANF_WorkFirst.pdf)

²² Wash. Rev. Code § 74.62.030(2).

²³ Wash. Rev. Code § 74.04.660(3)(a); Wash. Admin. Code § 388-436-0015.

Federal law lays out SNAP eligibility rules and benefit amounts. To qualify for benefits, a SNAP household's income generally must be at or below 130 percent of the federal poverty level, the household's net monthly income (after deductions for expenses like housing and child care) must be less than or equal to 100 percent of the federal poverty level, and its assets must fall below limits identified in federal regulations.²⁴ The average monthly benefit per household is \$253, and the average monthly benefit per person is \$125 per month, or \$1.40 per meal. *Id.*

For SNAP, adult immigrants with Lawful Permanent Residency (LPR) status are eligible after five years. Immigrant children with LPR status are eligible without a waiting period.

Washington's Basic Food program provides assistance for children and adults to purchase and access nutritious foods. The program combines federally funded SNAP and the state-funded Food Assistance Program for Legal Immigrants (FAP). FAP is used for individuals who are lawfully present and meet all eligibility requirements for SNAP except citizenship or immigration status.²⁵ To qualify for Basic Food, a household's earnings must fall below 200 percent (\$41,560 for a family of three) of the federal poverty level. The average daily benefit for a household receiving Basic Food is \$7.30 per day. According to the U.S. Department of Agriculture Food and Nutrition Service, for Federal Fiscal Year 2016, the total SNAP issuance for Washington was \$1,452,893,518, with an average of 546,931 households participating per month and receiving an average of \$327.30 in food assistance.²⁶ DSHS estimates that approximately six to eight percent of the combined SNAP/FAP caseload have someone who is a non-citizen.

(3) Employment and Training Programs

DSHS administers several employment and training programs designed to provide recipients of cash and food benefits opportunities to gain skills and to secure employment to help them out of poverty. In partnership with other state agencies and community-based organizations, DSHS focuses on developing custom plans to support individuals and families in building their skills and fully making use of their talents through employment and/or education and training. Each program is tailored to serve a particular population based on eligibility, including specially designed programs to help with non-citizen families.

Washington's WorkFirst program is for families receiving TANF or SFA. WorkFirst provides families with opportunities to engage in work activities that support financial stability and resilience. As part of the WorkFirst Program, DSHS offers the Limited English Proficiency (LEP) Pathway Program to offer employment services, job skills training, and English as a Second Language (ESL) services to nearly 5,000 people each year, the majority of whom are

²⁴ See A Quick Guide to SNAP Eligibility and Benefits, Ctr. on Budget & Pol'y Priorities, <https://www.cbpp.org/research/a-quick-guide-to-snap-eligibility-and-benefits> (last updated Sept. 14, 2017).

²⁵ Wash. Admin. Code § 388-400-0050.

²⁶ USDA, Food and Nutrition Serv., *Supplemental Nutrition Assistance Program State Activity Report Fiscal Year 2016* at 5 (September 2017), <https://fns-prod.azureedge.net/sites/default/files/snap/FY16-State-Activity-Report.pdf>.

refugees and immigrants. DSHS infuses state-funding into this program to be able to serve those non-citizens who may be ineligible for federally-funded services.

The Washington State Basic Food Employment and Training (BFET) program provides job search, job search training, self-directed job search, educational services, skills training, and other employment opportunities to Basic Food (SNAP) recipients who are not participating in the Temporary Assistance for Needy Families WorkFirst work program. BFET is an important part of the State's comprehensive workforce development system serving the needs of low-income individuals, displaced workers, and employers by encouraging financial independence from public assistance through skill acquisition, personal responsibility and gainful employment. Washington also dedicates state-funding to support a BFET program designed specifically to provide culturally and linguistically appropriate services to more than 1,000 non-citizens in Washington. This program is only available to people who are qualified for federal benefits.

(4) Services for Aging and Disabled Non-Citizens

The Aging and Long-Term Support Administration (AL TSA) is an agency in DSHS that administers Long Term Services and Supports (LTSS) to low-income elderly and disabled individuals. LTSS includes both paid and unpaid medical and personal care services and can be delivered in a person's home, community residential setting, or an institution such as a nursing home. Many U.S. citizens who are older, and/or who have disabilities, depend on LTSS to remain living safely and independently in their own homes.

The Proposed Rules will significantly diminish the workforce that provides LTSS in Washington, while at the same time forcing vulnerable individuals to choose between their basic needs and immigration benefits. According to the U.S. Department of Health and Human Services, the demand for workers who provide LTSS, called Direct Care Workers, in the United States will grow from 2.3 million in 2015 to an estimated 3.4 million by 2030.²⁷ One of the reasons for the growing demand for Direct Care Workers is the rapidly increasing population of individuals over the age of 65, as the over 65 population represents one of the largest cohorts that utilize LTSS. In 2015, the number of individuals in the United States age 65 and older was estimated to be 47.8 million, and that number is projected to grow to approximately 73 million by 2030.²⁸ Medicaid is the largest purchaser of LTSS nationally.

The Proposed Rules will significantly reduce the supply of Direct Care Worker labor in the United States. An unusually high percentage of the workers who make up the Direct Care Worker labor force – approximately 23 percent – are immigrants.²⁹ Their average annual earnings are at or below the Federal Poverty Level, despite working demanding jobs providing

²⁷ U.S. Department of Health and Human Services, Health Resources and Services Administration, *Long-Term Services and Support: Demand Projections 2015-2030* at 4 (March 2018), <https://bhwh.hrsa.gov/sites/default/files/bhw/nchwa/projections/hrsa-ltts-direct-care-worker-report.pdf>.

²⁸ *Id.* at 5.

²⁹ United States Government Accountability Office, *Long-Term Care Workforce*, p. 31 (August 2016), <https://www.gao.gov/assets/680/679100.pdf>.

services to some of the country's most vulnerable citizens.³⁰ As a result, many rely on public assistance for health care, food, and housing. Under the Proposed Rules, these individuals are more likely to be deemed public charges and denied entry to work in the United States. Other proposed factors that will cause problems for potential Direct Care Workers are credit history, education, and language, all of which will weigh against admission of the demographic that fills this job. Collectively, as we detail further below, the factors included in the new "totality of circumstances" test will promote the admission of well-educated, highly-skilled, wealthy immigrants from English-speaking countries. In contrast, the demographic that is attracted to the LTSS industry and upon which the industry relies to provide critical services to low-income individuals with disabilities and older adults will be excluded.

The resulting labor shortage in the LTSS market will increase costs for states like Washington and risk the safety of the elderly and disabled. Medicaid pays for a substantial portion of LTSS, and a labor shortage will drive Medicaid costs up. Many vulnerable citizens will end up in nursing homes, which would destroy decades of federal and state efforts, including millions of federal dollars spent, to reduce the number of individuals residing in nursing homes by providing services in the individual's own home. In addition, without LTSS many vulnerable elderly and disabled Americans will be at increased risk of serious injury, institutionalization, or death.

(5) Financial Impact of the Proposed Rules on DSHS and Individuals It Serves

DSHS developed estimates of the impact of the Proposed Rules on the use of food, cash, and medical assistance for the programs identified above. For each program, the number of affected families and total expenditures for cases including persons other than a U.S. citizen were identified for the month of August 2018. To forecast program expenditures through CY 2021, for purposes of these calculations, we assumed that caseloads associated with non-citizens would remain constant at August 2018 levels.

Following the approach taken in national estimates developed by the Kaiser Family Foundation, we estimate that when fully implemented, the Proposed Rules would lead to disenrollment rates ranging from 15 to 35 percent among food, cash, and medical assistance enrollees in cases including a non-citizen.³¹ These estimates reflect impacts on non-citizens without LPR status who would disenroll because participation in the program could negatively affect their chances of attaining LPR status, as well as disenrollment resulting from a "chilling effect" among a broader group of enrollees in immigrant families, including effects on their U.S. born children.

³⁰ The average annual salary for a Direct Care Worker, based on figures reported by the GAO, is approximately \$20,000 annually. United States Government Accountability Office, *Long-Term Care Workforce*, pp. 32, 34 (August 2016), <https://www.gao.gov/assets/680/679100.pdf> (National Mean Wage (\$11.20)*DCW average hours worked per week (34.9)*52 weeks per year=\$20,325.76).

³¹ See S. Artiga, R. Garfield, A. Damico, *Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid* (Henry J. Kaiser Family Foundation Oct. 11, 2018), <https://www.kff.org/disparities-policy/issue-brief/estimated-impacts-of-the-proposed-public-charge-rule-on-immigrants-and-medicaid/> [last accessed 12/1/18].

The assumed disenrollment rate range draws from previous research on the effect of welfare reform era rule changes on enrollment in health coverage among immigrant families.³²

With regard to participation in food or cash assistance programs administered by the DSHS Economic Services Administration, we estimate that at full implementation the Proposed Rules will cause:

- \$23.7 to \$55.3 million annual reduction in food and cash assistance to needy families;
- \$41.8 to \$97.5 million annual reduction in total economic output;
- \$15.7 to \$36.7 million annual reduction in wages, salaries, and benefits for workers; and
- the destruction of 334 to 782 jobs.

The Washington economy would be directly impacted due to a reduction in economic activity in industries that include retailers such as grocery stores and other merchants, transportation services, rental housing, and education and childcare services.

Further, the Washington State Input-Output (I-O) model was used to calculate the indirect economic impacts of the Proposed Rules from multiplier effects flowing from the direct impacts of reduced assistance to needy families. As the direct impact ripples through the State's economy, the I-O model projected the loss of economic activity, labor income, and jobs noted above.

b. Programs Administered by the Washington Health Care Authority

(1) State-Funded Medical and Behavioral Care Programs

Medicaid, created in 1965, is a program jointly funded by the federal and state governments to assist states in furnishing medical assistance to needy individuals and families. *See* 42 U.S.C. § 1396-1 (2018). Anyone who qualifies under program rules can receive Medicaid. States administer Medicaid, and they generally determine the financial eligibility criteria for participants. Adult lawful permanent residents are eligible for Medicaid after the five-year waiting period imposed by PRWORA. *See* 8 U.S.C. § 1613(a). Immigrants who have LPR status and are either pregnant or under 19 can be covered before the five-year period should a state choose to, or they will also be eligible after the five-year waiting period.

The Washington Health Care Authority (HCA) administers Washington's Medicaid program, as well as other federally and state-funded medical assistance programs. HCA has over 1,300 employees and a biennial budget of \$20.2 billion. With community, state, and national partners,

³² *See* N. Kaushal and R. Kaestner, *Welfare Reform and Health Insurance of Immigrants*, 40(3) Health Serv. Res. 697-722 (June 2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1361164/> [last accessed 12/1/18]; M. Fix and J. Passel, *Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform 1994-97* (The Urban Institute March 1, 1999), https://www.urban.org/research/publication/trends-noncitizens-and-citizens-use-public-benefits-following-welfare-reform/view/full_report [last accessed 12/7/18].

HCA provides evidence-based, cost-effective services that support the health and well-being of individuals, families, and communities in Washington.

Washington Apple Health is the brand name for all Washington State medical assistance programs, including Medicaid, CHIP, and state-funded-only programs. Apple Health provides essential health care coverage, which includes preventative care, inpatient hospital, prescription drugs, and many other health care services. Services are available to those in need in all Apple Health programs. Citizens and non-citizens are included in the following coverage groups under the Medicaid program:

- children under the age of 19;
- individual adults ages 19 up to 65;
- parents/caretakers;
- pregnant women;
- non-citizens (including federally funded Alien Emergency Medical);
- aged (age 65 or older), blind, or disabled;
- foster care;
- long-term services support and hospice; and
- Medicare Savings Program.

The Children's Health Insurance Program (CHIP) provides essential health care coverage, including preventative care, inpatient hospital, prescription drugs, and many other health care services, to low-income children. CHIP is federally matched under Title XXI of the Social Security Act. In Washington, CHIP does not operate as a separate program, so many families do not know that their coverage is from a federally-funded program. State law requires premium payments for CHIP coverage, and HCA markets this program as Apple Health with Premium. Premiums are \$20 or \$30 per month for per participating child, depending on household income, with a total premium payment maximum of \$40 or \$60 per household per month. These premiums represent an average of one percent of household income.

CHIP dollars fund other Apple Health programs and services such as:

- prenatal coverage of pregnant women ineligible for Medicaid due to citizenship status (unborn option);
- coverage of lawfully present, non-citizen children (CHIPRA Section 214);
- enhanced match for Medicaid eligible children above 133 percent of the federal poverty level (CHIPRA Section 107);
- the Washington Poison Center; and
- the WithinReach call center.

HCA integrates state-funded (Medicaid) services for the Community Behavioral Health Services program, which covers the full range of mental and emotional well-being from day-to-day challenges of life to treating mental health and substance use disorders. Apple Health covers

substance use, mental health, and problem gambling. HCA provides funding, training, and technical assistance to community-based providers for prevention, intervention, treatment, and recovery support services to people in need.

In State Fiscal Year 2019, HCA is expected to spend \$10.1 billion to support Apple Health and its Community Behavioral Health Services program. Of this amount, \$6.8 billion of the revenue to support those expenditures is expected to come from federal contributions. Some of the programs supported by this budget include:

- \$28.3 million (\$4.7 million federal) for health care coverage for undocumented children in the Apple Health for Kids program;
- \$70.3 million (\$47.0 million federal) for health care coverage for undocumented non-citizen pregnant women through the Apple Health for Pregnant Women program; and
- \$1.5 billion (\$919.4 million federal) for the Community Behavioral Health Services program.

c. Financial and Health Impacts of the Proposed Rules on HCA and Individuals It Serves

(1) Lost Health Care Coverage

As of October 31, 2017, there were 107,244 individuals insured for health coverage under Apple Health who could potentially be impacted if the Proposed Rules are implemented. These are non-citizens including refugees, asylees, and other individuals exempt from the five-year bar, lawful permanent residents, and those without a legal status. Most of these individuals are children who are U.S. citizens and women receiving pregnancy medical coverage who would have a higher likelihood of suffering adverse labor and delivery events if they are uninsured.

There are an additional 140,612 families where a member of the household may fall under public charge and a household member is receiving Apple Health coverage. If individuals are too fearful to access services, especially pregnant women and children, costs would grow exponentially as individuals would delay accessing preventative care, prenatal care, and wellness checks. Not only would severe health impacts occur, but the resulting lack of coverage would adversely impact health care jobs and various supporting services, and this would be more intense in rural regions of our state.

HCA projected the impacts on its medical programs using the same methodology as DSHS, estimating disenrollment rates ranging from 15 to 35 percent in cases including a non-citizen. With regard to participation in medical programs administered by HCA, we estimate that at full implementation the Proposed Rules will cause:

- \$42.6 to \$99.4 million annual reduction in medical and behavioral care to Washington families in 2019;

- \$85.2 to \$198.7 million annual reduction in medical and behavioral care to Washington families in 2020-2023;
- 10,000 to 24,000 lawfully present adults and 3,000 to 8,000 lawfully present children losing medical care annually and becoming uninsured and;
- 2,600 to 6,000 undocumented adults and children losing medical care annually and becoming uninsured.

The immigrants who lose health coverage as a result of the Proposed Rules will be forced to wait to seek care until their condition has become emergent. When they present at a hospital in an emergency, they will be eligible for Alien Emergency Medical care (*see* below), and Washington will be required to cover the vastly more expensive medical costs in an acute care setting than if the individuals had received preventive care.

(2) Increase in State-Funded Emergency Care

The Proposed Rules also will cause an increase in state-funded emergency care. The Alien Emergency Medical (AEM) Program is a Title XIX program that provides medical care for aliens with an emergent medical condition. Washington pays 50 percent of the costs of AEM care. An “emergency medical condition” includes labor and delivery and involves symptoms that the absence of immediate medical attention could reasonably be expected to result in placing the patient’s health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part.

(3) Increase in Unintended Pregnancies and State-Funded Women’s Reproductive Health Care

The Proposed Rules will have a particularly damaging impact on how much Washington pays for labor and deliveries. Under the Washington Apple Health program, Washington offers pregnancy medical care to any woman who is a resident and has countable income under 193 percent of the federal poverty level. Depending on the woman’s citizenship or immigration status, an income-eligible woman will be placed on the Medicaid or CHIP program. Women with no current legal status receive prenatal care through CHIP. Labor and delivery for these women are covered through the AEM program (*see* above), and their post-partum care is paid with state-only dollars.

The Proposed Rules will chill non-citizen women from using Medicaid and CHIP for routine reproductive care services, including obtaining contraception and other family planning services. Such delayed care will result in more pregnancies and hence more state-funded pre-natal care visits, deliveries, and post-partum care visits. Inadequate reproductive care also is tied to increases in high-risk deliveries. Washington will be responsible for the increased cost associated with newborns who have not received appropriate prenatal care. Under the U.S. Constitution, children born in Washington are American citizens. These newborn children will likely be eligible for Washington Apple Health for Kids through either Medicaid or CHIP.

(4) Increase in Uncompensated Care

The Proposed Rules will burden Washington hospitals with increased uncompensated care by Washington hospitals, harming Washington's economy. Uncompensated care refers to medical services provided by hospital to patients that result in charity care or bad debts. Hospitals generally recover the loss in uncompensated care by increasing prices, and the result is that patients pay more for their health care following increases in uncompensated care.

Washington has significantly reduced uncompensated care since 2014. This reduction appears to be closely associated with the decline in the uninsured rate. As the uninsured rate declined from 14 percent in 2013 to 5.4 percent in 2016, the uncompensated care in Washington dropped from \$2,368 million to \$932 million. Each one percentage-point decline (equivalent to 72,800 persons in 2016) in the uninsured rate is associated with \$167 million drop in uncompensated care.

By increasing the number of uninsured in immigrant households, the Proposed Rules will result in increasing the State's uncompensated care. An increase of 72,800 uninsured among the immigrant household members, for instance, would be equivalent to a four percentage-point upward change in their uninsured rate (from the 10 percent in 2016 to 14 percent) and would be associated with an increase of \$167 million in uncompensated care. This would pose a significant financial threat to many hospitals, especially rural hospitals and supportive services.

4. Programs Administered by the Washington Department of Commerce

a. Programs to Address Homelessness

The Washington Department of Commerce administers state and federal funding primarily through county governments who act as lead grantees and are responsible for directing and managing the local homeless response system. Local homeless response systems must be designed to meet the needs of homeless families and individuals who need help obtaining or maintaining permanent housing. The homeless housing systems are funded by an estimated \$196 million annually in private, federal, state, and local government funding. Document recording fees, collected by county auditors, are the largest single funding source of this effort. The primary interventions offered through these funds are administered with the goals of quickly stabilizing households who are at risk of homelessness in their current permanent housing or providing emergency shelter, temporary housing and placements into permanent housing for those who are experiencing homelessness. The interventions are costly, and there is already much more need for services than the homeless systems have capacity or funds to give.

The number of people experiencing homelessness in Washington State has increased year over year since 2013. Washington has 3,285 homeless families with children, approximately 14 percent of whom (459 families) are immigrant families. In addition, the state serves 50,000 families per year in rental assistance programs, of which an estimated 15,000 are families with children. Fourteen percent of families with children (2,100 families) are estimated to be immigrant families.

After examining potential drivers of homelessness trends, it is now widely understood that the increase in homelessness nationally and in Washington State is overwhelmingly caused by growing rents pushing people living at the margins into homelessness. National research shows a connection between rent increases and homelessness: a \$100 increase in rent is associated with an increase in homelessness of between 6 and 32 percent. Washington has responded to rising homelessness with a variety of housing and services programs, including emergency shelters, transitional housing, and permanent housing. A statewide network of not-for-profit organizations and housing authorities houses more than 98,000 people facing homelessness each year.

Though the response to homelessness is complex, the solution to prevent and end homelessness is simple: a sufficient supply of housing that is affordable to low and extremely low-income individuals and families. Over 78,000 low-income households in Washington use Public Housing and Section 8 to afford modest rent and make ends meet. Around 53,000 of those households include children. Most Public Housing and Section 8 users are working families who simply do not make enough to pay fair market rents. In Washington, the fair market rent for a two-bedroom apartment is \$1,229. In order to afford this level of rent and utilities, a household must earn \$4,098 monthly or \$49,177 annually. Most immigrant workers in Washington are employed in fields such as agriculture, construction, and food service, all of which pay less than \$49,177.

b. The Proposed Rules Will Worsen Homelessness, Cripple Homeless Children's Futures, and Drive Up Washington State's Homelessness Response Costs

The public charge analysis under the Proposed Rules will not consider use of homeless assistance programs, but the inclusion of Public Housing and Section 8 will have a strong impact on the homeless system. It will deter many eligible households from seeking much needed housing benefits, increase the number of imminently homeless individuals and families seeking assistance, and delay placement of homeless individuals and families into permanent housing. While the exact number of low-income immigrants who currently use Public Housing and Section 8 is unknown, it is reasonable to assume that the proportion of immigrants who use Public Housing and Section 8 vouchers to afford housing is consistent with the proportion of immigrants in the overall population in Washington, which is 14 percent. Therefore, we project that the Proposed Rules will compel 10,920 individuals and their families to give up the lifeline assistance that keeps their families one step away from homelessness.

The Proposed Rules will cause delays in placing immigrant households into permanent housing, because they essentially heighten the eligibility requirements for Public Housing and Section 8. These programs are a common source of permanent housing for placements from homeless systems: last year, 17 percent of households exiting the homeless system were placed in Public Housing or Section 8 programs. By decreasing the capacity of the homeless system to exit households to permanent housing, the costs per successful exit will increase substantially when households are not willing to risk hurting themselves or their children by accepting a Public

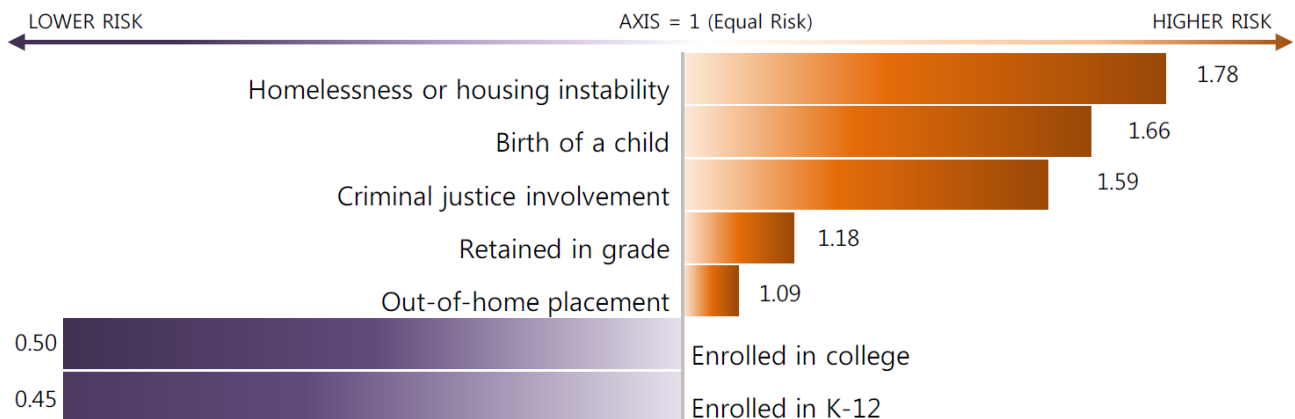
Housing or Section 8 program placement. State and local government funds will have to make up these extra costs, and fewer people will be served per year because of longer stays in emergency shelter and transitional housing.

Homelessness has long-term impacts that will be worsened by the Proposed Rules. Children in families that become homeless because they lose or decline housing assistance are twice as likely to suffer respiratory infections and are at three times the risk of being hospitalized for asthma.³³ In families that become homeless because they lose or decline government assistance, children are almost twice (1.78 times) as likely to disengage from education and work opportunities, as the graphic below shows.³⁴

FIGURE 4.

Young Adult Factors Predicting Later Disengagement

Disengagement odds-ratios associated with selected life events, measured yearly age 15 to 21



SOURCE: INVEST database. (All factors except out-of-home placement significant at the .001 level, placement significant at the .05 level)

Further, the unemployment rate for those who have not achieved a high school diploma is four percentage-points higher than among those who have achieved at least a high school diploma. In addition, employed individuals without a high school diploma will earn \$10,000 less than those with a high school diploma and \$34,000 less than those with additional post-secondary education. The Proposed Rules will aggravate all of these negative outcomes, permanently harming Washington's immigrant children.

5. Crime Victim Assistance Program Administered by the Office of Crime Victims Advocacy

The Washington legislature established the Office of Crime Victims Advocacy (OCVA) in 1990 to serve as an advocate for crime victims in Washington. The vision of OCVA is having a future where all people have access to support, healing, and the ability to reach their full potential, and

³³ *Homelessness and its Effects on Children*, Family Housing Fund, http://www.fhfund.org/wp-content/uploads/2014/10/Homelessness_Effects_Children.pdf, [last accessed 12/7/18].

³⁴ <https://www.dshs.wa.gov/sites/default/files/SESA/rda/documents/research-11-234.pdf>.

where all people experience autonomy, dignity, freedom of identity and expression, and safety in their homes and communities.

For almost 30 years, OCVA has accomplished this by assisting and supporting crime victims in obtaining needed services and resources, by assisting communities in planning and implementing the provision of services for crime victims, by advising local and state government agencies of practices, policies, and priorities that impact crime victims, and by administering grant funds for community programs that support and assist crime victims.

The practical effect of the Proposed Rules is that immigrant survivors will be deterred from seeking and accessing vital benefits for themselves or their families. This will include children and elderly relatives seeking to escape from and address the trauma of domestic violence, sexual assault, labor or sex trafficking, and other crimes. Advocates for crime victims have reported that immigrant families are currently withdrawing from assistance programs due to fear of being deemed public charges, even though the Proposed Rules have not taken effect. They have reported that individuals are concerned with accessing victim advocacy services through non-profit organizations because they think this may jeopardize their ability to remain in the United States.

OCVA is deeply concerned that, as a result of the Proposed Rules, crime survivors and their families are likely to sacrifice their basic needs, safety, and health by not accessing programs that assist with food, housing, and medical care.

C. If Adopted, the Proposed Rules Will Be Overturned by the Courts

1. The Proposed Rules Violate Federal Immigration Statutes

The Department does not have unbounded discretion to define the statutory term “public charge.” An agency may not exercise its discretion to define statutory terms out of existence, or to adopt a meaning patently contrary to the common meaning of a term. Here, the Department’s definition of “public charge” is flatly inconsistent with the common meaning and natural understanding of the phrase, and it would be invalidated on that basis.

A “charge” is “a person or thing committed or entrusted to the care, custody, management, or support of another.” Webster’s Third New International Dictionary of the English Language 377 (1986), *quoted in* Proposed Rule: Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,678 (May 26, 1999). It refers to someone whose care depends on another. This accords with the historical understanding of the term “public charge” as someone who is dependent on public funds for meeting his or her basic needs.

As a historian of the public charge doctrine explained, “[t]he legal origins of American immigration control date back to the colonial period,” and specifically to “the English poor law, which allowed each parish to banish transient beggars from other communities and forcibly send

them back to the parish where they legally belonged.”³⁵ The original public charge rule from 1882, which Congress continued to the present, addressed immigrants who could not support themselves, not merely those who received any form of government assistance upon arriving in a new country:

The state poor laws eventually developed into America’s first immigration laws when a large number of the impoverished Irish fleeing famine in their homeland arrived in the United States in the mid-nineteenth century. This immigration of the Irish, many of whom were Catholics, infuriated Protestant Americans, but their poverty equally fueled anti-Irish nativism. Impoverished at home and sickened during the transatlantic passage, a significant number of Irish immigrants arrived in the United States without the physical strength and financial resources to support themselves, entering public charitable institutions, such as almshouses and lunatic hospitals, as paupers soon after landing. [*Id.*]

The Department’s proposed interpretation defies this common, historical understanding of the term “public charge.” It no longer would be necessary for an individual to be dependent on public funds to live in order to be disqualified from immigrating. Merely temporarily receiving some public benefits, such as subsidized annual check-ups, subsidized housing, or help paying for medication, could make a person a public charge. This construction of the term is untethered from its intended, historical origin, and it will be struck down on this basis.

The Department’s interpretation of the term “public charge” also appears to be contrary to more recent immigration statutes. As recently as 1996, Congress provided that immigrants who are lawful permanent residents may receive means-tested federal benefits such as Medicaid, SNAP, and Section 8 housing and rental assistance. Yet the Proposed Rules purport to give to individuals in the executive branch the discretion to exclude such immigrants as public charges because they have received such benefits or are deemed likely to receive them in the future. It is an odd statutory interpretation that permits an employee in the executive branch to overrule a judgment made by Congress.

The Administration may prefer an immigration policy where receipt of most any federal benefit can disqualify an immigrant from remaining in the United States, but that is not what Congress has authorized. The executive’s policy choices cannot override Congress’s directives, and we urge you to withdraw the Proposed Rules on this basis.

2. The Proposed Rules Are Arbitrary and Capricious and Violate the Administrative Procedure Act (APA)

³⁵ H. Hirota, “Expelling the Poor: The Antebellum Origins of American Deportation Policy,” THE HISTORY OF U.S. IMMIGRATION LAWS (The Gilder Lehrman Institute of American History Fall 2018), <https://www.gilderlehrman.org/history-now/expelling-poor-antebellum-origins-american-deportation-policy> [last accessed 11/20/18].

The Proposed Rules are arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

The Department does not provide a reasoned analysis for changing its longstanding interpretation of the term “public charge.” It does not explain why receipt of temporary support for health care services, rental assistance, and medication subsidies converts the recipient to a person who relies on government assistance to live. The financial threshold the Department creates amounts to approximately \$150/month – far less than necessary to support a person in this country. This significantly lowered threshold for public charge consideration means that many hard-working and largely self-sufficient immigrants who need short-term help to establish themselves in this country may lose their opportunity to move to the United States. The Proposed Rules fail to explain why this is a rational interpretation of Congress’s public charge provision. We ask that the Department provide this explanation and, if it cannot, to withdraw the proposal.

We also are deeply concerned with the dramatic chilling effect the Proposed Rules already have had on individuals’ and families’ completely legal use of congressionally created benefits. As shown above, our state agencies have calculated with some precision the chilling effects that would be caused by the Proposed Rules on the use of government benefits created by the Washington legislature. We must be clear that the Proposed Rules do not address any illegal conduct. They are not a means to enforce existing restrictions preventing ineligible people from trying to receive public resources, or for punishing people who received benefits under false pretenses. Instead, the Proposed Rules would punish individuals and families legally present for using benefits intended to help them thrive in this country.

While the preamble attempts to calculate the cost savings to the Treasury resulting from this harmful chilling effect, it does not address the consequences on children, families, or adults. Nor does it confront the financial impacts that will be transferred to the states where the legally present individuals reside, or the ways the Proposed Rules undermine states’ policy priorities that immigrant families proceed to independence. The Department must explain why the harms to federal and state policy priorities that underlie immigrants’ access to legally available benefits are outweighed before it adopts rules that already have been shown to discourage immigrant adults, families, and children from utilizing congressionally authorized resources.

The Department does not explain the factual basis for its decision to equate existing wealth with future productivity and independence. An immigrant’s existing capital is tied more closely with the economic conditions in the person’s country of origin than the person’s own industriousness. Data shows that immigrants from poor or undeveloped countries will have a lower level of education and fewer capital assets than immigrants from developed countries.³⁶ A person with no capital may take a job, work hard, and build savings, and a person with capital may go unemployed and quickly deplete his or her savings. The Proposed Rules’ public charge test is

³⁶ See G. López, K. Bialik, J. Radford, *Key findings about U.S. immigrants*, Pew Research Center (Sept. 14, 2018), <http://www.pewresearch.org/fact-tank/2018/09/14/key-findings-about-u-s-immigrants/> (last accessed 11/25/18) (“Educational attainment varies among the nation’s immigrant groups, particularly across immigrants from different regions of the world”).

that assets roughly exceeding five times the federal poverty level will immunize a person from a public charge determination, reflecting the assumption that preexisting capital equates with future self-sufficiency. The Department fails to cite any evidence to support this assumption. We ask that the Department provide a factual basis for this inference or eliminate it as a central tenet in the Proposed Rules.

Nor does the Department explain why the benefits it selected are appropriate for predicting that a person will become a public charge. Why Medicare Part D prescription drug subsidies but not health insurance premium subsidies? Why Medicaid health coverage for children but not Women, Infants, and Children nutrition benefits? Why supplemental food assistance typically given to families but not school lunch programs? The Department already created a reasoned record for relying on cash benefits for income maintenance or institutionalization for long-term care as the measures for dependence on government assistance to live. It asked the federal agencies that administer public assistance programs to advise it on this question, and it received responses from the Department of Agriculture, the Social Security Administration, and the Department of Health and Human Services. 64 Fed. Reg. at 28,677-78. The Department cannot simply ignore a record it previously created, but instead it must explain why the information it previously relied on is wrong or no longer relevant. The Department has failed to do so, and we ask that it explain this omission.

The part of the Proposed Rules that gives immigration officers broad discretion to predict whether an immigrant will request public assistance is particularly improper. An agency may not, consistent with the APA, interpret a statutory provision in a way that prevents individuals subject to the statute from knowing whether their conduct accords or violates the statute. Here, the Proposed Rules require immigration officers to determine whether immigrants are “likely at any time in the future to receive one or more public benefits as defined in [8 C.F.R. § 212(b)] based on the totality of the alien’s circumstances.” 83 Fed. Reg. at 51,290 (proposed 8 C.F.R. § 212(c)). The Department lists the broad public charge factors Congress itself identified in 8 U.S.C. § 1182(a)(4)(B), but it does not explain how these factors relate to the benefits the Department now makes potentially disqualifying. Immigration officers are left wide latitude to declare who is and is not likely to use public benefits in the future. This sanctioned fortune-telling is not adequate to allow immigrants to understand the standards that will dictate whether or not they will qualify under Congress’s public charge test.

Further, the Department’s current difficulties demonstrate that it is ill-equipped to properly expand the independent discretion given to immigration officers. A review by The New York Times “of thousands of court records and internal agency documents showed that over the last 10 years almost 200 employees and contract workers of the Department of Homeland Security have taken nearly \$15 million in bribes while being paid to protect the nation’s borders and enforce immigration laws.”³⁷ The Department must explain the reasons to believe that the current difficulties identified with immigration officer’s current degree of discretion will not grow.

³⁷ R. Nixon, “The Enemy Within: Bribes Bore a Hole in the U.S. Border,” NEW YORK TIMES (Dec. 28, 2016), available at <https://www.nytimes.com/2016/12/28/us/homeland-security-border-bribes.html> [last accessed 12/5/18].

The Proposed Rules also are unclear whether age is considered alone or in combination with income. They do not specify the family size threshold that would constitute a negative factor. They do not offer an explanation about how the factors will be weighed or how many negative versus positive factors will result in denial. Because of this pervasive ambiguity, immigration officers have vast discretion in deciding who can and cannot get a green card. The Proposed Rules thus create the likelihood of inconsistent and arbitrary decisions by immigration officers.

The Department's proposed treatment of Medicaid as a non-monetized public benefit is irrational. Medicaid is a diverse program where individuals could be enrolled in the benefit for a lengthy period of time (more than 12 cumulative months) and never utilize any services. Conversely, an individual could enroll in Medicaid and utilize extensive and costly services in a short period of time (less than 12 cumulative months) before disenrolling from the benefit. By treating Medicaid as a non-monetized benefit, the first individual would have a heavily weighted negative factor against admissibility, while the second individual would not have a negative factor despite costing the government substantially more money. The Department should remove Medicaid as a factor in the public charge analysis or address the irrational treatment of Medicaid outlined above.

The Department also does not adequately confront the Proposed Rules' discriminatory impact. The Proposed Rules have a disproportionate, irrational negative impact on women and children. According to the Migration Policy Institute, a whopping 43 percent of recent green card recipients would have been disadvantaged under the Proposed Rules as being neither employed nor in school, and 70 percent of that group were women.³⁸ This ignores, however, a spouse's support. Many immigrant women do not work because of child-rearing responsibilities, and childcare is often difficult for low income families to afford. The same analysis applies to children, who could not individually meet the income test and will fail the test more frequently. The Department has not explained why it is rational to punish women and children, as the Proposed Rules appear to do, who may rely on a spouse's or parent's income and are not indigent or likely to become dependent on government support.³⁹

The Department fails to adequately justify the Proposed Rules' discrimination against people with disabilities and non-English speakers. Under the Proposed Rules, immigrants with a preexisting health condition must show that they have privately funded insurance in order to avoid potential disqualification for citizenship. It is irrational, however, for the Department to require a showing of insurance coverage for a preexisting condition to avoid being deemed a public charge when Congress authorizes the same person to obtain insurance under the Affordable Care Act for the condition. The Department identifies no connection between

³⁸ R. Capps, M. Greenberg, M. Fix, J. Zong, *Gauging the Impact of DHS' Proposed Public-Charge Rule on U.S. Immigration*, p. 8 (Migration Policy Institute Nov. 2018), <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration> [last accessed 12/7/18].

³⁹ The same reasoning applies to elders, many of whom come to the U.S. to live with their U.S. citizen adult children. They are usually retired and have no or low incomes and may use certain benefits sparingly, but they otherwise are supported by their families.

speaking English and being self-sufficient. Census data shows that a substantial percentage of Americans do not speak English as their first language at home. Yet the Department cites no data showing that these individuals are more dependent on government support to survive than English speakers. The Department may have a preference for English speakers in the country, but it cannot impose this preference by importing it into the unrelated public charge test.

3. The Proposed Rules Violate the United States Constitution

The Proposed Rules raise several constitutional concerns, which the Department has ignored. As shown above, the Proposed Rules create a vague patchwork that gives immigration officers nearly unbridled discretion to conclude or deny that an immigrant will become a public charge, and they likewise fail to inform individuals of the conduct that may be used to disqualify them from obtaining a green card or adjusting their visa status. This violates the vagueness doctrine made applicable to the Department by the Due Process Clause in the Fifth Amendment to the Constitution.

Also as shown above, the Proposed Rules irrationally discriminate against women and children, whose characteristics (such as age, education, and employment) may be used to support a public charge determination without consideration of a spouse or parent who contributes to their subsistence. These individuals also face unfairly losing a property interest, since some of them already receive and rely upon benefits that, under the Proposed Rules, may be taken from them unless their relative agrees to forfeit his or her path to lawful permanent residency and possible future citizenship. We ask the Department to explain how, given these facts, the Proposed Rules do not violate these individuals' constitutional rights.

Finally, there is evidence that the Proposed Rules were intended to discriminate against immigrants from Latin America, Asian, and African countries, and those who accept public benefits. They follow several previous executive orders and executive actions that target individuals of Latin American descent. Indeed, the Ninth Circuit recently concluded that the plaintiffs challenging the Trump Administration's decision to rescind the Deferred Action for Childhood Arrivals Program had sufficiently "allege[d] a history of animus toward persons of Hispanic descent evidenced by both pre-presidential and post-presidential statements by President Trump."⁴⁰ Judge Owens, concurring, even concluded that the "litany of statements by the President and high-ranking members of his Administration that plausibly indicate animus toward undocumented immigrants from Central America" meant that the plaintiffs were likely to succeed on their claims on the merits. *Id.* at *34.

President Trump's statements are an embarrassment and in diametric opposition to the values of diversity and equal opportunity on which this country and the State of Washington are based. We believe the Proposed Rules are fatally tainted by his discriminatory and offensive statements and should be withdrawn on this basis.

⁴⁰ *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, No. 18-15068, 2018 WL 5833232, at *30 (9th Cir. Nov. 8, 2018).

4. The Department Should Exempt CHIP From Public Charge Review

The Children's Health Insurance Program provides essential health care coverage, including preventative care, inpatient hospital, prescription drugs, and many other health care services, to low-income children and some adults, such as pregnant women. It provides low-cost health coverage for recipients who earn too much to qualify for Medicaid but still require assistance to pay for healthcare. In Washington, CHIP does not operate as a separate program, so many families do not know that their coverage is from a federally funded program.

If the Department includes CHIP in the final rule, vulnerable populations will lose critical medical coverage, as they or their parents are forced to choose between health care or preserving their path to lawful permanent residency. Without access to primary care, laboratory services, immunizations, dental and vision care, and in some cases prenatal care, those served by the program will experience serious health consequences. Those without coverage will visit emergency departments for care that could have otherwise been delivered more efficiently and effectively in a primary care setting, and they will suffer more acute disease symptoms or conditions due to a lack of healthcare access. As shown above, the resulting costs will be borne by the states, including Washington.

5. The Proposed Rules Do Not Conform to Executive Branch Policy for Promulgating Regulations

Executive Order 13132 requires the Department to produce a federalism summary impact statement. The Department acknowledges that agencies generally must perform such an analysis but summarily concludes that no such analysis is necessary here because the Proposed Rules will not impose substantial, direct costs on State and local governments.⁴¹ This is incorrect. As shown above, the Proposed Rules will cost Washington State up to \$97 million annually in total economic output and reduce Washingtonians' wages by up to \$36.7 million annually, and they will increase Washington's costs substantially for emergency medical care, unintended pregnancies, and pre- and post-natal care. There is every reason to believe other states will be similarly harmed.

The Proposed Rules also do not include an accurate economic impact statement. Executive Orders 12866 and 13562 require agencies to "assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits."⁴² Executive Order 12866 requires that a "significant regulatory action" comply with additional regulatory requirements. This proposed rule meets all the definitions of a "significant regulatory action" because it would (1) have an annual effect on the economy of \$100 million or more and will "adversely and materially affect" the agricultural, service, and other sectors of the economy, public health, and state and local governments; (2) materially alter budgetary impacts

⁴¹ 83 Fed. Reg. at 51,276.

⁴² Exec. Order No. 12,866, 58 Fed. Reg. 51735 (1993); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).

The Honorable Kirstjen Nielsen
Samantha Deshombres
December 10, 2018
Page 28

of entitlement grants or the right and obligations of recipients thereof; and (3) raise novel legal or policy issues arising out of legal mandates. The Proposed Rules dismiss without analysis or basis the financial impacts they will have on Washington, as shown above. A thorough economic impact analysis should be done to address these issues.

D. Conclusion

For the foregoing reasons, the Proposed Rules are deeply flawed as a policy and legal matter. They will impose well over \$100 million in costs annually on Washingtonians and the Washington economy in lost wages, increased health care spending, and reduced economic output. But most alarmingly, by the Department's own admission, they will cause immigrants – including both non-citizen and U.S. citizen children – to lose food, health insurance, medical care, vaccines, and shelter. They are a destructive, self-fulfilling prophecy: as shown by the data above, a child's loss of shelter, medical care, and nutrition now leads to disengagement, poor education outcomes, unemployment, and criminal justice involvement in the future. We urge you to withdraw this misguided proposal. Thank you for considering our views.

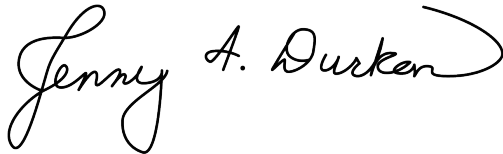
Sincerely,



JAY INSLEE
Washington State Governor



BOB FERGUSON
Washington State Attorney General



JENNY A. DURKAN
City of Seattle Mayor