State of California
Office of the Attorney General
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November 12, 2019

Via Federal eRulemaking Portal
Mike Pompeo, U.S. Secretary of State
Megan Herndon, Deputy Director for Legal Affairs, Visa Services, Bureau of Consular Affairs
Department of State
600 19th St. NW
Washington DC 20006

RE: Comments on Interim Final Rule: *Visas: Ineligibility Based on Public Charge Grounds*, 84 Fed. Reg. 54996 (Oct. 11, 2019), RIN 1400-AE87

Dear Secretary Pompeo and Ms. Herndon:

We, the Attorneys General of the State of California, District of Columbia, State of New York, State of Oregon, Commonwealth of Pennsylvania, and State of Washington (the States), write today to urge the Department of State to withdraw the Interim Final Rule: *Visas: Ineligibility Based on Public Charge Grounds*, 84 Fed. Reg. 54996 (Oct. 11, 2019), RIN 1400-AE87 (IFR). The State Department IFR is expressly modeled after the final rule recently issued by the U.S. Department of Homeland Security (DHS), *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (DHS Public Charge Rule or DHS Rule). Indeed, the IFR adopts in its entirety the definition and factors governing public charge determinations as set forth in the DHS Rule, and fails to provide any independent explanation of its public charge definition, beyond a need for consistency with the DHS Rule. 84 Fed. Reg. 55,000. Thus, like the DHS Rule, the IFR expands the public charge doctrine beyond its statutory limits, is based on discriminatory animus against immigrants of color rather than reasoned decision-making, and will cause grievous and irreparable harm to the States and their residents.

Following the DHS Rule's radical expansion of the grounds for inadmissibility based on being likely to become a public charge under section 212(a)(4) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(4), the IFR conflicts with its authorizing statute, and is therefore contrary to law and short of statutory right. *See* 5 U.S.C. § 706. Because the IFR sets the standard for public charge determinations for consular officers, it will directly impact individuals outside the United States seeking immigrant and nonimmigrant visas, individuals who are present without authorization in the United States and need to leave the country to apply

for a visa when they become eligible for one, and certain nonimmigrant visa holders in the U.S. who must renew their visas.[1] However, due to high levels of fear and confusion the IFR will cause in immigrant communities, it is likely that other immigrants in the United States will also be wary of engaging in behavior that would subject them to a public charge determination by the IFR's terms.

By adopting the DHS Rule's definition of "public charge" as a person who "receives one or more public benefits [including Medicaid, Supplemental Nutrition Assistance Program (SNAP) benefits, and housing assistance] for more than twelve months in the aggregate in any 36-month period," the IFR discourages the use of such benefits by immigrants who are or believe themselves to be subject to its terms. This chilling effect will harm those immigrants and their children, many of whom are U.S. citizens, as they forgo health, nutrition, and housing assistance for which they are eligible and entitled. Decreased enrollment in these programs burdens the States' administration of public benefits and undermines public health and community well-being, harming the public at large.

Applying the new public charge definition and framework for public charge determinations to immigrant and non-immigrant visa applications for new arrivals will also harm the States and their communities. Like the DHS Rule, the IFR mandates consideration of a host of factors in public charge determinations and requires that the State Department weigh negatively against a visa applicant factors like an income level of less than 125 percent of the Federal Poverty Guidelines (FPG), limited English ability, and larger family size. The IFR thus erects barriers that prevent lower income individuals—many of whom have been patiently waiting for years due to family-based visa backlogs—from reuniting with loved ones or contributing to our workforces. Employers reliant on temporary workers will struggle to succeed. Those affected include the States' universities, who welcome international students and faculty to enhance the experience of all who participate in their academic communities.

The DHS Rule upon which the IFR is based has been enjoined by five separate federal district courts. Each of the States is participating in litigation to challenge the DHS Rule as deficient under the Administrative Procedure Act, 5 U.S.C. § 702 *et seq*. (APA), among other claims. On October 11, 2019, the U.S. District Courts for the Northern District of California, Southern District of New York, and Eastern District of Washington issued preliminary injunctions against implementation of the DHS Rule. *See* Preliminary Injunction dated October 11, 2019 in *State of California v. U.S. Dep't of Homeland Security*, 19-CV-4975 (PJH) (N.D. Cal.), *City and County of San Francisco v. U.S. Citizenship and Imm. Svcs.*, 19-CV-4717 (PJH) (N.D. Cal.), and *La Clinica de la Raza v. Trump*, 19-CV-4980 (PJH) (N.D. Cal.) (California Order); Memorandum Decision and Order dated October 11, 2019 in *State of New York v. U.S. Dep't of Homeland Security*, 19 Civ. 7777 (GBD) (S.D.N.Y) (New York Order); Memorandum Decision and Order dated October 11, 2019 in *Make the Road New York v. Cuccinelli*, 19 Civ. 7993 (GBD) (S.D.N.Y.) (Make the Road Order); Order Granting Plaintiff States' Motion for

[1] *See infra* notes 4-9.

Section 705 Stay and Preliminary Injunction dated October 11, 2019 in *State of Washington v. U.S. Dep't of Homeland Security*, 19-CV-5210 (RMP) (E.D. Wash.) (Washington Order). On October 14, 2019, the U.S. District Courts for the Northern District of Illinois and the District of Maryland also issued preliminary injunctions against implementation of the DHS Rule. *See* Memorandum Opinion and Order dated October 14, 2019 in *Cook County, Illinois v. McAleenan*, 19-C-6334 (GF) (N.D. Ill.) (Illinois Order); and Memorandum Opinion and Order dated October 14, 2019 in *Casa de Maryland, Inc. v. Trump*, 19-CV-2715 (PWD) (D. Md.) (Maryland Order). [2] Each of these district courts held that the plaintiffs were likely to succeed on the merits of their APA claims because the definition of "public charge" in the DHS Rule departed from longstanding understanding and application of that term. Because the same is true of the IFR's definition of "public charge," the IFR is also contrary to law and short of statutory right. As explained below, it is also arbitrary and capricious and violates the Equal Protection Clause of the Fifth Amendment to the United States Constitution.

I. BACKGROUND

Unlike the DHS Public Charge Rule, which is administered by U.S. Citizenship and Immigration Services (USCIS) and Customs and Border Protection, the IFR applies to admissibility determinations made by State Department consular officers in the course of adjudicating visa applications.[3] There are two primary types of visas: (1) immigrant visas, for individuals who seek to become lawful permanent residents (LPRs) of the United States, usually through a petition filed by a family member or employer in the United States; and (2) nonimmigrant visas, for individuals seeking a temporary stay in the United States, such as temporary workers, international students, business travelers, and tourists.[4]

Applicants for immigrant visas (*i.e.*, LPR status) may be living outside the United States *or* present in the United States, but without authorization. These applicants must apply for an immigrant visa with a consular officer outside the United States through "consular processing" and will be subject to the IFR's new public charge rule.[5] By contrast, persons who are lawfully

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[2] In a case challenging expansion of public charge ground of inadmissibility in the Department of State's Foreign Affairs Manual, the U.S. District Court for the District of Maryland denied a motion to dismiss the City of Baltimore's claims based on an administrative rule carried out by consular officers processing visa applications. *See Mayor and City Council of Baltimore v. U.S. Dep't of Homeland Security*, 19-CV-2851 (PJM) (D. Md.) (Baltimore Order).

[3] *See* 8 U.S.C. § 1182(a) ("Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States. . .").

[4] *See, e.g.*, 8 U.S.C. § 1202 ("Application for visas").

[5] *See* 8 U.S.C. § 1202(b) ("All immigrant visa applications shall be reviewed and adjudicated by a consular officer."); U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL AND HANDBOOK (FAM) 602.2-2(A)(1)(c)(1), http://fam.state.gov/. (**"**The Department of State, through its consular sections, is responsible for visa processing and determining if an applicant is eligible to receive a

present in the United States may apply to become LPRs through adjustment of status with USCIS.[6]

Applicants for temporary, nonimmigrant visas outside the United States must apply through State Department consular offices and are subject to the IFR.[7] Most nonimmigrant visa holders already present in the United States may apply for an extension of stay, which is adjudicated by USCIS.[8] Others must reapply for a nonimmigrant visa through State Department consular processing, and as such are subject to the IFR.[9] Thus, individuals in the United States may have visa applications adjudicated by USCIS or in State Department consular offices, depending on their circumstances.[10]

II. THE INTERIM FINAL RULE'S DEFINITION OF "PUBLIC CHARGE" VIOLATES FEDERAL LAW

A. The IFR Is Contrary to Law and Short of Statutory Right

The nation's first general immigration statute required the exclusion of several categories of applicants for admission, including "any person unable to take care of himself or herself without becoming a public charge." An Act to Regulate Immigration, 22 Stat. 214, Chap. 376 § 2 (1882). Since the original 1882 Act, the likelihood of becoming a "public charge," has inured as a basis to deny admission to immigrants seeking to enter the United States. In 1999, the Immigration and Naturalization Service issued Field Guidance that "summarize[d] longstanding law with respect to public charge and provide[d] . . . guidance on public charge

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visa. Once in the United States, a nonimmigrant or immigrant visa holder falls under the jurisdiction of DHS. USCIS is responsible for the adjudication of all petitions, the authorization of permission to work in the United States, the issuance of extensions of stay, and change or adjustment of an applicant's status while the applicant is in the United States."); U.S. DEP'T OF CITIZENSHIP AND IMMIGRATION SERV. (USCIS), *Consular Processing*, https://www.uscis.gov/greencard/consular-processing (May 4, 2018).

[6] *Id.* *See also* USCIS, *Green Card for Employment-Based Immigrants*, https://www.uscis.gov/green-card/employment-based (Oct. 19, 2017).

[7] *See* 8 U.S.C. § 1202(d) ("All nonimmigrant visa applications shall be reviewed and adjudicated by a consular officer.").

[8] 9 FAM 602.2-2(A)(1)(c)(1); USCIS, *Extend Your Stay*, https://www.uscis.gov/visit-united-states/extend-your-stay (May 22, 2019); USCIS, FORM I-539, INSTRUCTIONS FOR APPLICATION TO EXTEND/CHANGE NONIMMIGRANT STATUS, https://www.uscis.gov/i-539 (Oct. 18, 2019).

[9] *Id.*

[10] In order for a person to enter the United States on a petition-based nonimmigrant visa, as well as for most immigrant visa categories, the prospective employer or family member must first obtain an approved petition from USCIS before the beneficiary of the petition may apply for a visa from the State Department. *See* 9 FAM 602.2-2(B)(2). The IFR applies in these circumstances, notwithstanding USCIS's approval of the initial visa petition, because the State Department adjudicates the visa application itself. *See id.*

determinations in light of . . . recent changes in law." 64 Fed. Reg. at 28,689. The guidance defined a "public charge," as "an alien who has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) 'primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.'" *Id.* Since the 1999 Field Guidance, Congress has considered and rejected amendments to INA section 212(a)(4) that would make receipt of or eligibility for non-cash supports a basis for denying adjustment of status on public charge grounds. *See* S. Rep. No. 113-40, at 42 and 63 (2013).[11]

As recognized by every federal court to consider the DHS Rule upon which the IFR's definition of "public charge" is based, this new definition—which makes receipt of non-cash benefits for 12 months in a 36-month period (where receipt of two types of benefit in one month counts as two months toward the 12)—is contrary to the term's statutory meaning. *See* California Order at 46 ("Given the term's long-standing focus on the individual's ability and willingness to work or otherwise support himself [and] . . . allowance for short-term aid, and the legislative history of the 1996 revision, it is likely the Rule's interpretation . . . is not a permissible or reasonable construction of the statute."); Illinois Order at 15-27 (Supreme Court has interpreted public charge consistent with concept of permanent dependence on government for subsistence, no cases support DHS's position that it applies to noncitizens that receive public benefits on a temporary basis, and Congress has declined to adopt provisions similar to DHS Rule); Maryland Order at 31 (traditional tools of statutory interpretation support plaintiffs' argument the DHS Rule "is precluded by the meaning of the term as enacted by Congress"); New York Order at 11-14; Washington Order at 44-45. Notwithstanding the clear meaning of public charge, the IFR authorizes denial of visa applicants who are able to work and even those who have been consistently employed, based on their income levels or because they have received moderate non-cash assistance, among other factors.

B. The IFR Is Arbitrary and Capricious

The Department does not provide any justification for adopting the vastly expanded definition of public charge other than to achieve consistency with the DHS Rule. Given that five federal district courts have held the DHS Rule to be contrary to law, this interest in consistency is not well served by maintaining the IFR. Moreover, DHS failed to provide a "reasoned basis" for either its drastic rewriting of the concept of "public charge," or many of the specific provisions contained in the DHS Rule. *See* New York Order at 15-17 (federal government failed to provide reasoned explanation for change in policy or specific provisions of the DHS Rule). The

[11] The history of the application of "public charge" is much more fully set forth in several district court decisions and materials submitted in support of motions for preliminary injunctions against the DHS Rule. *See e.g.*, California Order at 16-43; Historian's Comment on DHS Rule submitted by Torrie Hester, Hidetaka Hirota, Mary E. Mendoza, Dierdre Moloney, Mae Ngai, Lucy Slayer, and Elliott Young.

Department of State's reliance on the DHS rule is therefore insufficient to provide the reasoned justification required by law.

The United States District Court for the Northern District of California found that, "DHS appears to have wholly failed to engage with" comments raising "the Rule's predictable effects on local governments," in violation of its rulemaking obligations. California Order at 55. The court also noted DHS's utter failure to weigh the impacts to public health from the DHS Rule, despite its awareness that the Rule would lead to fewer immunizations. California Order at 58. The court further found that DHS's failure to address these health concerns was particularly problematic in light of the agency's previous policymaking, which did not include healthcare benefits as part of the public charge determination precisely because of the negative impacts such a practice would have on public health. California Order at 62.

Other federal courts analyzing the DHS Public Charge Rule explained that DHS's stated purpose—to encourage self-sufficiency—is inconsistent with the effects of the rule, which are to discourage use of public benefits that actually facilitate self-sufficiency. *See* Washington Order at 50 (noting DHS Rule negatively weights disabled persons' use of Medicaid to become or remain self-sufficient). The United States District Court for the Southern District of New York observed that DHS could not explain how the use of benefits to which one is entitled is proof of dependency and that the DHS Rule failed "to demonstrate a rational relationship between many of the additional factors enumerated in the Rule" and the Rule's definition of public charge. New York Order at 16-17 (noting example of English proficiency which DHS added as a factor although "one can certainly be a productive and self-sufficient citizen without knowing *any* English) (emphasis in original).[12] The IFR contains the same terms deemed likely to be arbitrary and capricious in the DHS Rule. *See e.g.* 22 C.F.R. § 40.41(a)(5) (including English proficiency as a factor for consideration).

C. The IFR Violates Equal Protection

Expansion of the public charge grounds of inadmissibility has been a priority of the current presidential administration, which has repeatedly betrayed racial animus in its approach to immigration. As a candidate, President Trump repeatedly made racist generalizations about Mexicans and promised the United States would no longer "take care of" "anchor babies" from Mexico.[13] As President, he questioned a plan that allowed protection to people from El

[12] The district court in Maryland declined to consider plaintiffs' arguments that the DHS Rule is arbitrary and capricious because its finding that plaintiffs were likely to succeed in their argument that the DHS Rule is contrary to law was sufficient to issue a preliminary injunction. Maryland Order at 32. The district court in Illinois also enjoined the DHS Rule based on its analysis that the INA does not permit a finding of public charge based on the temporary receipt of public benefits. Illinois Order at 27.

[13] *Here's Donald Trump's Presidential Announcement Speech*, TIME (Jun. 16, 2015), https://time.com/3923128/donald-trump-announcement-speech/; *Speech: Donald Trump in*

Salvador, Haiti, and some African countries, asking, "Why are we having all these people from shithole countries come here?"[14] He also expressed his preference for more immigrants from places like Norway, where the population is over 90 percent white.[15] President Trump's Director of U.S. Citizenship and Immigration Services—installed in the run-up to the issuance of the DHS Public Charge Rule—has likened immigration policy to animal control policies, once complaining that Washington D.C.'s animal control policies were worse than U.S. immigration policies because, "You can't break up rat families."[16]

The Equal Protection Clause of the Fifth Amendment to the U.S. Constitution prohibits government action motivated by racial animus. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977). Here, the administration's statements evincing discriminatory animus, combined with the fact that the impact of the IFR will be most keenly felt by non-White applicants—immigrants who are present without authorization and seeking visas through consular processing, as well as U.S. citizens and LPRs petitioning for family members to join them in the United States—is compelling evidence of discriminatory intent.[17] *Id.* Procedural irregularities in the rulemaking process such as pressure from the White House to hurry DHS's review process add important circumstantial evidence of an equal protection violation. *Id.* at 267 (historical background for decision and specific sequence of events leading up to challenged decision shed light on decision-maker's purpose).[18] The Department's adoption

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Oklahoma City, OK - September 25, 2015, FACTBA.SE, https://factba.se/transcript/donald-trump-speech-oklahoma-city-ok-september-25-2015 (last visited Nov. 8, 2019).

[14] Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole Countries,'* WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html.

[15] *See id.*

[16] Nick Wing, *Ken Cuccinelli Once Compared Immigration Policy to Pest Control, Exterminating Rats*, HUFFINGTON POST (July 26, 2013), https://www.huffpost.com/entry/ken-cuccinelli-immigration-rats_n_3658064 .

[17] According to the National Visa Service, the eleven countries with the highest number of waiting list registrants for family-based visas—which make up 77.8% of all waiting list registrants—in FY 2019 are (in order of backlog) Mexico, Philippines, India, Vietnam, China-mainland born, Bangladesh, Dominican Republic, Haiti, El Salvador, and Cuba. U.S. DEP'T OF STATE, *Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based Preferences Registered at the National Visa Center as of November 1, 2018, Immigrant Waiting List By Country*, https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2018.pdf (last visited Nov. 5, 2019).

[18] The U.S. District Court for the Southern District of New York concluded that, even under a rational basis review, plaintiffs challenging the DHS Rule were entitled to a preliminary injunction on their equal protection claim because "Defendants have yet to articulate a 'rational relationship between the disparity of treatment [between white noncitizens and noncitizens of color] and some legitimate government purpose." Make the Road Order at 20.

of a standard that was motivated by racial animus and disparately impacts communities of color violates the Constitution's guarantee of equal protection under law.

III. THE RULE WILL HARM THE STATES

The IFR harms the States in several ways. First, it imposes immigration consequences for the use of state-administered benefits such as Medicaid and nutrition and housing assistance. While these consequences flow directly to unauthorized immigrants in the United States that may become eligible to seek a visa through consular processing, as well as certain immigrants in the U.S. with authorization who seek to renew their visas, a broader chilling effect on the use of benefits will flow from a generalized fear of immigration consequences within immigrant communities in the United States. Immigrants declining to enroll or disenrolling from public benefits causes a number of harms—to themselves, their families, their communities, and the States. In addition to the harms that flow from the IFR's chilling effect on the use of public benefits by eligible residents, the IFR will curtail immigration to States, impacting their workforces and economies, and thwarting families' efforts to reunite and support each other as residents of the States.[19]

A. The Rule Will Discourage State Residents from Using Critical Public Benefits

Like the DHS Public Charge Rule, the IFR will discourage immigrants from accessing public benefits such as nutrition, housing assistance, and healthcare for which they are eligible. This is true not only for individuals living without authorization in the United States who anticipate needing to seek a visa through a consular office, but for the immigrant community in general. As with the DHS Rule, confusion and fear regarding the application of the IFR is likely to drive many to curtail their use of public benefits—including public benefits that the IFR does not include as relevant to a public charge determination. *See e.g.*, Washington Order at 25 (DHS Rule "will create fear and confusion regarding public charge inadmissibility").

Although the IFR fails to estimate the impact of its provisions, DHS acknowledged that its Public Charge Rule would have a chilling effect on noncitizens' use of public benefits for which they are eligible. 84 Fed. Reg. 41,463 (estimating a 2.5% disenrollment from benefits included in the DHS Rule in the year of adjustment of status, leading to a reduction in over $1.5 billion in federal payments to benefits programs). In fact, the likely effect is much greater than what was acknowledged by DHS. In a survey of 506 Mexican nationals earlier this year, research showed that knowledge that there was a *proposed* change to the public charge determination that would include "food stamps, . . . rental assistance of low-income families . . ., and obtaining some health care services using Medicaid," resulted in lower willingness to make use of non-included benefits such as free or reduced-price school meals. *See* Declaration of Tom

[19] The States have submitted a great deal of evidence regarding the impact of the DHS Public Charge rule in litigation. As this evidence is equally relevant to the Department's consideration of the impact of the IFR, we submit this evidence as attachments to this comment letter.

Wong submitted in support of Plaintiffs' Motion for Preliminary Injunction in *State of California v. U.S. Dep't of Homeland Security*, 19-CV-4975 (PJH) (N.D. Cal.) (Wong Decl.) ¶ 34. Knowledge of the proposed expansion of the grounds for a public charge decision led to respondents being:

- 15.1% less likely to utilize emergency health services
- 18.3% less likely to utilize preventative healthcare services
- 9.1% less likely to utilize free immunization services
- 6.4% less likely to utilize SNAP
- 6.6% less likely to utilize emergency health services for their children
- 8.6% less likely to utilize preventative healthcare for their children
- 12.4% less likely to utilize free immunizations for their children
- 9.1% less likely to allow their children to receive free or reduced-price school meals

This chilling effect also applied where U.S. citizen children were the would-be beneficiaries. When told about the proposed DHS rule, respondents with U.S. citizen children were 7.7 percent less likely to get emergency healthcare services, 9.6 percent less likely to get preventative healthcare services, and 12.8 percent less likely to get free immunization services, such as flu shots, for their U.S. citizen children. Wong Decl. ¶ 35. Those with U.S. citizen children in K-12 education were 9.5 percent less likely to get free or reduced price school meals for their children. *Id.* ¶ 36.[20]

The district court orders enjoining the DHS Public Charge Rule acknowledged this chilling effect and the federal government's obligation to address it in formulating policy. *See* California Order at 54-55 ("DHS was required to a certain extent to grapple with estimates and credible data explained in the comments."); Illinois Order at 18. The Washington district court found persuasive the data that concluded the potential Medicaid and CHIP disenrollment would range from 15 percent to 35 percent among enrollees in mixed-status households, representing 2.1 to 4.9 million residents of the plaintiff states represented in that case. Washington Order at 14. Notably, the U.S. District Court for the District of Maryland similarly accepted the City of Baltimore's allegations that the Department of State's FAM would have a chilling effect on utilization of benefits in that city. *See* Memorandum Opinion dated September 20, 2019 in *Mayor and City Council of Baltimore v. Trump*, Civil Action No. ELH-18-3636 at 28-36. Like the IFR, the FAM is applied to visa applications adjudicated by consular officers.

[20] A study by the Urban Institute similarly found that interviewees avoided participation in SNAP and Medicaid based on the *proposed* DHS Public Charge Rule prior to its finalization, and raised concerns about additional benefits programs not listed in the Proposed Rule. URBAN INSTITUTE, *Safety Net Access in the Context of the Public Charge Rule: Voices of Immigrant Families* (Aug. 7, 2019), https://www.urban.org/research/publication/safety-net-access-context-public-charge-rule.

B. Immigrants' Avoidance of the States' Public Benefits Programs Will Harm Those State Programs and Public Health

DHS's predecessor agency, the Immigration and Nationality Service, took public health into account when it issued guidance in 1999 to clarify that use of non-cash public benefits such as SNAP and Medicaid would not result in a public charge determination. *See* California Order at 60 (noting that 1999 Field Guidance was issued "to reduce the negative public health consequences generated" by the then-existing confusion around public charge). As the U.S. District Court for the Northern District of California found, the use of public benefits advances the public health and welfare. California Order at 58. By contrast, "[d]elaying diagnosis and treatment until a condition results in a medical emergency compromises the health and wellbeing of individuals and families and increases the cost of health care for [hospitals, states, and the states'] residents as a whole." Washington Order at 15. Entirely predictably, the chilling effect of the IFR will have the same negative impact on public health.

The IFR's chilling effect on use of nutrition, housing, and healthcare benefits most obviously harms the persons foregoing those benefits, as well as their (sometimes U.S. citizen) family members. The U.S. District Court for the Eastern District of Washington noted particular harm to children and pregnant women, including food insecurity, increased hospital admissions and medical costs, and poor health and developmental delays in young children, ultimately resulting in long-term health consequences and lower academic achievement. Washington Order at 17-18. Fear of immigration consequences is documented to have caused victims of domestic violence to forego critical healthcare, food, and housing assistance needed to establish independence after leaving an abusive relationship. Washington Order at 21. Disenrollment from housing assistance has similarly dire consequences for individuals, families, and children. *See* Washington Order at 18 (given housing markets, foregoing benefits can upend a working family's financial stability; housing instability in childhood can have lifelong effects on physical and mental health).

Moreover, because public health depends on widespread access to healthcare, when immigrants forgo care for themselves and their families, there is increased risk of contagion that affects the broader population. *See* California Order at 59-62 (discussing record evidence that Rule would decrease use of vaccinations and noting commentary to DHS on connection between prescription adherence and outbreaks of communicable diseases); Washington Order at 16 (evidence supports "that decreased utilization of immunizations against communicable diseases 'could lead to higher rates of contagion and worse community health' both in the immigrant population and in the U.S. citizen population because of the nature of epidemics"); New York Order at 20. In addition, disenrollment by certain sectors of the community extends costs to others because a sicker risk pool leads to higher premiums. Washington Order at 15. Relatedly, providers facing decreased enrollment will be forced to cut services due to uncompensated care costs, resulting in fewer patients being able to access primary care. *Id.*

In addition, under-enrollment in benefits programs by immigrants seeking to avoid public charge consequences results in several types of economic harm to the States. For example, under-enrollment in federally funded programs results in a loss of federal funding that the States receive to administer benefits. *See* California Order at 78-79. In addition, avoidance of federally funded benefits puts more pressure on state-funded benefits. California Order at 80.

Moreover, even absent a chilling effect, the IFR—like the DHS Rule—requires States to change their administration of benefits, at significant operational cost. The States have relied on previous federal guidance on public charge in educating the public and designing systems to administer benefits. Public benefit programs often involve numerous funding streams, and are administered by multiple federal, state, and local agencies that use complex outreach, intake, and eligibility processes. California, for example, provides state-funded healthcare benefits to immigrant children under 19 years old, irrespective of immigration status, and administers those benefits alongside federally funded benefits through a streamlined application system to help provide its diverse communities with access to, and increase the use of, critical benefits that support all of society when appropriately utilized. Because the IFR creates public charge consequences for some of these benefits, it will require California to update these systems and related educational materials. *See* California Order at 81-82.

Finally, the poorer health, lack of nutrition, and housing instability that flow from the IFR's chilling effect on utilization of public benefits will produce adverse consequences to the States' economies such as loss of work, school days, and productivity. *See* New York Order at 8; Washington Order at 22-23. The likelihood that the DHS Rule would lead to increased rates of poverty and housing instability, as well as the fact of worse health outcomes and decreased educational attainment, are known harms that DHS conceded during rulemaking. *See* New York Order at 20. Given the IFR's application to many of the States' residents who may seek visas through consular processing, as well as the broader chilling effect stemming from fear and confusion, these harms are also present here.

C. The Rule Will Undermine the States' Public Universities

Each of the States is home to universities that welcome international students and faculty members to create diverse and vibrant learning environments and to support cutting-edge research. In fact, international students make up 5.5% of students in higher education in the United States.[21] Many of the students and faculty come from countries with lower standards of living than the United States and their funding sources vary, making application of U.S. poverty

[21] INSTITUTE OF INTERNATIONAL EDUCATION, *Open Doors 2018 Briefing and Presentation*, slide 12, https://www.iie.org/en/Research-and-Insights/Open-Doors/Open-Doors-2018-Media-Information (last visited Nov. 5, 2019).

guidelines for income assessment a significant potential barrier to their obtaining visas under the IFR.[22]

The University of California (UC) is a public university system of 10 campuses. In 2018 the UC system had 46,313 foreign students who were visa holders, about 16,000 of whom were graduate students. In 2018, the UC system employed 4,572 international faculty members. This represents about 20% of UC faculty. About 65% of UC's post-doctoral scholars/fellows are non-U.S. citizens. The UC system's international programs are critical to its educational mission. For example the University of California, Los Angeles, explains:

> International research and academic exchanges are vital to the intellectual vibrancy of universities in the U.S., long held to be the world leader in higher education. At UCLA, an important aspect of our global vision is to be a university where all students have an opportunity to become globally proficient through study abroad and international experiences on campus. For UCLA students to become effective leaders and productive citizens—and to work with their peers from other countries to address the complex challenges that require global solutions—it is critical that they have an informed understanding of the world and its contemporary concerns and controversies.[23]

Some of UC's international programs work to open educational opportunities for individuals from developing countries. For example, UC Berkeley's MasterCard Foundation Scholars Program focuses on citizens of sub-Saharan African countries and UC San Francisco's Institute for Global Health Sciences is devoted to improving health outcomes across the world.

In 2018, the top ten countries sending students to UC programs were China, India, South Korea, Taiwan, Canada, Japan, Indonesia, Iran, Brazil, and Mexico. But UC's international student services directors have seen visiting scholars from China and Middle Eastern countries encounter increasing difficulty securing visas and have found potential international students and faculty more wary to accept an appointment. UC is concerned that current U.S. immigration policies will prevent UC from attracting the best and brightest students and scholars internationally.

Washington State University (WSU) sponsors about 190 visiting scholars on J-1 visas to participate in collaborative research every year, and their financial resources may include home country sponsorships or be limited to personal funds to cover their living expenses. About 65 of WSU's current international students come from countries in Mid- or West Africa known to have low standards of living. WSU's international program was created as part of the Mutual Education and Cultural Exchange Act of 1961, Pub. L. 87-256, § 101 (Sept. 21, 1961), 75 Stat.

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[22] In 2017-2018, the 10 countries with the most international students in the United States were China, India, South Korea, Saudi Arabia, Canada, Vietnam, Taiwan, Japan, Mexico, and Brazil. *Id*.

[23] UCLA GLOBAL, *About Us*, https://global.ucla.edu/aboutus (last visited Nov. 5, 2019).

527, 22 U.S.C. § 2451, to allow foreign nationals to temporarily reside in the United States and it furthers the University's priorities in research, education, service, and economic development. WSU foresees that the IFR will impact visa issuance, resulting in decreased enrollment by international students.

Already, visa processing delays and denials have emerged as the top reason for declines in international student enrollment in the United States.[24] In addition to frustrating the common goals of public universities to foster diversity and knowledge through global exchange, the IFR's barriers to international students and faculty cost money. International students generally pay out-of-state tuition, and universities incur new search costs when the visiting scholars they have selected and sponsored are unable to obtain visas.

The IFR also impacts the States' academic communities by negatively impacting students and alumni who are recipients of deferred action under the DACA program or present without authorization. For example, UC has an Undocumented Students Initiative that provides funding for student services for undocumented students. California makes significant financial aid and student loans available to students with particular ties to California who are not eligible for federal loan programs, including undocumented students. It also funds student staff coordinators and undergraduate and graduate fellowships, as well as other financial support, such as funds for textbooks. Undocumented students are among those Californians that are likely to be impacted by the IFR when—due to marriage or other qualifying event—they seek consular processing of an immigrant visa application.

The IFR threatens the States' education systems' investment in DACA recipients and other undocumented students by creating pressure on these young people not to make use of public benefits, and by erecting barriers to their ultimately gaining lawful permanent residence in the country many have called home since early childhood.

D. The Rule Will Harm the States' Economies by Undermining Their Workforces

Although all applicants for temporary work visas are subject to the IFR when they apply to the State Department for a visa,[25] applicants for two categories of nonimmigrant work visas are particularly at risk of being denied under the IFR's new definition of public charge: H-2A (temporary or seasonal agricultural workers) and H-2B (temporary non-agricultural workers).[26]

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[24] *See Open Doors 2018 Briefing and Presentation*, *supra* note 21, slide 24 ("visa application or visa delays/denials" and "social and political environment in the U.S." listed as top to factors driving enrollment declines).

[25] U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Temporary Worker Visas, Overview*, https://travel.state.gov/content/travel/en/us-visas/employment/temporary-worker-visas.html (last visited Oct. 31, 2019).

[26] Applicants for employment-based immigrant visas who currently live abroad also are subject to the IFR because they must apply for a visa through the State Department. *See* U.S. DEP'T OF

Workers in the H-2A and H-2B categories perform work that is temporary or seasonal and their average incomes tend to be lower than for other categories of employment-based visas (*e.g.*, H-1B). For that reason, H-2A and H-2B workers are less likely to benefit from the IFR's positive factor of annual gross income of at least 125% of the Federal Poverty Guidelines (FPG) or the heavily weighted positive factor of income of at least 250% of the FPG.[27] The IFR predictably will cause an increase in denials of H-2A and H-2B visa applications based on a public charge determination.

This increase in temporary employment visa denials will significantly undermine the nation's workforce. The H-2A temporary agricultural program allows employers who anticipate a shortage of domestic workers to bring nonimmigrant workers to the United States to perform agricultural labor or services of a temporary or seasonal nature.[28] In FY 2017, the State Department issued a total of 245,183 nonimmigrant visas for temporary workers in the H-2A and H-2B visa categories.[29]

Temporary workers are increasingly relied upon by California's agricultural sector. California is the top agricultural producing state in the United States and was responsible for 13.4% of total U.S. agricultural production in 2017 and 2018.[30] In fiscal year 2017, there were 46,994 admissions to California on nonimmigrant visas for temporary workers (H-2A and H-2B); 44,758 of those admissions were on H-2A agricultural worker visas.[31] California's

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STATE, BUREAU OF CONSULAR AFFAIRS, *Employment-Based Immigrant Visas*, https://travel.state.gov/content/travel/en/us-visas/immigrate/employment-based-immigrant-visas.html (last visited Oct. 31, 2019). In FY 2017, a total of 24,525 people nationwide obtained LPR status through the State Department's approval of an employment-based immigrant visa. *See* U.S. DEP'T OF HOMELAND SEC., *2017 Yearbook of Immigration Statistics*, tbl. 6: Persons Obtaining Lawful Permanent Resident Status by Type and Major Class of Admission: Fiscal Years 2015 to 2017, https://www.dhs.gov/immigration-statistics/yearbook/2017/table6 (Oct. 2, 2018). By contrast, during the same time period 113,330 people nationwide obtained LPR status through USCIS's approval of an employment-based adjustment of status application. *See id.*

[27] 84 Fed. Reg. at 55,013-14; 22 C.F.R. § 40.41(a)(4)(i)(A), § 40.41(a)(8)(ii)(A).

[28] U.S. DEP'T OF LABOR, *H-2A Program Overview*, https://www.foreignlaborcert.doleta.gov/h-2a.cfm (Nov. 7, 2019).

[29] U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Report of the Visa Office 2017*, Table XVI(B), Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards): Fiscal Years 2013-2017, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports/report-of-the-visa-office-2017.html (last visited Oct. 30, 2019).

[30] U.S. DEP'T OF AGRICULTURE, ECONOMIC RESEARCH SERV., *Farm Income and Wealth Statistics*, *Cash receipts by commodity, state ranking, 2017, 2018*, https://data.ers.usda.gov/reports.aspx?ID=17844 (Aug. 30, 2019).

[31] U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, *Annual Flow Report* (Oct. 2018), Nonimmigrant Supplemental tbl. 3, Nonimmigrant Admissions (I-94 Only) by Class

temporary worker admissions constituted 8.75% of all admissions nationally within those visa categories.[32]

In recent years, California employers increasingly have relied on H-2A workers to fill the shortage of domestic agricultural workers. For example, in fiscal year 2012, only 54 California employers requested H-2A labor certifications[33] and 2,862 job openings were certified in California.[34] However, by fiscal year 2019, a total of 263 California employers requested H-2A labor certifications[35] and 23,321 job openings were certified in California.[36] Any reduction in the number of approved H-2A and H-2B visas will harm California's economy, which relies on tens of thousands of temporary workers every year. Due to this reliance, a reduction in the number of approved H-2A visas due to public charge determinations will have a direct and negative impact on the agricultural production of California and, in turn, of the U.S. as a whole.

Likewise, New York is one of the states that hosts the most guest workers annually and increasingly relies on these workers to fill agricultural and service sector jobs, particularly on orchards and in landscaping and groundskeeping.[37] The number of agricultural workers certified

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of Admission and State FY 2017, https://www.dhs.gov/immigration-statistics/nonimmigrant (Jun. 5, 2019).

[32] *See id.*

[33] CAL. EMP'T DEV. DEP'T, Foreign Labor Certification Unit, *H-2A and H-2B Temporary Programs Disclosure Data, Federal Fiscal Years (FFY) 2012-19*.

[34] U.S. DEP'T OF LABOR, OFFICE OF LABOR CERTIFICATION, *OFLC Performance Data - 2012, California*, https://www.foreignlaborcert.doleta.gov/map/2012/CA.pdf.

[35] *H-2A and H-2B Temporary Programs Disclosure Data, Federal Fiscal Years (FFY) 2012-19*, *supra* note 33.

[36] U.S. DEP'T OF LABOR, OFFICE OF LABOR CERTIFICATION, *H-2A Temporary Agricultural Labor Certification Program - Selected Statistics, FY 2019 EOY*, https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2A_Selected_Statistics_FY2019_Q4.pdf.

[37] *See* U.S. DEP'T OF LABOR, OFFICE OF LABOR CERTIFICATION, *OFLC Performance Data - 2016, New York*, https://www.foreignlaborcert.doleta.gov/map/2016/NY.pdf; U.S. DEP'T OF LABOR, OFFICE OF LABOR CERTIFICATION, *OFLC Performance Data - 2012, New York*, https://www.foreignlaborcert.doleta.gov/map/2012/NY.pdf.

for H-2A visas has more than doubled from 2012 to 2019.[38] Over the same period, the number of non-agricultural workers certified for H-2B visas has increased over 40 percent.[39]

In the first three quarters of 2018, Washington ranked third for the most number of temporary agricultural visas given to foreign guest workers.[40] According to news reports, the number of foreign agricultural workers in Washington is more than 13,000 annually.[41] Not only do these agricultural workers have a direct impact on the farms they work for, but they also contribute to the local economies directly. Approximately 58% of Washington farms were affected by labor shortages in 2016—and one of the contributing factors was slow approval of H-2A visas.[42]

E. The Rule Will Prevent Family Reunification

A significant number of immigrants enter the United States and California every year following the State Department's determination of their eligibility for an immigrant visa through consular processing abroad. For example, during the 2015-2017 fiscal years, an average of 568,292 lawful permanent residents (LPRs) entered the United States annually as "new arrivals" following State Department consular processing.[43] The majority of new arrival LPRs (83.6% in FY 2017) enter the United States on family-based immigrant visas (immediate relatives of U.S. citizens and family-sponsored preferences).[44] In 2017 alone, 483,037 new arrival LPRs joined

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[38] *Cf. id.*, *OFLC Performance Data - 2012* (3,632 H-2A workers in 2012); U.S. DEP'T OF LABOR, OFFICE OF LABOR CERTIFICATION, *H-2A Temporary Agricultural Labor Certification Program - Selected Statistics, FY 2019 EOY*, https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2A_Selected_Statistics_FY2019_Q4.pdf (8,104 H-2A workers in 2019).

[39] *Cf. supra* note 37, *OFLC Performance Data – 2012, New York* (3,233 H-2B workers in 2012); U.S. DEP'T OF LABOR, OFFICE OF LABOR CERTIFICATION, *H-2B Temporary Non-Agricultural Labor Certification Program - Selected Statistics, FY 2019 EOY*, https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2B_Selected_Statistics_FY2019_Q4.pdf (4,590 H-2B workers in 2019).

[40] U.S. DEP'T OF LABOR, OFFICE OF FOREIGN LABOR CERTIFICATION, *H-2A Temporary Agricultural Labor Certification Program – Selected Statistics, FY 2018 YTD* (June 30, 2018) https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2018/H-2A_Selected_Statistics_FY2018_Q3.pdf.

[41] Hal Bernton, *Worried Washington Growers: 'Mob mentality' around immigration threatens state's ag industry*, SEATTLE TIMES (Mar. 20, 2017), https://www.seattletimes.com/seattle-news/northwest/washington-farmers-tell-trump-we-need-more-foreign-workers/.

[42] WASHINGTON POLICY CENTER, *Policy Brief: Washington state's agricultural labor shortage*, at 3, 5-6, 13 (June 2017), https://www.washingtonpolicy.org/library/doclib/Clark-Washington-state-s-agricultural-labor-shortage-PB-6-23-17.pdf.

[43] *See* Tbl. 6, *supra* note 26.

[44] *Id.*

their relatives in the United States on family-based immigrant visas after being subject to a State Department public charge evaluation.[45]

These changes will particularly impact Californian families seeking to reunite with loved ones abroad. Of the 578,081 new arrivals who obtained LPR status in FY 2017,[46] almost 20% were bound for California (113,086).[47] Of the family-based immigrant visas issued in FY 2017, an estimated 19.6% of those new arrivals (or 94,675) were joining their families in California.[48]

Based on these data, the IFR will subject a significant number of immigrants who seek to join their families in California to an increased risk of a public charge determination by a State Department consular officer; almost 100,000 immigrants annually, based on the estimate for FY 2017.[49] Accordingly, the IFR will harm many California families and individuals *who are already lawfully present here* by preventing them from reuniting with family members who live abroad.

The IFR's application to the State Department's adjudication of nonimmigrant visa applications will also hinder the reunification of California families. For example, in FY 2017 there were 7,224 admissions to California on family-based nonimmigrant visas (K1-K4 and V1-V3).[50] California's family-based nonimmigrant admissions constituted 17.37% of all admissions nationally within those visa categories.[51] During the same time period, the State Department issued a total of 40,208 family-based nonimmigrant visas in the same visa categories,[52] an estimated 6,984 of which were issued to family members bound for California.[53] Based on these

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[45] *Id.*
[46] *Id.*
[47] U.S. DEP'T OF HOMELAND SEC., *Profiles on Lawful Permanent Residents: 2017 State*, Persons Obtaining Lawful Permanent Resident Status During Fiscal Year 2017 by State/Territory of Residence and Selected Characteristics, https://www.dhs.gov/profiles-lawful-permanent-residents-2017-state (Oct. 22, 2018).
[48] There are no publicly available data on the number of "new arrival" LPRs by visa classification *and* by destination state. This estimate is based on the percentage of all new arrival LPRs in 2017 who were bound for California (19.6%). *See* Tbl. 6, *supra* note 26; *Profiles on Lawful Permanent Residents: 2017 State*, Persons Obtaining Lawful Permanent Resident Status During Fiscal Year 2017 by State/Territory of Residence and Selected Characteristics, *supra* note 47.
[49] *See id.*
[50] *Annual Flow Report*, Nonimmigrant Supplemental tbl. 3, *supra* note 31.
[51] *See id.*
[52] *Report of the Visa Office* 2017, tbl. XVI(B), *supra* note 29;, CONGRESSIONAL RESEARCH SERV, *Nonimmigrant and Immigrant Visa Categories: Data Brief* (Oct. 1, 2019), https://trac.syr.edu/immigration/library/P16538.pdf.
[53] There are no publicly available data on the State Department's issuance of nonimmigrant visas by classification *and* by destination state. This estimate assumes that the percentage of family-

data, the IFR will subject thousands of nonimmigrants who seek to reunite with their families in California—almost 7,000 annually, based on this 2017 estimate—to an increased risk of a public charge determination by a State Department consular officer.

Based on the State Department's FY 2018 visa statistics, which reflect the impact of a similar definition of public charge added to the State Department's Foreign Affairs Manual (FAM) in January 2018,[54] it is clear that the IFR will dramatically increase the number of individuals who are denied visas on public charge grounds. Strikingly, the 2018 FAM guidance resulted in ***450% increase*** in initial public charge ineligibility findings for immigrant visas and resulting denials.[55] The percentage of initial ineligibility findings not overcome also increased from 37.7% in 2017 to 41% in 2018.[56] A similar increase in visa denials resulting from the IFR will fall most heavily on immigrants who seek to reunite with their families in the U.S., the group that constitutes the vast majority of new arrival LPRs.[57]

Understanding the value of intact families, the States have robust integration programs to support newcomers. For example, California seeks to protect families from separation based on avoidable removal orders by funding *pro bono* immigration legal services. Since 2014, California has appropriated $292 million for legal and other supportive services for immigrants. The IFR's unlawful public charge standard will thwart the States' interests in promoting family unity and increase hardship to less affluent communities of color.

IV. CONCLUSION

For the foregoing reasons, we urge the Department of State to rescind the IFR and reinstate the definition of "public charge" utilized before January 3, 2018—as a "non-citizen likely to become primarily dependent on the U.S. Government for subsistence." 9 FAM § 302.8. Given IFR's complete reliance on the DHS Public Charge Rule for its content and validity, injunctions issued against implementation of the DHS Rule, and the IFR's harmful effects, the

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based nonimmigrant visas issued to persons bound for California in FY 2017 is the same as the percentage of family-based nonimmigrant admissions to California in FY 2017 (17.37%).

[54] *See* 9 FAM § 302.8-2.

[55] *Compare* U.S. DEP'T OF STATE, *Report of the Visa Office 2018*, tbl. XX, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2018AnnualReport/FY18AnnualReport%20%20-%20TableXX.pdf (13,450 initial findings, of which 5,518 were not overcome) *with* U.S. DEP'T OF STATE, *Report of the Visa Office 2017*, tbl. XX, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXX.pdf (3,237 initial findings, of which 1,221 were not overcome).

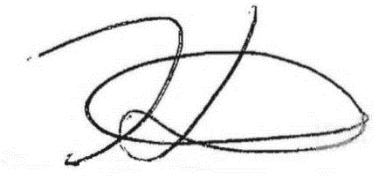
[56] *Id.*

[57] Tbl. 6, *supra* note 26.

Department of State should stay the IFR pending resolution of litigation challenging the DHS Rule. *See* 5 U.S.C. § 705.

Sincerely,

XAVIER BECERRA
California Attorney General



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