BEFORE THE
DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP AND IMMIGRATION SERVICES

COMMENTS OF
SANCTUARY FOR FAMILIES

ON NOTICE OF PROPOSED RULEMAKING REGARDING
INADMISSIBILITY ON PUBLIC CHARGE GROUNDS

Notice of Proposed Rulemaking: Inadmissibility On Public Charge Grounds	:

[redacted] 2018

I. INTRODUCTION

Sanctuary for Families ("Sanctuary") appreciates the opportunity to submit comments on the Department of Homeland Security's ("DHS's") notice of proposed rulemaking imposing prescriptive criteria for determination of whether an alien is inadmissible to the United States under Section 212(a)(4) of the U.S. Immigration and Nationality Act ("INA") on grounds that he or she is likely at any time to become a "public charge" (the "Proposed Public Charge Rule," or the "Proposed Rule" or "Proposal"). By way of background, Sanctuary is the largest nonprofit in New York State dedicated exclusively to serving victims of gender-based violence, including domestic violence, sex-trafficking, female genital mutilation, forced marriage and campus sexual assault. In FY 2017-2018, Sanctuary provided direct services to 13,221 victims of gender-based violence. Approximately 75% of Sanctuary's adult clients include immigrant women, many of whom have United States citizen children. On average, our clients have two children, so nearly all of them fall below the Federal poverty guidelines: some 82% of Sanctuary clients report a household income of $20,000 or less. Sanctuary is committed to the safety, healing, and self-determination to these thousands of victims and provides them with a variety of services, including legal representation, all free of charge. Sanctuary's legal arm, The Center for Battered Women's Legal Services (the "Center"), plays a leading role in advocating for legislative and public policy changes that further the rights and protections afforded battered women and their children, and provides training on domestic violence and trafficking to community advocates, *pro bono* attorneys, law students, service providers, and the judiciary. The Center also provides legal assistance and direct representation to indigent victims, mostly in family law and immigration matters, including immigrant children. Sanctuary and its Center are subject-matter experts in humanitarian forms of immigration relief and other immigration matters.

Sanctuary opposes the Proposed Public Charge Rule in all respects. Not only is the Proposed Public Charge Rule cruel and punitive, predicated on intimidating otherwise eligible aliens into not using benefits to avoid being categorized as "public charges," it is unlawful, and because its key factual determinations are unsupported by any evidence, DHS lacks any authority in law to promulgate the Proposed Rule and it would be void *ab initio* if adopted. For all of the reasons set forth in the remainder of these comments, among others, as well as the central tenet that, in order to Act, the Secretary of DHS must find authority in the Constitution or law to do so and has not done so here, the Proposed Rule is arbitrary and capricious, not in accordance with law, and is contrary to the plain language of INA, and, therefore, is not entitled to any deference. Its arbitrariness is exemplified by its fatally flawed and factually unsupported cost-benefit analysis. DHS must withdraw the Proposed Rule in its entirety, and continue to rely on current, long-standing regulatory guidance that is consistent with the statutory framework in making public charge determinations. DHS has not even attempted to rebut or explain why the current system of public charge review and determination is not working or requires revision at all, let alone support the draconian and unprecedented revisions it now proposes.

The Proposed Rule also runs contrary to the President's stated regulatory rollback agenda as specifically set forth by the Office of Management and Budget and its Office of Office of Information and Regulatory Affairs ("OIRA") and thus creates confusion and concern as to why an agency would impose more regulations to solve a problem which it has not demonstrated even exists. As such, the question arises as to why DHS would undertake this action even if it properly could.

In the balance of our comments, we set forth a brief overview of the Proposed Public Charge Rule and how it changes current rulemaking and practice, and address some of the

proposal's details and elaborate on Sanctuary's specific comments. Given the broad implications of DHS's Proposed Rule, Sanctuary's comments focus on some key points that are of particular importance to Sanctuary and the clients whom we serve. Its comments are not intended to be comprehensive or to address all aspects of the Proposed Rule.

II. THE PROPOSAL IS ARBITRARY, CAPRICIOUS AND NOT OTHERWISE IN ACCORDANCE WITH LAW AND VIOLATES THE ADMINISTRATIVE PROCEDURES ACT

A. As An Initial Matter, The Proposal Marks A Striking Departure From Current Law and Practice And DHS Has Failed To Provide A Reasoned Analysis For Its Change.

"An Agency's view . . . may change . . . [b]ut an agency changing its course must supply a reasoned analysis." *Motor Vehicles Mfrs. Ass'n of U.S. Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). DHS has proposed vast changes from its existing regulatory scheme with respect to determination of a "public charge," as outlined below, but provides no such "reasoned analysis" in its promulgation of the Proposed Rule.

B. The Proposal Fails Because DHS Cites No Evidence For Its Conclusion That Acceptance of Past Benefits Means An Individual Will Require These Same Benefits In The Future.

The Secretary lacks the authority to promulgate this Proposal because it is devoid of any factual support and is accordingly beyond the scope of her, or any, rule-making authority. Indeed, this is not a Proposal where one need quibble as to whether the Secretary's proposal is "unsupported by substantial evidence" as it is not supported by any evidence whatsoever. Surely, none is not substantial.

This failure is by no means a mere procedural deficiency. Rather, the conclusion leading to the Proposal is bereft of logical support. Many people who come to our country and will go on to make substantial contributions to our society and economy, arrive with nothing. Our

government recognizes this through its support of non-governmental organizations which work with these individuals to locate assistance that can supply life essentials such as housing, food, and clothing, for a limited period of time until such a person can locate employment and thus a source of income rendering the public benefits no longer necessary.

Nowhere is this truer than in the case of the victims of human trafficking. When these victims are identified and removed from what is quite simply a crime scene, they inevitably have nothing, have accumulated nothing for their work, and will require assistance for some period of time. While they are not subject to the Proposal at the time through the application of the INA, 8 U.S.C. § 1101(a)(15)(T), should it become the case that they wish to remain in our country and apply for an adjustment of status, they will now face the rigid requirements of the Proposal based on the Secretary's conclusion that their acceptance of covered benefits at the time they escaped their enslavement is suggestive of a need for those benefits in the future. Such a conclusion is not only an absurdity, but contrary to the controlling statutes that amended the term "qualified aliens" to explicitly include holders of T nonimmigrant status. 8 U.S.C. § 1641(c)(4).

C. The Proposal Fails Because DHS Cites No Evidence For Its Conclusion That The Purported Purpose of the Rule Would Be Met By Adoption Of These Rule Changes.

This Proposal likewise fails for because it does not cite any evidence at all for the proposition that the underlying purposes of the Rule will be met if it is promulgated. Again, an analysis is not only not helpful, but impossible as the Secretary has provided nothing to analyze and accordingly must be presumed to have analyzed nothing herself. Furthermore, the lack of support is hardly surprising. It is illogical and not rooted in a thought process which carries out the Will of the Congress.

The Secretary's Proposal usurps the role of Congress which has determined, *see* 8 U.S.C. § 212(a)(4), that those likely to become public charges ought to be inadmissible, or in this case,

ineligible for a visa extension, permanent residence, or citizenship. This represents a rational immigration policy assuring that our country is not burdened with an unfair task. Factors such as age, health, family status, assets, resources, financial status, education, and skills, all make up the facts placed before the Secretary when she makes her decision, *id.*, at § 212(a)(4)(B)(I-V). However, taking as an example, the trafficking victim who may have required significant public support to recover from her abuse and was thus a public charge in her entirety for a year or two after law enforcement has rescued her, but has gone on to become self-supporting, this Proposal would require that she be denied a visa extension, permanent residency or citizenship, effectively for having been the victim of a crime.

D. The Proposal Fails Because, By Its Terms, It In Fact Eliminates Discretion On The Part Of The Immigrant Adjudicator To Undertake The Type of Public Charge Inquiry Required By The Statute.

The Proposed Rule applies a considerably expanded and highly specific test to determine if applicants for a visa, admission, extension of nonimmigrant stay, or adjustment of status would be likely to use specified public benefits in the future. Immigration officials have long had substantial discretion in their review of public charge factors. This discretion affords them the opportunity to engage in a genuine inquiry about whether an applicant might be likely to become a public charge at some point in the future, or whether an applicant who previously has relied on a specific public benefit will provide a net contribution to the American economy in the future, given his or her current employment status or prospects. But the Proposed Rule undermines the ability of officers to use their own judgment to asses an applicant's situation and replaces that with a significantly more rigid mechanism that will remove the discretion from the decision makers. This is simply intended to substantially restrict lawful immigration, even in situations in which an applicant's admission will prove a net economic gain.

Although the Proposed Rule, on its surface, claims to hew to the prior rule reflecting the totality of an applicant's circumstances in making public charge determinations, in practice, it will prescribe the weight associated with each factor so narrowly that it forces the hand of immigration adjudicator. Applicants would likely be deemed inadmissible if they have received, or are supposedly likely to receive, even a modest amount of support from one or more public benefits – a "heavily negative" factor. Indeed, the Rule proposes to weigh an *extensive* range of factors as "heavily negative." *See* 83 Fed. Reg. at 51198-51203. But the only factor weighed as "heavily positive" is an income or resources of over $30,000 for a single person, or $63,000 for a family of four.[1] *See* 83 Fed. Reg. at 51204. (For reference, the median household income in the United States is roughly $61,000.)[2] In commanding this formulaic weighing system, the Proposed Rule views each factor in a silo, and plainly tips the scales in favor of an inadmissible determination. This proposed methodology departs from the current practice of evaluating how each factor interplays with the others, and harmonizing the relative importance of the varying factors – as determined by the adjudicator – into a public charge determination.

E. The Proposal Fails Because Its Cost-Benefit Analysis Is Fatally Flawed.

DHS's cost-benefit analysis is, at best, superficial, and at worst, entirely lacking in factual support. As an initial matter, DHS has failed to estimate one of the most critical costs of the rule – the number of immigrants who will be denied status and the resulting loss in taxpayer revenues. DHS assumes that the rule will coerce and intimidate otherwise eligible aliens into foregoing benefits and estimates the number of aliens affected, but makes no similar assumption or estimate about immigrants who choose not to immigrate to the United States or attempt to

[1] *See also* "Only Wealthy Immigrants Need Apply," October 10, 2018, Fiscal Policy Institute, at p. 2, http://fiscalpolicy.org/wp-content/uploads/2018/10/NY-Impact-of-Public-Charge.pdf.
[2] *See Income and Poverty in the United States: 2017*, U.S. Census Bureau, September 2018, at p. 1, https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-263.pdf.

obtain legal status. *Compare* 83 Fed. Reg. at 51269 (estimating 333,239 households or public benefits-receiving members of households who will unenroll or forego benefits within one year of application as a result of the Proposed Rule), with 83 Fed. Reg. at 51260 ("DHS is not able to quantify the number of aliens who would possibly be denied admission based on a public charge determination pursuant to this proposed rule, but is qualitatively acknowledging this potential impact.").[3] The National Academy of Sciences estimates that a recent immigrant to the United States will contribute, in net present value, $150,000 more in taxes than he or she receives in benefits over their lifetime.[4] Yet DHS completely fails to consider the loss of these tax revenues in its cost-benefit analysis, making no mention of the contribution of immigrants to the economic integrity of the United States and what it will mean to lose these contributions as a result of the Proposed Rule.

Even without consideration of these losses, the total estimated costs of the Proposed Rule over a 10-year period are enormous – up to approximately $1.3 billion undiscounted, and $1.1 billion and $910 million if discounted at rates of 3 and 7 percent, respectively. *See* 83 Fed. Reg. at 51273. Even these figures omit yet another important cost of DHS's new rule – the impact that reductions in federal and state transfer payments (due to coerced disenrollment from programs for which participants are legally eligible) will have on downstream and upstream state and local economies, large and small businesses, and individuals. While DHS "recognizes" this cost, it is given short shrift, and there is no corresponding quantification of these costs. *See* 83 Fed. Reg. at 51118. According to DHS's own assessment, negative impacts would sweep in

[3] DHS' inability to estimate the number of aliens who will be denied on public charge grounds is a function of the arbitrariness of the criteria used by DHS to establish public charge grounds in its Proposed Rule – it is simply impossible to determine how many immigrants will be denied based on these arbitrary criteria.
[4] The Economic and Fiscal Consequences of Immigration (2017), A Report of the National Academy of Sciences, Panel on the Economic and Fiscal Consequences of Immigration, Francine D. Blau and Christopher Mackie, Editors, Committee on National Statistics, Division of Behavioral and Social Sciences and Education.

healthcare providers (for example, those participating in Medicaid), pharmacies providing prescriptions to participants in certain Medicare programs, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in the Supplemental Nutrition Assistance Programs ("SNAP," or foods stamps), agricultural producers who grow foods that are eligible for purchase using food stamp benefits, and landlords participating in federally funded housing programs. *Id.* *See also* 83 Fed. Reg. at 51268 (same).

While DHS has not quantified these upstream and downstream losses, others have. The Fiscal Policy Institute, just looking at New York State alone, and assuming a moderate estimate of induced disenrollment rate of 25%, estimates the potential economic ripple effects of the Proposed Rule (loss to grocery stores, doctors' offices, hospitals, etc.) at $3.6 billion, with 25,00 jobs lost. At a higher induced enrollment rate of 35%, the estimated potential economic impacts from upstream and downstream losses rise to an estimated $5.0 billion and 34,000 unemployed in New York State.[5]

By DHS's own admission, the effect of the Proposed Rule will be to push to private organizations, such as Sanctuary, the needs of those who unenroll or forego assistance from programs to which they are legally entitled. *See, e.g.*, 83 Fed. Reg. 51274 (referencing reliance on private organizations, among others). This effectively shifts the responsibility to care for at-risk immigrants (including trafficking victims) to these private organizations. This amounts to an unfunded mandate for service providers to substitute the provision of essential services to immigrants normally borne by government. Indeed, the very publication of these proposed regulations have frightened Sanctuary clients into inquiring about terminating food stamp benefits, and turning to Sanctuary's limited food pantry to supplement their meager family diet.

[5] *See* "Only Wealthy Immigrants Need Apply," October 10, 2018, Fiscal Policy Institute, at p. 5 http://fiscalpolicy.org/wp-content/uploads/2018/10/NY-Impact-of-Public-Charge.pdf

Even more worrisome, other clients are seeking to terminate their lawfully permitted access to Medicaid, lifesaving care for which Sanctuary is entirely unequipped to offer.

Not only does DHS fail to quantify the costs of this likely effect, it callously ignores that private organizations such as Sanctuary lack the resources to serve in this role, putting the lives and health of their clients at risk, even while noting that the Proposed Rule may lead to purportedly "non-monetizable" adverse consequences on human health and society. These include: "[w]orse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants or children, and reduced prescription adherence;" "increased use of emergency rooms ... as a method of primary health care due to delayed treatment;" "increased prevalence of communicable diseases;" "increases in uncompensated care;" "increased rates of poverty and housing instability;" and "reduced productivity and educational attainment." 83 Fed. Reg. at 51270. None of these costs are included in the already enormous, quantified dollar burden of the Proposed Rule. The human cost of lives lost to starvation, homelessness and disease completely belies the humanitarian relief that the Violence Against Women Act was intended to afford Sanctuary's clients, some of society's most vulnerable individuals, who are also often the mothers and primary caretakers of U.S. citizen children.

The purported primary "benefit" of the Proposal, would, according to DHS, be "to better ensure that aliens who are admitted to the United States or apply for adjustment of status would not receive one or more public benefits as defined … in the proposed 212.21(b) …." Yet DHS categorizes this supposed "benefit" as qualitative only, and, therefore, never even seeks to quantify or define it. *See* 83 Fed. Reg. at 51119-51120, 51274. Moreover, as explained in

Section III.C. of these comments, this stated goal would not even be achieved by the Proposed Rule, which, among other arbitrary effects, would result in defining those who are financially self-sufficient as "public charges" ineligible for admission, visas, adjustment or change of status, or extension of stay.

III. THE PROPOSED PUBLIC CHARGE RULE IS UNLAWFUL BECAUSE IT IS CONTRARY TO THE PLAIN LANGUAGE OF THE IMMIGRATION AND NATIONALITY ACT, IS NOT ENTITLED TO DEFERENCE, AND IS UNREASONABLE

A. The Proposed Rule Is Contrary To The Plain Language Of The INA, And, Therefore, Would Not Be Entitled To Deference By A Reviewing Court.

The Proposed Public Charge Rule is not only arbitrary and capricious, but as shown below, is contrary to the plain language of the INA, and, therefore, under well-established principles of administrative law, exceeds DHS's statutory authority, is unlawful, and would be entitled to no deference by a reviewing court. This is because the Proposed Rule, in elevating any receipt of benefits, including past receipt, as a decisive factor in making public charge determinations, directly contradicts the unambiguous directive of the INA that such determinations be entirely prospective in nature.

When considering the lawfulness of an agency's statutory interpretation as embodied in a rulemaking, courts employ the familiar, two-step interpretive framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). Under *Chevron*, it is first asked whether the statute at issue "unambiguously forecloses the agency's interpretation," *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009), *i.e.*, "whether Congress has directly spoken to precise question at issue." *Chevron*, 467 U.S. at 843 (*Chevron* "step 1"). If so, as *Chevron* puts it, "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.,* 476 U.S. at 842-843. In making this determination, courts examine "the statutory text, the

structure and context of the statute as a whole, and the legislative history in turn." *Children's Hospital Ass'n of Texas v. Azar*, 2018 WL 1178024 at *11 (D. D.C. 2018) (finding under *Chevron* step 1 that a Health and Human Services administrative rule was inconsistent with the plain language of the Medicaid Act). *See also Mexichem Fluor, Inc. v. Environmental Protection Agency*, 866 F.3d 451, 459 (D.C. Cir. 2017) ("*Mexichem*") (finding that EPA's "strained reading" of a Clean Air Act statutory term "contravenes the statute and thus fails at *Chevron* step 1"). Put simply, under *Chevron* step 1, the threshold question is whether the statute is unambiguous with respect to the issue in question, and if so, agency interpretations are accorded no deference.

The Proposed Public Charge Rule fails at *Chevron* step 1. The INA in relevant part could not be clearer – a public charge inadmissibility determination must be prospective in nature. No single current or past factor or occurrence can be determinative. Yet the DHS would now deny on public charge grounds adjustment of status, visas, visa extension, or admission because applicants currently receive or have in the past received any of a broad array of public benefits, including Temporary Assistance for Needy Families ("TANF"), Medicaid, Medicare Part D Low Income Subsidy, assistance through the Supplemental Nutrition Program ("SNAP" or food stamps), institutionalization for long-term care, Section 8 Housing Choice Voucher Program or Project-Based Rental Assistance, or Public Housing.[6]

The INA, at section 212(a)(4) specifically states:

> Any alien, who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, *is likely at any time to become a public charge* is inadmissible.

8 U.S.C. §1182(a)(4)(A) (emphasis added).

[6] This expansion of public benefits to virtually all categories is needlessly broad, unsupported and reclassifies critical programs that have never before been treated as disqualifying forms of assistance.

This statutory language is unambiguous – a determination of public charge inadmissibility must be forward looking. The plain meaning of the text is clear – a public charge determination cannot be based merely on a past occurrence, such as past receipt of public benefits. Congress has directly spoken to the issue. DHS itself recognizes this in multiple statements in its preamble to the Proposed Rule, emphasizing the prospective nature of the public charge determination. *See, e.g.*, 83 Fed. Reg. at 51114 (applicants "must establish that they *are not likely at any time to become* a public charge") (emphasis added); 51116 (clarifying that "evaluating *the likelihood of becoming a public charge is a prospective determination*") (emphasis added); 51122 (noting factors in determining "the likelihood of the alien *becoming a public charge*") (emphasis added).

These, however, are hollow words – the actual language of the rulemaking and other DHS pronouncements undercut these statements and are contrary to the plain language of Congress's unequivocal directive that public charge determinations be strictly prospective in nature. DHS arbitrarily establishes as a "heavily weighted negative factor" the receipt of "one or more public benefit[s] ... within the 36 months immediately preceding the alien's application for a visa, admission, or adjustment of status." 83 Fed. Reg. at 51292. The term, "heavily weighted negative factor" is, essentially, a thinly-veiled euphemism for rejection on public charge grounds.

This is reinforced by DHS's proposal regarding treatment of nonimmigrant requests for extension of stay or change in status. *See* proposed 8 C.F.R. § 214.1(a)(3)(iv) ("as a condition for approval of extension of status, the alien must demonstrate *that he or she has not received* since obtaining the nonimmigrant status he or she seeks to extend . . . [or] is not receiving . . . a public benefit . . .") (emphasis added); 8 C.F.R. § 214.1(c)(4)(iv) (same); 8 C.F.R. § 248.1(a)

("as a condition for approval of a change of nonimmigrant status, the alien must demonstrate *that he or she has not received* since obtaining the nonimmigrant status from which he or she seeks to change . . . [or] is not currently receiving . . . public benefits . . .") (emphasis added); 8 C.F.R. § 248.1(c)(4) (same).

DHS's position is also inconsistent with the legislative history of the public charge statute. *See, e.g.*, Grounds for Exclusion of Aliens under the Immigration and Nationality Act, Historical Background and Analysis, Committee on the Judiciary, House of Representatives, Sept. 1988, at 119-123 (summarizing the history of the economic grounds for exclusion of aliens, and emphasizing the prospective language of the public charge provisions of the INA). DHS's new-found position also conflicts with historic case law in this area and these decisions' reinforcement of the well-articulated intent of Congress.

> We are convinced that Congress meant the act to exclude persons *who were likely to become* occupants of almshouses for want of means with which to support themselves in the future . . . The question is not: Is there a remote possibility that she may become a public charge, or may exigencies arise which might make her a public charge, but is there any evidence that she is or *is likely to become a public charge* – that is, a pauper, or a poor person who will be, or might properly be, sent to an almshouse and supported at the public expense?

See Ex parte Mitchell, 256 F. 229, 233, 234 (N.D. NY 1919) (emphasis added) (internal quotations and citations omitted).[7]

[7] This case, among others, is cited in the Proposed Rule, but DHS glosses over the actual holding of the case – rejecting a deportation order on grounds of lack of evidence that an individual would likely ever become a public charge, and concluding that the petitioner "is illegally restrained of her liberty, and is entitled to her discharge and to be set at liberty." *Id.*, 256 F. 229 at 235. DHS notes only that the court did not qualify or quantity the level of support necessary for one to be deemed a public charge. *See* 83 Fed. Reg. at 51158. DHS's treatment of another older decision is likewise marked by obfuscation, citing the case for this same proposition, but failing to note the court's actual conclusion – that there must be evidence that aliens are likely to be supported at the expense of the public, and finding that a mother and other children could not be excluded from the country on grounds that they were likely to become public charges merely because they were separated from husband and father. See *In re Keshishian et al.*, 299 F. 804 (S.D. N.Y. 1924). This is typical of DHS' sleight-of-hand throughout this rulemaking.

Tellingly, until today, DHS policy has long embodied this principle. "No single factor ... will control this [public charge] decision, including past or current receipt of public cash benefits." *See* 64 Fed. Reg. 28676, 28682 (May 26, 1999). *See also* current 40 C.F.R. § 245a.18(d)(1) ("existence or absence of a particular factor should never be the sole criteria for determining if an alien is likely to become a public charge. ... The determination of financial responsibility should be based on a prospective evaluation ..."). Moreover, the purpose of the law has never been to exclude individuals of modest income from the US. Rather, the purpose of the law is to prevent the immigration of those who will become completely reliant upon public benefits –that is the definition of a pauper.

Now, DHS construes a mere "suggestion" of a link to past receipt of public benefits to a likelihood of becoming a public charge. *See* 83 Fed. Reg. at 51158 (ignoring plain language of INA and instead relying on various dictionary definitions of "public charge" or "charge" that "generally suggest" a link between the receipt of public benefits and public charge status). Rulemaking under the Administrative Procedures Act ("APA") and the authorizing provisions of the INA cannot be based on general suggestions.

In sum, DHS proposes to stand the clear directive of the INA's statutory language on its head – effectively, making the mere past receipt of a broad array of public benefits (including, for the first time, non-cash benefits), a fatal, disqualifying factor for those seeking adjustment of status, a visa or admission, or those seeking an extension of stay or change of status. As a result, DHS is acting in excess of its statutory authority, and the Proposed Rule is entitled to no deference and fails at *Chevron* step 1.

B. DHS Provides No Factual Basis For Its Proposed Rule, And There Is No Deference To Be Granted.

Not only is the Proposed Public Charge Rule contrary to the plain language of the authorizing statute and a striking departure from current and past law and practice, DHS offers no factual basis for its proposed rulemaking. To the contrary, it effectively concedes that it is has no factual support or basis for its decision to promulgate this rule.

> [I]n general, there is a lack of academic literature and economic research examining the link between immigration and public benefits (*i.e.*, welfare), and the strength of that connection. It is also difficult to determine whether immigrants are net contributors or net users of government-supported public assistance programs since much of the answer depends on the data source, how the data are used, and what assumptions are made for analysis. Moreover, DHS was also not able to estimate potential lost productivity, health effects, additional medical expenses due to delayed health care treatment, or increased disability insurance claims as a result of this proposed rule.

83 Fed. Reg. at 51235-512376(footnotes omitted).

Indeed, as previously noted, the Agency has not even attempted to rebut or explain why the current system of public charge review and determination is not working or requires revision at all. DHS simply provides no explanation as to why this rule is necessary, other than vague, unsubstantiated claims that the Agency seeks to better ensure that applicants "are self-sufficient." Yet it provides no rational basis, or any basis at all, for its assertion that, for example, having received a public benefit at some point in the past will pre-dispose an individual to again receive public benefits at such a level that the person "would likely become a public charge."

There can be no deference to agency decision making in this context. There is simply nothing to defer to. DHS's record here is a blank slate. "Certainly, different administrations may implement different regulatory priorities, but the APA ... 'requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process.'" *South Carolina Coastal Conservation League v. Pruitt et al*., 318 F. Supp.

3D 959, 967 (D.S.C. 2018) (enjoining EPA rule suspending Obama-era Clean Water Act rulemaking defining waters of the United States, noting that the enjoined rule was promulgated "without that required fidelity" and that the court could not "countenance such a state of affairs"). The absence of a factual basis for the Proposed Public Charge Rule similarly marks it as lacking that fidelity to law and legal process necessary to withstand judicial scrutiny, making it similarly situated to the numerous other Trump Administration regulatory efforts that have failed.

C. The Proposed Rule Is An Unreasonable Interpretation Of The Immigration and Nationality Act.

Even where a statute is ambiguous or silent, agencies are entitled to no deference where the agency's interpretation is an impermissible construction of the statute, *i.e.*, where such construction is "arbitrary, capricious or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844 (*Chevron* "step 2"). Under *Chevron* step 2, "agencies must operate within the bounds of reasonable interpretation." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("*Michigan*"), quoting *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2422 (2014). "Federal administrative agencies are required to engage in 'reasoned decision-making.'" *Michigan*, 135 S. Ct. at 2706 (*citing Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)). Where they do not, agency rulemaking cannot stand. *See Michigan*, 135 S. Ct. at 2707 (*vacating* rulemaking where EPA strayed beyond the bounds of reasonable interpretation). *See also Mexichem*, 866 F.3rd at 459 (striking rule at *Chevron* step 1, but "even if we reach *Chevron* step 2, EPA's interpretation is unreasonable").

Even if the Proposed Public Charge Rule were to survive review at Chevron step 1, which it will not, it would fail at step 2 of the analysis. As previously explained in these comments, DHS provides no reasoned basis for its draconian interpretation of the INA's public

charge provisions. For example, it arbitrarily selects age 18 as an age cutoff for determination of public charge – those younger than 18 are, effectively, inadmissible as likely to become a public charge, *see* proposed 40 C.F.R. § 212.22(b)(1), ignoring the obvious fact that such individuals have their entire working careers in front of them and the financial contribution they would make to society. It also arbitrarily defines "public benefit" by, for example, ignoring the historic understanding of this term to encompass the use of benefits and the inability to support oneself apart from those benefits. Under the Proposed Rule, "public charge" is defined to include anyone who receives monetizable benefits the cumulative value of which exceeds 15% of the Federal Poverty Guidelines ("FPG") for a household of one within any period of 12-consecutive months, based on the per-month FPG for the months during which the benefits are received. *See* proposed 40 C.F.R. § 212.21(b)(1). According to the Cato Institute, this amounts to $2.50 per person daily for a family of four.[8] This arbitrary cutoff entirely ignores the extent to which the person might nonetheless be supporting themselves, banning from the United States those who might be substantially self-sufficient but who nonetheless during a 12-consecutive month period at any point in their lives received monetizable benefits above the 15% threshold.

While the rule establishes that those having an income above 250% of the poverty line as a "heavily weighted positive factor," *see* proposed 40 C.F.R. § 212.22(c)(2)(ii), the 15% cutoff described above means that even people earning more than this 250% could be determined to be public charges if they received $2.50 per day per person in a family of four. "Thus, even immigrants who are 95% self-sufficient could still be considered public charges."[9]

The unreasonableness of DHS's, 250% "heavily weighed positive factor" is illustrated in yet another way. This factor, which is the only one DHS categorizes as a "heavily weighed

[8] *See* "New Rule to Deny Status to Immigrants Up to 95% Self-Sufficient," at p. 3 of 6 https://www.cato.org/blog/new-rule-deny-status-immigrants-95-self-sufficient.
[9] *Id.*

positive factor," means that an applicant would have to have an income or resources of more than $30,000 for a single person or $63,000 for a family of four to escape denial as a "public charge."[10] Yet, by way of comparison, the median household income in the United States is only $60,000.[11] DHS's selection of a threshold that a large swath of the American citizenry would not be able to meet, even those that are self-supporting, is indicative of the arbitrary and capricious nature of the Proposed Rule. It also belies the stated purpose of the rule – to "better ensure that aliens who are admitted to the United States or apply for adjustment of status would not receive one or more public benefits," 83 Fed. Reg. at 51274, when even earning at a level equivalent to the median household income would not preclude consideration as a "public charge."

Similarly, the Center for Migration Studies ("CMS") recently focused on the unreasonably disproportionate and unjustified effect the Proposed Rule would have on undocumented immigrants and non-immigrants that would otherwise be eligible for legal permanent residency because of a legally qualifying relationship to a U.S. citizen or legal permanent resident living in their household. CMS concludes that a large percentage of the 2.25 million undocumented persons examined would be found inadmissible under the Proposed Rule on a variety of grounds, notwithstanding the fact that this population consists overwhelmingly of working persons who are not financially dependent on government benefits.[12]

We are particularly concerned on behalf of a significant subset of our clients who have been the victims of human trafficking or domestic violence as well as asylees and refugees who may accordingly be exempt from the public charge rules. Even though this Proposal is not yet

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[10] *See* "Only Wealthy Immigrants Need Apply," October 10, 2018, Fiscal Policy Institute, at pp. 2-3 http://fiscalpolicy.org/wp-content/uploads/2018/10/NY-Impact-of-Public-Charge.pdf

[11] *Id.*, at p. 3.

[12] CMS Report, *Proposed Public Charge Rule Would Significantly Reduce Legal Admissions and Adjustment to Lawful Permanent Resident Status of Working Class Persons*, November 2018 - http://cmsny.org/wp-content/uploads/2018/11/Public-Charge-Report-FINAL.pdf

law, we are already seeing that a substantial number of these individuals, confused by the language and its arbitrary standards, are already cancelling critical public assistance benefits to which they are legally entitled.

Because the Proposed Rule fails to recognize that federal statutes require that T visa recipient human trafficking victims are exempt from public charge in their applications for lawful permanent residency, it is directly contrary to Congressional intent[13]The proposed public charge rule recognizes that Public Charge INA Section 212(a)(4) requirements do not apply to refugees applying for lawful permanent residency both for purposes of the Form I-944 declaration of self-sufficiency and refugees are exempt from the affidavit of support requirement.[14] However, with regard to human trafficking victims, the proposed rule's chart first correctly recognizes that T visa applicants and recipients of T nonimmigrant status are exempt from public charge under INA Section 212(d)(13)(A).[15] The proposed rule then goes on to state that this 212(d) exemption does not create an exemption for T visa recipients when they apply for adjustment of status. This is statutorily incorrect.

INA Section 212(d)(13)(A) provides:

> (A)The Secretary of Homeland Security shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 1101(a)(15)(T) of this title, except that the ground for inadmissibility described in subsection (a)(4) shall not apply with respect to such a nonimmigrant.

This statutory language applies by its language of the text to both:

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[13] Comment Letter of the National Immigrant Women's Advocacy Project, American University, Washington College of Law, RE: [CIS No. 2499-10; DKS Docket No. USCIS-2010-0012] RIN 1615-AA22 Inadmissibility on Public Charge Grounds (December 10, 2018) at pps 2-3 (NIWAP Letter).

[14] Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 196 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pt. 103, 212, 213, 214, 245, and 248).

[15] Table 8. Applicability of INA 212(a)(4) to Refugee, Asylee, and Parolee Adjustment of Status Applications, 83 Fed. Reg. 51,114, 51,153 (proposed Oct. 10, 2018)(to be codified at 8 C.F.R. pt. 103, 212-14, 245, and 248).

- Applicants for T visas who are "described in 101(a)(15)(T)" for purposes of adjudicating the T visa; and
- T non-immigrants who are T visa applicants who are granted T visas that have T nonimmigrant status. Once a T visa holder is granted non-immigrant status, the only purpose of the public charge exemption would be to exempt T visa holders from public charge inadmissibility when they apply for adjustment of status.

When DHS promulgated the T and U adjustment regulations in 2008, the regulations did not state that T visa applicants for adjustment of status were subject to public charge. The preamble to the regulations, however, discussed that it was the USCIS view at the time that the Section 212(d)(13) exemption may not apply to T visa adjustment of status cases. It is important to note that USCIS never implemented the suggestion in the T and U visa adjustment regulations preamble and T visa victims applying for adjustment of status were not required to file for public charge waivers that could be granted in the national interest as a matter of discretion under INA Section 245(1)(2)(A). It is this preamble suggestion that USCIS is currently seeking to make part of the new public charge regulations.

One reason why USCIS cannot make the proposed regulatory change is that Section 804 of the Violence Against Women Act (VAWA) 2013 exempted T visa applicants and T nonimmigrant recipients applying for lawful permanent residency from public charge. See INA Section 212(d)(4)(E)(iii). The VAWA 2013 Section 904 Exemption from public charge created exemptions from public charge for immigrant crime victim filing both applications for immigration status through the VAWA, T and U visa programs and applications for lawful permanent residency for filed by successful applicants through these same programs. Section 804 exempted VAWA self-petitioners and U visa applicants and U visa holders from public

charge fully for both purposes of the self-petition or U visa application and for all applications for lawful permanent residency that these applicants file. The proposed rule on public charge correctly recognized the full extent of these VAWA 2013 exemptions from public charge for these victims.

The proposed rule, however, ignores the fact that VAWA 2013 Section 804 grants the exact same exemptions from public charge inadmissibility to all other immigrant victims who are qualified immigrants under Section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1966 (PRWORA); 8 U.S.C. 1641(c). There were several groups of immigrant victims that Congress covered in the VAWA 2013 amendments creating INA 212(d)(4)(iii). One of the primary groups that Congress' citation to 8 U.S.C. 1641(c) were T visa holders with T nonimmigrant status. The list of additional immigrants covered by 8 U.S.C. 1641(c) includes:

- 8 U.S.C. 1641(c) (1)(iii) (Victims applying for VAWA suspension of deportation and lawful permanent residency based on an approved application);
- 8 U.S.C. 1641(c)(1)(iv) (Immigrant spouses who have been subjected to battering or extreme cruelty by their U.S. citizen or lawful permanent resident spouse when the abusive citizen or lawful permanent resident spouse had filed an I-130 family-based visa petition on the abuse spouses or child's behalf);
- 8 U.S.C. 1641(c)(1)(v) (Victims applying for VAWA cancellation of removal and lawful permanent residency based on an approved application); and
- 8 U.S.C. 1641(4) (T visa applicants who have received prima facie determinations and T visa holder/T visa nonimmigrants.

Congress explicitly sought to cover T visa victims applying for lawful permanent residency in section 212(d)(4)(iii) out of concern that the T and U adjustment rule preamble language might be interpreted to require that T visa victims applying for lawful permanent residency could be forced through an extra application step of applying for a waiver that the preamble language stated that DHS had the discretion to deny. Since at the application for the T visa stage T visa applicants are exempt from public charge under INA 212(d)(13)(a), the only T visa related group that the public charge exemption in the VAWA 2013 Section 804 would provide protection to would be T visa applicants for lawful permanent residency. NIWAP Letter.

Not only does the cancellation of these benefits prevent or slow these victims' own recovery from the abusive crimes which they have suffered, but their qualified children, many of whom are U.S. citizens, rely on benefits such as SNAP for their basic subsistence.

The overwhelming majority of our clients who are trafficking or domestic violence victims rely on public assistance at some point after fleeing their abuse and seeking safety, and the harm to these individuals, almost a revictimization, is incalculable. Safe housing, competent medical care and food are all essential to the survival of victims of gender based violence; and without access to them, victims will be faced with the impossible choice between risking starvation, homelessness and disease for themselves and their children or remaining with a potentially lethal abuser.

Finally, as an overarching matter, the Proposed Rule simply fails to define the term, "likely," as that term is used in the phrase "likely to become a public charge," but rather leaves this decision making to DHS bureaucrats using a complex and entirely arbitrary weighting system. Determinations will be made on a case-by-case basis – the particular facts and circumstances of each case – and, as stated by the Cato Institute, "no immigrant will know before

they apply whether they qualify."[16] This stands in stark contrast to the current rule guidance, which makes clear that a determination of "public charge" will be found only where "an alien is *likely to become primarily dependent* on the Government for subsistence" based on a well-defined subset of circumstances – the receipt of public cash assistance for income maintenance or long term institutionalization at government expense. *See* 64 Fed. Reg. 28676, 28681 (May 26, 1999) (emphasis added).

These are just a few examples of the arbitrary and capricious nature of the Proposed Rule, but these examples alone demonstrate that DHS has here strayed beyond the bounds of reasonable interpretation. *See Michigan*, 135 S. Ct. at 2707.

IV. THE PROPOSAL ALSO FAILS BECAUSE IT IS CONTRARY TO THE PRESIDENT'S STATED REGULATORY ROLLBACK AGENDA

The President is the Chief Executive, *See* U.S. Const. Art I, and as such it falls to him to set the policies and practices of his administration. One of this President's stated goals has been what he refers to as "regulatory rollback." See Executive Order (EO) 13771. Yet, the Secretary's Proposal does no such thing and accordingly violates EO 13777 "Enforcing the Regulatory Reform Agenda."

Rather than relying on a Rule that has more than adequately implemented the requirements of the INA, the Secretary seeks to change the meaning of an existing law (which she, in any event, may not do) and to create a series of criteria which are not supported by any evidence. This creates a regulatory thicket for taxpayers seeking to avail themselves of visa extensions, permanent residence or citizenship, as provided for in existing and unchanged law

[16] "New Rule to Deny Status to Immigrants Up to 95% Self-Sufficient," at p. 4 of 6.

and costing taxpayers untold sums of money for the retraining and repurposing of DHS and other employees as well as systems and forms (which costs the Secretary fails to identify).

Clearly the President could choose to change his stated goals. It is, after all, his prerogative to issue an Executive Order. But, until and unless he does so, it falls to the Secretary to comply with the law as her President has established it. This Proposal fails to do so.

V. CONCLUSION

For all of the foregoing reasons, the Secretary must withdraw her Proposal and she should leave the current state of the law as it is.