

December 10, 2018

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
DHS Docket No. USCIS-2010-0012

Re: **Agency Notice of Proposed Rulemaking; Public Comment Request; Inadmissibility on Public Charge Grounds**

To Whom it May Concern:

Lambda Legal Defense & Education Fund, Inc. (“Lambda Legal”) submits these comments to the Department of Homeland Security (“DHS”) in opposition to the proposed Public Charge rule, which would cause serious harm to immigrants and their families, particularly to LGBTQ immigrants and immigrants living with HIV. Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender and queer (“LGBTQ”) people and everyone living with HIV. Lambda Legal has represented the interests of people living with HIV since the beginning of the epidemic, and our work has ensured access to treatment, promoted effective treatment policies, and helped combat discrimination, bias and stigma for countless individuals throughout these years.

Since its founding in 1973, Lambda Legal has educated the public that LGBTQ people exist in all communities, including among America’s vibrant communities of immigrants from all corners of the world. Like all immigrant populations, LGBTQ immigrants bring new ideas, talents, ambition and human resources to our American society and economy. They are within the strong families united by processes established by federal law, and are among those entitled by our laws to safety from persecution abroad. As discussed further in these comments, LGBTQ immigrants and immigrants living with HIV also can be especially vulnerable due to multiple types of compounding discrimination. Accordingly, Lambda Legal has engaged in litigation, policy advocacy, and public education to challenge this discrimination, especially when it results from government policy. Our history of work in this area informs our opposition to the proposed Public Charge rule.

The current and longstanding public charge analysis considers an applicant’s receipt of public “cash” assistance when determining whether or not an immigrant is likely to become a public charge.¹ This policy has been relied upon by immigrant families for two decades and is consistent with Congressional intent and existing case law.² The proposed rule radically changes this long standing policy to include “non-cash” benefits such as healthcare and housing benefits. This expansion is a departure from existing policy and creates an unworkable, overly broad definition that will be impossible to implement fairly. Experts estimate

¹ *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999), available at <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-54070/0-0-0-54088/0-0-0-55744.html>.

² See *Matter of B—*, I. & N. Dec. 323 (BIA 1948), *Matter of Harutunian*, 4 I. & N. Dec. 583 (BIA 1974.)

that under the new definition, 94% of all noncitizens who entered the U.S. without Lawful Permanent Resident (LPR) status have at least one characteristic that DHS could potentially weigh negatively in a public charge determination under the proposed rule.³

We are concerned that this proposal to expand the public charge inquiry to include non-cash benefits will harm vulnerable populations—including LGBTQ people and people living with HIV, would disproportionately impact communities of color, and would have disastrous individual and public health consequences.

Lambda Legal urges DHS to consider the recommendations and comments detailed below and to withdraw the proposed rule in its entirety.

I. Impact on LGBTQ Immigrants

LGBTQ people are more likely to live in poverty and to rely upon public benefits

Many LGBTQ people—including LGBTQ immigrants—experience economic insecurity due to anti-LGBTQ discrimination in the workplace, education, housing, and healthcare. Research shows that LGBTQ people, especially those who are black, transgender, and women, are more likely to live in poverty and experience higher unemployment and homelessness than non-LGBTQ people.⁴ According to recent research, LGBTQ people and their families are more likely to depend on the Supplemental Nutrition Assistance Program (“SNAP”), Medicaid, unemployment insurance and public housing assistance than non-LGBTQ people.⁵ LGBTQ people are also more likely than non-LGBTQ people to report experiencing food insecurity. A 2016 study by researchers at UCLA School of Law found LGBTQ survey respondents and their families are more than twice as likely to report receiving SNAP benefits.⁶ The study also found that LGBTQ people and their families are more likely to receive Medicaid. While 12.9% of non-LGBTQ people surveyed reported receiving Medicaid benefits, 20% of LGBTQ people reported receiving Medicaid.⁷ The

³ Kaiser Family Foundation, *Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid* (2018), available at <https://www.kff.org/report-section/estimated-impacts-of-the-proposed-public-charge-rule-on-immigrants-and-medicare-key-findings/>.

⁴ Lourdes Ashley Hunter, Ashe McGovern, and Carla Sutherland, Eds., *Intersecting Injustice: Addressing LGBTQ Poverty and Economic Justice for All: A National Call to Action* (2018), available at https://static1.squarespace.com/static/5a00c5f2a803bbe2eb0ff14e/t/5aca6f45758d46742a5b8f78/1523216213447/FINAL+PovertyReport_HighRes.pdf.

⁵ Caitlin Rooney, “Protecting Basic Living Standards for LGBTQ People” (Center for American Progress 2018), available at <https://www.americanprogress.org/issues/LGBTQ/reports/2018/08/13/454592/protecting-basic-living-standards-LGBTQ-people/>.

⁶ Taylor N.T. Brown, Adam P. Romero, and Gary J. Gates, “Food Insecurity and SNAP Participation in the LGBTQ Community” (The Williams Institute, UCLA School of Law, 2016), available at <https://williamsinstitute.law.ucla.edu/research/LGBTQ-food-insecurity-2016/> (“LGBTQ” rather than “LGBTQ” is used to reference the study’s findings, which were limited to LGBTQ individuals.); Caitlin Rooney, “Protecting Basic Living Standards for LGBTQ People” (Center for American Progress 2018), available at <https://www.americanprogress.org/issues/LGBTQ/reports/2018/08/13/454592/protecting-basic-living-standards-LGBTQ-people/>.

⁷ Caitlin Rooney, *Protecting Basic Living Standards for LGBTQ People*, *supra* note 6.

survey also found LGBTQ respondents and their families relied on housing assistance at 2.5 times the rate of non-LGBTQ respondents.⁸

Impact of the proposed rule on LGBTQ immigrants

There are an estimated 904,000 LGBT immigrants living throughout the U.S.⁹ The intersectional identities of LGBT immigrants means greater risk for a lifetime of discrimination that restricts educational, employment, and other opportunities. These cumulative and compounding experiences of discrimination make LGBTQ immigrants particularly vulnerable. As an intersectional subset of both the immigrant and LGBTQ populations, it is likely that tens of thousands of LGBTQ immigrants and their families, including those with U.S. citizen children, are eligible for and depend upon Medicaid and other government programs such as SNAP and the Children’s Health Insurance Program (“CHIP”) to assist themselves and their families with health insurance, nutrition, and other supports. This proposed rule would have a chilling effect on their use of public benefits as it forces them into a Hobson’s choice; to forego essential health, nutrition, and other critical programs for themselves and their families or to risk their immigration status.¹⁰ The impact would extend far beyond any individual who may be subject to the “public charge” analysis, harming families and entire communities who rely upon such support for proper nutrition, safe housing, and healthcare. Individuals petitioning for family members to join them may be too afraid to use benefits they need and are entitled to receive because they fear a threat to their loved one’s ability to unite as a family in the U.S.

Penalizing immigrants for actual or predicted use of a wide-range of supplementary assistance in their lifetimes would disproportionately impact LGBTQ immigrants and their families. Access to programs to support LGBTQ immigrants are important safeguards, are critical to ensure basic living standards, and help LGBTQ immigrants and their families build a strong foundation in the U.S. These programs ensure that they are able to live, thrive, and be healthy, contributing members of our communities. Use of these programs should not be made into a bar to block them from becoming lawful permanent residents.

Impact on LGBTQ immigrant workers

Immigrants make up a significant population of the LGBTQ community. The Williams Institute at UCLA estimates that there are 637,000 LGBTQ-identified individuals among the adult authorized immigrant population.¹¹ There are an estimated 24,700 non-citizens who are part of a same-sex couple with a U.S. citizen; a quarter of the couples are raising children.

⁸ *Id.*

⁹ Gary J. Gates, *LGBT Adult Immigrants in the United States* (The Williams Institute, UCLA School of Law, March 2013), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTImmigrants-Gates-Mar-2013.pdf>. (“LGBT” rather than “LGBTQ” is used to reference the study’s findings, which were limited to LGBT individuals).

¹⁰ National Association of Community Health Centers, Joint Statement of America’s Health Centers Opposing Public Charge Proposal (Oct. 10, 2018), available at <http://www.nachc.org/news/joint-statement-of-americas-health-centers-opposing-public-charge-proposal/>.

¹¹ Gary J. Gates, “LGBTQ Adult Immigrants in the United States” (The Williams Institute, UCLA School of Law, 2013), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQImmigrants-Gates-Mar-2013.pdf> (“LGBTQ” rather than “LGBTQ” is used to reference the study’s findings, which were limited to LGBTQ individuals).

LGBTQ people, including those who are immigrants, experience rampant workplace discrimination. Half of the U.S. population lives in a jurisdiction without explicit nondiscrimination laws prohibiting employment harassment and other discrimination based on sexual orientation and gender identity.¹² A 2017 survey found that 1 in 5 LGBTQ people experienced discrimination due to their sexual orientation or gender identity when applying for jobs and 22 percent reported experiencing this discrimination in pay or promotions.¹³ Sixteen percent of respondents to the 2015 U.S. Transgender Survey reported losing their job due to their gender identity or expression.¹⁴ Respondents in this survey also reported a 15 percent unemployment rate, which was three times higher than the unemployment rate for the total U.S. population at the time.¹⁵

Discrimination faced by LGBTQ people hurts their ability to attain and maintain economic security, making support systems that help them feed themselves and their families, access health care, and keep a roof over their heads critical to their basic wellbeing and safety. This is even more of an issue for LGBTQ immigrants who face additional challenges due to their multiple and intersecting identities. Non-citizens in same-sex couples who are in the labor force have lower median annual personal incomes than their naturalized citizen counterparts.¹⁶ In effect, this proposed rule would effectively, wrongfully punish LGBTQ immigrants for systemic workplace discrimination.

II. The proposed rule would have a significant impact on immigrants living with HIV

With advances in HIV treatment and prevention—and the evidence that individuals who are virally suppressed cannot transmit the virus to others—we have the tools to end the HIV epidemic in this country. However, we will not end the epidemic with policies that deter and jeopardize access to HIV prevention, care, and treatment services. The proposed public charge policy, if enacted, will have a sweeping negative impact on access to vital public health services across all immigrant categories, not just those directly implicated in the rule, with negative public health impacts across society.

The Proposed Rule Would Cause Harmful Disruptions in HIV Treatment

The proposed expansion of the number of non-cash programs that would be weighed negatively in a public charge consideration—including Medicaid services and Medicare Part D subsidies—is unprecedented and would lead to long-term negative health care outcomes for many people. The historically limited approach of considering only cash benefits in the public charge analysis has been important in encouraging access to critical public health services, including for people living with HIV in particular. For instance, Medicaid is the largest source of HIV care and treatment in this country, providing coverage for 42% of people living

¹² Movement Advancement Project, “Local Employment Nondiscrimination Ordinances” (2015), *available at* <http://LGBTQmap.org/file/policy-spotlight-local-NDOs.pdf>.

¹³ Sejal Singh & Laura E. Durso, “Widespread Discrimination Continues to Shape LGBTQ People’s Lives in Both Subtle and Significant Ways” (Center for American Progress, 2017), *available at* <https://www.americanprogress.org/issues/LGBTQ/news/2017/05/02/429529/widespread-discrimination-continues-shape-LGBTQ-peoples-lives-subtle-significant-ways/>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Gary J. Gates, “LGBTQ Adult Immigrants in the United States,” (The Williams Institute, UCLA School of Law, 2013), *available at* <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQImmigrants-Gates-Mar-2013.pdf>.

with HIV who are in care.¹⁷ Another 25% of people living with HIV who are in care are insured through the Medicare program.¹⁸ The federal government has pledged its commitment to ending the HIV epidemic, and part of this commitment has meant using the Medicaid and Medicare programs to ensure that people have access to HIV prevention, care, and treatment. The Kaiser Family Foundation estimates that as a result of the proposed rule and the inevitable chilling effect on access to services, between 2.1 and 4.9 million individuals could drop out of Medicaid alone if the rule were to go into effect.¹⁹

Incentivizing immigrants not to enroll or to drop out of these programs will hamstring efforts to end new cases of HIV and could cause dangerous disruptions in treatment as individuals leave these programs in fear of a public charge determination. Indeed this proposal and similar policies targeting immigrants are already having a chilling effect on immigrants' ability to access vital health and public health services for which they are eligible, including HIV prevention and treatment.²⁰ The drop in health care coverage would not only be devastating to the health of affected individuals, but would also inflict negative health consequences on the community at large, as disruptions in HIV care and treatment—especially resulting in reduced adherence or medication rationing and a decline in prenatal and postnatal care by immigrants—can foster drug resistant strains of HIV and result in more transmissions. As a result of the proposed rule, immigrants living with HIV would be forced to choose between their healthcare and their immigration status (or the immigration status of their family members). Such a policy is harmful for both individual and public health.

Confusion about the scope of the rule may also lead U.S. citizens and permanent residents and groups of immigrants who are not subject to the public charge rule to believe they would need to terminate their subsidized health care in order to remain eligible to petition for their family. It is unclear whether public benefits not explicitly enumerated in the rule would be weighed negatively in the totality of the circumstances review. Because immigrants subject to public charge may have difficulty determining which benefits are allowable and which are not, this proposal would have a significant chilling effect on access to a range of services, including public health and emergency services that are excluded from the public charge inquiry. There is strong evidence, cited in the NPRM itself, that many people whose eligibility for benefits was not directly affected by the 1996 legislation nonetheless were deterred from participating in programs.²¹ After the enactment of the 1996 legislation, benefits-use rates fell sharply even among groups such as refugees and U.S.-citizen children whose eligibility was unchanged. In the current climate of increased deportations and rhetoric, fear of consequences of using public benefits could be even greater than in 1996.

¹⁷ Kaiser Family Foundation, *Medicaid's Role for Individuals with HIV* (2017), available at <https://www.kff.org/infographic/medicaids-role-for-individuals-with-hiv/>.

¹⁸ Kaiser Family Foundation, *Medicare and HIV* (2016), available at <https://www.kff.org/hiv/aid/fact-sheet/medicare-and-hiv/>.

¹⁹ Kaiser Family Foundation, *Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid* (2018), available at <https://www.kff.org/report-section/estimated-impacts-of-the-proposed-public-charge-rule-on-immigrants-and-medicaid-key-findings/>.

²⁰ Helena Bottemiller Evich, *Immigrants Appear to be Dropping out of Food Stamps*, POLITICO (Nov. 15, 2018), available at <https://www.politico.com/story/2018/11/14/immigrant-families-dropping-out-food-stamps-966256>.

²¹ Michael E. Fix, Randy Capps and Neeraj Kaushal, *Immigrants and Welfare* (2009) available at https://www.russellsage.org/sites/all/files/Fix_Chapter%201.pdf.

Lastly, the proposed harm to migrant communities is a broader public health issue that impacts all of our communities. By creating a new test that treats those living with health conditions and disabilities harshly, the proposed rule is not only placing at risk the health of migrant people living with HIV, but by discouraging use of publicly funded health services, is placing at risk the health of Americans living with or at higher risk for developing the same health conditions or disabilities.

The Expanded Disability and Health Status Factors Are Discriminatory

Although the proposed rule takes great pains to clarify that a disability would not serve as the sole basis for an inadmissibility finding, federal law does not allow an executive agency to discriminate in whole—or in part—based on a person’s disability. By weighing a disability negatively while also negatively weighing important supports someone living with a disability relies upon, the proposal will have the effect of creating a bar to entry or adjustment of status based solely on a person’s disability. Medicaid, Medicare Part D, and other programs serve to support individuals to live self-sufficient, full, and productive lives. Given that approximately three in ten adults under age 65 enrolled in Medicaid have a disability, weighing Medicaid negatively undercuts the very programs that are meant to support self-sufficiency, punishing anyone with a disability simply for having a disability.²²

The proposed treatment of individuals living with a serious medical condition is also arbitrary. The proposed rule would negatively weigh a diagnosis of an illness that is “likely to require extensive medical treatment or institutionalization.” A diagnosis will be even more heavily negatively weighed unless the individual demonstrates he or she will be able to purchase private health insurance or has other resources to cover foreseeable medical costs. This incredibly broad inquiry into a person’s health status will arbitrarily punish individuals living with HIV, is not based in either sound science or public health principles, and will increase stigma for people living with HIV or any chronic condition. Stigma has been identified by the head of the Centers for Disease Control and Prevention as being the enemy of public health.²³

People living with HIV are able to live productive lives, with life expectancies comparable to people not living with the virus. Congress has recognized that people with disabilities—including people living with HIV—contribute to society and make substantial contributions to the economy. Congress has repeatedly acted to protect against discrimination based on disability status. As of the end of 2015, more than one million people in the U.S. were living with HIV.²⁴ And a chronic illness such as HIV is not an accurate indicator of future self-sufficiency and full-time employment capability. The United States Bureau of Statistics showed that people living with chronic illnesses such as HIV increased the labor force.²⁵ With

²² Kaiser Family Foundation, *How Might Medicaid Adults with Disabilities Be Affected By Work Requirements in Section 1115 Waiver Programs?* (2018), available at https://www.kff.org/report-section/how-might-medicaid-adults-with-disabilities-be-affected-by-work-requirements-in-section-1115-waiver-programs-issue-brief/#endnote_link_248152-2.

²³ Lindsey Bever, Lena H. Sun, *The CDC Director’s Deeply Personal Reason for Fighting Opioids: His Son Nearly Died of an Overdose* (July 17, 2018), Washington Post, available at <https://www.washingtonpost.com/amhtml/news/to-your-health/wp/2018/0717/the-cdc-directors-deeply-personal-reason-for-fighting-opioids-his-son-nearly-died-of-an-overdose/>

²⁴ Centers for Disease Control and Prevention, *Estimated HIV incidence and prevalence in the United States, 2010–2015*, HIV Surveillance Supplemental Report 2018, Vol. 23, No. 1, at p.7 (March 2018), available at <https://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-supplemental-report-vol-23-1.pdf>.

²⁵ See Bureau of Labor Statistics, *Persons with a Disability: Labor Force Characteristics* (News Release, June 21, 2018), available at https://www.bls.gov/news.release/archives/disabl_06212018.htm.

appropriate treatment, care and support, persons living with HIV can expect to live long, healthy and productive lives. In addition, people living with HIV who are virally suppressed do not transmit the virus to others. HIV prevention and treatment have advanced to a place where HIV is a chronic, manageable condition for many people, yet the proposed language in the rule could make an HIV diagnosis an insurmountable hurdle in a public charge determination.

Moreover, because Supreme Court interpretation of the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act protects people living with HIV,²⁶ we are concerned that weighing HIV status negatively without any consideration of HIV management or treatment access violates federal law. The combination of penalizing someone’s medical condition while at the same time negatively weighing use of services that help to treat that medical condition will create an insurmountable bar for many people living with HIV seeking to enter this country or adjust their status, something the previous Administration determined was bad public health policy when it made the decision to remove HIV from the list of diseases of public health significance, ending the HIV entry ban.²⁷

The economic benefits of immigrants living with chronic medical conditions, such as HIV, should also be taken into account in assessing the costs and benefits of this proposed rule. DHS did not address how specific medical conditions would be analyzed under proposed section §212.22 (c)(1)(iv)(A), while nonetheless heavily weighing whether an immigrant has been diagnosed with a medical condition that is “likely to require extensive medical treatment.” Because of the lack of clarity and arbitrary decision-making that likely will result, it is important to underscore the economic benefits associated with immigrants living with chronic medical conditions, such as HIV, who are living and working in the United States. To assist DHS in this analysis, we have attached a prior comment and report as Exhibit A. The comment and report was submitted in 2009 in response to a proposed regulation to remove HIV from the list of communicable diseases of public health significance and to eliminate mandatory HIV testing in the routine medical examination of foreign nationals. At that time, Lambda Legal (along with the Whitman-Walker Clinic) retained the services of economic consultants at Deloitte Financial Advisory Services LLP, which provided a report regarding HHS/CDC’s economic model and analysis of the economic impact of the proposed elimination of the HIV travel and immigration ban. The section entitled “Comments on Cost and Benefit Concepts,” and in particular the discussions of “omitted benefits” and the “cost concept,” are relevant in the context of this proposed rule regarding the exclusion of those likely to become a public charge. We include this study again, to emphasize the economic benefits associated with immigrants living with chronic medical conditions, such as HIV, who are living and working in the United States. *See* Deloitte Report at page 7-8 (Exh. A).

Additional Non-Cash Benefit Programs Should Not Be Included

For reasons stated above, we do not believe that non-cash benefits additional programs should be added and believe that the public charge determination should remain limited. Individuals living with HIV with secure access to food are more likely to be virally suppressed, meaning they cannot transmit the virus to

²⁶ *Bragdon v. Abbott*, 524 U.S. 624, 633 (1998); *Know the Rights that Protect Individuals with HIV and AIDS*, U.S. DEPT OF HEALTH & HUMAN SERVS., available at <http://www.hhs.gov/sites/default/files/ocr/civilrights/resources/factsheets/hivaids.pdf> (HHS has established that individuals with HIV/AIDS are protected under the Rehabilitation Act and the Americans with Disabilities Act).

²⁷ Centers for Disease Control and Prevention, Final Rule: Removing HIV Infection from U.S. Immigration Screening (2009), available at <https://www.cdc.gov/immigrantrefugeehealth/laws-regs/hiv-ban-removal/final-rule.html>.

others.²⁸ Similarly, access to adequate and stable housing is also associated with better health outcomes and viral suppression for people living with HIV.²⁹ People who are homeless or unstably housed have HIV infection rates up to 16 times higher than people who have a stable place to live.³⁰ Penalizing use of these important programs jeopardizes progress we have made in fighting the HIV epidemic and, counterproductively, will lead to greater healthcare costs as a result of deferred care, increased use of emergency rooms, and lack of access to regular care and treatment.

We also strongly oppose the inclusion of the Children’s Health Insurance Program (“CHIP”). The Williams Institute estimates that 3,000,000 lesbian, gay, bisexual, and transgender people have had a child and as many as 6,000,000 American adults and children have a lesbian, gay, bisexual, or transgender parent. Among adults under 50 years of age living alone or with a spouse or partner, 48 percent of lesbian, bisexual, or transgender women are raising a child under 18 years of age, and 20 percent of gay, bisexual, or transgender men are doing so. CHIP is a vital safety net for millions of children and young adults. For the same individual and public health reasons stated above, we believe that adding CHIP as a negative factor to the public charge determination will jeopardize access to HIV prevention and care services for the young people and pregnant women served by CHIP, with the same negative impacts on public health and public health costs discussed above. Moreover, CHIP has been expanded by many states to ensure that vulnerable immigrant populations, including pregnant women and children, have access to services. Penalizing use of CHIP undercuts the sound public policies many states have put in place to ensure basic healthcare services are available to immigrants to protect their health and to promote healthy communities.

III. The New Income Criteria Are Arbitrary

The proposed rule would heavily favor the wealthy by creating a new bright line test for income. Under the proposed rule, earning under 125% FPL percent of the poverty line (\$31,375 annually for a family of 4) would be considered a negative factor in deciding whether an immigrant could be granted a green card or permanent residency. Having a poor credit history or being authorized to work but not working would also be considered negative factors. This means that LGBTQ immigrants could be considered to have multiple negative factors, all of which stem from discrimination. Conversely, earning over 250% of the poverty line (\$62,750 annually for a family of 4) would be a heavily weighted positive factor, even though this is higher than the median income in the U.S.³¹ A bright line income test is not reflective of a person’s value to this country or potential to meaningfully contribute to a community. Basing entry into this country and adjustment of status solely on the basis of wealth is not only anathema to longstanding American values of upward mobility, but it also destabilizes financial security of immigrant families already here, particularly in instances of family-based green card petitions.

²⁸ Center for HIV Law and Policy Innovation, *Food Is Prevention: The Case for Integrating Food and Nutrition Interventions into Health Care* (2015), available at <https://www.chlpi.org/wp-content/uploads/2013/12/Food-is-Prevention-Report-July-2015.pdf>.

²⁹ Wolitski, R.J., et al., *Randomized Trial of the Effects of Housing Assistance on the Health and Risk Behaviors of Homeless and Unstably Housed People Living with HIV* (493-503) (2010) AIDS & BEHAVIOR.

³⁰ Kerker B, et al, *The Health of Homeless Adults in New York City: A report from the New York City Departments of Health and Mental Hygiene and Homeless Services*, (2005).

³¹ Kayla Fontenot, Jessica Semega, & Melissa Kollar, *Income and Poverty in the United States: 2017*, Current Population Reports (U.S. Census Bureau, Sept. 2018), available at <https://www.census.gov/library/publications/2018/demo/p.60-263.html>.

IV. English Proficiency and Education Criteria Are Far Too Broad

We also object to the provisions related to negatively weighing lack of English language proficiency and formal education. It is well-documented that access to public benefits and services is critical to ensuring that immigrants acquire the language and education skills necessary to be successful. However, the proposed rule negatively weighs the lack of education and English proficiency, while at the same time penalizing use of the services that enable immigrants to become self-sufficient members of their communities. This policy would also disproportionately impact immigrants from some communities of color. The expanded negative weights for English language proficiency and educational/skills attainment conflict with longstanding policy and principles that support upward mobility and self-sufficiency. Lastly, making admissibility assessments based on person's accent or ability to speak English likely violates Title VI of the Civil Rights Act of 1964.³²

V. The Cost Benefit Analysis is Incomplete

The harms that would flow from the NPRM outweigh any purported cost savings involved with such drastic action. The proposed rule fails to acknowledge the human cost associated with incentivizing vulnerable migrants and their families to abandon their access to nutritious food, safe housing and healthcare provided by our public safety nets. The potential human costs attributable to the lives wrecked by this policy outweigh any purported economic savings to the government. If such suffering needs to be monetized, the long-term impact of the policy on individual lives should be accounted for by using actuarial models or models used in personal injury litigation that accurately capture the pain and suffering these individuals would undergo as a result of this policy. In addition, the cost to society of having children who do not have access basic medical care and have their basic nutritional needs met is, while difficult to calculate, potential enormous with cascading consequences for generations

In addition, the proposed rule cites, but fails to even attempt to quantify the harms associated with the proposed rule. The proposed rule waves off numerous examples of “non-monetized potential consequences,” such as negative health care outcomes, increased prevalence of communicable diseases, increased rates of poverty and housing instability, and reduced rates of productivity and educational attainment. Yet these costs *are* monetizable and should at least be weighed in some manner. The NPRM itself recognized the importance of factoring in those costs by considering the cumulative receipt of “non-monetizable” benefits such as healthcare and housing for more than 12 months in a 36-month period or within 12 months of application as indicative of an individual's likelihood of becoming a public charge.³³ In addition, the NPRM fails to account for those individuals who are denied a change of legal status but who remain in the United States who, once denied, will reapply for public benefits because they are unable to obtain a green card to help them find meaningful employment.

Conclusion

Assumptions that LGBTQ people and people living with HIV are likely to become a public charge have historically been used to keep this community out of the U.S., even before immigration laws explicitly excluded LGBTQ people from entry.³⁴ While our country's immigration laws no longer explicitly exclude

³² Federal laws particularly applicable to language access include Title VI of the Civil Rights Act of 1964, the Title VI regulations, prohibiting discrimination based on national origin, and Executive Order 13166.

³³ 83 Fed. Reg. 51165.

³⁴ Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton University Press, 2011).



people living with HIV or treat LGBTQ people and their families as less than, this sweeping proposed rule once again puts LGBTQ people and people living with HIV at disproportionate risk of being kept out of the U.S. and torn apart from their families. Discrimination and bias based on a person's sexual orientation, gender identity or HIV status contribute to economic insecurity for members of these communities and their families, which could be used against them under the proposed rule.

For these reasons, we strongly urge the Department to immediately withdraw its current proposal, and instead to dedicate its efforts to advancing policies that strengthen rather than undermine the ability of immigrants to support themselves and their families in the future. If we want our communities to thrive, families in those communities must be able to stay together and get the care, services and support they are entitled to and need to remain healthy and productive.

In light of the above concerns, we urge DHS to withdraw this proposed rule in its entirety, and instead allow the longstanding limited public charge policy included in the 1999 field guidance on public charge to remain in effect.

Thank you for the opportunity to submit comments on the proposed rule. Please do not hesitate to contact Sasha Buchert at sbuchert@lambdalegal.org if further information would be of assistance.

Most respectfully,

Lambda Legal Defense & Education Fund, Inc.