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Office of Policy and Strategy
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529

Electronically submitted through the Federal eRulemaking Portal at www.regulations.gov.

**Re: Notice of Proposed Rulemaking: Inadmissibility on Public Charge Grounds – DHS Docket No. USCIS-2010-0012**

Dear Chief Deshommes:

The Mississippi Center for Justice is a public interest law firm that combines legal, policy, community, and media advocacy to advance racial and economic justice in public benefits, health care, food security, housing, education, and consumer protection. We appreciate the opportunity to comment on and express our strong opposition to the Department of Homeland Security's (DHS) proposed regulation on public charge, published in the Federal Register on October 10, 2018.[1]

The Proposed Rule seeks to abandon enduring federal immigration policy on public charge without persuasive justification and despite acknowledged harms to the public's health, economic security, productivity, and educational attainment. If enacted, the rule would radically expand the enduring meaning of a public charge from a person "*primarily* dependent on the government for subsistence"[2] (emphasis added) to one who is likely at any time to receive specified public benefits, including most Medicaid programs, Premium and Cost Sharing Subsidies for Medicare Part D, Supplemental Nutrition Assistance Program (SNAP), the Housing Choice Voucher Program, Project-Based Rental Assistance, and subsidized housing under the Housing Act of 1937, U.S.C. 147.[3] This expansion reflects a fundamental misunderstanding of the supplemental and often temporary nature of these public benefits, which

[1] Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, and 248) [hereinafter Proposed Rule].
[2] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) [hereinafter "INA"].
[3] *Id*. at 51289–51290.

often augment inadequate income from low wages or inconsistent hours. It also neglects the critical role of these benefits in addressing often insurmountable barriers to economic stability and productivity, such as food insecurity, lack of health insurance, and housing instability. By addressing these barriers, public benefits help qualifying individuals improve their health and productivity, find and retain employment, and become self-sufficient members of their communities. These benefits are especially important to qualifying lawfully present noncitizen immigrants (noncitizens) and their families, many of which include U.S.-born citizen children, as they gain their footing in the U.S. By expanding the grounds for a public charge determination to include these public benefits, the Proposed Rule would accomplish what decades of federal immigration policy have sought to remedy and prevent, forcing millions who work hard, pay their taxes, and follow the rules to make an impossible choice between lawfully accessing critical health care, food, housing, and other public benefits, and staying together. By effectively ending access to public benefits for otherwise qualified noncitizens, the Proposed Rule also inappropriately attempts to subvert Congress and state policymakers that have expressly safeguarded or extended eligibility to immigrants.

As we detail in our comments below, these and other changes under the Proposed Rule would catalyze profound and irreparable racial and economic injustices in access to health care, healthy food, and housing for immigrants and their families in Mississippi and across the country, exacerbating barriers to stability and self-sufficiency, and erecting insurmountable obstacles to permanent residency and admission to the U.S. Accordingly, we urge DHS to immediately withdraw the Proposed Rule in its entirety.

## I. The Proposed Rule would create a chilling effect on public benefits participation echoing fear, confusion, and disenrollment in the wake of PROWRA and IIRIRA

In 1996, Congress narrowed noncitizen eligibility for certain public benefits in the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[4] These reforms generated considerable confusion about the relationship between the receipt of public benefits and the meaning of a "public charge." Reportedly, some consular officials and Immigration and Naturalization Service (INS) employees inappropriately scrutinized participation in health care and nutrition programs in public charge determinations.[5] Eligible noncitizens and their families, including U.S. citizen children, were deterred from accessing important health and nutrition benefits to which they were legally entitled, resulting in significant harms to the public's health. For example, Medicaid enrollment among U.S.-born children of foreign-born parents decreased by 18 percentage points in the wake of PRWORA, heightening their barriers to health.[6] In contrast, PRWORA's reforms reduced the Medicaid coverage of children of U.S.-born parents by just 4.7 percentage points—even though the law's eligibility reforms did not differentiate between citizen children of U.S.- and foreign-born parents.

[4] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 [hereinafter "PRWORA"].
[5] MICHAEL FIX & JEFFREY PASSEL, TRENDS IN NONCITIZENS' AND CITIZENS' USE OF PUBLIC BENEFITS FOLLOWING WELFARE REFORM: 1994-97 (1999).
[6] Neeraj Kaushal & Robert Kaestner, *Welfare Reform and Health Insurance of Immigrants*, 40(3) HEALTH SERVICES RESEARCH, 697–722, 717 (June 2005).

In 1999, the Immigration and Naturalization Service (INS) responded to these public health harms by publishing field guidance clarifying the types of public benefits that could be considered in public charge determinations.[7] Under this guidance, which still remains in effect today, a public charge is a person "likely to become primarily dependent on the government for subsistence," demonstrated by institutionalization in long-term care at government expense or receipt of government cash assistance for income maintenance.[8] The guidance underscored the importance of identifying "those who are primarily dependent on the government for subsistence without inhibiting access to non-cash benefits that serve important public interests," and provided common examples of benefits that *may not* be considered for public charge purposes, including Medicaid and other health insurance and health services, nutrition programs such as food stamps (now SNAP), and housing benefits.[9]

The Proposed Rule blatantly disregards this history and attempts to undo decades of federal immigration policy by making an eligible noncitizen's lawful participation in certain public benefits—including several that INS specifically protected from public charge determinations in its 1999 guidance—central considerations in public charge determinations.[10] This sea change would make—and is perhaps designed to make—noncitizens afraid to access the public benefits to which they are legally entitled, resulting in widespread disenrollment and forgone enrollment among noncitizens and their families, including citizen children. It would also likely dissuade citizen family members from accessing benefits, fearing that their participation could place a noncitizen family member's immigration status at risk. This chilling effect would likely extend to public benefits and programs beyond the scope of the Proposed Rule, such as Medicaid-covered services in a student's Individual Education Program.

Through our legal service work with immigrants and their families in Mississippi, we have already heard early signs of a chilling effect, including client and community member fears related to lawful public benefits participation and confusion about which benefits would serve as grounds for public charge determinations. Some have already expressed that they no longer wish to access much-needed public benefits for their US-citizen children, fearing that they will be arrested, removed, and forever separated if they do. For example, nearly a decade ago, one of our clients emigrated from Guatemala to a small town in Mississippi with her husband and their daughter. For years, her husband sexually, physically, and emotionally abused her and their daughter. Last year, with the help of a local nun, she courageously reported her husband to the police, resulting in his removal to Guatemala. She applied for a U Visa, which provides protected nonimmigrant status for victims who suffered substantial physical or mental abuse as the result of a qualifying criminal activity, have relevant information about the criminal activity, and cooperate with law enforcement efforts. Even though she cannot afford health care or adequate groceries on her low wages, she is terrified to apply for SNAP benefits and Medicaid on behalf of her newborn son, a U.S. citizen. She worries that his lawful participation could adversely affect her U visa application, resulting in her and her eldest child's removal from the U.S. and

[7] Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 101, 28689 (May 26, 1999).
[8] *Id*. at 28692.
[9] *Id*. at 28693.
[10] Proposed Rule *supra* note 1 at 51289–51290.

the separation of their family. These fears are compounded because her abusive husband awaits her and her daughter in Guatemala.

In this era of heightened immigration enforcement marked by radical racial, ethnic, and economic animuses, the Proposed Rule sends a clear message to that accessing any public benefit, whether for oneself or one's family, would likely result in the denial of future immigration benefits and potential for family separation and removal from the country. Based on data from the American Community Survey, Manatt estimates that the rule could affect 22.2 million noncitizens and a total of 41.1 million noncitizens and their family members living in the U.S., including 12.56 million children.[11] In Mississippi, the chilling effect could deter 42,417 noncitizens and a total of 73,808 noncitizens and their family members from accessing critical health care, nutrition, and housing supports—including 22,272 children with a noncitizen family member living in their household.[12] This effect would have a disproportionate impact on noncitizens and their family members of color: 85 percent of the total chilled population in the U.S. and 80 percent of the total chilled population in Mississippi would be black, Asian, Hispanic/Latino, multiple races, or another race.[13]

## II. The Proposed Rule's chilling effect would catalyze far-reaching public health harms

Ample research demonstrates how health care, nutrition, and housing assistance benefits promote the public's health, reduce health care costs, and lift individuals and families out of poverty.[14] By stigmatizing and disincentivizing enrollment in these programs, the Proposed Rule would catalyze far-reaching public health harms akin to those that INS specifically sought to prevent and end in 1999. The rule directly acknowledges some of these ramifications, including: (1) "worse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children, and reduced prescription adherence[;]" (2) "increased use of emergency rooms and emergent care as a method of primary health due to delayed treatment[;]" (3) "increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated[;]" (4) increased rates of poverty and housing instability[;]" and (5) "reduced productivity and educational attainment."[15] These and additional negative impacts would extend decades into the future, undermining a generation's opportunity to thrive in tangible and entirely preventable ways.[16]

Mississippi simply cannot afford a policy change that would exacerbate existing racial and economic injustices in food insecurity, housing instability, lack of health insurance, and their

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[11] *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard*, MANATT, https://www.manatt.com/insights/articles/2018/public-charge-rule-potentially-chilled-population#DataDashboard (Oct. 11, 2018).
[12] *Id*.
[13] *Id*.
[14] Liana Fox, *Change in Number of People in Poverty After Including Each Element: 2017*, in THE SUPPLEMENTAL POVERTY MEASURE: 2017 (U.S. Census Bureau ed., Sept. 12, 2018) (finding that SNAP helped 3.4 million people move out of poverty and housing subsidies helped 2.9 million people move out of poverty in 2017).
[15] Proposed Rule, *supra* note 1, at 51270.
[16] Sharon Parrot, et al., *Trump "Public Charge" Rule Would Prove Particularly Harsh for Pregnant Women and Children,* CTR. ON BUDGET & POL'Y PRIORITIES (May 1, 2018), https://www.cbpp.org/research/poverty-and-inequality/trump-public-charge-rule-would-prove-particularly-harsh-for-pregnant.

collective public health consequences. According to America's Health Rankings, Mississippians experience the worst health determinants, outcomes, and inequities of any state in the U.S.[17] For example, our state has the highest rates of low birthweight, infant mortality, premature death, and adult diabetes, the highest number of cardiovascular deaths, and the second-highest rates of cancer deaths and frequent mental distress in the U.S. These outcomes are directly rooted in endemic racial and economic injustices in access to health care, healthy food, and stable housing, among other social determinants of health.

Mississippi already has the third highest rate of uninsured individuals nationally (12 percent), a problem compounded by its status as a non-expansion state.[18] Mississippians of color are more likely to be uninsured than their white counterparts: while 82.3 percent of white residents had health care coverage in 2015, only 69.8 percent of black residents and 69.4 percent of Hispanic residents were insured.[19] Low-income children with immigrant parents are less likely to receive Medicaid than those with U.S. born parents.[20] Medicaid enables low-income individuals and families to access primary care and care coordination services, which help prevent acute, chronic, and behavioral health conditions; emergency department utilization; hospitalizations; and associated costs. These benefits are key to a family's financial stability and provide safe environments for their children. Coverage enables low-wage workers to find and retain employment, decrease reliance on cash assistance, save more and contribute more to the local economy, address previously unmet medical needs, timely pay bills, purchase better quality food and housing, access credit and reduce debt, and achieve financial stability.[21] The Proposed

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[17] AMERICA'S HEALTH RANKINGS, 2016 ANNUAL REPORT: MISSISSIPPI (last visited Nov. 10, 2018), https://www.americashealthrankings.org/api/v1/render/pdf/%2Fcharts%2Fstate-page-extended%2Freport%2F2016-annual-report%2Fstate%2FMS/as/AHR-2016-annual-report-MS-full.pdf?params=mode%3Dfull.

[18] *Health Insurance Coverage of the Total Population*, KAISER FAM. FOUND., https://www.kff.org/other/state-indicator/total-population/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Uninsured%22,%22sort%22:%22desc%22%7D (last visited Nov. 3, 2018); *See e.g.*, J. Michael McWilliams, *Health Consequences of Uninsurance among Adults in the United States: Recent Evidence and Implications*, 87(2) MILBANK Q. 443–494 (2009).

[19] *See, e.g.*, MISS. STATE DEP'T OF HEALTH, STATE OF THE STATE: ANNUAL MISSISSIPPI HEALTH DISPARITIES AND INEQUALITIES REPORT (Oct. 2015), https://msdh.ms.gov/msdhsite/_static/resources/6414.pdf.

[20] Wendy Cervantes Rebecca Ullrich & Hannah Matthews, *Our Children's Fear Immigration Policy's Effects on Young Children*, CLASP (Mar. 2018), https://www.clasp.org/sites/default/files/publications/2018/03/2018_ourchildrensfears.pdf.

[21] *See e.g.*, Larisa Antonisse & Rachel Garfield, The Relationship Between Work and Health: Findings from a Literature Review, KAISER FAM. FOUND. (Aug. 7, 2018), https://www.kff.org/medicaid/issue-brief/the-relationship-between-work-and-health-findings-from-a-literature-review/; Aparna Soni et. al., *Medicaid Expansion and State Trends in Supplemental Security Income Program Participation*, 36(8) HEALTH AFFAIRS 1485–1488 (Aug. 2017); Marguerite Burns & Laura Dague, *IRP Discussion Paper: The Effect of Expanding Medicaid Eligibility on Supplemental Security Income Program Participation*, INST. FOR RESEARCH ON POVERTY, U. WIS. MADISON (Mar. 2016), *available at* https://www.irp.wisc.edu/publications/dps/pdfs/dp143016.pdf/; Karina Wagnerman et. al., *Medicaid Is A Smart Investment in Children*, GEORGETOWN CTR. FOR CHILDREN & FAM. 1-11 (Mar. 2017), https://ccf.georgetown.edu/wp-content/uploads/2017/03/MedicaidSmartInvestment.pdf; Robin Rudowitz & Larisa Antonisse, *Implications of the ACA Medicaid Expansion: A Look at the Data and Evidence*, KAISER FAM. FOUND. 1–12 (May 2018), http://nasuad.org/sites/nasuad/files/KFF_Implications-of-the-ACA-Medicaid-Expansion_May-2018.pdf; Loujia Hu et. al., *The Effect of The Affordable Care Act Medicaid Expansions on Financial Wellbeing*, 163 J. PUB. ECON. 99–112 (Jul. 2018); Benjamin D. Sommers et. al., *Health Insurance Coverage and Health — What the Recent Evidence Tells Us*, 33 New England J. Med. 586–593 (Aug. 2017); Wagerman, *supra* note **Error! Bookmark not defined.**, at 6; Rudowitz & Antonisse, *supra* note **Error! Bookmark not defined.**, at 4; Kyle J.

Rule's chilling effect would heighten and erect new barriers to immigrant families' ability to seek appropriate health care and achieve self-sufficiency in Mississippi and nationally, perpetuating disparities in insurance status and especially harming the children of immigrants. The Kaiser Family Foundation estimates that between 2.1 million and 4.9 million individuals would disenroll from Medicaid nationally as a consequence of DHS' rule, depending on varying rates of disenrollment.[22] Kaiser further estimates that 1.5 million children would lose Medicaid coverage, 1.1 million of whom would remain uninsured.[23]

Our state's food insecurity crisis is the direst in the nation: one in five people (600,840) and one in four children (176,580) lack physical, social, or economic access to healthy food.[24] Food insecurity is associated with many of our state's most significant and costly public health challenges, including diabetes, heart disease, obesity, chronic kidney disease, and depression. Families experiencing food insecurity often stretch insufficient budgets by underusing medicine, forgoing medically-tailored diets that address special health care needs, or diluting infant formula. These coping strategies exacerbate existing disease and compromise future health. Bread for the World estimates that food insecurity cost the U.S. $160 billion in health care costs in 2014.[25] The Public Health Institute estimated that food insecurity cost Mississippi between $1.08 and $2.22 billion in health care costs in 2015.[26] By providing a nutrition lifeline to hundreds of thousands of low-income Mississippians experiencing food insecurity, SNAP helps improve their short- and long-term health outcomes, including reducing the burden of nutrition-related disease, improving birth outcomes, and helping seniors live independently and avoid hospitalization.[27] After controlling for factors that likely affect medical care spending, the Center for Budget and Policy Priorities estimated that low-income adults who participate in SNAP incur about $1,400 (nearly 25 percent) less in medical costs per year than their non-participant counterparts.[28] The difference is even more significant for those with hypertension (nearly $2,700 less) and heart disease (over $4,100 less).

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Caswell & Timothy A. Waidmann, *The Affordable Care Act Medicaid Expansions & Personal Finance*, 00(0) MED. CARE RES. & REV. 1–34 (2017); Sarah Miller et al., *The ACA Medicaid Expansion in Michigan & Financial Health*, NAT'L BUREAU OF ECON. RES. (Sep. 2018), *available at* http://www.nber.org/papers/w25053; OH. DEP'T MEDICAID, OHIO MEDICAID GROUP VIII ASSESSMENT: A REPORT TO THE OHIO GENERAL ASSEMBLY (Jan. 2017), *available at* http://medicaid.ohio.gov/Portals/0/Resources/Reports/Annual/Group-VIII-Assessment.pdf.

[22] *Id*.

[23] Samantha Artiga et al., *Potential Effects of Public Charge Changes on Health Coverage for Citizen Children*, KAISER FAM. FOUND. (May 18, 2018), https://www.kff.org/disparities-policy/issue-brief/potential-effects-of-public-charge-changes-on-health-coverage-for-citizen-children/ (using PRWORA-era disenrollment rate of 25 percent in estimate).

[24] *Food Insecurity in Mississippi by County in 2016*, FEEDING AMERICA (2018), https://www.feedingamerica.org/sites/default/files/research/map-the-meal-gap/2016/overall/MS_AllCounties_CDs_MMG_2016.pdf; *Child Food Insecurity in Mississippi by County in 2016*, FEEDING AMERICA (2018), https://www.feedingamerica.org/sites/default/files/research/map-the-meal-gap/2016/child/MS_AllCounties_CDs_CFI_2016.pdf.

[25] *The Cost of Hunger in the U.S.*, BREAD FOR THE WORLD (2015), http://www.hungerreport.org/costofhunger/.

[26] *Tackling Hunger to Improve Health in Americans: Economic Burden Study*, PUBLIC HEALTH INSTITUTE (2016), http://www.phihungernet.org/economic-burden-study.

[27] Steve Carlson & Brynne Keith-Jennings, *SNAP Is Linked with Improved Nutritional Outcomes and Lower Health Care Costs*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 17, 2018), https://www.cbpp.org/research/food-assistance/snap-is-linked-with-improved-nutritional-outcomes-and-lower-health-care.

[28] *Id*.

Many communities across Mississippi experience challenges related to unstable housing, including trouble paying rent, overcrowding, moving frequently, staying with relatives, or spending the majority of household income on housing. For example, according to the Princeton Eviction Lab's 2016 Eviction Rankings, the City of Jackson, MS had the fifth highest eviction rate (8.75 percent) in the U.S., with 7.58 households evicted every day that year.[29] Unstable housing can increase the risk of poor physical and behavioral health, and disproportionately impacts children. For example, children whose families can only afford to live in substandard accommodations can be exposed to problems like lead and mold which can have lifelong consequences on their health. Children who move 3 or more times in a given year due to evictions and other instability challenges are more likely to have chronic conditions and less likely to have consistent health insurance coverage.[30] Accordingly, in addition to improving housing stability, housing benefits help to dramatically improve health outcomes and reduce health care costs. For example, a 2016 study from the Center for Outcomes Research and Education found that participation in affordable housing programs reduced Medicaid beneficiaries' overall health expenditures by 12 percent, including an 18 percent decrease in costly emergency department visits and 20 percent decrease in primary care service utilization.[31] Some housing programs are so effective that they reduce health care spending by an average of $59,415 per participant.[32]

## III. The Proposed Rule inappropriately attempts to subvert Congress and state policymakers by effectively ending public benefits eligibility for otherwise qualified noncitizens

The Proposed Rule attempts to subvert Congress by punishing individuals for accessing the public benefits to which they are already narrowly entitled under federal law. Although certain classes (e.g., certain refugees and asylees) may qualify for benefits such as Medicaid, CHIP, and SNAP immediately, most noncitizens are subject to a five-year waiting period before they qualify. [33] Noncitizens face similar restrictions to housing assistance.[34]

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[29] *2016 Eviction Rankings*, EVICTION LAB, https://evictionlab.org/rankings/#/evictions?r=United%20States&a=0&d=evictionRate&l=4 (last visited Nov. 28, 2018).

[30] Diana Becker Cutts et al. *U.S. Housing Insecurity & the Health of Very Young Children*, 101(8) Am. J. Public Health 1508–14 (2011); Ashley Busacker & Laurin Kasehagen, *Association of Residential Mobility with Child Health: An Analysis Of The 2007 National Survey Of Children's Health*, 16(1) MATERNAL CHILD HEALTH J. 78–87 (2012).

[31] Bill Wright et al., *Health in Housing: Exploring the Intersection Between Housing and Health Care*, CTR. FOR OUTCOMES RES. & ED. & ENTERPRISE COMM. PARTNERS, INC. (2016).

[32] *In Focus: Using Housing to Improve Health and Reduce the Costs of Caring for the Homeless*, COMMONWEALTH FUND (Oct. 24, 2014), https://www.commonwealthfund.org/publications/newsletter-article/2014/oct/focus-using-housing-improve-health-and-reduce-costs-caring.

[33] *SNAP Policy on Non-Citizen Eligibility*, FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., https://www.fns.usda.gov/snap/snap-policy-non-citizen-eligibility (March 24, 2017); *New Option for States to Provide Federally Funded Medicaid and CHIP Coverage to Additional Immigrant Children and Pregnant Women*, KAISER FAM. FOUND. (July 10, 2009), http://kff.org/medicaid/fact-sheet/new-option-for-states-to-provide-federally/.

[34] 24 C.F.R. §5.508(b)(2) (1999); *HUD Residency Documentation Requirements for Subsidized Multifamily Housing Programs*, ADMIN. FOR CHILDREN & FAM., U.S. DEP'T OF HEALTH & HUMAN SERV. (last visited Nov. 24, 2018), https://www.acf.hhs.gov/sites/default/files/orr/download_hud_subsidized_refugee_residency_requirements_pdf.pdf.

The rule would also effectively override state options to expand health care coverage and nutrition assistance. Recognizing the importance of prenatal and early childhood health and nutrition, 29 states provide Medicaid coverage to noncitizen children and/or pregnant women without a 5-year waiting period.[35] Twenty-one states use CHIP funds to cover income-eligible pregnant women regardless of immigration status, and 16 of these states cover prenatal care to those who are otherwise ineligible for Medicaid and/or CHIP under the CHIP unborn child option.[36] Together, these policies demonstrate that states have significant interests and investments in the health and wellbeing of immigrants and their families, which would be directly undermined by this Proposed Rule.

## IV. The Proposed Rule's Totality of Circumstances Framework is unprecedented, arbitrary, and discriminatory

The INA establishes minimum factors that DHS should consider in a public charge determination: age; health; family status; assets, resources, and financial status; and education and skills.[37] The proposed Totality of the Circumstances Framework for Public Charge Determinations[38] would set new arbitrary and unprecedented standards for how DHS should assess these newly weighted factors under the guise of objectivity. The rule explicitly states that the weight given to individual factors not "designated as carrying heavy weight would depend on the particular facts and circumstances of each case[,]" and would not be consistent across all applicants.[39] In addition, it asks about whether unenumerated benefits should be counted in the totality of the circumstances.[40] This chaotic regime of immigration control would enable the government to make up the rules for admission on a case by case basis, resulting in arbitrary, discriminatory, and wildly divergent outcomes.

In addition, it would count multiple highly correlated experiences (e.g., low income, lack of employment, poor credit scores, poor health, and low educational attainment) as negative factors without controlling for their significant confounding effects.[41] While each of these factors is problematic in its own right, their cumulative effect would deny many noncitizens, especially low-income people of color and those living with chronic but manageable health conditions, the opportunity for a fair assessment of whether they are likely to become a public charge.

### A. The proposed retrospective assessment of public benefits use is unreasonable and unprecedented

Federal case law, public policy, and even the Proposed Rule itself acknowledge that public charge determinations should be prospective in nature, yet the Proposed Rule would make

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[35] *Coverage for Lawfully Present Immigrants*, HEALTHCARE.GOV, (June 15, 2018), https://www.healthcare.gov/immigrants/lawfully-present-immigrants/.
[36] The Kaiser Commission on Medicaid and the Uninsured, *Where Are States Today? Medicaid and CHIP Eligibility Levels for Children, Pregnant Women, and Adults*, KAISER FAM. FOUND. (Mar. 28, 2018), https://www.kff.org/medicaid/fact-sheet/where-are-states-today-medicaid-and-chip/.
[37] INA § 212(a)(4).
[38] Proposed Rule *supra* note 1 at 51211, 51291–51292.
[39] *Id*. at 51179.
[40] *Id*. at 51173.
[41] *Id*. at 51290–5192.

receipt of one or more public benefit within at least the 36 months immediately preceding the application for a visa, admission, or adjustment of status a heavily weighted negative factor in public charge determinations.[42] The Proposed Rule does not provide a persuasive rationale for this major change in policy, which would deny access to nutrition, health, and stable housing, undermining the ability of immigrant families to transition to self-sufficiency over time.

### B. The proposed income thresholds are arbitrary, unreasonable, and without statutory bases

The Proposed Rule would treat household income below 125 percent of the FPG as a negative factor.[43] Conversely, it proposes only one heavily weighted positive factor: income above 250 percent of the FPG. These proposed thresholds are arbitrary, unreasonable, and without statutory bases.

These thresholds are arbitrary and unreasonable. In 2017, 250 percent of the FPG for a family of four was $61,500[44]—more than the U.S. median income of $61,375.[45] That same year, 125 percent of the FPG was $30,750. Many U.S. households would have struggled to surpass the negatively-weighted threshold. Yet these arbitrary standards are even harder for individuals and families to overcome in Mississippi, where the average household income was only $40,528 in 2016 (the most recently available Census data).[46] This shows that the average Mississippian would have failed to qualify for the positively-weighted income threshold and many would be unable to overcome the negatively-weighted income threshold. Based on population data compiled by Manatt, 28 percent of all Mississippians, including citizens and noncitizens, earned less than 125 percent of the FPG between 2012–15.[47] Thirty-five percent of noncitizens and their families failed to meet this same threshold.[48] Harms from these arbitrary thresholds would be compounded by significant racial and ethnic pay gaps.

In addition, these thresholds are without a statutory basis. To rationalize its 125 percent touchpoint, the rule cites the statute governing the income threshold for sponsors who are required to submit an affidavit of support and provides no justification for why this threshold is appropriate for a noncitizen subject to a public charge determination.[49] The rule offers even less justification for the 250 percent threshold, and at footnote 582, admits that the differences in receipt of non-cash benefits between noncitizens living below 125 percent of the FPG and those living either between 125 percent of the FPG or 250 and 400 percent of the FPG is not statistically significant.[50] Rather, these thresholds exceed the bounds of the department's

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[42] *Id*. at 51199–5200.
[43] *Id*. at 51175–51187, 51204, 51292.
[44] Annual Update of the HHS Poverty Guidelines, 82 Fed. Reg. 8831 (Jan. 31, 2017).
[45] *Report P60-263: Income & Poverty in the U.S.: 2017*, U.S. CENSUS BUREAU (Sep. 12, 2018), https://www.census.gov/library/publications/2018/demo/p60-263.html.
[46] QuickFacts: Mississippi, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/ms (last visited Nov. 26, 2018).
[47] Manatt, *supra* note 11.
[48] *Id*.
[49] Proposed Rule, *supra* note 1 at 51165.
[50] *Id*. at 51204.

statutory authority, attempting to achieve a policy change that the administration has sought through Congressional action.[51]

### C. The proposed negative treatment of health insurance status and physical and mental health conditions is discriminatory and could violate the Americans with Disabilities Act (ADA)

While health has always been a factor in the public charge test, the Proposed Rule codifies and unduly weighs discriminatory standards for evaluating a noncitizen's health. It would give heavy negative weight to individuals who do not have private health insurance or the financial resources to pay for reasonably foreseeable medical costs related to a medical condition likely to require extensive medical treatment or institutionalization or interfere with a person's ability to care for him- or herself, attend school, or work.[52] DHS would make this determination based on a diagnosis and other information submitted to DHS, including a physician's attestation as to whether a medical condition impacts the ability to go to work or school.[53] This factor expressly discriminates against people with chronic health conditions and disabilities and perpetuates the false narrative that a diagnosis is predictive of a person's future successes.

The standard would cause disproportionate and discriminatory harm to Mississippians living with acute, chronic, and behavioral health conditions, compounding already endemic racial and economic injustices in health. This is particularly true for people living with HIV. An HIV diagnosis is not an indicator of self-sufficiency and full-time employment capabilities. With adequate access to care, including anti-retroviral therapy (ART), people living with HIV are able to live healthy and productive lives. Over time, daily ART can reduce an individual's HIV viral load to undetectable levels, dramatically reducing health care costs and preventing HIV transmission.[54] ART is often not covered by private payers, including employer-based insurance, and is prohibitively expensive out of pocket.[55] Yet the Proposed Rule could incentivize U.S. citizens and permanent residents to forego public benefits that help pay for ART in order to avoid a public charge determination for themselves or family members. The rule would enable the government to exclude both applicants living with HIV and those seeking to unite with and care for a family member living with HIV. Such exclusions would violate the ADA, which prohibits executive agencies from discriminating against individuals based on disability status (such as a HIV diagnosis) and requires that they provide reasonable accommodations providing meaningful access to their services and benefits.[56]

### D. The proposed negative weight to a low credit score or negative credit history is unjustifiable

[51] *See* the RAISE Act, S.354, 115th Congress (2017); Donald J. Trump, *President Donald J. Trump Backs Raise Act*, WHITE HOUSE (August 2, 2017), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/.
[52] Proposed Rule, *supra* note 1 at 51200, 51291.
[53] *Id*. at 51182.
[54] *Dear Colleague*, DIV. HIV/AIDS PREVENTION, U.S. CTR.'S FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERV. (Sep. 27, 2017), https://www.cdc.gov/hiv/library/dcl/dcl/092717.html.
[55] Emily Land, *Why Do Some HIV Drugs Cost So Much?*, BETA (Nov. 2, 2017), https://betablog.org/hiv-drugs-price/.
[56] 29 U.S.C. §794(a) (2006); *Bragdon v. Abbott*, 524 U.S. 624 (1998).

DHS proposes to give negative weight to a low credit score or negative credit history.[57] Neither credit scores nor credit reports were designed to indicate whether a person would likely participate in public benefit programs. DHS offers no evidence that a low credit score or bad credit report is an indication of future self-sufficiency. Instead, these retrospective measures, which inherently reflect an individual's past financial situation, could fail to show improvements in health status, job security, education, and other changes in circumstances.

**Conclusion**

The Mississippi Center for Justice strongly objects to any efforts to create a discriminatory regime of poverty-based immigration control that would exacerbate racial and economic injustices in health, food security, and housing faced by noncitizens and their families. Accordingly, we urge DHS to withdraw the Proposed Rule in its entirety. We respectfully direct DHS to our numerous citations to supporting research, and request that their full text and data, along with the full text of our comments, be considered part of the formal administrative record.

We appreciate your consideration of our comments. If we can be of further assistance, please contact Madeline Morcelle (mmorcelle@mscenterforjustice.org; 769-230-0063) or me (borlansky@mscenterforjustice.org; 769-230-2838).

Respectfully Submitted,

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cc: The Honorable Bennie Thompson, United States Representative and Ranking Member of the Committee on Homeland Security
The Honorable Steven Palazzo, United States Representative
The Honorable Gregg Harper, United States Representative
The Honorable Cindy Hyde-Smith, United States Senator
The Honorable Roger Wicker, United States Senator

**Authors and Contributors**

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[57] Proposed Rule, *supra* note 1 at 51291.

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