Dear Secretary Nielsen and Chief Deshommes:


California is proud to be home to more than 10 million immigrants from around the world, the largest immigrant population in the United States.\(^1\) Overall, 6.6 million

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immigrants work in our State, comprising over a third of California’s workforce. Most immigrants in California are naturalized citizens or legal residents. The overwhelming majority of Californian immigrants are long-term residents; in fact, 85% of all California’s immigrants have lived in the U.S. for 10 years or more, and over four million of California’s children—90% of whom are U.S. born citizens—have at least one immigrant parent. Consequently, nearly five million Californians—12% of the State’s total population—live in mixed-immigration status households, with at least one undocumented family member. This data makes clear that the Proposed Rule will have a significant and long-term impact on millions of Californians, their families and communities. It is an arbitrary and capricious attack with no legal justification.

In fact, the Proposed Rule seeks to radically redefine the criteria for admissibility into the United States and adjustment to lawful permanent resident status to effectively exclude a person below certain income levels. The Rule vastly expands the programs that are included, heavily penalizing people who participate, or are likely to participate in, widely used public benefit programs aimed at meeting families’ basic life needs. These include Medicaid (known in California as Medi-Cal), the Medicare Part D Low-Income Subsidy (also known nationally as Extra Help), the Supplemental Nutrition Assistance Program (known in California as CalFresh), and federal programs that help individuals in need of housing. The “public charge” doctrine, originally enacted in 1882, contemplated neither this broad array of benefits and services nor how widely they would be used by low- and moderate-income individuals and families. Today, these benefits and services are baked into the budgets of working families, U.S.-born and immigrants alike. They comprise the safety-net that is designed to help families meet their basic medical needs; care for elders, people with disabilities, and children; and allow working families to live fully in society. Indeed, these programs as implemented in California reflect

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3 Roughly 49% of California’s immigrant population are naturalized U.S. citizens, 26% have a legal status (are either green card or visa holders), and about 25% are undocumented. Johnson & Sanchez, supra note 1.
6 In some congressional districts in the San Francisco Bay Area and greater Los Angeles, more than 75% of children have at least one immigrant parent. See KidsData, Half of CA children have immigrant parents (Feb. 10, 2017) http://www.kidsdata.org/blog/?p=7804 (estimating that 4.5 million children in California have at least one immigrant parent).
longstanding State commitments to promoting self-sufficiency and ensuring the health and well-being of our communities, which in turn benefits the State as a whole.

The Proposed Rule is unlawful. It violates federal law by unconstitutionally targeting immigrant communities of color and interfering with the State’s administration of programs that benefit the health and safety of its residents. Further, the Proposed Rule itself violates the Administrative Procedure Act because it is arbitrary and fails to have a rational justification for the proposed changes and it goes far beyond the authority of the Department of Homeland Security. The Proposed Rule actually undermines the very interests the federal government claims as its justification. As an initial matter, the Rule targets low- and moderate-income individuals and families who have never used public benefits. The Proposed Rule denies them the opportunity to become lawful permanent residents and forces them to pay expensive bonds. And the effect is simply to deny economic opportunity to low-income families. This in itself is in conflict with the federal government’s stated purpose in promoting self-sufficiency, as it punishes the very people who are demonstrating self-sufficiency despite their modest means. In addition, the Rule targets the use of publicly funded benefits that are critical to supporting the ultimate self-sufficiency of vast numbers of working families—immigrant and non-immigrant alike.

Similarly, the Rule is not designed to further the federal government’s stated interest in curbing government expenditures for nutrition, housing, and healthcare. Far from simplifying public charge criteria (another purported federal purpose), the Rule creates an extremely complex test for calculating whether application for, or use of, a broader range of benefits will subject an individual applicant to public charge consequences. This will lead to widespread confusion and fear among immigrants who are eligible for medical care, nutrition, and housing, including many who are not directly targeted by the Rule itself. In this way, the Rule will inevitably chill participation in programs far beyond those it directly regulates—an arbitrary and capricious outcome in itself. This chilling effect will come at great cost to taxpayers. Investment in nutrition, healthcare, and housing benefits has a net positive impact on society, saves emergency and other healthcare costs incurred in treating people with inadequate access to nutrition and preventative care, and promotes economic activity among adults and optimal conditions for growth and learning for children. Discouraging participation in these programs will lead to greater economic and social costs than any purported savings to the programs themselves. The Proposed Rule’s departure from traditional public charge analysis is not supported by evidence, logic, or Congressional action allowing immigrant access to nutrition and housing benefits. If promulgated as a final rule, it will not survive legal challenge.
The Rule’s drastic changes will have dire consequences for the vitality of California and undermine our State’s investment in our communities and our commitment to supporting working families. The Rule:

- **Targets Working Immigrants and People of Color**: The new bright-line income thresholds target working immigrants and their implementation will disproportionately penalize people of color and low-wage laborers.

- **Hurts Families**: The Rule undermines California families by erecting barriers to reunification and creating disincentives for family members to support each other financially—or even live together.

- **Creates Widespread Chilling Effect in Communities**: The scope and breadth of this Proposed Rule will have a chilling effect even on those not directly subject to it. It will cause widespread confusion about the immigration consequences of using—or even applying for—heath, nutrition, and housing programs, causing families to forgo needed services to avoid feared drastic consequences, including the possibility of family separation and deportation.

- **Harms State Programs and Coffers**: The Proposed Rule will harm our State’s vital efforts to promote Californians’ well-being, reducing our programs’ effectiveness by discouraging immigrants from using them as intended while imposing substantial direct and indirect costs on the State.

- **Targets and Harms Vulnerable Populations**: The Proposed Rule will harm the State’s most vulnerable populations, targeting rather than protecting young children, individuals with disabilities, pregnant women, elders, and others in need.

- **Undermines California’s Healthcare Infrastructure and Public Health Generally**: The Proposed rule will harm California’s public health by undermining decades of effort to implement state programs providing broad access to healthcare, nutrition, and housing, regardless of immigration status. Limiting this access will have long-term effects on the health and vitality of the State and its residents, particularly with one out of every two children in California having at least one parent who is an immigrant.

- **Is Unlawful**: Not only does the Proposed Rule undermine State law and policy, it violates the U.S. Constitution and the Administrative Procedure Act.

A recent study by the University of California, Los Angeles and University of California, Berkeley summarized these dire consequences to our State. California stands to lose up to $1.67 billion in federal benefits; $2.8 billion from its economy; and 17,700 jobs (47% of these lost jobs would be in the healthcare sector, and 10% in agriculture and
The study estimated that 765,000 immigrants in California could disenroll from nutrition assistance and healthcare programs. Nearly 70 percent of the immigrants who lose benefits would be children.9

**I. CALIFORNIA’S IMMIGRANT POPULATION—AND ITS CONTRIBUTIONS—ARE SIGNIFICANT AND THIS DIVERSITY DRIVES STATE POLICY**

Immigrants are vital to our State’s workforce in many economic sectors that are critical to our collective prosperity. They have propelled California to become the United States’ economic engine and the fifth-largest economy in the world. Overall, 6.6 million immigrants work in our State, comprising over a third of California’s workforce.11 Over two-thirds of the jobs in the agricultural and related sectors and almost half of those in manufacturing are filled by immigrants.12 Further, 43% of construction workers and 41% of technology workers are immigrants.13 These immigrant workers and their families add billions to our State’s economy and generate billions more as entrepreneurs. In 2014, immigrant-led households paid over $26 billion in state and local taxes and exercised almost $240 billion in spending power.14 Immigrant business owners accounted for over 38% of all self-employed Californians and generated almost $22 billion in business income in 2015. These contributions were particularly pronounced in the Los Angeles and Silicon Valley regions, where over 40% of business owners are immigrants.15 Simply put, immigrants are the backbone of California’s economy.

California’s immigrants are remarkably diverse. The represented countries of origin among California’s immigrant population include Mexico (4.2 million), China (936,000), the Philippines (813,000), Vietnam (534,000), India (482,000), El Salvador (428,000), South Korea (328,000), and countries in east Africa (27,000).16 Many

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10 *Id.*


12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

members of these communities maintain strong familial relationships; the extended-family, multi-generational family, and chosen family models all figure prominently in California’s immigrant cultures. While this phenomenon is partly driven by income, social mobility, and demographics, family structure is the core. For immigrants especially, extended family households often function as a safety net during economic hardship and households become a base for many family members in times of need.

This diversity has influenced California’s policy agenda, leading the state to adopt and design programs that meet residents’ needs. 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 chooses to implement “no-wrong door,” single-entry systems to help provide its diverse communities with access to, and increase the use of, critical benefits that support all of society when appropriately utilized. To implement that choice, California invests in a number of state-funded programs that support families, including mixed immigration-status families. For example, Medi-Cal state funds provide the same coverage to immigrant children under 19 years old, irrespective of immigration status, because our State is better off when everyone is healthy and has access to healthcare. Our programs reduce barriers to services and allow mixed immigration-status families to maintain strong family bonds, live healthier lives, and remain in their homes and in the workforce.

II. THE PROPOSED RULE WILL HARM CALIFORNIANS

A. The Rule Penalizes Low-Income Working Families, Even If They Use No Public Benefits

The Proposed Rule creates a bright-line income threshold that is entirely independent from the individual’s past use of—or even application for—public benefits, which is itself a separate negative factor. Thus, immigrants who satisfy the Rule’s ostensible definition of self-sufficiency by foregoing public assistance can still be deemed “likely to become a public charge” simply because they earn less than an arbitrary amount selected by DHS. DHS fails to justify the insertion of a new—and arbitrary—income threshold.

This change is fundamentally irrational because it will impact self-sufficient, working immigrants, contrary to the Rule’s stated purpose to “better ensure that

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18 Id. at 226.
19 Id. at 212, 227.
20 Proposed 8 C.F.R. § 212.22(b)(4)(ii)(F)(1)-(2); see also 83 Fed. Reg. at 51211-51212.
21 The Immigration and Nationality Act and current regulations do not contain such numeric thresholds. INA § 212(a)(4)(B)(IV); 8 C.F.R. § 245a.4(b)(11)(iv)(B).
[immigrants] . . . do not depend on public resources to meet their needs, but rather rely on their own capabilities, as well as the resources of family members, sponsors, and private organizations.”

Many working immigrant families’ incomes are within the disfavored income bands that the Rule sets out. Fifty-six percent of recently admitted immigrants’ incomes would fall below 250% of the federal poverty guidelines (FPG), the Rule’s “heavily weighed positive” standard, sweeping in a huge proportion of the workforce.

In some of the most affected industries, immigrants’ average incomes are well below this threshold even in high cost-of-living areas. For example, California child care and early education providers’ average income is only $30,000, which (for a family of four) equates almost exactly to the Rule’s 125% of FPG cutoff. The Rule itself recognizes, through its explanatory example “Applicant B,” that an income at this level will result in a public charge finding for many people. Immigrant providers in the child care and early education field earn even less than non-immigrants. Twenty-one percent take in below 100% of the FPG—well within the negatively weighed income band. Farmworkers earn less still, an average of $17,500 per year in seasonal employment.

Thus, far from supporting its stated “self-sufficiency” goal, the Rule will undermine California’s workers, by erecting new barriers to adjustment of status and ultimately citizenship for hard-working immigrants in lower-wage sectors.

B. Income Thresholds Will Disproportionately Harm Communities of Color

Californians—particularly people of color, who already face significant economic disadvantage—will be profoundly impacted by the Rule’s income threshold. The poverty rate in California for Latinos (14%) is twice the poverty rate for Whites (7%). For Blacks, the poverty rate is higher still, at 17%. And while the poverty rate among Asians (8%) is closer to Whites, Asians are much more likely than Whites to be concentrated in metropolitan areas with the highest costs of living, meaning that their

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26 California: Quick Stats on ECEC, supra note 24.
29 Id.
30 Id.
effective income is likely much lower when accounting for cost of living.\textsuperscript{31} Further, the gap between Latino and White elders in California is even wider than the overall Latino-White gap; the poverty rate for Latinos over 65 is more than two-and-a-half times that for Whites.\textsuperscript{32} Thus, the Rule’s disproportionate effect will be even more pronounced on people of color and the extended families of which they are often a critical part.

Further, many people of color tend to have considerably larger household sizes than Whites, a function of housing costs, income, family size, and extended family living arrangements discussed above. For example, Californian Latinos tend to live in substantially larger households than Whites, and the average Latino household size has increased since the 1970s.\textsuperscript{33} Conversely, the percentage of single-person households in our State (apparently DHS’s preferred configuration, given the strong preference for the single person shown by the analysis of example “Applicant A”) is much higher among Whites than Latinos and most other immigrant groups.\textsuperscript{34} In the Sacramento metropolitan area, for instance, Asians and Pacific Islanders have larger than-average household sizes (3.2 and 3.5 people per household, respectively, compared to the overall average of 2.7).\textsuperscript{35} Since the income required to escape the negative income category increases with larger household sizes, the incomes of immigrants from communities of color are more likely to fall within the negative band.

C. Proposed Rule Bond Requirements Create Counterproductive Barriers to Immigration

The Proposed Rule’s addition of new and excessive public charge bonds, a typical federal surety guarantee, as the only method of curing a public charge determination will exacerbate harms and disproportionally fall on immigrants of color. DHS’s attempt to force working families to post a minimum $10,000 surety bond from those it deems likely to become a public charge would have the perverse effect of undermining the department’s stated goal of self-sufficiency. USCIS already has the discretion to accept these types of bonds, but the statute does not contain a provision for establishing a $10,000 minimum. And the Proposed Rule fails to establish a reason for selecting such a


\textsuperscript{34} \textit{Id.} at 29, chart 2.22.

high amount or making the public charge bond mandatory. Rather, the department itself acknowledges that these types of bonds have rarely been used. Instead, pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, USCIS has for decades accepted affidavits of support from sponsors, employers, or relatives and will continue to do so even if the Rule is adopted. These affidavits provide sufficient assurances that an immigrant applicant will not become overly reliant on the social safety net, without requiring immigrants to freeze significant assets in government-held bonds for years. The Proposed Rule fails to establish any basis for this proposed change, or to explain how it will further the proposed goal of self-sufficiency.

In effect, the Proposed Rule establishes a bond process that institutionalizes a pay-to-play system for any immigrant family that finds itself in times of hardship, or with members with a severe illness or disability, or older adults. The public charge bond makes applying for an immigration benefit an exclusionary process, requiring significant wealth. The median American household’s savings balance is just $11,700 (regardless of citizenship status); meeting the bond requirements would wipe out accessible cash and result in severe financial instability. By imposing a substantial cost on the very families who most need to reserve emergency funds, the Rule undermines DHS’s stated goal of encouraging self-sufficiency.

Moreover, it is well established that wealth discrepancies across racial groups are substantial, which means the Rule’s bond requirement will have a severe disparate impact on non-White immigrants. One study reported on the differentials in wealth, finding that the median net worth of White households in Los Angeles County—the largest immigrant hub in the State—is $355,000, compared to a median wealth of $3,500 for Mexicans, $42,500 for other Latinos, and $72,00 for Black immigrants from African countries. A recent survey further confirmed this wealth disparity, with 40% of White households in Los Angeles holding assets in stocks, mutual funds, and investment trusts; compared to significantly less in communities of color. Thus, the Rule’s bond requirement will impact immigrant families of color far more than White families, a disparate impact unsupported by any compelling interest.

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38 *Id.* at 28. The study found that only 18% of recent Black immigrants from African countries, 7.6% of Mexicans, 23.6% of Koreans, and 9.9% of Vietnamese residents owned such investments.
D. Immigrants Targeted by the Proposed Rule Are Critical Members of California’s Workforce

Limiting the ability of immigrants to adjust their status or extend or change the basis for their legal presence will harm California’s economy by gutting an important part of its workforce. This loss of productivity and diminution of the labor force will be especially pronounced in sectors that are critical to California’s economic vitality.

Agriculture

A prime example is the agricultural sector, which is heavily reliant on immigrant workers. In the dairy industry alone, eliminating immigrant labor on dairy farms would cut U.S. economic output by $32.1 billion and employment by 208,208 jobs. A staggering 95% of California’s farmworkers are immigrants. Labor shortages in this sector are so severe that farmers have been forced to leave 20% or more of their crops in the field to rot due to lack of workers.

Construction

The construction industry would also be heavily impacted by this rule and is already having trouble hiring workers. Among other things, this labor shortage jeopardizes California’s ability to prepare for natural disasters, such as recent wildfires, as well as rebuild after them, for which immigrant workers are critical. California has the highest percentage of immigrant construction workers in the nation at 42% and cannot afford to lose a significant portion of this labor force. Yet, over 36% of

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41 Id.
43 New Amer. Econ. Res. Fund, How Temporary Protected Status Holders Help Disaster Recovery and Preparedness (Nov. 6, 2017), https://tinyurl.com/NewAmTPS; USG Corporation & U.S. Chamber of Commerce, Commercial Construction Index (Third Quarter 2018), https://tinyurl.com/CommerceCICIQ3 (57% of contractors reporting high difficulty finding workers, 37% reporting moderate difficulty; 80% of contractors reporting labor shortage as factor impacting safety, with over half listing it as top factor).
construction workers’ families use public programs, putting them into the crosshairs of the harm of this Proposed Rule.46

**Child Care and Early Education**

Thirty-nine percent of child care and early education providers in California—81,000 people—are immigrants, reflecting an increase in their share of the workforce of over 145% since 1990.47 Children rely on these providers for care and education, and parents require these services to maintain their own employment. Losing child care workers will be disruptive for the children and families they help and for the economy, especially given how difficult it is for parents to find affordable, trustworthy, and convenient child care.48

**Healthcare**

The Rule’s changes will also disrupt the healthcare workforce in California. Nationally, immigrants represent almost 17% of the 12.4 million individuals in the healthcare labor force, including doctors, nurses, dentists, and other healthcare occupations.49 In California they represent 33% of healthcare workers—twice the national level.50 Immigrants play a key role in healthcare because they fill a large variety of roles, serving as professionals ranging from physicians and surgeons (36%), to nurses and home health aides (46%).51

More specifically, immigrants are heavily represented in the direct care field, which includes caregivers and home health aides who assist elders and people with disabilities. In fact, 48% of direct care workers in California are immigrants.52 With a growing older adult population, the need for workers in this field is projected to grow by 41% in the next few years.53 And it will prove difficult for employers to fill these


50 Id.

51 Id. (see “State-Level Data on Immigrant Health-Care Workers” datasheet).


positions if immigrant workers are forced to leave. Workers in direct care fields generally receive low wages, forcing many (about half nationally) to rely on public income supports such as those listed in the Proposed Rule.54 Across the country, a striking 44% of noncitizen immigrant caregivers use public benefits, including Medicaid (67%) and food and nutrition assistance (57%).55 Turnover in the industry is already high (33% in California), and losing still more workers due to the Rule would exacerbate this problem.56 The Proposed Rule is likely to cause particular difficulty for the State’s Medicaid personal care services program, In-Home Supportive Services. Providers who are not citizens may be unclear about the applicability of the new rule, and whether or not their work for a social service program such as IHSS will impact their immigration status. In addition to the disruption to direct care workers, their employers, and their families, vulnerable Californians could lose the services of caregivers with whom they have established trusting relationships. Ultimately, if home care positions go unfilled, patients who would otherwise be able to stay in their homes may be forced to move to nursing facilities, incurring higher costs for them and the State and, in many cases, significantly decreasing patients’ quality of life.57

Students
The Proposed Rule’s new extension to non-immigrant visa holders seeking to change or extend their visas will impact students in whom the State has invested. The University of California and the California State University systems, as well as numerous private colleges and universities in California, sponsor undergraduate and graduate students as well as post-doctoral scholars from a diverse array of countries.58 California has an interest in these students’ successful promotion—from undergraduate to graduate school and into careers—as our colleges and universities have invested in helping to ensure that they are able to live up to their potential. Graduating students’ low incomes

54 Sarah Thomason and Annette Bernhardt, California’s Homecare Crisis: Raising Wages is Key to the Solution, UC Berkeley Ctr. for Labor Research and Educ. 3 (Nov. 2017), https://tinyurl.com/homecare-crisis-CA.


56 Altormai and Batalova supra note 49.


are no indicator of their future earnings, but as written, the Proposed Rule would undermine these students’ opportunities to change or extend their visas based on their incomes at the time they apply.

In sum, although DHS acknowledges that the Rule could lead to “increased rates of poverty” and “reduced productivity” among individuals applying for permanent resident status and their families, the Proposed Rule fails to account for the impact on critical workforces that are significantly comprised of low-wage immigrants. By establishing rigid income bands which place thousands of workers in low-paying—but critical—jobs in serious jeopardy of adverse public charge determinations, DHS utterly fails to account for these workers’ valuable contributions to our economy. Putting additional barriers on these workers’ path to legal status as DHS proposes will not move them toward “self-sufficiency”—it will simply decrease their opportunities and imperil major sectors of our workforce.

E. Targeting Immigrant Use of Benefits Is Irrational Because These Benefits Support Work and Self-Sufficiency

While the Rule claims to be aimed at people who are “incapable of earning a livelihood,” its provisions discouraging immigrants from using publicly-funded services will hit working families—and their employers—hardest, effectively removing one of the pillars supporting the low-income labor pool. As discussed above, large percentages of people employed in a number of critical sectors of the workforce use these programs. Overall, regardless of immigration status, almost 60% of households with workers in the lowest income decile, and over half of those in the next highest decile, receive some public benefit. Such benefits are essential for these workers to remain employed, employable, and productive. For example, access to affordable health insurance helps workers to enter and remain in the workforce. Once employed, workers with health insurance miss almost 77% fewer work days than uninsured workers. And insured employees are more productive when they are at work. Conversely, as workers lose their coverage due to the Rule, employment, tenure, and productivity are likely to decrease, while absenteeism will rise. And, of course, many immigrant workers run the

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60 Cooper, supra note 46.
risk of being removed from the American workforce altogether due to application of the Rule.

DHS’s assertion in the Proposed Rule that the immigrants subject to public charge “should have adequate income and resources to support themselves without resorting to seeking public benefits” is at odds with the realities of the modern workforce.64 In fact, thousands of employees from the nation’s most profitable companies depend on public benefits to make ends meet.65 Many workers and their dependents, regardless of immigration status, qualify for, utilize, and rely upon a wide range of public benefits. Nearly three quarters of enrollees in the major federal benefit programs are members of working families.66 In California, almost 6.8 million working families are enrolled in Medicaid and/or the Children’s Health Insurance Program (CHIP), and 930,000 receive Temporary Assistance for Needy Families (TANF),67 due in part to decades of wage stagnation as well as declines in employer-provided health insurance.68 About 40 percent of SNAP recipients in California are from working households.69 Access to public benefit programs has become a key feature of the modern low-income workforce, and—far from forcing beneficiaries into helpless dependency—actually supports the self-sufficiency that is the stated goal of the Proposed Rule.

F. The Rule Will Tear Immigrant Families Apart and Is Contrary to Immigration Law’s Well-Established Family-Reunification Goals

By creating new barriers to admission, adjustment of status, and changes and extensions of visas, the Proposed Rule would directly impact the integrity of California’s

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64 83 Fed. Reg. 51123; see also 83 Fed. Reg. 51266, n852.
67 Id.
68 Id.
families. As mentioned, California has the highest rate of mixed-status families and nearly half of California’s children live with at least one immigrant parent. The Proposed Rule would undermine the integrity of working immigrant families in a variety of ways that bear no meaningful relationship to their self-sufficiency or burden on taxpayers.

First, application of the Proposed Rule runs directly counter to DHS’ view of self-sufficiency and the Rule’s stated purpose—that immigrants should be capable of self-sufficiency and “rely on their own capabilities and the resources of their families.” Instead, the Proposed Rule’s definition of “household,” combined with its arbitrary income and asset standards, would create pressures on extended families to live in separate households and to refrain from supporting each other financially. The perverse incentive created by the Proposed Rule could even discourage non-citizen members of mixed-status families from living with and providing support to U.S.-citizen family members in order to avoid adverse immigration consequences. The Rule ignores that communities and nations thrive when families support each other, whether that support is contributing to a young person’s education, providing child or elder care, or allowing a sibling or cousin to stay in one’s spare bedroom during times of hardship.

Second, the Proposed Rule’s application at admission will prevent reunification of grandparents, parents, and siblings who have been patiently waiting for family-based visas with their relatives living in the United States. Among other problems, the Rule’s focus on income-earning capacity and age neglects the important contributions that non-citizen parents of adult children (themselves often naturalized citizens) make to support households’ economic self-sufficiency and emotional health. In many working-class households, grandparents may be caretakers, providing critical support for working parents and their small children, or family members with illnesses or disabilities. The Proposed Rule would penalize such arrangements based on the household’s income even when the applicant would add value to, and save costs for, the household. The Rule would similarly lead to exclusion of an adult child applicant sponsored by a low-income U.S. citizen parent, even if that adult child’s income (based presumably on earning capacity in his or her country of origin) does not reflect what he or she would be likely to earn and contribute to the economy in the United States. DHS is statutorily required to conduct a meaningful assessment of the effects to family well-being, and while the department itself recognizes that the Rule “may decrease disposable income and increase the poverty of certain families and children, including U.S. citizen children,” it fails to

70 KidsData, supra note 6; Mathema, supra note 7.
72 See proposed 8 C.F.R. § 212.21(d), 83 Fed. Reg. 51290 (including in “household” any individuals to whom the immigrant provides at least 50 percent of the individual’s financial support).
73 Pub. L. 105-277, 112 Stat. 2681 (1998); see discussion below.
account for the negative outcomes that result from disrupting the familial resources of a household.

Third, the Proposed Rule will also prevent applicants already in the United States from obtaining lawful permanent resident status or extending or changing their visas to reflect relevant life transitions. For example, graduating college students may need to change student visas to work visas, allowing them to use their skills to support themselves and their families, as well as contribute to our economy. However, those students may well lack sufficient income to avoid being identified as a public charge under the Rule. In fact, thousands of California’s immigrant families have taken significant measures to come out of the shadows, making it the state with the highest number of individuals obtaining lawful permanent resident status in the last three years alone. For many applicants, denial of the requested adjustment, extension, or change would leave them without permission to remain in the United States. The Proposed Rule would lead either to their declining to apply for adjustment, extension, or change of status—forcing them into unauthorized status, relegated to the margins of society—or risking deportation if their temporary legal status is revoked. For example, a DACA recipient who is a student and has a U.S. citizen child may forgo an opportunity to seek a visa through marriage with a U.S. citizen spouse if their household income could put them at risk of an adverse public charge determination, or if they suffer from serious illnesses. Similar obstacles could also prevent vulnerable populations that are intended to be exempt from public charge considerations, such as Temporary Protected Status (TPS) holders or Violence Against Women Act petitioners, from adjusting their status through family-based petitions, despite the carve-out in the Rule for people in these statuses.

Finally, the Proposed Rule would subject immigrants with ongoing lawful status (such as long-term, multiple-entry visas) to public charge inadmissibility standards every time they reenter the United States. This would discourage California’s immigrant community from remaining in contact with their families abroad, leading to unnecessary separation of family members during times of hardship and joy, such as serious illnesses, funerals, weddings, or celebrations of birth.

III. THE RULE WILL HAVE SUBSTANTIAL CHILLING EFFECTS

A particularly pernicious effect of the Rule would be to force lower-income immigrants to make unbearable choices. Do I accept food stamps and make sure my children can eat, even if this could put my ability to remain in this country at risk if I am denied adjustment of status? Do I continue to live with my extended family in order to

76 8 U.S.C. § 1182(a)(4) applies inadmissibility based on public charge at time of visa issuance by consular officer, application for admission at a port of entry, and application for adjustment of status.
benefit from family childcare, intergenerational connections, and preservation of language and culture, or do I split my family up to make sure our larger household size doesn’t increase the risk of a public charge determination?

These unnecessary, painful choices are striking enough when viewed as the direct effect of the Rule itself. But this Rule will also have a strong “chilling effect” on immigrants’ willingness to avail themselves of critically needed public benefits—even those that are not subject to the proposed public charge determination, and even benefits that DHS ostensibly exempts from the Rule.

Even before the Rule has been finalized, a pronounced chilling effect is evident in immigrant communities throughout California and the Nation. Recent social services agency surveys show that two-thirds of immigrant families in Southern California are afraid to continue being part of, or sign up for, public benefits programs.77 And Northern California is also feeling the effects, as “a troubling pattern” has begun to emerge at health clinics, with patients who have “caught wind” of the public charge proposal asking health care workers “if they should drop their Medicaid coverage, or not apply, for fear that receiving the benefit could imperil their chances at permanent residency.”78 Media reports indicate that 18 states have reported drops of up to 20% in WIC enrollment—a benefit not even included in the Rule—which they attribute largely to fears about public charge changes.79 In California, local WIC agencies have received dozens of reports regarding immigrant parents’ concerns about using WIC benefits and requests to disenroll from services.80 This chilling effect has been increasing in immigrant-dense regions like Southern California and the Central Valley, where seasonal employment forces many families to rely on public supports to fill the gaps.

The projected chilling effects from the Rule if it is implemented are severe. DHS acknowledges this phenomenon in the Proposed Rule, and estimates, based on a 2.5% disenrollment rate, that over 332,000 households may forgo benefits, with an aggregate annual cost of over $1.5 billion.81 The analysis, however, is woefully inadequate. While the Rule correctly cites the Personal Responsibility and Work Opportunity (PRWORA)
Act of 1996 as a bellwether for possible consequences, it massively understates the likely chilling effects. In fact, as thorough analyses have shown, the Rule will discourage millions of immigrants from accessing health, nutrition, and social services for which they are eligible. The Migration Policy Institute, whose study of PRWORA is cited in the Proposed Rule, estimates that up to 16.2 million—60%—of the 27 million immigrants and their family members currently enrolled in benefits programs could disenroll. Alameda County, California—where 41% of noncitizens who live in families that use at least one means-tested benefit—estimated that its immigrant population would miss out on millions of dollars of benefits due to the chilling effect generated by the Rule. Estimating that half of the county’s households with non-citizens who use relevant benefits—over 8,000—will disenroll from programs they are eligible for, the direct annual economic impact would be approximately $39 million.

The chilling effect in California as a whole is likely to impact millions of immigrants and their families. While all of the State’s noncitizens and their family members (over 10 million people, 27% of the state’s population) may be subject to this chilling effect, those in lower income brackets are most likely to be affected. In California, nearly seven million noncitizens and their family members have incomes below 250% of the federal poverty level (FPL) (almost 18% of the State’s population). Most at risk are the nearly four million noncitizens and family members below 125% of FPL (over 9% of Californians), whose income would a “heavily weighed negative” factor in the public charge test. Under any reasonable analysis, the chilling effect is likely to be widespread and devastating to these families.

Indeed, DHS forthrightly admits that this Rule may “increase the poverty of certain families and children, including U.S. citizen children.” The Department, however, deems these outcomes justified by the “compelling” goals of “better ensuring the self-sufficiency of [immigrants] admitted or migrating to the United States, and minimizing the financial burden of [immigrants] on the U.S. social safety net.” This

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88 Id.
choice is irrational because—as demonstrated above—the Proposed Rule flatly fails to promote self-sufficiency and instead chills participation in critical programs that help advance it.

IV. THE RULE WILL HARM CRITICAL STATE PROGRAMS

A. Medi-Cal Programs & Children’s Health Insurance Program (CHIP)

California’s Medicaid program, known as Medi-Cal, is the pillar of the state’s healthcare safety net, helping insure millions of low-income Californians every day. More than two million non-citizens are enrolled in Medi-Cal, and if the Proposed Rule were implemented, a significant percentage of these individuals would be either determined a public charge and lose a path to citizenship, or discouraged from enrolling out of fear of such a determination. California receives 50% or more in federal matching funds for qualified Medicaid expenditures, and if even a small percent of California’s eligible non-citizen population does not apply for benefits, it will have a significant effect on the availability of federal support. Moreover, in California, Children’s Health Insurance Program (CHIP) funds are used to extend Medi-Cal funding to children in working families whose parents or guardians exceed the income eligibility threshold for Medi-Cal, but lack access to affordable private insurance. Every federal dollar lost represents fewer resources with which California can ensure that its residents have access to healthcare.

B. Medicare Part D Low-Income Subsidy (Extra Help)

Medicare Part D Low-Income Subsidy helps Medicare beneficiaries who have limited income and assets pay the costs of their prescription drugs. Its inclusion in the public charge determination is likely to have a significant effect on older adults. A large proportion of all Medicare beneficiaries (citizens and non-citizens alike), almost one in three, qualify for Extra Help with their premiums and co-pays. For example, many TPS beneficiaries are eligible for Medicare on the basis of their long-term U.S. work histories and eligible for Medicare Low-Income Subsidies. They will be penalized for using that critical aspect of the Medicare program if they ever apply to adjust their immigration status via a family-based petition, despite the Rule’s carve-out for TPS generally.

If Medicare-eligible immigrants start declining Medicare Part D out of fear of repercussions on their status, it will have a significant negative impact on California state programs that are designed to serve older adults eligible for both Medi-Cal and Medicare. One such program is Cal MediConnect, an innovative healthcare delivery system

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intended to improve coordination of care for beneficiaries with both Medi-Cal and Medicare; these objectives cannot be achieved if participants fear accessing that care.

C. Supplemental Nutrition Assistance Program (SNAP)

The Rule’s inclusion of SNAP—the nation’s most important anti-hunger program, which helped 42 million people avoid food insecurity in 2017 alone—runs directly counter to federal and state efforts to support working families facing financial hardships.\(^90\) In providing SNAP benefits for the nation’s most vulnerable immigrants, Congress recognized the critical nature of nutrition for healthy families and communities.\(^91\) California’s own commitment led it to fill in the gaps left by Congress: the California Food Assistance Program provides state-funded nutrition services for qualified non-citizens who are not eligible for federal benefits.\(^92\) California’s nutrition program—CalFresh—is critical to the health of California’s families.\(^93\) In 2017, SNAP served over four million California residents, including nearly two million people for whom the possibility of a public charge determination may raise serious concerns.\(^94\) The Proposed Rule will discourage eligible immigrants from seeking both federally and state-funded nutrition assistance, thwarting California’s goal of curtailing hunger.

For more than 20 years, California has made a significant effort to encourage enrollment in CalFresh as a means of reducing food insecurity. Annually, between 2009 and 2012, SNAP kept an average of 806,000 people out of poverty in California, including 417,000 children.\(^95\) To fully implement California’s state-funded benefit for immigrant communities, the State has a robust outreach program that explicitly includes outreach to immigrant communities.\(^96\) Both the U.S. Department of Agriculture (USDA) and California’s Department of Social Services (CDSS) have historically understood that fear of immigration consequences leads eligible residents to forego assistance and have developed outreach materials and training guidelines to make clear that nutrition benefits


\(^93\) In 2017, more than 74% of SNAP participants were in families with children, and almost 9% were in families with members who are elderly or have disabilities. *A Closer Look at Who Benefits from SNAP*, supra note 90.


\(^95\) *A Closer Look at Who Benefits from SNAP*, supra note 90.

are not currently considered part of a public charge determination. If adopted, the Proposed Rule will thwart California’s ability to enroll SNAP-eligible residents and discourage thousands of eligible applicants from accessing CalFresh, seriously undermining California’s attempt to address food insecurity.

Decreased participation in CalFresh has economic consequences beyond hunger and public health. Fewer Californians using CalFresh will harm the 24,934 grocers, farmers’ markets, and other merchants in California that accept EBT. CalFresh includes the Restaurant Meals Program for disabled, elderly, and homeless recipients who can use benefits to purchase lower cost prepared meals at 2,016 restaurants in 10 counties throughout the state, restaurants whose owners and employees will likewise be affected by a decrease in CalFresh participation. This decreased revenue, in addition to reducing tax receipts, could result in restaurants being forced to lay off employees, hurting the State’s economy further still.

Moreover, as a top food producer for the United States, California’s farmers and broader economy will suffer as a result of decreased SNAP participation nationwide. Increases in food purchases made possible by nutrition benefits generate significant jobs

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“MYTH: CalFresh is like welfare and you are considered a “Public Charge” when you receive CalFresh benefits. FACT: CalFresh is not welfare and it is not cash aid.

MYTH: Receiving CalFresh will hurt my chances for becoming a U.S. citizen.

FACT: Receiving CalFresh will not hurt your chances of becoming a citizen. It is not a welfare program and it is not cash aid.”).

98 One California non-profit reported that from July 1, 2017 to June 30, 2018, CalFresh participants at seven northern California farmers’ markets purchased nearly $148,000 in EBT tokens and received $95,000 in Market Match incentives, increasing the economic benefit to the farmers and the local economy. Information provided by Agricultural Institute of Marin; see also Oberholtzer, Dimitri, and Schumacker, Linking farmers, healthy foods, and underserved consumers: Exploring the impact of nutrition incentive programs on farmers and farmers’ markets, J. of Agric., Food Systems, and Community Dev. (Jul. 27, 2012), [http://foodsystemsjournal.org/index.php/fsi/article/view/124/118](http://foodsystemsjournal.org/index.php/fsi/article/view/124/118) (describing impact of SNAP and other nutrition benefits programs on farmers and farmers’ markets); Florence A. Becot, et al., Can a shift in the purchase of local foods by Supplemental Nutrition Assistance Program (SNAP) recipients impact the local economy? Cambridge Core (Aug. 15, 2018), [https://tinyurl.com/SNAP-Impact-on-Local-Econ](https://tinyurl.com/SNAP-Impact-on-Local-Econ) (describing positive economic impact from allowing use of SNAP at community supported agriculture programs and farmers’ markets). State-wide, these effects are even greater.
and profits in agriculture, food processing, and transportation services.99 Over a third of the country’s vegetables and two-thirds of the country’s fruits and nuts are grown in California.100 California’s agricultural exports totaled over $20.04 billion for 2016.101 The Rule’s economic impact on California therefore is not limited to impacts on California-administered benefits, but will include reverberations from decreased use of nutrition benefits nationwide.

D. Housing Assistance Programs: Section 8 Housing Choice Voucher Program and Section 8 Project-Based Rental Assistance

For the first time, the Rule will include federal housing assistance among the benefits that subject people to the public charge determination. This is likely to have a number of negative effects not only on the recipients themselves and related State programs, but on California’s workforce and economy.

As of 2017, more than five million people in over two million low-income families used the Section 8 Housing Choice Voucher (“HCV”) Program,102 including almost 690,000 Californians.103 Using the new “public benefit” definition based on use equaling more than 15% of FPG over 12 months, the vast majority of, if not all, HCV recipients in California would be considered public charges, even in relatively low cost-of-living areas. The threshold for public benefit status is $1,821 per year.104 The average value of Section 8 in every California county for which figures are available is far in excess of this amount, from San Francisco’s $22,000 per year to the Stanislaus County’s $6,564 per year.105 Given the state’s high housing costs, the same is likely true for

100 Cal. Dep’t of Food & Agric., California Agricultural Production Statistics (Crop year 2017), https://www.cdfa.ca.gov/statistics/.
101 Id.
102 Ctr. on Budget Pol’y Priorities, Policy Basics: The Housing Choice Voucher Program (May 3, 2017), https://tinyurl.com/CBPP-Housing-Voucher-Programs (see “National and State Housing Fact Sheets & Data” link for California).
104 Id. FPG for single person = $12,140 * .15 = $1,821.
Section 8 Project-Based Rental Assistance. As of 2017, more than 2 million people used this type of assistance, including almost 170,000 Californians.\textsuperscript{106}

The Rule would treat subsidized public housing as “non-monetizable.” About two million people lived in public housing as of 2017, including over 76,000 Californians.\textsuperscript{107} The Rule’s definition of a “non-monetizable” public benefit would penalize any use of such a benefit for more than 12 months in the aggregate within a 36-month period.\textsuperscript{108} Occupants of public housing stay an average of almost 6 years,\textsuperscript{109} so it is very likely that a high percentage would be considered public charges under the Rule. Further, under the Rule, use of benefits for more than 12 months in the aggregate means DHS will count receipt of two non-monetizable benefits in one month as two months.\textsuperscript{110} This is extremely problematic, as most beneficiaries of housing benefits often also qualify and rely on other public benefits included in this Rule. In fact, as of July 2017, California had over six million residents who received two or more public benefits from programs such as CalFresh, CalWORKs, IHSS, and Medi-Cal, and over 974,000 residents who received three or more public benefits.\textsuperscript{111} This provision of the Rule and its inclusion of so many critical housing and healthcare programs is capricious agency action, and will have severe ramifications for low-income families.

While, as DHS states, immigrant participation in these programs is relatively low due to the requirement that applicants must be citizens or legal residents,\textsuperscript{112} the Rule’s direct and chilling effects could still be considerable. Approximately 275,000 households including non-citizens receive federal housing subsidies nationally, an estimated 63,000 households in California.\textsuperscript{113} This means that almost 86,000 Californians are directly impacted by this aspect of the Rule, including their household members.\textsuperscript{114}

Loss of housing assistance will seriously harm affected families. Housing vouchers have been repeatedly shown to improve children’s educational and health

\textsuperscript{106} Assisted Housing: National and Local dataset, supra note 103.
\textsuperscript{107} Id.
\textsuperscript{108} 83 Fed. Reg. at 51290. Under the Rule, use of benefits for more than 12 months in the aggregate means DHS will count receipt of two non-monetizable benefits in one month as two months.
\textsuperscript{110} 83 Fed. Reg. 51290.
\textsuperscript{111} California Health and Human Services Program Data Dashboard, Multi-Program Participation by District or County (July 2017).
\textsuperscript{112} 83 Fed. Reg. 51167 fn. 318.
\textsuperscript{113} Ctr. on Budget and Pol’y Priorities analysis of HUD administrative data.
\textsuperscript{114} Id.
outcomes, and help pull their families out of poverty. Indeed, children whose families were able to move to higher opportunity neighborhoods due to their receipt of housing assistance experienced long-term improvements in their income and educational attainment, as well as reduced homelessness, housing instability, and overcrowding. In fact, a study conducted by HUD showed that youth who live in public housing actually improved their self-sufficiency long term, contradicting DHS’s fundamental assumption that use of public benefits necessarily undermines self-sufficiency. The Rule places all of these gains at risk.

And the impact of losing housing vouchers will, for many people, extend well beyond housing itself. Many housing authorities provide a suite of “wraparound” services to public housing residents, including employment, clinical, health, and financial literacy services. San Francisco, for example, is part of an innovative program aimed at families who interface with the child welfare system and are at risk of homelessness. In addition to a housing voucher, these families receive intensive case management services, including mental and behavioral healthcare, parenting classes, and peer support, as well as referrals to other benefits. All of these will be lost to eligible families who withdraw from public housing assistance programs or fail to apply due to fear of impact on their immigration status, harming families and their communities, and ultimately undermining program effectiveness.

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E. State Affordable Housing Programs

California’s affordable housing crisis is well documented and shows no sign of abating. This crisis has profound effects on immigrant farmworkers. For example, in the Salinas Valley (known as the “salad bowl of the world,” with a nine billion dollar agricultural industry employing 82,000 people) farmworker families have resorted to “sleeping in vehicles in the parking lots of Walmart or 24-hour eateries, the motels, multiple households living in cramped quarters including garages, tool sheds and kitchens.” One local school district reports 36% of its students as homeless. The causes of this severe shortage of affordable housing are not difficult to understand. Employer-provided housing has dried up, while market rates for housing have skyrocketed. For example, in Salinas, the average rent for a two-bedroom apartment is $1,600, while farmworkers make an average of between $1,700 and $2,600 per month. The consequences are dire not just for these families, but for California’s economy; as discussed above, the State’s agricultural sector is almost entirely reliant on immigrant workers and already faces severe labor shortages.

Although the State does not directly administer housing benefits to individuals, it plays a significant role in assisting housing development, particularly affordable housing, which is a critical need in California given this crisis. California’s Department of Housing and Community Development (HCD) funds, finances, and monitors projects that receive Section 8 and other federal housing subsidies, having provided more than $3 billion of such funding in the past 30 years. Recipients of those loans use revenues from federal housing benefits to repay the State and pay ongoing operating and maintenance costs.

More specifically, HCD funds two grant programs to help develop housing for agricultural employees, including immigrant farmworkers, that are contingent upon

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121 See, e.g., Michael Hiltzik, California’s housing crisis reaches from the homeless to the middle class — but it’s still almost impossible to fix, (Mar. 29, 2018) https://www.latimes.com/business/hiltzik/la-fi-hiltzik-housing-crisis-20180330-story.html (stating that California faces shortfall of more than a million units for households earning between 50% and 120% of median wage; has 21% of the Nation’s homeless people, despite having only 12% of the population; and that at least 30% of Californians in every county cannot afford local rents, over 60% in some counties, including over 2.3 million in Los Angeles alone).


123 Id.

124 Id.

125 Id.

occupant income. The Joe Serna, Jr. Farmworker Grant Program provides grants and loans to assist development for rehabilitation of housing projects for agricultural worker households.127 Similarly, the Office of Migrant Services (OMS) provides grants to local government agencies that contract with HCD to operate OMS centers throughout the state, mostly in rural locations.128 This housing has been critical to allow farmworker families to obtain affordable, safe housing in California’s expensive, competitive housing markets.129

Due to the Rule’s chilling effects, it is likely that eligible immigrant agricultural workers will withdraw from, or decline to apply to, these programs, forcing them into homelessness, severe overcrowding, or leaving the region entirely. This displacement and homelessness will cause additional disruption to families, communities, schools, and industries, as discussed above. Moreover, increasing vacancy rates in the occupant restricted agricultural housing units will disrupt future funding streams for agricultural worker/migrant housing grants. If occupancy rates significantly decrease, the data supporting the necessity for such housing will be skewed and funding resources will dwindle for this important aspect of HCD’s work.

HCD may be impacted in other ways. One of HCD’s roles is to review local jurisdictions’ housing elements for compliance with regional needs for housing across all incomes.130 HCD’s findings as to the sufficiency of these elements are premised on the existing physical, financial, and demographic environment (i.e., without the “chilling effect” on Section 8 usage that the Rule creates). Any change to that environment would require HCD to reevaluate the assumptions that it relied on in reviewing these housing elements. This may create barriers to general plan implementation on the local level, as some approvals are provided to cities and counties, who, in turn, rely on these approvals in promulgating local ordinances.

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127 California Dep’t of Housing and Community Development, Joe Serna, Jr., Farmworker Housing Grant Program (JSJFWHG), Available at http://www.hcd.ca.gov/grants-funding/active-no-funding/jsjfwhg.shtml.
128 California Dep’t of Housing and Community Development, Office of Migrant Services (OMS), (Accessed on December 6, 2018), http://www.hcd.ca.gov/grants-funding/active-no-funding/oms.shtml.
V. CALIFORNIA WILL BE FORCED TO ALTER NUMEROUS STATE PROGRAMS AND WILL INCUR SUBSTANTIAL COSTS

California will be forced to alter state programs in light of potential negative immigration consequences for millions of recipients who receive benefits. Decades of extensive interagency processes will have to be reevaluated to address this overreaching Rule. State agency programs and administrators will be required to disentangle longstanding wraparound services, translate informational material, and review applications and enrollment processes, while at the same time conducting aggressive consumer educational outreach in hopes of preventing eligible recipients from disenrolling. Not only will this cost State agencies considerable time and money, it will also contribute to widespread confusion about whether or not Californians can continue to access nutrition, medical, and housing assistance without penalty.

One example is the SNAP program. In addition to wary immigrants avoiding nutrition assistance and suffering from the resulting lack of healthy food, the Rule’s inclusion of SNAP in the public charge determination will seriously impact CalFresh and its partners with respect to implementation. The State has already prepared and submitted its outreach plan for FFY 2019-2021 with an annual budget of over $44 million for each of those three years. California funds 145 contractors and subcontractors and works with local government agencies, community-based organizations, the California State University system, and many others to encourage CalFresh enrollment. If the Proposed Rule is adopted, California and its partners will need to study and understand the new rule’s impact on the communities they serve, train employees and volunteers, and develop new outreach materials and applications. The State may even need to change the way it delivers state-funded CalFresh benefits.

Additionally, the Rule’s inclusion of federal housing benefits could destabilize the administration of housing programs and services throughout the State, many of which include other critical services previously discussed. The State’s annual investment in affordable housing is considerable; for example, in 2016-2017, HCD awarded 238 grants and loans totaling more than $460 million. HCD’s 2015-2016 awards will help rehabilitate 696 substandard homes and apartments, create 2,742 new, affordable places to live, and create or rehabilitate 1,880 migrant farmworker rental homes. As discussed above, disruptions caused by the Rule’s inclusion of housing benefits threatens the gains the State has made to secure and build affordable housing for thousands of Californians. And this could add costs to local authorities, and by extension State

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131 California Dep’t of Social Services, California CalFresh Outreach Plan for FFY 2019-2021, Available at http://www.cdss.ca.gov/inforesources/CalFresh-Outreach/Plan.
133 Id.
coffers, needing to reevaluate local budgets and the future administration of housing services.

The Proposed Rule will also undermine California’s enormous investments in its public health infrastructure and cause additional, unreasonable administrative and fiscal burdens. For example, California’s Health Eligibility, Enrollment, and Retention System (CalHEERS), a central automation system jointly administered by Covered California (the state’s health insurance Exchange) and the Department of Health Care Services, serves as a consolidated system for state eligibility enrollment and retention for both Covered California and Medi-Cal. The system is designed to integrate federal and state-funded health programs and to provide beneficiaries with timely and clear eligibility notices regarding coverage. The State has already invested an extraordinary amount of time and financial resources into CalHEERS. Overhauling this system in order to provide enrollees with all relevant details for purposes of a public charge analysis would be extremely expensive (not to mention sow confusion and distrust among beneficiaries). As part of the implementation of the Affordable Care Act (ACA), California engaged in an extensive outreach effort to inform and educate the public about changes to healthcare options, including paid media, social media, customer service centers, dissemination of information at community hubs, and more. For example, Covered California’s 2018-2019 budget included a substantial investment of $107 million for marketing and $105 million for customer service. The Proposed Rule would necessitate the diversion of a substantial portion of those resources toward revising materials providing technical support and advice to consumers confused by changes to public charge. And any chilling effect on enrollment in federally-funded Medi-Cal programs will translate into fewer efficiencies that come from broad-based participation and less funding with which to administer Medi-Cal.

In short, California state agencies would incur millions of dollars of direct administrative costs as a result of the Proposed Rule—resources that would then be unavailable for providing services to State residents.

VI. THE RULE WILL HARM THE STATE’S MOST VULNERABLE RESIDENTS

A. Children Living in Poverty, with Disabilities, and in Foster Care

As the range of California’s programs impacted by the Proposed Rule demonstrates, its harmful effects will fall heavily on children, particularly those in already precarious situations due to their poverty, disability, or foster care status. Nearly three million California children live in benefit-receiving families with immigrant

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parents. While the vast majority of these children are themselves U.S. citizens, the Rule’s effects on them will nevertheless be serious. For example, receipt of benefits such as CalFresh has a well-documented, profoundly positive effect on children. One study found that “access to food stamps in childhood leads to a significant reduction in the incidence of . . . obesity, high blood pressure, and diabetes.” Reduced access to nutritional benefits will likely lead to increases in all of these serious health problems.

A very large percentage of children with disabilities—almost half—use publicly funded health programs as their care needs may be intense and complex. Care for children with disabilities is much more expensive—seven times that of the typical child on Medicaid. Thus, uninsured low-income parents will be unlikely to be able to afford to cover these costs out of pocket, leaving their children’s needs unmet and harming their development, with life-long consequences. Indeed, the chilling effect caused by leaked versions of the public charge rule alone is so acute that many are considering forgoing these services. One poignant story from Fresno, in California’s Central Valley, illustrates this impossible dilemma:

A Fresno mother who takes her special needs son to a health clinic said she fears she’s jeopardizing her path to legal residency. “I don’t want the simple act of using Medi-Cal to be an obstacle in me getting papers,” she said. Her son, age 5, has autism. He is eligible for the state-federal health insurance program, but she is an undocumented immigrant and her angst stems from talk in the community that legal permanent residency in the U.S. could be denied to those who had ever used government aid programs. “Before, I was sure that I was going to keep Medi-Cal because of my son, but now I’m very scared,” she said. “We don’t know what to do.”

Finally, children in foster care could be significantly harmed by limits on their ability to access needed benefits. Nearly 90% of children entering foster care have

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138 Id.
physical health problems, many with multiple chronic health issues such as malnutrition, anemia, and manifestations of abuse. They also have much higher rates of developmental, behavioral, and mental health diagnoses. Virtually all children in foster care are eligible for Medicaid, so they would be highly impacted if their access to care is limited in any way, or if potential foster parents become more reluctant to entangle themselves with public benefits programs as a result of the Proposed Rule.

B. Pregnant Women and Youth in Need of Reproductive Health Services

The Proposed Rule would have a devastating effect on women and adolescents who need pregnancy-related coverage and reproductive healthcare services. Pregnant women who are eligible for Medicaid services receive vital prenatal care, labor and delivery services, and postnatal support; approximately 20,000 immigrant women receive pregnancy-related Medi-Cal services in California, which also include nutrition and health education. Over one million immigrants in California receive other, non-Medicaid family planning services. The Commonwealth Fund found that compared to U.S.-born patients, immigrant patients were significantly more likely to report not seeking or having coverage, and about one in five women who had coverage did not plan to use it because of barriers or concerns regarding their immigration status. The Rule’s inclusion of Medicaid, as well as likely chilling effects on access to other publicly-funded care, puts at risk crucial reproductive healthcare services that reduce adverse birth outcomes associated with teenage pregnancy, short periods of time between pregnancies, and sexually transmitted diseases, by helping avoid unwanted pregnancies, births, and abortions.

DHS acknowledges that the consequences of its Proposed Rule may include “[w]orse health outcomes […] especially for pregnant or breastfeeding women.”\textsuperscript{146} In evaluating the Proposed Rule, DHS must fully account for harms to pregnant women and children today, as well as harms to future U.S. citizen children whose mothers were intimidated from making full use of available prenatal healthcare services.\textsuperscript{147} These include harms to children’s future health and socioeconomic mobility that come from lack of prenatal and early life Medicaid coverage.\textsuperscript{148} It also must include higher costs to the State as a result of future health harms, such as future rates of hospitalization and workforce participation, since research shows a link between access to Medicaid and later adult health.\textsuperscript{149}

C. People at Risk of Substance Abuse Disorders

California, like every other state, is confronting an opioid abuse crisis, with almost 2,200 overdose deaths in 2017 alone.\textsuperscript{150} This is particularly true in certain rural parts of the State, where death rates meet or exceed national levels.\textsuperscript{151} Youth are significantly at risk, with 3.6% of 12 to 17 year olds reporting misusing opioids in 2016.\textsuperscript{152} California has invested in several initiatives to address this crisis.\textsuperscript{153} However,

\begin{itemize}
  \item \textsuperscript{146} 83 Fed. Reg. 51270.
  \item \textsuperscript{147} 83 Fed. Reg. 51277. DHS must review the Rule in light of 654 of the Treasury General Appropriations Act, 1999, Public Law 105–277, known as the Family Assessment, to determine impact on family-wellbeing. See discussion below.
  \item \textsuperscript{148} Sarah Miller and Laura R. Wherry, \textit{The Long-Term Effects of Early Life Medicaid Coverage} (Aug. 2015), \url{http://www-personal.umich.edu/~mille/MillerWherry_Prenatal2015.pdf}.
  \item \textsuperscript{150} California Dep’t of Pub. Health, \textit{California Opioid Surveillance Dashboard} (Accessed Oct. 31, 2018), \url{https://discovery.cdph.ca.gov/CDIC/ODdash/}.
  \item \textsuperscript{151} California Dep’t of Pub. Health, \textit{State of California Strategies to Address Prescription Drug (Opioid Misuse, Abuse, and Overdose Epidemic in California} (June 2016), \url{https://tinyurl.com/CDPH-Opioid-Strategy}.
  \item \textsuperscript{152} U.S. Dep’t of Health and Human Resources, \textit{Opioids and Adolescents} (Accessed on Oct. 31, 2018), \url{https://tinyurl.com/HHS-Opioids-and-Adolescents}.
\end{itemize}
these efforts will founder if people are discouraged from accessing healthcare. Recent studies show that people with opioid addiction who lack Medicaid are only half as likely to receive treatment as those with insurance.154

D. Individuals Struggling with Mental Health Illness and Behavioral Health Issues

The Proposed Rule will harm many Californians struggling with mental health. Nearly one in six adults in California experience mental illness, one in twenty-four have a serious mental illness that makes it difficult to carry out major life activities, and one in thirteen children have an emotional disturbance that limits participation in daily activities.155 Since the State’s expansion of Medi-Cal eligibility, the number of adults accessing mental health services increased by almost 50% from 2012 to 2015.156 The Proposed Rule’s inclusion of programs like Medi-Cal, which pays for a significant portion of mental health treatment in California, is highly problematic for those struggling to obtain the counseling and medication they need to care for their children, contribute to the economy, and otherwise participate in society.

E. Adults with Disabilities and Elders

The Proposed Rule’s inclusion of community-based Medicaid services will have a harmful and perverse effect on immigrant adult Californians with disabilities and their families. California is one of many states that offers Medicaid to working people with disabilities whose earnings may exceed traditional Medicaid rules.157 Yet the Proposed Rule’s incredibly broad definition of potentially disabling conditions,158 in combination with the inclusion of community Medicaid as a negative factor in the public charge determination, forces immigrants with disabilities to choose between using health care programs needed for healthy and independent living and maximizing their chances of obtaining permanent residency.159 As DHS notes, many persons with disabilities are

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156 Id.
158 “[A]ny other evidence demonstrating that the individual has a medical condition that will affect the alien’s ability to work” should be considered “to the extent that such disability […] impacts the likelihood of becoming a public charge.” 83 Fed. Reg. 51183.
159 While public charge may be waived for immigrants who are “aged, blind or disabled,” as defined in section 1614(a)(1) of the Social Security Act, see 8 C.F.R. § 245a.3(g)(3)(ii), these waivers are not guaranteed, and immigrants with a potentially disabling conditions may be put in
fully capable of contributing to the work force,\textsuperscript{160} yet, DHS fails to consider the high percentage of individuals with disabilities who use Medicaid-funded services or the Medicare Part D Low Income Subsidy to support their ability to work. Further, DHS’s proposed exception for immigrants who demonstrate that they have private health insurance or financial resources to pay for all “reasonably anticipated medical costs” is an impossible test to meet for persons with disabilities.\textsuperscript{161} DHS’s conclusion that immigrants with disabilities “are not being treated differently, or singled out” is simply untrue.\textsuperscript{162} Instead, inclusion of likelihood of receiving community Medicaid as a negative factor, when health is already a factor, creates an unfair, double-strike against immigrants with disabilities.

The Proposed Rule would also hurt older Californian immigrants, challenging their ability to meet their basic needs. California has the largest number of immigrant older adults in the Nation—about 1.3 million, almost 30% of the total immigrant older adult population.\textsuperscript{163} Older adult immigrants play a critical role in immigrant families, providing unpaid childcare and household support to working Californian families, and contributing to family cohesion. Many of these workers rely on programs like Medicaid and CalFresh.\textsuperscript{164} The Proposed Rule would force older adult Californians—including those who have spent ten or more years paying into the Medicare system, like many immigrants with Temporary Protected Status who may become subject to the public charge determination when they seek to adjust or extend their status—to choose between filling prescriptions or visiting a doctor and jeopardizing their ability to stay together with their families permanently. As with disability, the Rule attaches a new, negative weight to limited English proficiency and likelihood of receiving the Part D Low Income Subsidy. With age and employability already considered, this levies an unfair double-strike against older adults, who by virtue of age are less likely to reach English proficiency and more likely to receive Medicare assistance.

\textsuperscript{160} 83 Fed. Reg. 51184.
\textsuperscript{161} Applicants who are racial and ethnic minorities would be disproportionately negatively affected because they disproportionately experience an increased incidence of disabling chronic conditions, including diabetes, cancer, and heart disease. California Dep’t of Health Care Services, \textit{Health Disparities in the Med-Cal Population} (Accessed on Oct. 31, 2018), https://www.dhcs.ca.gov/dataandstats/reports/Pages/DisparitiesFactSheets.aspx.
\textsuperscript{162} 83 Fed. Reg. 51184.
F. Youth and Others at Risk of Homelessness

Added to the above pressures, the Rule threatens immigrants’ ability to remain safely in their homes. By sweeping housing benefits into the public charge test for the first time, the Rule puts people at increased risk of homelessness. Although the Rule narrowly excludes programs providing housing assistance to homeless people, its chilling effect will deter eligible people from accessing these and other programs. Further, it will cause those already participating in Section 8 to give up life-critical benefits, which are often the only thing between low-income families and homelessness.

VII. THE RULE WILL UNDERMINE CALIFORNIA’S HEALTH LAWS AND POLICIES

Apart from the many direct harms to individuals, the Proposed Rule would directly harm California’s sovereign state law and policy objectives. California’s health policy approach is based on principles of broad-based access to healthcare, nutrition, housing, and “no wrong door,” regardless of immigration status.

A. The Proposed Rule Will Limit California’s Efforts to Promote Broad Access to Healthcare

California has substantially relied upon prior agency interpretations of public charge in designing its healthcare system. California’s major health programs provide a variety of benefits to all its residents, including providing coverage for qualified low-income individuals, families, and seniors and persons with disabilities. Eligible persons are to be allowed access to healthcare “without discrimination or segregation based purely on their economic disability.”

In addition to contributing to patient health and well-being, these services also help California prevent the spread of communicable diseases, prepare for and respond to public health emergencies, and achieve numerous other health-related goals. The following are examples of California state laws and policies that were designed with the intention of providing broad-based access to health care, all of which would be substantially undermined by the Proposed Rule.

- As part of its implementation of the Affordable Care Act, California established a single, accessible statewide application for all affordable health programs. This application is used by all California entities authorized to make eligibility

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166 Cal. Welf. & Inst. Code § 15926(b). Furthermore, California state law provides that all types of information concerning an individual and obtained for provision of Medi-Cal services “shall be kept confidential, and shall not be open to examination other than for purposes directly connected with the administration of the Medi-Cal program.” Cal. Welf. & Inst. Code § 14100.2(a). The complex nature of the Proposed Rule would conflict with this limitation on Medi-Cal relevant information.
determinations, and all California residents are encouraged to apply. The utility of the single, statewide application would be undermined by the Proposed Rule.

- As stated above, CalHEERS is the automated and consolidated system for determining healthcare eligibility. This program offers a streamlined mechanism for all Californians to research, compare, check eligibility for, and purchase health coverage. These functions would be undermined by the Proposed Rule, and, as described below, any attempts to alter the system to reflect changes from the Proposed Rule would be enormously burdensome for the State.

- California provides some state-funded healthcare services for immigrants who are not qualified to receive federally-funded Medicaid or Medicare. These programs are intended as complements, not substitutes, for federally-funded health services. As non-citizens are discouraged or chilled from participating in federally-funded health services for which they are otherwise eligible, California’s costs for state-only health programs will go up.

- California has selected the option provided by federal law for twelve-month continuous certification periods for Medicaid. The Proposed Rule, which puts strict limits on overall time spent enrolled in community Medicaid (regardless of whether services are used during that period of time), undermines the purpose of this option by providing incentives for Medicaid “churn” (i.e., otherwise eligible immigrants dropping in and out of enrollment based on their perceived medical needs) caused by beneficiaries seeking to reduce risks to their immigration status. Churn creates undesirable gaps in coverage that “can disrupt the continuity of health care services, which can then lead to otherwise preventable health problems,” described in more detail below.

For each of these programs, California’s Legislature and/or state agencies relied upon federal immigration authorities’ long-standing guidance on immigrant inadmissibility, in which the public charge determination does not apply to community-based Medicaid, to assure and encourage immigrants’ participation. The efforts listed above have engendered serious reliance interests captured nowhere in DHS’ Proposed Rule, and which must be considered when considering the Proposed Rule. See, e.g., Perez v. Mortgage Brokers Ass’n, 135 S.Ct. 1199, 1209 (2015) (“[T]he APA requires an agency to provide more substantial justification when […] its prior policy has engendered serious reliance interests that must be taken into account.”). If immigrants’ admissibility

167 See, e.g., Cal. Welf. & Inst. Code § 14007.8 (authorizing full-scope Medi-Cal benefits regardless of immigration status for all children under 19, as long as they meet all other eligibility requirements).


169 Leighton Ku et al., Continuous-Eligibility Policies Stabilize Medicaid Coverage for Children and Could Be Extended to Adults with Similar Results, 32 Health Affairs 1576 (Sept. 2013), http://www.statecoverage.org/files/HA_Continuous_Eligibility_Policies_Stabilize_Medicaid_Coverage.pdf.
may be placed at risk if they receive any federally-funded Medicaid or the Medicare Low-Income Subsidy, or if immigrants are understandably chilled from accessing any public healthcare benefits, then California will be forced back to the drawing board, harming sovereign state interests and depriving the State of the benefit of its deep investments in its current public healthcare infrastructure.

B. The Proposed Rule’s Consideration of Nutrition and Healthcare Benefits as “Public Charge” Will Increase Uncompensated Hospital Care Costs

Along with threats to State law and policy, the Proposed Rule will cause direct economic harm to California in the form of increased uncompensated costs for hospital care. People living in poverty are more likely to consume nutrient-poor foods, and low-income families are disproportionately impacted by chronic illness.170 And it is well-established that reducing access to preventative and timely healthcare leads to increases in costs to the State from uninsured emergency room visits.171 High rates of uninsurance have “considerable financial implications for hospital systems—which are charged with providing care regardless of insurance coverage—and adversely impact community access to quality healthcare for local residents even if they are insured.”172 Indeed, DHS admits that the proposed regulation could lead to “increased use of emergency rooms and emergent care as a method of primary health care due to delayed treatment,” “reduced prescription adherence,” and “increases in uncompensated care in which a treatment or service is not paid for by an insurer or patient,” but does not weigh or quantify those costs to states.173 Those costs are substantial.

California is committed to full implementation of the ACA, which Congress enacted to increase access to care and improve healthcare affordability in part by increasing the insured proportion of the population. Since passage of the ACA, our State has experienced a considerable decrease in the number of uninsured residents—the uninsured rate dropped from 17% in 2013 to 6.8% in 2017—predominantly attributable to the expansion of eligibility in the Medi-Cal program and the newfound availability of health coverage through Covered California.174 Participation of eligible immigrants is a significant part of that improvement. For example, hundreds of thousands of non-citizens

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172 Id.
who have purchased health insurance through Covered California may be impacted or chilled by the Proposed Rule. Immigrants are, on average, more healthy than native-born U.S. residents, and their participation in health care systems lowers costs for everyone.  

The Proposed Rule would reverse these achievements and turn the virtuous circle of more healthcare coverage, better health, and lower costs on its head. Deferred care leads to more complex medical conditions that are more expensive to treat. As the American Hospital Association has warned, “foregoing care can exacerbate medical conditions leading to sicker patients and a higher reliance on hospital emergency departments. In turn, this could drive up costs for all purchasers of care.” This problem cannot be solved by simply obtaining private insurance; an estimated 59% of potential permanent residents reported that they did not have private health insurance. The Proposed Rule’s effect of pushing more people into the ranks of the uninsured would therefore have significant, negative consequences for California’s healthcare marketplaces and overall economy. See, e.g., U.S. House of Representatives v. Price, 2017 WL 3271445 (D.C. Cir. Aug. 1, 2017) (noting substantial risks facing California state hospitals for increased costs of uninsured, indigent patients).

C. The Rule Will Have a Broad Impact on California Schools and Student Nutrition

The National School Lunch Program and School Breakfast Program, among others (collectively “school meals” programs), help to fight hunger and obesity by

assisting schools in providing healthy meals to children. Although the Rule exempts these programs from the “public benefits” definition, the Rule will indirectly undermine school meals programs and their goal of ensuring adequate nutrition for America’s school children because the school meal programs’ automatic enrollment process is linked to participation in SNAP and Medicaid. California currently certifies over 730,000 children for free meals and over 310,000 children for reduced price meals due to their households’ participation in Medicaid, as well as almost 1.6 million children for free meals due to their households’ participation in SNAP. Without these automatic certifications, many eligible children will go without free or reduced-price school meals because of the transaction costs in applying for them or because of the fear and confusion the Proposed Rule creates for immigrant families seeking nutrition assistance. Moreover, the impact on nutrition for children in low-income districts will extend beyond the children of immigrants due to a provision in the school meals programs—the Community Eligibility Provision—that allows all students in eligible communities to obtain free school meals without a showing of individual eligibility. For example, where at least 40% of students in a particular school are directly certified for free meals through programs like SNAP, all students receive free school lunch. Thus, students in low-income areas who are not themselves eligible for nutritional assistance based on higher household income—but may nevertheless be struggling with hunger—will lose access to healthy meals provided by their local school to all children.

Threatening access to SNAP benefits leads to food insecurity, which is associated with numerous negative health outcomes in children, such as depression, fatigue, poor self-efficacy, and behavioral problems. The anti-immigrant policies and rhetoric of this administration have already impacted the health of children in immigrant families. In fact, healthcare providers surveyed across the State reported that two-thirds (67%) have observed an increase in families’ concerns about enrolling in Medi-Cal, WIC, SNAP or other public programs. And over 70% reported an increase in children


experiencing symptoms of depression (such as feelings of sadness, sleeping problems, loss or gain of appetite, and loss of interest in activities they used to enjoy). As a result of the Rule, low-income children who go without school lunches and nutritious food will struggle to learn in classrooms, impacting their educational advancement and that of their peers.

D. Reduced Utilization of Healthcare Services Will Reduce the State’s Ability to Protect the Public Against Health Threats

Reduction in utilization of healthcare benefits due to immigrants’ decisions to avoid or minimize potential risks to their immigration status will have a direct, long-term negative effect on California’s ability to protect the State’s public health. Health care is an evidence-based, well founded investment in the future health and productivity of Californians. California’s Department of Public Health is committed to the promotion of healthy communities, by, for example, providing for the control and prevention of infectious diseases like the Zika virus, HIV/AIDS, tuberculosis, and viral hepatitis. This commitment encompasses the State’s population, including immigrants, as public health affects all Californians, not just citizens. The department employs statewide efforts to prevent the spread of communicable disease. As reported by the State Department of Public Health, California invests about $7 million annually so that local health departments can administer half a million doses of influenza vaccine that protect vulnerable populations, such as pregnant woman, children under five, adults over 65, and people with chronic conditions who are at high-risk for flu-related complications.

Indeed, DHS correctly notes that the Proposed Rule will increase the prevalence of disease “among members of the U.S. citizen population who are not vaccinated,” but makes no attempt to quantify or weigh those harms. Protection of population health depends on broad-based access to healthcare services. DHS’s attempt to carve out public health efforts (by, for example, continuing PRWORA-defined exceptions for immunizations and testing and treatment of communicable diseases) is inadequate and ineffective in the face of the Rule’s inclusion of community Medicaid as a public benefit factor for an adverse public charge determination. In the experience of our State agencies, many people do not distinguish between different types of government-funded healthcare services, and suspicions that public programs will jeopardize adjustment of immigration status will affect utilization even of those services exempt from this Rule. As noted above, the impact from even leaked rules can have a dire impact on utilization of services statewide (particularly WIC services), despite state and local partners’ efforts

184 Id.
to dispel misunderstandings. As such, robust efforts to protect residents and their children from disease will be severely undermined. For example, the Vaccines for Children (VFC) Program helps families by providing vaccines at no cost to over 4,000 public and private providers who serve eligible children from birth through 18 years of age. In 2017, the State Department of Public Health reportedly distributed over 11 million doses of VFC vaccine to help immunize at least 2 million children, including more than 600,000 uninsured infants and children who are eligible to receive VFC doses. These individuals already face barriers to immunization and the Rule’s restrictions on healthcare benefits will make it harder for our State agencies to reach populations most in need. The Proposed Rule will severely undermine California’s effort to send an effective, consistent message that accessing public healthcare services—such as federal Title X family planning-funded preventative screenings or childhood immunizations—is safe and beneficial to all.

E. Public Investments in Healthcare, Nutrition, and Housing Save Lives, Produce Vast Savings for the State, and Lessen the Burden on State Emergency Services

Immigrant and mixed-immigration status families already endure inferior health outcomes, especially prior to recent expansions in healthcare access, due to “fear among immigrants about using the healthcare system at all,” a phenomenon the Rule will only exacerbate. For example, children of undocumented immigrants are often sicker when seeking emergency room care and frequently miss their preventive annual exams. Undocumented women are less likely to receive needed healthcare and preventive screenings than the general U.S. population, which leads to significantly higher rates of adverse conditions, including cervical cancer, birth complications, neonatal morbidity, respiratory distress syndrome, and seizures for newborns. These preventable illnesses become even more serious risks for immigrants under the Proposed Rule.

Healthcare access and nutrition go hand in hand. Food security simply translates to better health outcomes. And low-income adults participating in SNAP incur about

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188 Meredith L. King, Immigrants in the U.S. Health Care System, Ctr. for Am. Progress (June 2007), https://tinyurl.com/ImmHealth.
191 Leung C.W. et al., Household food insecurity is positively associated with depression among low-income supplemental nutrition assistance program participants and income-eligible
$1,400 less in medical care costs in a year than low-income non-participants. Research shows that food insecurity and poor nutrition can influence health and development. Further, the anxiety associated with unpredictable or intermittent meals may be a source of chronic stress, which can contribute to an increased risk of chronic conditions, including high blood pressure, heart disease, obesity, and diabetes. Access to SNAP among pregnant mothers and in early childhood improves birth outcomes and long-term health as adults. Thus, SNAP can offer a pathway to improved health and lower public healthcare expenditures.

Moreover, the costs to the State will be amplified by the increased healthcare costs of families facing food insecurity as well as the decreasing economic activity. As stated, SNAP participants incur less in medical care costs in a year than low-income non-participants. At the rate of $136 per household member per month in benefits, the total annual amount that will be denied to immigrant household members could be $2.47 billion statewide. Because every $1 in SNAP benefits generates $1.80 in economic activity, the loss in economic activity by California’s immigrant families (an estimated 1.5 million) who will forgo critical nutritional benefits would amount to more than $4.4 billion—in addition to the $2.1 billion in increased healthcare spending—an outcome that would largely impact Medicaid and Medicare services. This will cost California an estimated total of $6.5 billion annually. The Rule’s addition of SNAP will leave

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193 Id.
194 Id.
195 Id.
196 Id.
197 A Closer Look at Who Benefits from SNAP supra, note 90.
200 Id. (Number of ESL individuals served in FY 2017 = 1,514,564. Annual healthcare savings by SNAP beneficiaries: $1,400. Increased healthcare costs: 1,514,564 * $1,400 = $2,120,389,600.).
millions of working families struggling to put food on the table, leading to worse health outcomes, and at the same time weakening California’s economy.201

Discouraging eligible immigrants from accessing Medi-Cal, SNAP, and housing benefits, will ultimately transfer costs to state and local governments and community organizations, as those families rely on emergency services and public safety net programs, such as local shelters, homeless services, and food pantries. California’s food banks, for example, are already trying to fill the growing gap that is in part created by the under-enrollment in CalFresh to date.202 The Rule will likely augment the burden on food banks already providing for 4.6 million Californians (including 1.7 million children) facing food insecurity.203 Additionally, multiple immigrant-dense localities, including Sacramento County, the cities of Berkeley, Oakland, and San Jose, have recently declared homeless shelter crises due to a lack of space for a burgeoning homeless population.204 The “safety net for the safety net” simply cannot fulfill the increased need that the Proposed Rule could trigger. DHS lists some of these impacts, but fails to provide a thorough analysis and discussion, seemingly dismissing them as insignificant.205

VIII. THE PROPOSED RULE IS CONTRARY TO LAW

A. The Rule Violates the Equal Protection Clause

The Proposed Rule violates the Equal Protection clause in multiple ways. First, the Rule is indistinguishable for equal protection purposes from the enactment struck down by the Supreme Court in \textit{U. S. Dep’t of Agric. v. Moreno}, 413 U.S. 528 (1973), where the Court invalidated Congress’s decision to exclude from the food stamp program households containing unrelated individuals on the basis that it represented “a bare congressional desire to harm a politically unpopular group.” \textit{Id.} at 534. The classification here, as discussed at length in this letter, is “wholly without any rational basis” and is, in fact, counterproductive to its agency’s goals. It is the paradigm of a measure adopted to “harm a politically unpopular group”—consistent with this Administration’s determination to pursue an “American First” immigration agenda, a phrase which courts have acknowledged may well be “a code word for removal of

\begin{footnotesize}
\begin{enumerate}
\item See Ctr. on Budget and Pol’y Priorities, \textit{Most Working-Age SNAP Participants Work, But Often in Unstable Jobs} (May 15, 2018), \url{https://tinyurl.com/Most-SNAP-Families-work}.
\item See California Association of Food Banks, \textit{Alliance to Transform CalFresh}, \url{http://www.cafoodbanks.org/alliance-transform-calfresh}.
\item California Association of Food Banks, \textit{Hunger Fact Sheet}, (Accessed on Oct. 29, 2018) \url{http://www.cafoodbanks.org/hunger-factsheet}.
\item Cynthia Hubert and Alexandra Yoon-Hendricks, \textit{Sacramento County declares homeless shelter crisis. Here’s what that means}, Sacramento Bee (Oct. 16, 2018), \url{https://tinyurl.com/SACBee-Homeless-Crisis}.
\item 83 Fed. Reg. 51270.
\end{enumerate}
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Like the TPS termination at issue in *Ramos*, the Proposed Rule also discriminates on the basis of national origin and race and is subject to strict scrutiny. The Fifth Amendment contains an implicit guarantee of equal protection which prohibits classifications based on race and national origin absent a compelling governmental interest. Such classifications receive exacting scrutiny, and even facially neutral policies and practices will be held unconstitutional when they reflect a pattern unexplainable on grounds other than race. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). As described above, it is clear that the Rule’s effect will fall more heavily on immigrants of color.206 Moreover, multiple courts have found that the President’s racist and nativist statements relating to immigrants from Latin America, Africa, and other countries of origin for non-White immigrants are cognizable to support an equal protection cause of action.207

Finally, as a sudden change of course with respect to immigrant families’ use of public benefits, and one that hearkens back to the National Origins Quota Act of 1924, which “sought to tilt immigration to Western Europe,”208 the Rule is suspect of racial animus under *Arlington Heights*’ “historical background” factor. *See Centro Presente*, 2018 WL 3543535, at *15 (citing “allegedly unreasoned shift in policy”).

**B. The Rule Exceeds Federal Power with Respect to State Programs**

The Proposed Rule would undermine established California state law and represent major federal overreach. Indeed, DHS’s improper attempt to reinterpret the Immigration and Nationality Act (INA) would disrupt the cooperative federalism that characterizes programs such as Medicaid and interfere with State authority to regulate internal public welfare administration. The Proposed Rule’s expansion of the relevant

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206 *Through the Back Door*, supra note 23. Seventy-one percent of Mexicans and Central Americans, 69% of Africans, and 52% of Asian immigrants would fall below the 250% of FPL threshold, compared to only 36% of European and Canadian immigrants.

207 *See, e.g.*, *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 298 F. Supp. 3d 1304, 1315 (N.D. Cal. 2018), aff’d, 908 F.3d 476 (9th Cir. 2018) (denying motion to dismiss Equal Protection claims in DACA case, holding that allegations raised “a plausible inference that racial animus towards Mexicans and Latinos was a motivating factor in the decision to end DACA”; see 908 F.3d at 523–24 (Owens, J. concurring) noting that evidence “may well raise a presumption that unconstitutional animus was a substantial factor in the rescission of DACA”); *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1131–32 (N.D. Cal. 2018) (same in context of TPS, holding that plaintiffs had “plausibly pled that President Trump’s racial and national-origin/ethnic animus was a motivating factor in DHS’s TPS termination decisions”); *Centro Presente v. United States Dep’t of Homeland Sec.*, 2018 WL 3543535, at *14–15 (D. Mass. July 23, 2018); *Casa de Maryland, Inc. v. Trump*, 2018 WL 6192367, at *12 (D. Md. Nov. 28, 2018).

208 *Through the Back Door*, supra note 23.
criteria, and the ways in which it will upend State programs and policies, impermissibly reach into California’s sovereign interests and decisions. This is an apparent back-door attempt to drastically limit immigrant eligibility for public benefits not authorized by Congress. If Congress did attempt to accomplish it through withholding federal reimbursement, it would run afoul of Article I of the U.S. Constitution’s Spending Clause. See South Dakota v. Dole, 483 U.S. 203, 207-08 (1987) (recognizing limits on federal government’s ability to restrict state use of federal grant money). California is significantly harmed by the overreach embodied in this Proposed Rule, reflecting an intent to illegally override State laws and policy choices that are legal, supported by Congress, and supported by the citizens of the State.

C. The Rule Violates the Administrative Procedure Act

1. The Proposed Rule is Arbitrary and Capricious

For all of the reasons described in Sections I-VII above, the Proposed Rule is arbitrary and capricious. Although DHS may change its policies within statutory limits, the agency must “provide a reasoned explanation for the change.” Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016). Even if it were consistent with the INA—it is not—the Proposed Rule fails to provide the necessary “satisfactory explanation” for its proposed changes to the public charge determination. See Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

The Proposed Rule rejects the evidence-based reasoning in the 1999 Interim Final Rule and fails to adequately quantify or weigh the harms that will flow from its issuance. For example, the Rule admits that it may “increase the poverty of certain families and children, including U.S. citizen children.” Yet, the analysis omits any quantification of the actual costs to the Nation, its States, and communities from increasing the poverty of families and U.S. citizen children. This abject failure to provide the necessary analysis is a clear violation of the APA. See Regents, 279 F. Supp. 3d at 1045–46 (citing DHS’s failure to give “consideration to the disruption a rescission would have on the lives of DACA recipients, let alone their families, employers and employees, schools and communities” in holding DACA rescission arbitrary and capricious).

The proposed changes do not result from any new evidentiary developments, nor are they supported by any new report or analysis that was not available to DHS when formulating the 1999 Interim Final Rule. Indeed, the Proposed Rule appears to be an ideologically-driven, underhanded effort to radically transform national immigration policy without Congressional approval. Such action violates the APA. See Utility Air Regulatory Group v. E.P.A., 134 S.Ct. 2427, 2444 (2014) (holding that federal agency
exceeds its authority when it brings about an “enormous and transformative expansion in [the agency’s] regulatory authority without clear congressional authorization”).

Prohibiting access to healthcare, for example, is irrational and will fail to result in the Rule’s stated goal of reducing the costs of the social safety net. It is also aimed at a nonexistent problem. Most immigrants who have been in the U.S. for fewer than five years have few options for accessing SNAP or healthcare through public benefit programs. And immigrants use fewer healthcare benefits than native-born Americans, accounting for less than 10% of overall healthcare spending.210 Recent immigrants were responsible for only 1% of total spending.211 Immigrants spend half to two-thirds less on healthcare than people born in the U.S. According to a Medical Expenditure Panel Survey data from 2000-2009, unauthorized immigrants spent $15.3 billion annually on healthcare, while legal residents spent $28.4 billion, and naturalized immigrants spent $52.6 billion—together reaching a total of $96.5 billion—an amount still lower than the slightly more than $1 trillion spent by US natives alone.212 In fact, immigrants paid more toward medical expenses than they withdrew, providing “a low-risk pool that subsidized the public and private health insurance markets.”213 Allowing immigrants access to healthcare services is not only good public health policy, but it also allows the State’s healthcare market to benefit from immigrants’ lower healthcare costs.214 The Rule’s proposed changes are arbitrary—they are based on neither disproportionately high use of public benefits by immigrants nor rising costs to healthcare markets.

Not only has DHS failed to provide a reasoned basis for the proposed change to public charge determinations, the structure of the Rule will impact access to and administration of public benefits in a manner that demonstrates the Rule’s fundamentally arbitrary and capricious nature. The Rule applies only to a limited portion of the immigrant population—applicants for admission, change or extension of visas, and adjustment of status.215 The Rule further exempts a number of persons within these categories, reducing the universe of individuals to whom it applies even more.216 Consequently, only a relatively narrow portion of benefits-eligible immigrants will have their use of benefits counted against them in adjustment of status or visa application

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211 Id.
213 Flavin, supra note 175. In Los Angeles County, for example, 27% of medical expenditures for immigrants were out-of-pocket expenses, compared to 20% for U.S.-born.
214 Id.
processes. This in turn means that the Rule will directly impact a relatively narrow group of individuals, and will have a concomitantly narrow result both on its ostensible goal of encouraging “self-sufficiency” and on federal costs associated with providing such benefits. The much broader impact will come from the Rule’s “chilling effect,” on immigrant families as described in Section III.217 Yet, DHS fails to analyze whether the limited, so-called “benefit” of depriving a narrow group of immigrants of the use of healthcare, nutrition, and housing benefits outweighs the tremendous cost that will follow in terms of both chilling effect on individuals, and the states’ and localities’ administration of these and related benefits. This is an abdication of DHS’s duties under the APA to consider “the advantages and the disadvantages of agency decision” before taking action. Michigan v. EPA, 135 S.Ct. 2699, 2707 (2015) (citing 5 U.S.C. § 706(2)(A)). The alternative—that the Rule is designed as an intentionally confusing regulation meant to dissuade eligible immigrants from needed benefits—would certainly be a “clear error of judgment” that would fail the APA’s most basic test of rational decision-making. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

2. The Proposed Rule Exceeds Agency Authority

The term “public charge” is used twice in the INA but is not defined in the statute itself. The term dates back to the first national immigration law, which in 1882 excluded “aliens” deemed “likely to become a public charge” after coming to the U.S.218 A deportability provision using the term “public charge” was added in 1903.219 Congress considered whether to further define public charge in 1952, but decided against it.220

Although USCIS is given discretion to make public charge determinations, that discretion is clearly limited. The Court shifted from a deferential view of agency public

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218 Act of Aug. 3, 1882, 22 Stat. 214. Section 2 of this law provides, in part, “if […] there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge, [officials] shall report the same in writing to the collector of such port, and such persons shall not be permitted to land.”
219 Act of Mar. 3, 1903, 32 State. 1213. There, public charge was listed among a long list of qualities Congress considered inadmissible at that time: “All idiots, insane persons, epileptics, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with a loathsome or with a dangerous contagious disease; persons who have been convicted of a felony or other crime or misdemeanor involving moral turpitude; polygamists, anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States,” prostitutes, and “any person whose ticket or passage is paid for by the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes.”
220 S. Rep. 81-1515 at 349.
charge determinations, see, e.g., *Yamataya v. Fisher*, 23 S.Ct. 611 (1903), *In Re Rhagat Singh*, 209 F. 700 (N.D. Cal. 1913), to a much more limited approach in *Gegiow v. Uhl*, 239 U.S. 3 (1915). There, the Court rejected a decision by the Immigration Commissioner excluding an immigrant under public charge based on grounds that were not specifically set forth in the statute, holding that “[t]he statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases.” *Id.* at 9.

Congress has not defined the public charge doctrine with specificity. Contrary to DHS’ statement, the Proposed Rule would not align public charge policy with the existing principles set forth in the Personal Responsibility and Work Opportunity (PRWORA) Act of 1996. *Cf.* 83 Fed. Reg. 51123. Congress considered the same types of concerns about immigrants’ ability to be self-supporting but chose not to alter the public charge law. Indeed, in PRWORA, Congress authorized states to provide benefits for immigrants who are ineligible for federal benefits due to the five-year federal “waiting period.” *See* 8 U.S.C. § 1621(d), 1622. Subsequent legislation allowed states to waive federal waiting periods for children and pregnant women, as California has.221 The Proposed Rule’s interpretation of the public charge statute is inconsistent with Congress’s intent to allow immigrants to access healthcare, nutrition, and housing benefits.

Congress’ only act specifically elucidating the “public charge” term is the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996’s amendment to the INA requiring immigration officials to consider certain factors when determining either admissibility or eligibility for adjustment of status on public charge grounds, including, “at minimum,” age; health; family status; assets, resources, and financial status; and education and skills. 8 U.S.C. § 1182(a)(4)(B)(i)(I)-(V). By heavily weighting factors such as an immigrant’s likelihood of receiving Medicare Part D’s Extra Help, for example, DHS goes beyond the authority of IIRIRA, making some factors effectively determinative in isolation, contrary to IIRIRA’s clear requirement that multiple factors be considered. Likewise, the institution of strict income thresholds is clearly at odds with Congressional intent. In combination with chilling effects and confusion regarding whether a specific public benefit will interfere with an individual’s pathway to citizenship or legal residence, the Proposed Rule effectively creates an insuperable bar to receipt of benefits.

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Finally, the impact the Proposed Rule will have on California’s administration of programs is of such a magnitude that it could only be justified if it hewed more closely to Congress’s intent regarding the scope of “public charge,” rather than veer sharply from it as the Rule does. See *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) (where statute is ambiguous, it must be interpreted to avoid intrusion on state governmental functions). The Proposed Rule’s intrusion into California’s healthcare, nutrition, and other critical public health programs appears to be a back-door attempt to drastically limit immigrant participation in benefits programs. Core federalism principles weigh strongly against construing the public charge statute to apply to the benefits outlined in the Proposed Rule.

3. **The Proposed Rule Conflicts with Federal Law**

   To comply with the APA, the proposed regulation must be in accordance with law, and DHS must evaluate and explain how its proposed rule conforms with relevant laws. The Proposed Rule, however, conflicts with several federal and state statutes. This conflict goes unaddressed in DHS’s analysis. Such flaws render the Proposed Rule unlawful.

   Numerous federal laws prohibit discrimination on the basis of characteristics that are directly targeted by the Proposed Rule, such as disability, age, and language proficiency. These include the Rehabilitation Act; Developmental Disabilities Assistance and Bill of Rights Act; the Americans with Disabilities Act, as implemented by the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999); Title VI of the Civil Rights Act; Section 1557 of the Affordable Care Act; and the Older Americans Act. The Proposed Rule contravenes these laws, targeting disabled immigrants and older adults as described in Section VI above. California state law likewise protects people who apply for or receive public assistance benefits from discrimination in the administration of those programs. The Proposed Rule would embed discriminatory preferences into immigration law, contrary to federal and state civil rights laws.

   Furthermore, the Medicare Modernization Act and the Medicaid Act, as amended by the ACA, promote broad-based, affordable access to healthcare to all eligible individuals. Congress has further empowered States to make their own decisions about certain immigrant eligibility, as described above. California has exercised those options in its own approved state Medicaid plan. Yet, the Proposed Rule, by targeting California’s immigrants use of and access to healthcare, directly undermines the authority granted to the State by federal law.

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222 See, e.g., Cal. Welf. & Inst. Code § 10000 et seq. (stating that public aid “shall be administered and services provided promptly and humanely, with due regard for the preservation of family life, and without discrimination […]”).
Finally, applying public charge to non-immigrant visa holders who are seeking to change or extend their visas is not grounded in any statutory authority. This change harms California, which has a strong interest in its investments in its students, and in retaining them in our population through further student visas or issuance of new work visas.  This proposed extension not only lacks a statutory basis, it is irrational and arbitrary.

4. The Proposed Rule Fails to Undertake the Required Analyses

In addition, the Proposed Rule violates the APA because it fails to undertake the proper analyses required by law.

a. Inadequate Analysis of Federalism Impacts

As the Proposed Rule acknowledges, Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that has substantial direct effects on the states, imposes substantial direct compliance costs on state and local governments, or has other federalism implications. DHS summarily concludes that the Proposed Rule “does not have substantial direct effects on the States” and therefore “this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.” As is demonstrated throughout this letter, this conclusion is erroneous. The Proposed Rule will significantly undermine California’s state policies and programs and will impose substantial costs on state and local governments. By failing to properly and adequately analyze these impacts, the Proposed Rule violates the APA.

b. Inadequate Analysis of Economic Impact

Executive Orders 12866 and 13563 require agencies to “assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits.” DHS acknowledges that the Proposed Rule is a “significant regulatory action” because it will have an annual effect on the economy of $100 million or more. However, its attempts to fulfill the requirements that flow from this determination are wholly inadequate.

223 See, e.g. Jie Zong and Jeanne Batalova, International Students in the United States, Migration Pol’y Inst. (May 09, 2018), https://www.migrationpolicy.org/article/international-students-united-states (Indicating international students have transitioned into U.S. jobs at low rates in recent years, pointing to limited availability of work visas as the main barrier. And only 45% of foreign student graduates were able to extend their visas to work visas where the student attended university).


226 Id.
The Rule briefly discusses the direct costs to applicants and employers from application fees, and devotes two short paragraphs of a 182-page regulation to a discussion of the impacts to “state and local economies, large and small businesses, and individuals.” The Rule’s passing reference to the impacts to immigrants has been discussed at various points of this comment; these are cursory and devoid of meaningful qualitative and quantitative analysis. This anemic economic analysis gives woefully insufficient attention to the steep costs to immigrant residents in need of health, nutrition or housing benefits; to the workforce and economy; and to State programs and healthcare systems. The failure to adequately analyze the Rule’s impacts violates the law.

c. The Proposed Rule Fails to Analyze the Rule’s Effect on the Well-Being of Families

Federal departments and agencies are required to determine whether a proposed policy or regulation could affect family well-being. In relevant part, agencies must assess whether the proposed regulatory action: (1) Impacts the stability or safety of the family; (2) Helps the family perform its functions; and (3) Affects disposable income or poverty of families and children. If the regulatory action does financially impact families, the agency must determine whether that impact is justified and prepare an impact assessment to address criteria specified in the law.

DHS states that it has determined “that the proposed rule may decrease disposable income and increase the poverty of certain families and children, including U.S. citizen children,” and yet still fails to provide any meaningful family assessment. DHS merely concludes that “the benefits of the action justify the financial impact on the family.” This ignores the profound impact the Proposed Rule will have on child and family wellbeing, as discussed above, and points to an ill-considered decision by the department to overhaul decades of welfare policies designed to precisely provide for the health and wellbeing of working families.

* * *

Ultimately, DHS has utterly failed to account for the potential impact the Proposed Rule has on states and their residents, especially in California. The Rule will have truly damaging and irreparable ramifications to our State’s families, employers,
economy, and public agencies for years to come. For the reasons set forth above, California strongly opposes the Proposed Rule and urges that it be withdrawn.

Sincerely,

XAVIER BECERRA
California Attorney General