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January 18, 2022

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Submitted via www.regulations.gov

**Re: DOS-Docket No. 2021-0034; Comments on Visas:
Ineligibility Based on Public Charge Grounds**

Dear Ms. Lage:

Thank you for the opportunity to comment on the Department of State's (DOS) [Interim Final Rule](#) (IFR) on the public charge grounds of visa ineligibility. The National Health Law Program (NHeLP) protects and advances the health rights of low income and underserved individuals by advocating, educating, and litigating at the federal and state level.

We support the comments submitted by the Protecting Immigrant Families (PIF) campaign, and submit additional comments in response to the questions posed in the IFR. We share PIF's view that the nation is stronger when we welcome people who are willing to contribute to the country and recognize their potential. We believe U.S. immigration laws should not discourage immigrants and their family members from seeking health care, nutrition, housing, or other benefits for which they are eligible. NHeLP urges DOS to remove from the Code of Federal Regulations the regulatory text that DOS promulgated in the [October 11, 2019 IFR](#) ("2019 Rule" or "2019 DOS Rule") and restore the longstanding regulatory text which appeared prior to the 2019 Rule.

The 2019 Rule includes the same definition and test as the Department of Homeland Security's companion public charge

rule (“[2019 DHS Rule](#)”). Together, these Rules (collectively, the “2019 rules”) have caused a significant chilling effect in the use of crucial and life-saving services among immigrants and their families. We support that the Biden Administration DHS’ has announced that it will not be enforcing the 2019 DHS Rule.¹ The chilling effect continues nonetheless: in a national poll conducted in September 2021, nearly half of families with immigrants who needed assistance during the COVID-19 pandemic responded that they abstained from applying due to concerns about their immigration status.² The research also found that the most effective messaging to encourage people to seek needed help is to make clear that “the Trump policy era has ended, and using public programs will have no immigration consequences for applicants or their families.”³ Thus, in the context of the COVID-19 pandemic, concern and confusion over the public charge rule risks harm for individual and public health. In order to effectively combat the chilling effect, DOS must remove the 2019 Rule from the Code of Federal Regulations (C.F.R.) as soon as possible.

Further, the 2019 Rule’s definition of “public charge” is inconsistent with the term’s historical meaning and use. Courts have confirmed this long-standing understanding, finding the 2019 DHS’s Rule’s departure from this historical understanding unlawful.⁴ For these reasons, we urge DOS to act quickly to remove the 2019 Rule from the C.F.R.

I. Chilling Effect and Harm

A. The 2019 Rule is Causing a Chilling Effect

When the 2019 rules were proposed, commenters warned about the chilling effect they would bring, based on decades of prior research.⁵ These predictions were realized even prior to the enactment of the rules. From 2016 to 2019, participation in TANF, SNAP, and Medicaid declined far more rapidly for non-citizens than U.S. citizens.⁶ These chilling effects continued

¹ DHS, *DHS Secretary Statement on the 2019 Public Charge Rule* (Mar. 9, 2021),

<https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule>.

² PROTECTING IMMIGRANT FAMILIES, *Immigrant Mixed Status Families Topline Summaries* (Dec. 8, 2021),

<https://protectingimmigrantfamilies.org/wp-content/uploads/2021/12/PIF-Poll-Toplines-Memo-FINAL-1.pdf>.

³ *Id.*

⁴ See, e.g., *City & Cty. of San Francisco v. United States Citizenship & Immigr. Servs.*, 981 F.3d 742, 756 (9th Cir. 2020).

⁵ Samantha Artiga, Rachel Garfield, Anthony Damico, *Estimated Impacts of Final Public Charge Inadmissibility Rule on Immigrants and Medicaid Coverage*, KAISER FAM. FOUND. (September 2019),

<https://files.kff.org/attachment/Issue-Brief-Estimated-Impacts-of-Final-Public-Charge-Inadmissibility-Rule-on-Immigrants-and-Medicaid-Coverage>;

Randy Capps, Mark Greenberg, Michael Fix, Jie Zong, *Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration*, MIGRATION POL’Y INST. (November 2018),

<https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>.

⁶ Randy Capps, Michael Fix & Jeanne Batalova, *Anticipated “Chilling Effects” of the Public-Charge Rule Are Real: Census Data Reflect Steep Decline in Benefits Use by Immigrant Families*, MIGRATION POL’Y INST. (Dec. 2020),



to be realized after the changes made to the definition of “public charge” by both 2019 rules. Despite the fact that the 2019 DOS Rule only applies to individuals entering the U.S. from outside the country, the evidence demonstrates that its chilling effect inevitably sweeps broader, as will be discussed in greater detail in subsection B. The 2019 DOS has had detrimental impacts on the families and individuals already here, as U.S. citizen children in mixed-status families and U.S. resident family members of individuals seeking a visa are likely to remain fearful.

After the Trump Administration proposed sweeping changes in the 2019 rules, nearly 1 in 7 adults in immigrant families (15.6 percent) reported that they or a family member avoided a noncash government benefit program such as SNAP, Medicaid, or housing subsidies that same year.⁷ Low-income immigrant families have been especially impacted by the new public charge rules’ chilling effects; about 32 percent of low-income immigrant families avoided a public benefit program in 2019.⁸ Families without low incomes were also negatively impacted, with 10 percent avoiding public benefits because of immigration concerns.⁹ The rules drastically affected immigrant families with children: these families were twice as likely to report avoiding public benefits because of fear of the impact on their immigration status compared to immigrant families without children.¹⁰ The public charge rule changes were linked to a decrease in 260,000 child Medicaid enrollments from 2017-2020.¹¹ Adults in immigrant families with children most frequently avoided applying for SNAP, Medicaid and CHIP, and housing subsidies.

B. The Scope of the Chilling Effect is Broader than the Rule Itself

Keeping the 2019 Rule on the books exacerbates immigrants’ and citizens’ fear of using public benefits because of stigma or adverse immigration consequences associated with their use, even if such consequences are not applicable. Decades of evidence shows that the chilling effect of public charge regulations, or immigrant eligibility restrictions, inevitably sweep broader than the actual application of the rules.

<https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real> [hereinafter “Capps et al.”]

⁷ Jennifer M. Haley, Genevieve M. Kenney, Hamutal Bernstein, and Dulce Gonzalez, Urban Institute, *One In Five Adults in Immigrant Families with Children Reported Chilling Effects on Public Benefit Receipt in 2019*, 1 (June 2020), <https://www.urban.org/sites/default/files/publication/102406/one-in-five-adults-in-immigrant-families-with-children-reported-chilling-effects-on-public-benefit-receipt-in-2019.pdf> [hereinafter “Haley et al.”].

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Jeremy Barofsky, et al., *Spreading Fear: The Announcement of the Public Charge rule Reduced Enrollment in Child Safety-Net Programs* HEALTH AFFAIRS (October 2020), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00763> [hereinafter “Barofsky et al.”].



First, evidence shows that the chilling effect often extends to people who are not actually subject to the particular requirements. For example, scholars have documented that following passage of the Personal Responsibility and Work Opportunity Act (PRWORA) in 1996, many immigrants entitled to public benefits and services were deterred from using them due to confusion about eligibility criteria and concerns about future immigration consequences.¹² This includes a reduction in benefit use by refugees and asylees who remained eligible for benefits under the new rules.¹³ More recently, although the 2019 rules excluded Medicaid received by children, U.S. Census Bureau data indicates that immigrant parents were still hesitant to enroll their children in Medicaid.¹⁴ Citizen children living in households with at least one noncitizen saw an 18 percent drop in Medicaid participation as compared to only 8 percent drop in participation by citizen children living in households with only U.S. citizens.¹⁵

Second, historical evidence shows that the chilling effect often extends to benefits and programs which are not considered by the relevant law or regulations. For instance, although the public charge rule of 1999 only counted Medicaid for long-term institutionalization, studies indicate that immigrants were nonetheless deterred from enrolling in and using other Medicaid services.¹⁶ Moreover, even public benefit programs that were not part of the definition of “public benefits” in the 2019 rules (such as free or lost-cost medical care to uninsured people, WIC, free or reduced price school lunches, and health insurance purchased through the

¹² Jeanne Batalova, Michael Fix, & Mark Greenberg, *Chilling Effects: The Expected Public Charge Rule and its Impact on Legal Immigrant Families’ Public Benefit Use*, MIGRATION POL’Y INST. (June 2018), https://www.migrationpolicy.org/sites/default/files/publications/ProposedPublicChargeRule_FinalWEB.pdf.

¹³ *Id.* citing (Jenny Genser, *Who Is Leaving the Food Stamp Program: An Analysis of Caseload Changes from 1994 to 1997*, U.S. DEP’T OF AG., FOOD & NUTRITION SERV., OFFICE OF ANALYSIS, NUTRITION, & EVAL. (Mar. 1999), <https://fns-prod.azureedge.net/sites/default/files/cdr.pdf>; Michael E. Fix & Jeffrey S. Passel, *Trends in Noncitizens’ and Citizens’ Use of Public Benefits Following Welfare Reform: 1994-1997*, URBAN INST. (Mar. 1, 1999), <https://www.urban.org/research/publication/trends-noncitizens-and-citizens-use-public-benefits-following-welfare-reform>).

¹⁴ Capps et al., *supra* note 6.

¹⁵ *Id.*

¹⁶ Jennifer Stuber & Karl Kronebusch, *Stigma and other determinants of participation in TANF and Medicaid*, 23 J. POL’Y ANALYSIS & MGMT. 509 (2004); Claudia Schlosberg & Dinah Wiley, *The Impact of INS Public Charge Determinations on Immigrant Access to Health Care*, NAT’L HEALTH LAW PROG. & NILC (1998), https://www.montanaprobono.net/geo/search/download.67362#N_%202; Marilyn R. Ellwood & Leighton Ku, *Welfare And Immigration Reforms: Unintended Side Effects For Medicaid*, 17 HEALTH AFFAIRS 137 (1998), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.17.3.137>; HHS, ASPE, *How Are Immigrants Faring After Welfare Reform? Preliminary Evidence from Los Angeles and New York City*, 16 (2002), <https://aspe.hhs.gov/system/files/pdf/72691/report.pdf> (describing immigrants’ limited understanding of eligibility restrictions and benefits); Danilo Trisi & Guillermo Herrera, *Administration Actions Against Immigrant Families Harming Children Through Increased Fear, Loss of Needed Assistance*, CTR. ON BUDGET & POL’Y PRIORITIES, https://www.cbpp.org/research/poverty-and-inequality/administration-actions-against-immigrantfamilies-harming-children#_ednref12 (noting how immigrants’ fear of government causes chilling effects); Leighton Ku & Alyse Freilich, *Caring for Immigrants: Health Care Safety Nets in Los Angeles, New York, Miami, and Houston*, KAISER FAMILY FOUND. 7 (2001), <https://aspe.hhs.gov/system/files/pdf/72701/report.pdf>.



Marketplace) experienced decreased enrollment.¹⁷ Evidence also shows that immigrants disenrolled from local and state health programs not subject to public charge.¹⁸ These chilling effects carried over to the COVID-19 pandemic. A 2021 Kaiser Family Foundation analysis found that 35 percent of immigrants noted concern that getting the COVID-19 vaccine might negatively affect their own or a family member's immigration status.¹⁹ Additionally, one study found that immigrants avoided COVID-19 testing services due to concerns that a COVID-19 diagnosis will label them as undesirable citizens and negatively affect their immigration applications.²⁰

This reaction is understandable: there are many types of programs, with different eligibility determinations and a wide range of services. Thus, it is difficult for most individuals to distinguish between the differences in programs, and as a result they are fearful that utilizing public benefits of any kind will trigger a negative immigration action. In particular, navigating the Medicaid program is difficult because the programs have different names in different states, and it is hard for individuals to know if their particular benefits are state- or federally-funded. Similarly, confusion over the applicability and status of different public charge rules leads individuals to whom it does not apply to forego government programs. Thus, the continued existence of the DOS Rule causes a chilling effect beyond those to whom it was applicable, and reduces program enrollment by immigrant families who are already residing in the U.S.

C. The Chilling Effect is Harming Health During a Pandemic

As discussed above, immigrant enrollment in Medicaid has significantly decreased in recent years, including among those who are eligible for services. Medicaid participation by low-income noncitizens fell by 20 percent between 2016 and 2019.²¹ This phenomena was also

¹⁷ Barofsky et al., *supra* note 11.

¹⁸ Matthew Yu et al., *Challenges for Adult Undocumented Immigrants in Accessing Primary Care: A Qualitative Study of Health Care Workers in Los Angeles County*, HEALTH EQUITY (September 2020), <https://www.liebertpub.com/doi/10.1089/heq.2020.0036>; Grace Kim et al., *Public Charge: Reducing the Chilling Effects on Medi-Cal Participation Due to the 2018 Proposed Public Charge Rule*, CAL. IMMIGRANT POL'Y CTR. (September 2019), <https://caimmigrant.org/updates/https-caimmigrant-org-wp-content-uploads-2019-09-public-charge-long-r4-1-pdf/>.

¹⁹ Liz Hamel et al., *KFF COVID-19 Vaccine Monitor: COVID-19 Vaccine Access, Information, and Experiences Among Hispanic Adults in the U.S.*, KAISER FAM. FOUND. (May 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-access-information-experiences-hispanic-adults/>.

²⁰ Carol Galletly, Julia Lechuga, Julia Dickson-Gomez, *Assessment of COVID-19 Related Immigration Concerns Among Latinx Immigrants in the US*, JAMA, (July 2021), <https://jamanetwork.com/journals/jamanetworkopen/article-abstract/2782051>.

²¹ Capps et al., *supra* note 6.



seen following PRWORA, when chilling effects on Medicaid use led to worse health outcomes among single mothers, pregnant women, and children,²² especially Latinas.²³

Given the context of the current COVID-19 pandemic, it is especially important to note the adverse health effects that will result from the current rule's chilling effect. Lack of insurance, especially for those eligible for Medicaid, reduces access to care and contributes to worse health outcomes.²⁴ On almost all relevant measures, Medicaid enrollees have improved access to care when compared to the uninsured population. This includes having a more usual source of care, not delaying medical care,²⁵ and being less likely to visit the emergency department.²⁶ The chilling of Medicaid enrollment reduces immigrants' access to preventive services, care management, and primary care.²⁷ Lack of insurance and the resulting patterns of decreased utilization and poorer health outcomes will only deepen the disparities in health care access and health outcomes that immigrants already face.²⁸

While all of these effects would be harmful absent the existence of a public health emergency, they are dire and deadly in the context of COVID-19, when individuals—immigrant and native-born, insured and uninsured—are having difficulty accessing health care and while hospitals, health care workers, and emergency departments in particular are severely overloaded. Large-scale disenrollment from health coverage is particularly concerning in the context of a global

²² Paul Wise et al., *Assessing the Effects of Welfare Reform Policies on Reproductive and Infant Health*, 89 AM. J. PUB. HEALTH 1514 (1999), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.89.10.1514>; Kimberly Narain et al., *The impact of welfare reform on the health insurance coverage, utilization and health of low education single mothers*, 180 SOCIAL SCI. & MED. 28 (2017), <https://escholarship.org/content/qt04s3m0hn/qt04s3m0hn.pdf>.

²³ Marianne P. Bitler & Hilary W. Hoynes, *Welfare Reform and Indirect Impacts on Health*, Working Paper 12642, NAT'L BUREAU OF ECON. RES. (2007), <http://www.socsci.uci.edu/~mbitler/papers/Michigan-Health-3-14-07.pdf>.

²⁴ Julia Paradise, *Data Note: Three Findings about Access to Care and Health Outcomes in Medicaid*, KAISER FAMILY FOUND. (2017), <https://www.kff.org/medicaid/issue-brief/data-note-three-findings-about-access-to-care-and-health-outcomes-in-medicaid/>.

²⁵ MACPAC, *Access and Quality/Key Findings on Access to Care* (2018) <https://www.macpac.gov/subtopic/measuring-and-monitoring-access> (last visited Nov. 7, 2018).

²⁶ Winston Liaw et al., *The Impact of Insurance and a Usual Source of Care on Emergency Department Use in the United States*, 2014 INT. J. FAMILY MED. 1 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3941574/pdf/IJFM2014-842847.pdf>; Tina Hernandez-Boussard et al., *The Affordable Care Act Reduces Emergency Department Use By Young Adults: Evidence From Three States*, 33 HEALTH AFFAIRS 1648 (2014), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2014.0103>.

²⁷ Karina Wagnerman, *Medicaid: How Does it Provide Economic Security for Families?*, GEORGETOWN CTR. FOR CHILDREN & FAMILIES, (2017), <https://ccf.georgetown.edu/wp-content/uploads/2017/03/Medicaid-and-Economic-Security.pdf>; Paradise, *supra* note 24.

²⁸ Zhihuan Jennifer Huang et al., *Health Status and Health Service Access and Use Among Children in U.S. Immigrant Families*, 96 AM. J. PUB. HEALTH 634 (2006), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2004.049791>; Susmita Pati & Shooshan Danagoulian, *Immigrant Children's Reliance on Public Health Insurance in the Wake of Immigration Reform*, 98 AM. J. PUB. HEALTH 2004 (2008), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2007.125773>; Ruth E. Zambrana, & Laura A. Logie, *Latino Child Health: Need for Inclusion in the US National Discourse*, 90 AM. J. PUB. HEALTH 1827 (2000), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446433/pdf/11111250.pdf>.



pandemic, where lack of coverage threatens individual, family, and public health. The impact of the pandemic on immigrant communities is largely pronounced given that 20 million immigrants hold essential jobs that place them at the front lines of the pandemic and at greatest risk for COVID-19.²⁹ Generally, noncitizen immigrant workers are concentrated in jobs that cannot be done virtually, including high percentages who are employed in construction and restaurant/food service.³⁰ In addition, researchers have concluded that noncitizen immigrants face increased risk of contracting COVID-19 as they are more likely to live in larger households and urban areas and to rely on public transit or carpools to commute, increasing exposure to the virus.³¹

As DOS recognizes in the IFR, “[t]he pandemic’s ongoing effects on public health and economic conditions have been vast and have underscored the importance of ensuring that individuals are able to access public health and other programs for which they and their family members are eligible, without undue fear or confusion.”³² In 2020, More than 1 in 4 low-income immigrant families (27.5 percent) reported that they or a family member avoided noncash benefits or other help with basic needs because of green card or other immigration concerns.³³ Additionally, adults in families with nonpermanent residents were more likely than adults in other low-income immigrant families to report these chilling effects (43.9 percent).³⁴

This chilling effect continues despite the fact that DHS has issued guidance excluding Medicaid coverage of COVID-19 testing and treatment from its public charge determination, the chilling effect of these rules have nonetheless deterred families from accessing critical services. A survey of immigrants with undocumented members in their households that got sick with COVID-19 revealed that 18 percent of respondents cited being labeled as a public charge and 13 percent cited fear of their information being shared with immigration agents as reasons why they did not seek treatment for the virus.³⁵ The Urban Institute surveyed immigrant-serving community-based organizations and found that 70 percent reported that

²⁹ Donald Kerwin et al., *US Foreign-Born Essential Workers by Status and State, and the Global Pandemic* CTR. FOR MIGRATION STUDIES (May 2020), <https://cmsny.org/publications/us-essential-workers/>.

³⁰ Samantha Artiga & Matthew Raw, *Health and Financial Risks for Noncitizen Immigrants due to the COVID-19 Pandemic*, KAISER FAM. FOUND. (Aug. 18, 2020), <https://www.kff.org/report-section/health-and-financial-risks-for-noncitizen-immigrants-due-to-the-covid-19-pandemic-issue-brief/>.

³¹ *Id.*

³² 86 Fed. Reg. 64070-71.

³³ Haley et al., *supra* note 7.

³⁴ *Id.*

³⁵ Marion Davis, *The Impact of COVID-19 on Immigrants in Massachusetts: Insights from our Community Survey*, MASS. IMMIGRANT & REFUGEE ADVOCACY COALITION (2020), <http://www.miracoalition.org/cvsurvey>; see also US DEP’T OF HOMELAND SECURITY, *COVID-19 Vulnerability by Immigration Status: Status-Specific Risk Factors and Demographic Profiles* (May 2021), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/research_reports/research_paper_covid-19_vulnerability_by_immigration_status_may_2021.pdf.



public charge and other anti-immigrant policies deterred immigrants from seeking COVID-19 testing and treatment.³⁶

D. Quick Action is Needed

Although the United States Citizenship and Immigration Services (USCIS) released a final rule that removed the 2019 DHS regulation from the Federal Register, many immigrants are still avoiding applying for public benefits due to continued fear and confusion around public charge.³⁷ Only about one-fourth (22 percent) of immigrant families reported “having heard a lot” about the Biden Administration’s changes made to the Trump public charge rule.³⁸ Awareness was especially low among Asian American and Pacific Islander (AAPI) communities (16 percent heard a lot) and Latinx communities (27 percent heard a lot).³⁹ Notably, 50 percent of immigrants reported that knowledge about the reversal of the public charge rule made them more likely to use safety net programs when necessary.⁴⁰

The chilling effect of the public charge rule, even after the Biden Administration announced non-enforcement, has led to dangerous confusion for immigrants seeking public benefits. These challenges are exacerbated by the fact that many federal pandemic initiatives such as the pandemic tax rebate and federal pandemic unemployment benefits made available through the CARES Act excluded millions of immigrants and their families. Thus it is critical that immigrants feel comfortable accessing the benefits for which they are eligible. Given high rates of poverty and pre-existing health conditions among immigrant communities due to decades of institutional violences including but not limited to public charge, immigrants have been disproportionately affected by the COVID-19 pandemic.

Quickly removing the 2019 DOS Rule from the C.F.R. will help limit the chilling effect for immigrant families. Clarity around public charge is especially important given the necessity of healthcare and social services during the COVID-19 pandemic. NHeLP urges DOS to remove from the C.F.R. the regulatory text that DOS promulgated in the 2019 Rule, this is an essential

³⁶ Hamutal Bernstein et al., *Immigrant-Serving Organizations’ Perspectives on the COVID-19 Crisis*, URBAN INST. (Aug. 2020), <https://www.urban.org/research/publication/immigrant-serving-organizations-perspectives-covid-19-crisis>.

³⁷ Hamutal Bernstein, Dulce Gonzalez, & Michael Karpman, *Adults in Low-Income Immigrant Families Were Deeply Affected by the COVID-19 Crisis yet Avoided Safety Net Programs in 2020*, URBAN INST. (May 2021), <https://www.urban.org/research/publication/adults-low-income-immigrant-families-were-deeply-affected-covid-19-crisis-yet-avoided-safety-net-programs-2020>.

³⁸ PROTECTING IMMIGRANT FAMILIES (PIF), *Public Charge was Reversed— But Not Enough Immigrant Families Know* (Dec. 2021), <https://protectingimmigrantfamilies.org/wp-content/uploads/2021/12/PIF-Poll-Toplines-Memo-FINAL-1.pdf>.

³⁹ *Id.*

⁴⁰ *Id.*



step in ensuring immigrant communities can access essential public health resources needed to stay protected from COVID-19 pandemic.

II. The 2019 Rule Departs from Historical Meaning, Use, and Interpretations of “Public Charge”

DOS should also remove the 2019 Rule from the C.F.R. because the 2019 Rule’s definition of “public charge” is inconsistent with the term’s historical meaning and use. The 2019 Rule’s definition reversed decades of existing law, policy, and practice concerning the interpretation and application of what it means to be a public charge. This reversal and inconsistency has led the nearly-identical language of the 2019 DHS Rule to be rejected as unlawful by the courts.

A review of the historical legislative and regulatory context concerning what constitutes a “public charge” illustrates that the 2019 Rule departs from both the historical understanding and commonplace use of the term. Section 1182 of Title 8 of the U.S. Code renders inadmissible a noncitizen who is “likely at any time to become a public charge.”⁴¹ Since Congress first introduced the term in the immigration context in 1882, “public charge” has been interpreted narrowly to mean a person who is primarily dependent on public assistance to avoid destitution, *i.e.*, extreme poverty. Congress based this definition on the concept of “public charge” already used in several states and local laws, which described people “incompetent to maintain themselves” and who “have *no* visible means of support[,]” such that they “might become a *heavy and long* continued charge to” the public.⁴² Thus, public charge has generally been understood to apply to someone with severe impoverishment and destitution who is permanently and primarily reliant on the government for survival.

The Board of Immigration Appeals has also recognized that the term “public charge” means a person who is “destitute,” holding that “[t]he words ‘public charge’ had their ordinary meaning: that is to say, a money charge upon or an expense to the public for support and care, the [immigrant] being destitute.”⁴³

Outside of the immigration context, the term “public charge” also has been consistently interpreted to require destitution, that is, permanent and primary dependence on public support. For example, many state *in forma pauperis* cases distinguish between those who are poor and need limited assistance with court costs (who are not public charges), and those who

⁴¹ 8 U.S.C. § 1182(a)(4)(A).

⁴² *City of Boston v. Capen*, 61 Mass. 116, 121–22 (1851) (emphasis added); see also Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1848–59 (1993).

⁴³ *Matter of Harutunian*, 14 I. & N. Dec. 583, 586 (BIA 1974). The BIA opinion uses the term “alien,” which is a dehumanizing term. NHeLP has replaced that term with “immigrant.”



are so destitute as to be public charges.⁴⁴ Federal bankruptcy exemption rules likewise equate being a public charge with being destitute.⁴⁵

Historically, though there have been several changes to the public charge definition in the immigration statutes, all changes support the core concept that a public charge determination should be based upon permanent and primary dependence on the government, not just mere receipt of temporary benefits.⁴⁶

Several circuit courts have confirmed this long-standing interpretation in recent challenges to the 2019 DHS Rule. The Second Circuit concluded that the Rule's definition was "inconsistent with the traditional understanding of what it means to be a 'public charge'".⁴⁷ Similarly, the Ninth Circuit found the 2019 DHS Rule unlawful, finding that "[f]rom the Victorian Workhouse through the 1999 Guidance, the concept of becoming a 'public charge' has" had a consistent meaning and that meaning "has never encompassed" the broad definition contained in the 2019 DHS Rule.⁴⁸ The Seventh Circuit, while noting that there may be some ambiguity to the definition of "public charge", found that the overly broad definition in the 2019 DHS Rule "does violence to the English language and the statutory context".⁴⁹ The Court stated that "[t]here is a floor inherent in the words 'public charge,' backed up by the weight of history", and concluded that the 2019 DHS Rule went beyond this floor and was therefore unlawful.

The 2019 rules were the first to drastically expand the meaning of public charge, and to broaden the public benefits immigration officers may consider. They disrupted the longstanding principle of a public charge as an individual permanently and wholly or primarily dependent on the government for support, as well as the 1999 Field Guidance interpretation with only considered income maintenance programs and long-term institutionalization when determining if someone was a public charge.⁵⁰ For the same reasons as the 2019 DHS Rule, the 2019 DOS Rule goes beyond the historical meaning and common use of the term, and is thus unlawful.

⁴⁴ See, e.g., *Martinez v. Kristi Kleaners, Inc.*, 364 F.3d 1305, 1307–08 (11th Cir. 2004); *Harris v. Harris*, 424 F.2d 806, 810 (D.C. Cir. 1970); *Brown v. Upfold*, 123 N.Y.S.2d 342, 345 (Sup. Ct. 1953).

⁴⁵ See, e.g., *Clark v. Rameker*, 573 U.S. 122, 129 n.3 (2014) (explaining that purpose of bankruptcy exemptions is to provide debtor "'with the basic necessities of life' so that she 'will not be left destitute and a public charge'" (quoting H.R. Rep. No. 95–595, at 126 (1977)); *In re Krebs*, 527 F.3d 82, 85 (3d Cir. 2008) (same); *In re Collins*, 281 B.R. 580, 583 (Bankr. M.D. Pa. 2002) (explaining that to fulfill statute's purpose of preventing debtor from becoming public charge, court must "set aside an amount sufficient to sustain the basic needs," or "subsistence needs," of debtor).

⁴⁶ Ashley M. Slater, *A Public Charge: Can Temporary Benefits Mean Primary Dependence?* 19 DARTMOUTH L. J. 134 (2021).

⁴⁷ *New York v. U.S. Dep't of Homeland Security*, 969 F.3d 42, 78 (2d Cir. 2020).

⁴⁸ *City & Cty. of San Francisco v. United States Citizenship & Immigr. Servs.*, 981 F.3d 742, 756 (9th Cir. 2020).

⁴⁹ *Cook Cnty., Ill. v. Wolf*, 962 F.3d 208, 229 (7th Cir. 2020).

⁵⁰ Anna Shifrin Faber, *A Vessel for Discrimination: The Public Charge Standard of Inadmissibility and Deportation*, 108 GEORGETOWN L. J. 1363 (2018).



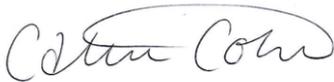
III. Ultimately, Public Charge Should Be Eliminated to Advance Racial and Health Equity

While we urge and recognize the urgent, short-term need to return to the pre-2019 regulatory text's definition of public charge, we ultimately advocate for the complete removal of the public charge test from the statute. President Biden outlined the goals of his Administration with regards to equity, stating it is "the policy of my Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."⁵¹ The history of public charge is mired in racism and, simply put, there is no way to salvage the public charge test without continuing its racist legacy.⁵² Eliminating public charge is an important step towards justice for low-income immigrant communities. Public charge's legacy of xenophobia, racism, ableism, and classism imposes life endangering structural violence on immigrant communities. It limits access to life-affirming and life-saving resources and thereby contributes to health, economic, and racial inequities. We urge DOS to remove the 2019 Rule as quickly as possible and urge the administration to simultaneously work towards ultimately removing the statutory requirement to promote health justice for all communities.

IV. Conclusion

Thank you for the opportunity to provide comments. We urge DHS to move as expeditiously as possible to revoke the 2019 Rule and return the prior regulatory text.

Sincerely,



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⁵¹ THE WHITE HOUSE, Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

⁵² See generally Faber, *A Vessel for Discrimination*, *supra* n. 50.

