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Comments on the Department of Homeland Security's Proposed Rule Regarding "Inadmissibility on Public Charge Grounds"

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

RE: DHS, Draft Notice of Proposed Rulemaking, *Inadmissibility on Public Charge Grounds*, CIS No. 2499-10, DHS Docket No. USCIS-2010-0012

Dear Ms. Deshommes:

Lawyers for Civil Rights (LCR) writes to express its strong opposition to the above-referenced rule proposed by the U.S. Department of Homeland Security (DHS). As written, the rule would improperly expand the ways in which individuals may be deemed "public charges" and found ineligible to be admitted to the United States, adjust to lawful permanent residency, or change or extend their nonimmigrant status. The rule is discriminatory and unsupported by any evidence, and LCR urges DHS to immediately withdraw its proposal.

LCR is joined in its comments by the following organizations:

- MGH—Chelsea HealthCare Center;
- Brazilian Worker Center;
- Chelsea Collaborative;
- East Boston Ecumenical Community Council (EBECC);
- Hyde Square Task Force;
- Inquilinos Boricuas en Acción Boston (IBA);
- Sociedad Latina; and
- Justice at Work.

LCR and its Client Communities

For fifty years, LCR has promoted equal opportunity and fought discrimination on behalf of people of color and immigrants in Massachusetts through creative and courageous legal action, education, and advocacy in collaboration with law firms and community partners.

Many of LCR's immigrant clients would be directly affected by the proposed public charge regulations. In particular, since 2003, LCR has spearheaded a Medical Legal Partnership, an innovative collaboration between civil rights attorneys at LCR and healthcare providers at the MGH Chelsea HealthCare Center with the goal of improving the material well-being of low-

income immigrants and refugees. Many of these clients would be impacted directly by the rule, or by the chilling effect it will produce. The proposed rule threatens to eliminate the progress the Partnership has made over the past fifteen years.

More generally, if adopted, the proposed rule would have an enormous impact in Greater Boston. The Boston Metropolitan Statistical Area is a vibrant and diverse community, whose population growth is driven by increases in the nonwhite and immigrant population. In 2014, Boston's foreign-born residents accounted for 27.1% of the city's population; the city has the seventh highest share of foreign-born residents among the largest U.S. cities, and more than half of Boston children under the age of 18 lived with at least one foreign-born parent.[1] The most common countries of origin for these foreign-born residents are the Dominican Republic, China, Haiti, El Salvador, Vietnam, Jamaica, Cape Verde, Colombia, India, and Guatemala.[2] The Boston Planning and Redevelopment Agency has estimated that nearly 20,000 city residents could be considered public charges under the rule.[3]

LCR is gravely concerned about the impact of DHS' proposed rule on its constituents. As explained below, the proposed rule would render thousands of people ineligible for immigration relief—most of them people of color. Further, there is nothing to suggest that penalizing non-citizens for accessing public benefits would render these populations more self-sufficient. To the contrary, the proposed rule would simply chill participation in life-saving programs, while having a catastrophic effect on public health, education, employment, and well-being for all Americans.

I. Changes to the "Public Charge" Determination

Historically, a public charge has been defined as an individual who is "primarily dependent" on federal benefits. Currently, U.S. Citizenship and Immigration Services (USCIS) considers an individual "primarily dependent" if public benefits provide more than half of their income and support.[4]

Now, DHS proposes to label as a public charge anyone whose receipt of a vast array of cash and non-cash benefits—including nonemergency Medicaid, SNAP, and housing assistance—exceeds 15% of the federal poverty guidelines for a household of one within any period of 12 consecutive months. As an example, if a single person received more than $1,821 worth of monetizable benefits between January and December 2018, he or she is likely to be found to be a public

[1] Lima et al, *Boston by the Numbers 2015*, Boston Redevelopment Authority Research Division, at 8 (Dec. 2015).
[2] *Id*. (*citing* U.S. Census Bureau, 2014 1-year American Community Survey, Public Use Microdata Sample (PUMS), BRA Research Division Analysis).
[3] Boston Planning and Development Agency Research Division, *Impact of Proposed Federal Immigration Rule Changes on Boston: Public Charge Test for Inadmissibility*, at 5 (Oct. 15, 2018) (hereinafter "BPDA Public Charge Test").
[4] 83 F.R. 51114, 51163.

charge.[5] Put more starkly, if a family of four receives only $2.50 per person per day, they would be considered public charges.[6] This sweeping change—which has no grounding in immigration statutes or caselaw—would mean that, according to the Cato Institute, "even immigrants who are 95 percent self-sufficient could be considered public charges."[7] There is no legal or policy basis for this draconian and punitive measure.

This criterion in no way predicts or reflects an individual's self-sufficiency or his or her economic contributions. An analysis by New American Economy revealed that more than 91% of all adults active in the labor force who would be affected by the proposed rule are employed.[8] This parallels a broader trend—across the country, the vast majority of enrollees in many public assistance programs are employed. In an April 2015 brief, the University of California Berkeley Center for Labor Research and Education examined public participation in Medicaid/CHIP, TANF, EITC, and SNAP and reported that "[n]early three-quarters (73%) of enrollees in America's major public support programs are members of working families."[9] Consequently, more than half of both state and federal spending on those programs "goes to working families."[10] Similarly, in a March 2018 report, the Center on Budget and Policy Priorities revealed that "most non-disabled adults participating in SNAP are workers," who are more likely to participate in SNAP when they are between jobs and, for those who participated while unemployed, "they are often soon working again."[11]

DHS also claims to define and clarify the statutory factors which, when considered as a whole, may operate to render someone a public charge. For example, although it is undisputed that DHS has statutory authority to consider an "applicant's assets, resources, and financial status in making a public charge determination," those terms are not defined in the statute, and the practical focus is currently on the sufficiency of the affidavit of support submitted on the non-citizen's behalf.[12]

Under the proposed rule, however, DHS states broadly that "the more assets and resources an alien has, the more self-sufficient the alien is likely to be, and the less likely the alien is to

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[5] *Id*. at 51164.
[6] New American Economy, *Economic Impact of Proposed Rule Change: Inadmissibility on Public Charge Grounds* (Oct. 31, 2018) (hereinafter "2018 New American Economy").
[7] Bier, D., *New Rule to Deny Status to Immigrants Up to 95% Self-Sufficient*, Cato Institute (Sept. 2018).
[8] 2018 New American Economy, *supra*.
[9] Jacobs, K. et al, *The High Public Cost of Low Wages: Poverty-Level Wages Cost U.S. Taxpayers $152.8 Billion Each Year in Public Support for Working Families*, University of California Berkeley Center for Labor Research and Education, at 1 (Apr. 2015).
[10] *Id.* at 5.
[11] Keith-Jennings, B. & Chaudhry, R., *Most Working-Age SNAP Participants Work, But Often in Unstable Jobs*, Center on Budget and Policy Priorities, at 6 (Mar. 15, 2018).
[12] 83 F.R. at 51186.

receive public benefits."[13] In considering assets and resources, DHS will examine—for the first time—whether the immigrant has gross household income of at least 125% of the federal poverty guidelines based on household size. If the immigrant has a household income below that threshold, their other household assets and resources "should be at least 5 times the difference between the household income and 125 percent of the [federal poverty guidelines] based on household size."[14] DHS will also consider a non-citizen's English language ability and financial status, including—for the first time—the liabilities evidenced by the individual's credit report and score and whether he or she has private health insurance or the ability to pay for medical costs.[15] "Heavily weighed negative factors" will include the current receipt of one or more public benefits as well as the receipt of public benefits within the 36 months preceding the filing of an application with USCIS.[16]

By defining assets, resources, and financial status in the foregoing manner and by determining that these factors will carry "considerable . . . weight," DHS exceeds the authority delegated by statute and proposes to fundamentally alter the immigration policy of the United States through regulation.[17]

II. The Proposed Rule will have a Disproportionate Impact on Immigrants of Color

LCR is concerned that the foregoing factors—including assets, income, financial status, past use of benefits, credit, and health insurance—are negatively determined by institutional determination and influenced by bias. Moreover, they are improper proxies and predictors for self-sufficiency and participation in the American economy. The rule will not save taxpayers millions of dollars in expenditures on public programs. It will only accomplish another insidious, unstated goal: to render people of color ineligible for immigration relief.

On average, immigrants from Canada and European countries, who are overwhelmingly white, have "education levels, incomes, professional skills, experience in high-status occupations, and entrepreneurial ambitions that are high compared to both the populations in their countries of origin and the U.S. population"—all traits that "predict wealth ownership."[18] European immigrants are also "much more likely to be proficient in English and to speak English at home" than the foreign-born population as a whole.[19]

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[13] *Id*. at 51187.
[14] *Id*.
[15] *Id*. at 51187-88.
[16] *Id*. at 51198-99.
[17] *Id*. at 51179.
[18] Keister, L.A. & Aronson, B., *Immigrants in the One Percent: The National Origin of Top Wealth Owners*, PLOS ONE, at 4 (Feb. 2017).
[19] Alperin, E. & Batalova, J., *European Immigrants in the United States*, Migration Policy Institute (Aug. 2018).

By contrast, the "powerful and pervasive effects" of racial discrimination can make it impossible for immigrants of color to "improve their financial well-being."[20] For example, 125% of the 2018 federal poverty guidelines for the continental United States is $20,575 for a two-person household and $31,375 for a four-person household.[21] But in Boston, according to a June 2017 research profile, the median household income for Dominican-headed households is $21,100, with 40% of Dominicans below the census poverty line.[22]

In and around the Greater Boston Area, white households are more likely than non-white immigrant households to hold "every type of asset."[23] For example, while 93% of whites in the Boston area hold checking or savings accounts, only 75% of Cape Verdeans held either, while only 62% of Dominicans hold a checking account.[24] Although 56% of white households hold either an IRA or private annuity, only 20% of Caribbean Blacks and 8% of Dominicans have retirement accounts.[25] Most striking is the disparity in net wealth. While white households have a median wealth of $247,500, Dominicans and U.S. Black households have a median wealth of $0 and $8, respectively.[26] In the country as a whole, Asian immigrants have $589 less wealth than white immigrants, while Black immigrants have $909 less wealth.[27] Researchers have posited that the legacy of racial discrimination in the United States "financially advantages lighter-skinned immigrants," particularly with regard to assets like cash accounts and mortgages that "require greater in-person contact."[28]

These disparities have persisted for decades across educational and employment lines. For example, according to the 2000 census, approximately 90% of African immigrants to the United States had a high school education or greater and 40% had a college education.[29] But a greater percentage of African immigrants lived at or below the poverty line than all other foreign-born residents and they were "significantly more likely to be renters and have lower median and mean household incomes."[30] By contrast, even though the number of European immigrants with a bachelor's degree or higher was comparable—42%—households headed by a European immigrant had a median income of $64,000, compared to $54,000 for all immigrant households,

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[20] Painter, M.A. et al, *Skin Tone, Race/Ethnicity and Wealth Inequality among New Immigrants*, 94(3) Social Forces 1153, 1176 (Mar. 2016).
[21] Office of the Assistant Secretary for Planning and Evaluation, *Annual 2018 Poverty Guidelines for the 48 Continental United States*, U.S. Department of Health and Human Services (Jan. 13, 2018).
[22] Boston Planning & Development Agency Research Division, *Profiles of Boston's Latinos*, at 19 (Jun. 2017).
[23] Muñoz, A.P. et al, *The Color of Wealth in Boston: A Joint Publication with Duke University and the New School*, Federal Reserve Bank of Boston, at 10 (2015).
[24] *Id*. at 10-11.
[25] *Id*. at 13.
[26] *Id*. at 20.
[27] Painter, M.A. et al, *supra*, at 1166.
[28] *Id*. at 1173.
[29] Reed, H.E. et al, *The New Wave of African Immigrants in the United States*, Population Association of America 2010 Annual Meeting, at 3 (2010).
[30] *Id*. at 8.

and only 10% of Europeans in the United States live in poverty, compared to 17% for immigrants overall.[31]

There is also a significant gap in healthcare coverage between white immigrants and immigrants of color. In 2011, only 4% of the 21.4 million whites without insurance were non-citizens, while 46% of the 15.5 million uninsured Latinx population and 42% of the 2.6 million uninsured Asians were non-citizens.[32] Indeed, Migration Policy Institute reported that, in 2015, approximately 40% of Central American immigrants were uninsured.[33]

LCR is particularly concerned by DHS's new proposal to treat a credit score characterized as "good" or better as a positive factor favoring admissibility and its assertion that a lower credit score "may indicate that a person's financial status is weak and that he or she may not be self-sufficient."[34] In addition to the fact that credit scores are, on average, lower in Latinx and Black communities than in white ones, there is no evidence demonstrating a connection between an individual's credit history and his or her employment performance or prospects, particularly given the high rate of error on major credit reports.[35]

III. The Proposed Rule is Unsupported by Evidence

DHS' proposal utterly disregards the financial contributions non-citizens make to the United States. In Boston alone, it is estimated that the nearly 20,000 affected non-citizens who live in or commute to Boston "contribute $500 million annually to the income of Boston residents through direct, indirect, and induced economic impacts."[36] More broadly, an October 2018 study revealed that in 2014, immigrants and their employers paid $24.7 billion more in premiums than insurance providers paid for their care; this offset a "deficit incurred by U.S. natives"—who pay less in premiums than is expended on their care—and suggests immigrants "subsidize U.S. natives in the private health insurance market, just as they are propping up the Medicare Trust Funds."[37]

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[31] Alperin & Batalova, *supra*.
[32] Artiga, S., *Health Coverage by Race and Ethnicity: The Potential Impact of the Affordable Care Act*, Henry J. Kaiser Family Foundation (Mar. 2013).
[33] Lesser, G. & Batalova, J., *Central American Immigrants in the United States*, Migration Policy Institute (Apr. 2017).
[34] 83 F.R. at 51189.
[35] *See* Federal Trade Commission, *In FTC Study, Five Percent of Consumers Had Errors On Their Credit Reports That Could Result in Less Favorable Terms for Loans* (Feb. 11, 2013) (noting that a congressionally mandated study on credit report accuracy "found that one in five consumers had an error on at least one of their three credit reports"). Indeed, Eric Rosenberg, the state government liaison for TransUnion, acknowledged in testimony before Oregon legislators in January 2010 that there is no research "to show any statistical correlation between what's in somebody's credit report, and their job performance or their likelihood to commit fraud." Martin, A., *As a Hiring Filter, Credit Checks Draw Questions*, New York Times (April 9, 2010).
[36] BPDA Public Charge Test, *supra*, at 6.
[37] Zallman, L. et al, *Immigrants Pay More in Private Insurance Premiums Than They Receive in Benefits*, 37(10) Health Affairs 1663, 1666-67 (Oct. 2018).

Additionally, in 2014, immigrant-led households in Massachusetts paid $3 billion in state and local taxes and $6.5 billion in federal taxes and, through taxes on individual wages alone, Massachusetts immigrants contributed $981.7 million to Medicare and $3.6 billion to Social Security.[38] Importantly, many immigrants cannot legally access the programs that their taxes support. For example, nationwide, undocumented immigrants pay an estimated $11.74 billion a year in state and local taxes.[39] Income tax filers without a social security number, many of whom are undocumented, pay over $9 billion in annual payroll taxes.[40] As a result, even as they help Medicare and Social Security remain solvent, undocumented immigrants are barred from accessing those social safety net programs and are ineligible for everything from the Children's Health Insurance Program to federal student aid.

The ramifications of this proposal then are twofold. First, the proposed rule will disproportionately operate to render people of color ineligible for permanent residency or nonimmigrant status. By privileging certain forms of government assistance over others—for example, by considering the receipt of rental assistance but not mortgage deductions—DHS will change the face and demographic composition of American legal immigration. Through regulation, rather than Congressional action, this rule will accomplish one of the Trump Administration's most pernicious priorities: increasing highly-educated, wealthy Canadian and European immigration and decreasing family-sponsored immigration from African, Asian, and Latin American countries. The rule recalls the racially discriminatory preferences of the 1924 Immigration Act (National Origins Act), which welcomed northern and western Europeans but set highly restrictive quotas for all other nationalities.

Second, DHS will fail to meet the Trump Administration's claimed goal of promoting economic independence by emphasizing factors like income, credit, and public benefit use and penalizing the use of non-cash, non-welfare programs, many of which are, by DHS' own admission, "intended to foster self-sufficiency."[41] As demonstrated above, these factors are poor proxies for whether or not an individual is employed and actively contributing to their community. By using them to deprive people of color of legal status, DHS will exacerbate the injustice caused by years of discrimination in housing, education, health, and employment.

IV. The Proposed Rule Will Have a Devastating Impact on Public Health and Well-Being

[38] New American Economy, *The Contributions of New Americans in Massachusetts*, at 8 (Aug. 2016).
[39] Gee, L.C. et al, *Undocumented Immigrants' State and Local Tax Contributions*, Institute on Taxation & Economic Policy, at 2 (Mar. 2017).
[40] Internal Revenue Service, *Immigration and Taxation*, IRS Nationwide Tax Forum (2014).
[41] 83 F.R. at 51166.

Of equal concern is the chilling effect of the proposed rule on non-citizens' application for public benefits. Although DHS has included exceptions for certain enumerated benefits and classes of immigrants, the evidence strongly suggests that the proposed rule will nonetheless chill non-citizens' participation in critical public benefits programs. This weakening of the safety net will be highly detrimental to the families that forego needed benefits, as well as to the public at large. Research on welfare reform in the 1990s has shown how dramatic this chilling effect can be. Between 1994 and 1997, use of TANF, SSI, Medicaid, General Assistance, and food stamps fell by 35% among noncitizen households, even though most legal immigrants remained eligible for welfare and Medicaid.[42] More alarmingly, even though refugees were largely exempted from the new restrictions, refugee enrollment in assistance programs decreased by 33%.[43]

The nonpartisan Urban Institute has argued that this drop in noncitizen use owes "more to the 'chilling effect' of welfare reform" than to actual changes in eligibility and that changes in one program "may chill noncitizens' use of other programs."[44] As a result, following the passage of the 1996 Act, there were "sharp declines" in the use of health, food, and cash assistances "within populations that are thought to be more vulnerable and were not a focus of welfare reform," including refugees and the citizen children of noncitizens, contrary to Congress' express public policy goals.[45]

Here, DHS appears not just to recognize, but to welcome, this chilling effect. DHS suggests that providing advance notice to immigrants will give them "an opportunity to stop receiving public benefits and obtain other means of support."[46] But those other means of support simply do not exist—immigrants of color are less likely than their white counterparts to hold assets in their home country or to have familial or other resources to draw upon in case of an emergency.[47] Moreover, there is a strong possibility that the chilling effect of the proposed rule will be even greater than under welfare reform because of the harsh penalties attached to accessing public benefits.

The impact of widespread disenrollment from life-saving public benefits cannot be overstated. Without Medicaid or CHIP, non-citizens will be more likely to die prematurely and experience poorer medical outcomes, while their children, citizen or otherwise, will be less likely to be immunized and have access to regular, high-quality care.[48] With higher rates of uninsurance, local health care systems will be destabilized, and U.S. employees will incur billions of dollars a

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[42] Fix, M.E. & Passel, J.S., *Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform, 1994-97*, Urban Institute, at 1 (Mar. 1, 1999).
[43] *Id.* at 2.
[44] *Id.* at 4.
[45] *Id.*
[46] 83 F.R. at 51210.
[47] Keister & Aronson, *supra*, at 4.
[48] National Immigration Law Center, *Issue Brief: The Consequences of Being Uninsured*, at 2-4 (Aug. 2014).

year in costs due to absent employees and lost productivity.[49] Without SNAP, vulnerable populations will be deprived of a program that alleviates poverty and food insecurity, improves dietary intake and weight outcomes, and supports economic stability and academic outcomes, which in turn reduces healthcare, educational, and employment costs for the country as a whole.[50] A preliminary analysis has estimated that the economic burden to Boston alone from disenrollment in programs like Medicaid, CHIP, and SNAP could be between $14 and $57 million a year.[51]

These shattering effects are given short shrift by DHS, which has made no attempt to monetize these consequences, include them in its direct costs analysis, or address their impact on the U.S. citizen population.[52]

Conclusion

DHS' assertion that the "benefits" of this proposed rule "justify . . . [an] increase [in] the poverty of certain families and children, including U.S. citizen children" is not supported by any evidence.[53] By excluding non-citizens based on their household income, assets, credit, insurance, and use of benefits, DHS ensures only that the U.S. will grant fewer nonimmigrant and immigrant visas to people of color, regardless of their economic contributions to their communities. The rule change will not aid these individuals in becoming economically self-sufficient but instead will perpetuate a historical cycle of discrimination and disempowerment. Non-citizens will face an impossible choice: remain on public benefits, working towards self-sufficiency but inadmissible as public charges, or voluntarily disenroll, triggering even poorer economic, health, educational, and employment outcomes, which may still render them inadmissible based on the other factors elucidated by DHS.

Given the disproportionate impact upon communities of color and the enormous costs to the country posed by voluntary disenrollment from public benefit programs, LCR urges DHS to abandon this discriminatory, irrational, and cruel rule change.

Submitted by,

Lawyers for Civil Rights

MGH—Chelsea HealthCare Center

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[49] *Id.* at 3-4.
[50] Food Research & Action Center, *Hunger & Health: The Role of the Supplemental Nutrition Assistance Program in Improving Health and Well-Being*, at 5 (Dec. 2017).
[51] BPDA Public Charge Test, *supra*, at 10.
[52] 83 F.R. at 51270.
[53] *Id.* at 51277.

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