BOUNDLESS

Comments of Boundless Immigration Inc. on the Department of Homeland Security's Proposed Rule, *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114 (Oct. 10, 2018)

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December 10, 2018

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These comments are submitted for the record to the United States Department of Homeland Security (the Department)[1] on behalf of Boundless Immigration Inc. They are offered in response to the Department's notice of proposed rulemaking on inadmissibility on public charge grounds, published in the October 10, 2018 edition of the *Federal Register*.

I. Introduction.

Boundless is a technology company dedicated to empowering families to navigate the U.S. immigration system more confidently, rapidly, and affordably. Much of its staff has direct and personal experience in navigating the complex, high-stakes U.S. immigration system. Boundless is well aware of the difficult choice that many immigrants face—paying thousands of dollars in legal fees or spending months trying to figure out how to proceed independently. We seek to provide immigrants with a better option, acting as a trusted partner and guide for families throughout their immigration journeys.

As an organization providing tools, information, and personalized support directly to immigrants in the United States, Boundless has unique insight on the potential effects of this proposed rule. As we document, the proposed income triggers for public charge inadmissibility would have dramatic effects on the eligibility of individuals for U.S. immigration benefits. To take one concrete example, using Boundless's own data, we estimate that, under the proposed rule, the Department may deny more than half of the marriage-based green cards that are currently approved. Beyond that, the new proposal would cost U.S. businesses billions of dollars annually, in addition to lost productivity.

As a leader on immigration matters in the business community, Boundless objects to the proposed rule on grounds of principle, policy, and procedure.

As a matter of principle, the Department's proposed backdoor wealth test is contrary to what makes America great. Never in our country's history have we required that someone be comfortably middle class to come live and work in America. Such restrictions would have barred some of America's most successful and innovative business leaders, from Andrew Carnegie to Sergey Brin.

As a matter of policy, the proposed rule would mean that companies would no longer be able to hire talented workers whom the Department's wholly discretionary determinations deem unable to work in America. Talented workers seen as too old or too unhealthy—and even many of those workers observed to have a disability or to be currently earning less than 250 percent of the federal poverty guidelines, among many other factors—would be unable to do business in

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[1] We also use "the Department," where appropriate, in reference to its predecessor departments and agencies. Thus, prior to the establishment of the Department of Homeland Security, "the Department" also refers to the Department of Justice and the Immigration and Naturalization Service.

America. For all noncitizen workers and their employers, the proposed rule would introduce enormous new complexity, uncertainty, and compliance burdens. And, as the Department itself acknowledges, the proposed rule would have enormous repercussions on the entire U.S. economy and on public health throughout the Nation, among other substantial negative effects.

And as a matter of procedure, the proposed rule is plagued by legal defects. In its proposed rule, the Department failed to comply with the carefully calibrated rulemaking process required by law. The Department eschewed elementary principles of agency rulemaking—and, in so doing, it ran afoul of its statutory obligations, executive-branch directives, and constitutional limits. The proposed rule violates:

- The plain meaning of the statutory term "public charge" as that concept has been defined in immigration law for more than 125 years.

- The Administrative Procedure Act, given that the Department changes its longstanding policies without reasoned explanations for so doing. The Department's failure to offer analysis regarding obvious and substantial negative consequences of the proposed rule renders its decision-making unlawfully arbitrary and capricious.

- Executive Orders 12,866 and 13,563, as the Department both fails to undertake the requisite cost-benefit analysis and ignores the reality that even its deficient cost-benefit analysis shows that the proposed rule would impose a substantial net cost on the United States.

- The Regulatory Flexibility Act, because the Department fails to consider—let alone quantify and examine—the most important effects of its proposed rule on small entities in its initial regulatory flexibility analysis.

- Executive Order 13,132, given that the Department ignores the evident federalism concerns in its proposed rule and consequently does not prepare a federalism summary impact statement.

- The Treasury General Appropriations Act of 1999, by failing to provide an adequate rationale for this proposed rule, which the Department acknowledges would negatively affect family well-being.

- The Paperwork Reduction Act of 1995, as the Department now proposes to impose substantial new paperwork and compliance burdens without adequate justification for so doing.

- Federal disability law, by discriminating against individuals based on the presence or absence of a disability in administering this federal rule.

- The U.S. Constitution, which precludes the government from discriminating on the basis of national origin.

We demonstrate at length that the proposed rule is bad policy. The costs of the proposed rule are substantial, weighty, and life-altering. The proposed rule would—as the Department acknowledges—worsen poverty and health outcomes, especially for children.

The Department focuses principally on the "direct" costs imposed by the proposed rule insofar as it creates massive new compliance costs that would be borne by both individuals and their U.S. sponsoring relatives or employers. The Department estimates that these annual costs may reach $129,596,485 per year. Boundless, however, demonstrates that there are several deep flaws with the Department's cost model. Including just the applicants who the Department considers, the actual costs will be approximately $2,260,448,302—more than 17 times greater than what the Department projects. But even this does not begin to model the true costs of the proposed rule. The Department wholly neglects to account for more than 13 million relevant applications adjudicated by the Department of State. When those applications are considered, the annual cost of the proposed rule climbs to $12,973,350,644—which is 100 times the Department's estimate.

Meanwhile, two of the three "benefits" that the Department identifies are nonexistent. And with respect to what the Department repeatedly calls the "primary benefit" of its proposed rule—the reduction of expenditures on public benefits—the Department makes a stunning confession that is itself fatal to this rulemaking: the Department cannot "determine whether immigrants are net contributors or net users" of the programs it seeks to regulate in the name of "self-sufficiency."[2] In other words, the Department puts nothing on the positive side of the ledger.

And even if the proposed rule were sound policy—which it is not—the Department's wholesale failure to comply with legally required procedures and directives precludes the Department from promulgating this proposed rule.

For these reasons, and for the numerous additional shortcomings that we highlight in these comments, the Department should withdraw its proposed rule and allow public-charge determinations to proceed according to the Department's well-considered, decades-used policies. At minimum, the Department must issue a supplemental notice curing the deficiencies of this proposed rule and give the public adequate time to submit additional comments.

II. Background.

A. Statutory history.

The statutory term "public charge" first appeared in the late nineteenth century. In 1882, Congress provided that, upon an examination of "the condition of passengers arriving at the ports,"

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[2] *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114, 51,122, 51,235 (Oct. 10, 2018).

"any convict, lunatic, idiot, or any person unable to take care of himself or herself or herself without becoming a public charge" would not be permitted to land.[3]

In the Immigration and Nationality Act of 1952, Congress reused the statutory term "public charge" without modification. Congress stated that those who "are likely at any time to become public charges" are ineligible for admission.[4] The law also established a public charge bond process, through which someone "likely to become a public charge" could "be admitted in the discretion of the Attorney General upon the giving of a suitable and proper bond."[5]

The Immigration Act of 1990 amended 8 U.S.C. § 1251 to provide that "[a]ny alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry" is subject to removal.[6]

The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) bars eligibility for federal means-tested public benefits for a period of five years upon entry to the United States.[7] The statute exempts 11 classes of benefits, including assistance or benefits under the National School Lunch Act, the Child Nutrition Act of 1966, and public-health assistance for immunizations and treatment of communicable diseases.[8] The law also establishes that, in general, qualified immigrants are ineligible to receive supplemental security income or food stamps and have limited eligibility for Temporary Assistance for Needy Families, social services block grants, and Medicaid.[9]

Passed that same year, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) established that, when adjudicating public-charge cases, the Department should, at minimum, consider each immigrant's age, health, family status, financial status, and education and skills.[10]

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3 22 Stat. 214, 214 (1882).

4 Pub. L. 414, ch. 2, § 212(a)(15), 66 Stat. 163, 183 (1952).

5 *Id.*, § 213, *id.*, 188-89.

6 Pub. L. 101-649, tit. 6, § 602, 104 Stat. 4978, 5081 (1990).

7 Pub. L. 104-193, tit. 4, § 403, 110 Stat. 2105, 2265-67 (1996).

8 *Id.*, § 403(c), *id.*, 2266.

9 *Id.*, § 402, *id.*, 2262-65.

10 Pub. L. 104-208, div. C, § 531, 110 Stat. 3009, 3674 (1996) (amending 8 U.S.C. § 1182).

B. Regulatory history.

In 1989, the Department issued a final rule, stating that "[a]n alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level is not excludable."[11]

One decade later, in 1999, the Department issued Field Guidance on Deportability and Inadmissibility on Public Charge Grounds.[12] The guidance was passed in response to IIRIRA and PRWORA, which "sparked public confusion about the relationship between the receipt of federal, state, [and] local public benefits."[13] The Department defined a "public charge" as an immigrant "likely to become . . . 'primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.'"[14] The Department "adopt[ed] this definition immediately,"[15] and it has been acting on that definition since 1999.[16]

In that field guidance, the Department also set forth that "officers should not place any weight on the receipt of non-cash public benefits" other than long-term institutionalization.[17] This was so, in part, because "non-cash benefits . . . are by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or family."[18] The Department affirmed that it could "identify those who are primarily dependent on the government for subsistence without inhibiting access to non-cash benefits that serve important public interests."[19] What is more, the Department observed that "federal, state, and local benefits are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient. Thus,

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[11] *Adjustment of Status for Certain Aliens*, 54 Fed. Reg. 29,442, 29,454 (July 12, 1989). *Compare* 83 Fed. Reg. at 51,291 (proposed regulation: "DHS will consider whether . . . [t]he alien's household's annual gross income is at least 125 percent of the most recent Federal Poverty Guidelines" or "whether the total value of the alien's household assets and resources is at least 5 times the difference between the alien's household's gross annual income and the Federal Poverty Guideline.").

[12] *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28,689 (May 26, 1999).

[13] *See id.* at 28,689.

[14] *Id. See also id.* at 28,692 ("primarily dependent"); *id.* at 28,693 ("primary dependence").

[15] *Id.* at 28,689.

[16] In keeping with the plain meaning of the term, the Department defined "primar[y]" as "the majority" or "more than 50 percent." 83 Fed. Reg. at 51,133 n.154.

[17] 64 Fed. Reg. at 28,689. *See also id.* at 28,690 (noting that current or past receipt of non-cash benefits "should not be taken into account").

[18] *Id.* at 28,692.

[19] *Id.*

participation in such non-cash programs is not evidence of poverty or dependence."[20] Among the list of benefits that should not be considered for public-charge purposes, the Department explicitly listed "Medicaid and other health insurance and health services," "CHIP," "[n]utrition programs," and "[h]ousing benefits."[21]

On the same day that the field guidance was issued, the Department published a proposed rule.[22] The Department observed that the "primary dependence model of public assistance was the backdrop against which the 'public charge' concept in immigration law developed in the late 1800s."[23] Indeed, "[h]istorically, individuals who became dependent on the Government were institutionalized in asylums or placed in 'almshouses' for the poor long before the array of limited-purpose public benefits now available existed."[24] In addition to making these historical observations, the Department also cited multiple dictionary definitions and underwent "extensive consultation with benefit-granting agencies" in developing its definition.[25]

The Department also further explained its decision to include only cash benefits (in addition to long-term institutionalization) in making public-charge determinations. The Department of Health and Human Services (HHS), "which administers TANF, Medicaid, CHIP, and many other benefits," advised the Department that "the best evidence of whether an individual is relying primarily on the Government for subsistence is either the receipt of public cash benefits for income maintenance purposes or institutionalization for long-term care at Government expense."[26] The Department of Agriculture concurred in that assessment.[27] "According to HHS and other benefit-granting agencies consulted by the [Department], non-cash benefits generally provide supplementary support in the form of vouchers or direct services to support nutrition, health, and living condition needs."[28] The Department observed that "[t]hese benefits are often provided to low-income working families to sustain and improve their ability to remain self-sufficient."[29] The Department further noted that the "distinction between cash benefits that can lead to primary dependence on the Government and non-cash benefits that do not create such

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[20] *Id.*

[21] *Id.* at 28,693.

[22] *Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,676 (May 26, 1999).

[23] *Id.* at 28,677.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See id.*

[28] *Id.* at 28,677-78.

[29] *Id.* at 28,678.

dependence is already applied by the State Department with regard to Food Stamps, a non-cash benefit program."[30]

For its part, the HHS letter stated:

- "The receipt of cash benefits or long-term care institutionalization are the most effective proxies for identifying an individual as one who is primarily dependent on government assistance for subsistence."[31]

- "[N]on-cash assistance programs typically provide only supplemental and marginal assistance."[32]

- "[N]on-cash services often have a primary objective of supporting the overall community or public health, by making services generally available to everyone within a community, providing infrastructure development and support, or providing stable financing for services and systems that benefit entire communities."[33]

- "[N]on-cash support programs generally have more generous eligibility rules so as to be available to individuals and families with incomes well above the poverty line."[34]

The Department credited those findings in adopting its proposed rule and interim field guidance.[35]

III. The Proposed Rule Would Have Severe Negative Policy Consequences.

The Department seeks to change the "public charge" determination by doubling the income threshold—to 250 percent of the federal poverty level based on family size—that a household must demonstrate to presumptively escape from the "public charge" bar to admissibility. This income threshold is enough to render one decidedly middle class. Indeed, 250 percent of the federal poverty level for a family of five is $73,550. Even then, the Department retains discretion to deny an application. As for everyone below 250 percent of the federal poverty level, the Department would establish a discretionary system that would give government adjudicators effectively unreviewable discretion to deny immigration benefits to *anyone*, based on a series of nebulous, wide-ranging, and non-exclusive factors. And even those earning greater than 250 percent of the

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30 *Id.*

31 *Id.* at 28,686.

32 *Id.*

33 *Id.*

34 *Id.*

35 *See id.* at 28,677-78, 28,686-87.

federal poverty level would not be guaranteed to clear the Department's new test. The proposed rule has several substantial, devastating policy ramifications:

- The full effects of the proposed rule are enormous—and almost entirely unstated by the Department. Boundless's data shows that, if implemented, the proposed rule would deny immigration status to roughly half of those who currently apply for (and obtain) marriage-based green cards. That is to say, half of those who currently obtain immigration status by virtue of marriage would be denied status.

- The Department drastically understates the direct costs associated with the proposed rule, as the time and costs involved with completing the proposed Form I-944 would be far greater than what the Department estimates.

- The Department does not estimate, much less analyze, the implications the proposed rule would have on returning lawful permanent residents.

- The Department acknowledges that the proposed rule would be applied by the Department of State and U.S. Customs and Border Protection but makes no attempt to quantify the relevant costs.

- The proposed rule would, as the Department seems to recognize, have widespread adverse health impacts. Those impacts would be especially borne by children, including U.S.-citizen children.

- The proposed rule would worsen poverty in the United States. Again, children—including U.S.-citizen children—would be the most adversely impacted. The Department *recognizes* this policy result.

- The proposed rule would damage the U.S. economy, creating multiple drains on economic productivity and growth.

- The proposed rule would create an immigration system where, because the relevant factors are completely discretionary and ultimately indeterminate, immigration adjudications will by design become arbitrary and capricious.

Any one of these ramifications alone is reason enough to forego the proposed rule; taken together, the proposed rule is exceedingly bad policy. At the very least, the Department must reform the proposed rule and restart the rulemaking process.

A. Boundless's unique data demonstrate the substantial effects of the proposed rule.

The proposed rule will have devastating consequences on the ability of individuals to obtain critical immigration benefits, including adjustment of status to marriage-based permanent residence. The proposed rulemaking is critically deficient because it fails to identify the number

of individuals who are likely to be denied benefits following implementation of the proposed rule. The Department's failure to quantify this essential number precludes the agency from making any rational policy judgment—and it precludes the public from being aware of the holistic costs of the proposed regulation. The Department must, at minimum, first quantify these baseline effects—and then allow the public to comment—before proceeding.

In previous years, the government has granted around 350,000 green cards annually to spouses of U.S. citizens and permanent residents, allowing these couples to build their lives together in the United States. By raising the household income threshold of the immigrants who would satisfy the "public charge" analysis to 250 percent of the federal poverty level, among proposing to include other negative factors, without careful assessment of additional factors, the Department is proposing a policy that would likely reduce the number of marriage-based green cards that it issues each year by 50 percent or more. That means that nearly 200,000 families may be denied a spousal green card *each and every year*.

Boundless has unique data that sheds considerable light on this question. By integrating technology and legal services, Boundless helps more spousal green card applicants navigate the immigration system than any individual law firm. Boundless has estimated the likely impact of the public charge rule by analyzing the immigration status, current employment, and household income of foreign national spouses in its secure customer database. From this analysis, Boundless has drawn several conclusions.[36]

To begin with, 31 percent of foreign-born spouses are unemployed when they apply for a marriage-based green card.[37] Because student visas, visitor visas, and other common visas generally do not authorize employment in the United States, these spouses would be in an impossible situation—prevented from legally working yet required to earn an income to satisfy the "public charge" requirement. The current proposed regulation is deficient insofar as it fails to account for individuals in these circumstances. Additionally, approximately 22 percent of foreign-born spouses are employed when they apply for a marriage-based green cards but are in jobs that likely would not meet the new annual-household-income threshold proposed by the Department.[38]

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[36] *See Looming Immigration Directive Could Separate Nearly 200,000 Married Couples Each Year*, Boundless Immigration Inc. (Sept. 24, 2018), perma.cc/4SEJ-M6W6, https://www.boundless.com/blog/looming-immigration-directive-separate-nearly-200000-married-couples/. Boundless evaluated recent marriage-based green card applications for 585 individuals. 313—or 53.5 percent—had an income that would likely not satisfy the 250-percent federal-poverty-guidelines threshold for a family of two. In all of these cases, the Department proposes to adopt a discretionary test where the grant of a marriage-based green card will be at the whim of the Department. Even if the Department ultimately decides to allow both spouses to pool their income to meet the new threshold, 36 percent of couples could still find themselves unable to qualify for a marriage green card. *Id*.

[37] *Id*.

[38] *Id*.

Altogether, Boundless's data shows that more than half (53 percent) of foreign-born spouses who are currently eligible for green cards would likely be excluded by the Department's proposed rule.

The Migration Policy Institute (MPI) has arrived at a similar conclusion. MPI has evaluated Census data to conclude that 55.7 percent of recently arrived, legally present immigrants have annual family incomes below 250 percent of the federal poverty limit.[39] Well over half of new immigrants applying for any range of benefits—from green cards to extensions of status—may thus be denied if the proposed rule is finalized.

MPI, moreover, identified that this proposed rulemaking would have disproportionate effects based on national origin and ethnicity, blocking 71 percent of applicants from Mexico and Central America, 69 percent from Africa, and 52 percent from Asia—but only 36 percent from Europe, Canada, and Oceania.[40]

It is incumbent on the Department to quantify the numbers of prospective applicants whom its proposal would render ineligible for immigration benefits—and who would likely be denied as a result of this proposed rulemaking. As it now stands, the proposed rulemaking is a surreptitious effort to wholly remake the U.S. immigration system by rendering more than half of the total population who may apply for benefits potentially ineligible.

B. The Department fails to predict the direct costs imposed by application of the proposed rule by the Department of State and U.S. Customs and Border Protection.

The Department states that "it is likely that DOS will amend its guidance to prevent the issuance of visas to inadmissible aliens" seeking admission to the United States.[41] The Department avoids any further mention—let alone discussion or analysis—of this substantial policy change that would impose substantial direct costs on the United States and the regulated public. The Department must estimate these costs—including estimating the number of people who would be affected by this change in the Department of State's policy—before proceeding.

The Department likewise fails to estimate the impact of individuals who would be directly barred from the country by U.S. Customs and Border Protection. If the proposed rule is finalized, the Department acknowledges that "CBP could find that an alien arriving at a port of entry seeking admission, either pursuant to a previously issued visa or as a traveler for whom visa requirements

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[39] Jeanne Batalova et al., *Through the Back Door: Remaking the Immigration System via the Expected "Public-Charge" Rule*, Migration Policy Inst. (Aug. 2018), perma.cc/3TZJ-U9VY.

[40] *Id*.

[41] 83 Fed. Reg. at 51,135.

have been waived, is likely to become a public charge if he or she is admitted."[42] As we explain below,[43] the Department's failure to quantify these impacts is unacceptable and must be corrected. It cannot be avoided by the Department's "qualitatively acknowledging" some unknown level of costs.[44]

Indeed, the Department affirmatively contemplates that this proposed rule would have enormous implications for a considerable number of individuals other than those filing Form I-485, Form I-129, or the other immigrant benefits on which it focuses. The Department, for example, expressly recognizes that its proposed rule regarding "public charge" will impact "a B-2 nonimmigrant visitor for pleasure who is coming to the United States for a one-week vacation."[45] The government has offered no data as to how many temporary visitors coming to the United States for vacation, temporary business travel, or to study will be affected by this proposed regulation.

Until the Department identifies the numbers and circumstances of individuals that this new policy would affect by virtue of its application by the Department of State and the U.S. Customs and Border Protection, the proposed rule is necessarily arbitrary and capricious. A fundamental threshold consideration by any agency is identifying the magnitude and nature of the impact of its proposed rulemakings. Without this analysis, the Department lacks a reasoned basis to proceed with the proposed rule.[46]

The Center for American Progress (CAP) estimates that the proposed rule would "directly apply to roughly 900,000 potential immigrants and another 176 million potential nonimmigrants each year."[47] CAP anticipates, for instance, that 382,264 immigrants applying for adjustment of status to become a lawful permanent resident would be subject to the test as applied by the Department and immigration officials; 529,247 immigrants applying for admission as a lawful

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[42] *Id.* at 51,260.

[43] *Infra*, p. 57.

[44] 83 Fed. Reg. at 51,260.

[45] *Id.* at 51,135.

[46] Moreover, in the proposed rule, the Department represents that "Department of Justice precedent decisions would continue to govern the standards regarding public charge deportability determinations." *Id.* at 51,134. But the Department itself distributed background materials in September stating that "[t]he Department of Justice intends to conduct a parallel rulemaking on public charge deportability, and will ensure that the standards are consistent to the extent appropriate." Ted Hesson, *DOJ Plans to Issue Public Charge Rule That Deals with Deportability*, Politico Pro (Sept. 25, 2018). Soon after, the Office of Management and Budget confirmed that "[t]he Department of Justice (DOJ) proposes to change how adjudicators within the Executive Office for Immigration Review (EOIR) determine whether an alien is inadmissible to the United States as a public charge" and "intend[s] to make certain revisions to more closely conform EOIR's regulations with the DHS public charge rule." *Inadmissibility on Public Charge Grounds*, Office of Mgmt. & Budget (Oct. 2018), perma.cc/676K-UUKS.

[47] Shawn Fremstad, *Trump's 'Public Charge' Rule Would Radically Change Legal Immigration*, Ctr. for Am. Progress, 7 (Nov. 27, 2018), perma.cc/WXB7-KW4U.

permanent resident would undergo the test as applied by the Department of State and consular officials; another 10,010,396 would be subject to the test as applied by the Department of State and consular officials for applications to temporarily stay in the United States; and 517,508 would undergo the test as applied by the Department and immigration officials with respect to extension of stay or a change in nonimmigrant status.[48] And "roughly 176 million nonimmigrants admitted annually to the United States who are mainly temporary visitors for business, tourists, students, and temporary workers and their families" would be subject to public-charge determinations, including the more than 10 million people mentioned above.[49] As CAP observes, "the statutory provision the administration is regulating—8 U.S.C. § 1182(a)(4)—is the exact same provision that the State Department must use."[50]

The government's own data demonstrate that these unconsidered impacts would be enormous—and that the information bearing on those impacts is readily available. For B1/B2 visas alone, the Department of State's fiscal year 2017 workload was 10,451,589.[51] As discussed in further detail below, key figures made available in the Department's own data went unconsidered in this proposed rule.[52]

The government is in possession of the information necessary to calculate these impacts; it must do so. And the resulting economic effects must be considered if the Department wishes to move forward with its proposed rule.

C. The Department drastically understates the direct costs associated with the proposed Form I-944 and other aspects of the proposed rule.

The Department asserts that "[t]he primary source of quantified new costs for the proposed rule would be from the creation of Form I-944."[53] The Department can make this stunning assertion only because it has not so much as attempted to "quantify" the other, far more substantial costs that the proposed rule would have—effects on health, poverty, and the U.S. economy as a whole. We will later discuss the Department's failure to address those issues in depth. But, at the outset, it bears mention that the Department has badly miscalculated the costs associated with the proposed Form I-944.

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[48] *Id.* at 3.

[49] *Id.*

[50] *Id.*

[51] *See Worldwide NIV Workload by Visa Category FY 2017*, Dep't of State, 1 (last visited Dec. 6, 2018), goo.gl/RmZRh7.

[52] *See generally Yearbook of Immigration Statistics 2017*, Dep't of Homeland Sec. (last visited Dec. 6, 2018), goo.gl/y6rSfw.

[53] 83 Fed. Reg. at 51,252.

The proposed Form I-944 represents an onerous new form that would require applicants to supply the Department with substantial amounts of unwarranted information. The Department itself calculates that, over the first ten years, "the total quantified new direct costs of the proposed rule would range from about $453,134,220 to $1,295,968,450 (undiscounted)."[54]

The Department reaches this result by assessing "the total estimated costs for filing Form I-944 as part of the review for determination of inadmissibility based on public charge when applying for adjustment of status and the opportunity cost of time associated with the increased time burden estimate for completing Forms I-485, I-129, I-129CW, and I-539."[55] The Department estimates—without support for its chosen figure—that the proposed Form I-944 would take 4.5 hours for an applicant to complete, "including the time for reviewing instructions, gathering the required documentation and information, completing the declaration, preparing statements, attaching necessary documentation, and submitting the declaration."[56] Then, using a weighted hourly wage of $10.66 to $35.78, the Department estimates that completing the form would have an opportunity cost of $47.97 to $161.01 per applicant.[57] The Department estimates that a credit score will further cost $19.95 per applicant.[58] The Department then reaches its total annual impact by assessing only those applicants directly adjudicated by the Department, which it estimates as 900,757 per year on average.[59]

There are several significant flaws with this analysis. The likely "direct" costs of the proposed form alone would be far greater than the Department suggests. Before the Department may proceed with its proposed rule, it must correct its several flaws in reasoning and data, issue a new proposal with proper economic calculations, and invite renewed public comment against a properly constituted economic analysis. Anything less would render any rulemaking by the Department arbitrary and capricious.

We address five significant categories in which the Department has flaws in its analysis: the Department 1) addresses none of the costs borne by immigrants and nonimmigrants applying for benefits via the Department of State, 2) relies on substantially faulty data, 3) miscalculates

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54 *Id.* at 51,117. *See also id*. at 51,272-73 (Table 55).

55 *Id.* at 51,271.

56 *Id*. at 51,254.

57 *Id*.

58 *Id*.

59 *Id*. at 51,253. This counts 382,264 individuals filing a Form I-485 (Application to Register Permanent Residence or Adjust Status), 336,335 individuals filing a Form I-129 (Petition for a Nonimmigrant Worker To Request Extension of Stay/Change of Status), 6,307 individuals filing a Form I-129CW (Petition for a CNMI-Only Nonimmigrant Transitional Worker), 174,866 individuals filing a Form I-539 (Application to Extend/Change Nonimmigrant Status), 960 individuals filing a Form I-945 (Public Charge Bond), and 25 individuals filing a Form I-356 (Request for Cancellation of Public Charge Bond).

opportunity cost, 4) drastically underestimates the time it will take applicants to complete the proposed Form I-944, and 5) fails to account for the legal fees that individuals will accrue by virtue of the proposed Form I-944.

We then provide a model that, using best available data, provides a more accurate assessment of the costs associated. A more fulsome explanation of that model is provided in the addendum to this comment letter.[60]

1. The Department fails to address applications processed by the Department of State.

In assessing the anticipated costs, the Department excludes all of the nonimmigrant and immigrant categories processed by the State Department, even though the Department clearly states that the State Department will apply the same public-charge determination to all categories subject to the public charge ground of inadmissibility.[61] No legitimate cost-benefit analysis can disregard these costs.

Specifically, the Department limits its cost analysis of existing forms to four types of filings directly adjudicated by U.S. Citizenship and Immigration Services, based on the average annual number of applications received between Fiscal Years 2012 and 2016:

- Form I-485, Application to Register Permanent Residence or Adjust Status: 382,264;
- Form I-129, Petition for a Nonimmigrant Worker to Request Extension of Stay/Change of Status: 336,335;
- Form I-129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker to Request Extension of Stay/Change of Status: 6,307; and
- Form I-539, Application to Extend/Change Nonimmigrant Status: 174,866.[62]

The Department thus limits its cost analysis to a population of 899,772 individuals per year, which erroneously excludes the much larger population of individuals who would likely be obligated to file a Form I-944 as a direct consequence of this proposed rule but would be under the direct jurisdiction of the State Department.

The Department lists all of the visa categories subject to the "public benefits condition" in Table 4 of the proposed rule,[63] including those adjudicated by the Department of State. In an effort

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60 *See infra*, pp. 69-83.

61 *See* 83 Fed. Reg. at 51,137-46.

62 *Id.* at 51,253.

63 *Id.* at 51,137-46.

to properly estimate the direct costs of the proposed rule, we have gathered the number of applications in Fiscal Years 2013 to 2017 for each of the most significant such nonimmigrant categories, based on the total workload reported by the Department of State.[64]

[64] App. 59-68.

Visa Category	Average Annual Applications, '13 to '17	2017	2016	2015	2014	2013
A1	12,915	12,521	12,938	13,038	13,001	13,075
A2	114,976	112,988	115,029	112,582	117,329	116,950
A3	1,811	1,841	1,598	1,689	2,013	1,915
B1	57,003	54,964	55,053	58,491	60,436	56,069
B1/B2	8,578,376	8,845,755	9,573,530	9,397,240	7,944,862	7,130,492
B2	159,932	99,995	106,510	140,626	230,776	221,752
BBBCC	1,476,340	1,403,501	1,468,041	1,543,866	1,490,943	1,475,347
BBBCV	50,787	47,374	53,758	41,766	37,854	73,183
C1	15,356	14,746	15,343	14,541	16,548	15,601
C1/D	300,207	316,096	315,684	300,102	286,778	282,374
C2	22	32	18	33	14	13
C3	10,031	8,612	9,414	10,206	11,837	10,087
CW1	6,308	8,677	11,643	4,727	3,308	3,187
CW2	1,075	1,039	1,359	996	952	1,028
D	7,454	8,122	7,035	7,156	7,101	7,855
E1	9,449	9,022	10,475	9,600	9,331	8,817
E2	51,511	57,753	57,613	52,132	46,607	43,450
E2C	183	173	97	216	110	317
E3	5,690	6,325	6,346	6,349	5,032	4,399
E3D	3,932	4,576	4,731	4,140	3,411	2,802
E3R	1,695	2,482	2,176	1,482	1,349	984
F1	729,269	608,631	718,342	856,251	768,631	694,488
F2	42,993	42,408	43,723	44,705	43,677	40,450
G1	6,820	7,030	6,855	6,710	6,862	6,645
G2	17,532	18,210	18,790	18,833	16,472	15,355
G3	397	401	475	484	314	313
G4	25,542	26,467	25,091	23,786	24,340	28,027
G5	955	946	892	1,002	916	1,017
H1B	193,383	215,303	203,647	192,194	179,408	176,364
H1B1	1,149	1,544	1,417	1,167	957	660
H1C	1	1	1	1	0	0
H2A	125,131	175,831	147,048	120,552	98,982	83,243
H2B	82,921	93,515	96,002	78,872	78,635	67,581
H3	2,285	1,570	1,824	1,983	2,691	3,358
H4	131,583	153,128	143,714	134,732	118,179	108,162
I	16,406	16,599	16,991	16,463	15,821	16,155
J1	381,006	398,985	389,270	376,642	373,860	366,275
J2	49,406	49,220	48,965	50,576	50,615	47,653

Visa Category	Average Annual Applications, '13 to '17	2017	2016	2015	2014	2013
K1	49,761	55,359	60,895	43,898	51,763	36,891
K2	5,411	7,792	5,798	4,442	5,188	3,834
K3	200	84	119	209	420	169
K4	44	27	25	46	76	45
L1	90,086	94,801	95,342	92,399	85,297	82,590
L2	93,066	97,455	97,893	96,912	88,255	84,814
M1	14,483	13,025	14,441	14,660	15,386	14,904
M2	614	604	563	566	663	674
N8	32	28	45	34	24	28
N9	10	9	8	17	10	5
NATO1	13	7	10	26	15	9
NATO2	5,785	6,036	5,794	5,641	5,925	5,531
NATO3	1	0	2	1	3	0
NATO4	217	225	170	261	214	216
NATO5	45	23	42	33	65	63
NATO6	523	566	538	508	475	530
NATO7	3	3	3	0	3	4
O1	17,388	20,993	19,245	16,735	15,164	14,805
O2	7,783	9,295	8,424	6,704	7,054	7,436
O3	4,855	6,054	5,763	4,765	4,063	3,632
P1	28,389	28,929	29,600	28,726	27,209	27,481
P2	129	131	90	118	169	138
P3	11,922	12,675	13,278	11,375	11,043	11,237
P4	1,466	1,738	1,409	1,428	1,214	1,542
Q1	2,161	2,229	2,285	2,163	2,270	1,856
R1	5,989	6,642	5,991	5,713	5,632	5,965
R2	2,382	3,109	2,596	2,232	2,071	1,900
S5	0	0	0	0	0	1
S6	0	0	0	0	0	0
S7	5	0	3	6	4	10
T1	1	0	0	0	1	0
T2	151	91	109	149	158	249
T3	461	411	378	489	501	524
T4	32	26	37	29	36	31
T5	36	35	61	21	20	43
T6	12	25	9	2	0	0
TD	9,277	10,678	10,873	9,561	8,054	7,218
TN	14,940	19,067	17,159	14,982	12,633	10,857
U1	398	387	445	385	361	414
U2	237	255	226	250	254	201
U3	1,976	1,828	1,732	2,005	2,464	1,851
U4	104	104	111	131	97	77
U5	80	73	94	67	96	71
Totals	**13,042,537**	**13,227,202**	**14,093,044**	**14,013,695**	**12,424,729**	**11,454,013**

While not every nonimmigrant visa category is relevant to public charge admissibility, a great many are. The Department must recalculate its economic analysis using this information. We include many of these categories in our calculations below.

Additionally, for immigrant categories processed by the Department of State, we use the Department's average number of persons actually obtaining lawful permanent resident status as "new arrivals" in Fiscal Years 2013 through 2017.[65] We then estimate that the approval rate is 90 percent, based on the Department's approval rate for comparable immigrant filings, so we adjust the application rate accordingly.[66] This data produces the following numbers of affected individuals:

	Issued								
	2017	**2016**	**2015**	**2014**	**2013**	**Total '13-'17**	**Annual average**	**Inferred grant rate (percentage mirroring USCIS adjustment of status)**	**Inferred number of applications**
Diversity visas (DV)	51,592	49,865	47,934	53,490	45,618	248,499	49,700	90%	55,222
Immediate relatives (IR)	264,277	309,404	234,874	188,328	207,355	1,204,238	240,848	90%	267,608
Family-sponsored preferences (FB)	218,760	222,971	197,127	205,902	183,888	1,028,648	205,730	90%	228,588
Employment-based preferences (EB)	24,525	24,253	22,069	21,951	21,101	113,899	22,780	90%	25,311

For the Department to engage in rational rulemaking, it must recalculate its economic analysis addressing the full scope of individuals affected. It must then reopen the comment period to allow the public to provide input on the basis of a proper economic model.

2. The Department errs in its population calculations.

In multiple respects, the Department has erred in its calculation of the number of individuals likely affected by the proposed rule on an annual basis. We provide a fulsome explanation of the Department's errors in the addendum.[67]

In brief, Table 40 of the proposed rule is titled "Total Estimated Population of Individuals *Seeking* Adjustment of Status Who Were Exempt from Public Charge Adjudication," and the Department states that it "estimates the projected annual average total population of adjustment *applicants* that would be subject to public charge review for inadmissibility by DHS is 382,264."[68] The Department purports to draw the data in Table 40 of the proposed rule[69] from Table 7 of the

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65 *Infra*, p. 74.

66 *Id.*

67 *Id.*

68 83 Fed. Reg. at 51,240-41 (emphasis added).

69 *Id.* at 51,241.

Department's *Yearbook of Immigration Statistics 2016*.[70] Table 7, however, is titled "Persons *Obtaining* Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2016."[71] The Department has thus mischaracterized this data as presenting the total annual number of applications, when in fact this data presents the total annual number of *approvals*. Because the Department's grant rate of such applications is less than 100 percent, the approval number will always be less than the number of applications.

To correct this defect, we used the Department's own data that offers more accurate numbers. Each quarter, U.S. Citizenship and Immigration Services (USCIS) publishes a "Data Set" titled *Data Set: All USCIS Application and Petition Form Types*.[72] This data is currently only available for the full Fiscal Years of 2013 through 2017, which we compiled for purposes of this cost analysis.[73]

The accurate data is as follows:[74]

	Family AOS		Employment AOS		Total AOS	
Fiscal Year	**Received**	**Approved**	**Received**	**Approved**	**Received**	**Approved**
2013	276,975	293,565	106,571	135,999	383,546	429,564
2014	280,290	248,850	122,532	126,939	402,822	375,789
2015	298,398	249,732	123,239	117,416	421,637	367,148
2016	338,013	278,523	128,858	110,406	466,871	388,929
2017	365,716	275,931	139,555	114,480	505,271	390,411
Average ('13-'17)	**311,878**	**269,320**	**124,151**	**121,048**	**436,029**	**390,368**
Acceptance rate		**86%**		**98%**		**90%**

In sum, the five-year average of Form I-485 adjustment of status applications *received* by USCIS—and thus subject to the Department's new Form I-944 requirement—is 436,029, not

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[70] *See 2016 Yearbook of Immigration Statistics*, Tbl. 7, Dep't of Homeland Sec. (last published Dec. 18, 2017), perma.cc/3MHX-VPCG. We have attached Table 7 at App. 25-29.

[71] *See id*. at 51,238.

[72] This data is available here: https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-all-uscis-application-and-petition-form-types.

[73] We have included these full-year reports in the appendix to these comments, at App. 53-58.

[74] This data is drawn from App. 53-58, the year-end data titled "Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status." This data is available on the USCIS webpage: https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-all-uscis-application-and-petition-form-types.

382,264. The Department must therefore use the correct number of anticipated applications in making its calculation.

The Department also errs in its calculation of I-129 filers. Table 42 of the proposed rule is titled "Total Estimated Population of Beneficiaries Seeking Extension of Stay or Change of Status through an Employer Petition Using Form I-129, Fiscal Year 2012 – 2016," and it appears to properly focus on the number of applications actually received, not just those approved by the Department.[75] However, the total number presented in this table (336,335)[76] is significantly lower than the five-year average from Fiscal Years 2013 to 2017 in the "All USCIS Application and Petition Form Types" data set (471,444).[77] Since both Table 4 and Table 57 of the proposed rule indicate that all status categories using the Form I-129 are subject to public-charge review,[78] the most recent public data from USCIS should be used in lieu of the opaque internal data presented by the Department.

The proper data—drawn from the publicly available data from USCIS's "Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status"—is as follows:[79]

USCIS "All Forms" Data	
Fiscal Year	**I-129 Forms Received**
2013	404,520
2014	432,987
2015	483,643
2016	509,636
2017	526,435
Total received ('13-'17)	**2,357,221**
Average ('13-'17)	**471,444**

The Department should therefore use the annual figure of 471,444 Form I-129 filings.

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75 83 Fed. Reg. at 51,243.

76 *Id*.

77 *See* App. 53-58.

78 83 Fed. Reg. at 51,137-46, 51,278-79.

79 Once again, this data is drawn from App. 53-58, the year-end data titled "Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status." This data is available on the USCIS webpage: https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-all-uscis-application-and-petition-form-types.

The Department also miscalculates I-539 filers. Table 44 of the proposed rule is titled "Total Estimated Population of Individuals Seeking Extension of Stay or Change of Status Using Form I-539, Fiscal Year 2012 – 2016," and it appears to properly focus on the number of applications actually received, not just those approved by the Department.[80] However, the total number presented in this table (174,866) is significantly lower than the five-year average from Fiscal Years 2013 to 2017 in the "All USCIS Application and Petition Form Types" data set (195,698).[81] Since both Table 4 and Table 57 of the proposed rule suggest that all major status categories using Form I-539 are subject to public-charge review,[82] the most recent public data from USCIS should be used in lieu of the opaque internal data presented by the Department.

That data demonstrates the following:[83]

USCIS "All Forms" Data	
Fiscal Year	**I-539 Forms Received**
2013	148,274
2014	182,184
2015	199,820
2016	214,785
2017	233,430
Total received ('13-'17)	**978,493**
Average ('13-'17)	**195,698**

The Department should therefore use the annual figure of 195,698 Form I-539 filings.

The Department must correct its flawed analysis using the proper underlying data.

3. The Department's opportunity cost calculation is flawed.

The Department's opportunity cost model is deeply flawed. With respect to applicants for a Form I-485, in addressing opportunity cost, the Department errs by using a weighted "minimum

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80 83 Fed. Reg. at 51,244.

81 *See* App. 53-58.

82 83 Fed. Reg. at 51,137-46, 51,278-79.

83 Again, this data is drawn from App. 53-58, the year-end data titled "Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status." This data is available on the USCIS webpage: https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-all-uscis-application-and-petition-form-types.

wage" rather than the average prevailing wage.[84] The Department assumes that *all* applicants using Form I-485 to apply for adjustment of status would have earning capacities at the federal minimum wage of $7.25 per hour, plus $3.41 in weighted average benefits.[85]

The Department offers no non-arbitrary reason to use the very lowest wage. Rather, it simply asserts that "since approximately 80 percent of the total number of individuals who obtained lawful permanent resident status were in a class of admission under family-sponsored preferences and other non-employment-based classifications such as diversity, refugees and asylees, and parolees," the Department "assumes many of these applicants hold positions in occupations that are likely to pay around the federal minimum wage."[86] In other words, because an unquantified "many" of the annual applicants for adjustment of status are "likely" to be paid "around" the federal minimum wage, the Department deems it rational to apply the actual federal minimum wage to *all* such applicants. There are several fatal problems with this analysis.

First, the Department's use of an 80 percent metric is incorrect. As we demonstrate below, using running five-year averages, there are roughly 311,878 family-based Forms I-485 filed each year and roughly 124,151 employment-based applications.[87] That means an average of 28.5 percent of Forms I-485 are employment-based,[88] not the 20 percent that the Department asserted without any basis and by invalidly including humanitarian classifications that are not subject to the proposed rule.

Second, it is unlikely that *any* of the population in this 28.5 percent are paid the minimum wage; to the contrary, since most of these workers are by necessity in a "specialty occupation" or are otherwise high-skilled workers, these individuals are likely paid substantially in excess of the federal minimum wage.

Third, the Department offers no data whatsoever to support its assumption that even those applicants who are applying for family-based adjustment of status are paid "around" the federal minimum wage. (In fact, refugees, asylees, and parolees are not subject to this proposed rule to begin with.) Since the minimum wage is just that—the "minimum" workers may be legally paid—it is virtually impossible that it is reflective of the *average* salary for affected individuals.

Fourth, the usage of the *national* minimum wage fails to account for the fact that the minimum wage is substantially higher in many States and cities where significant portions of the

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84 83 Fed. Reg. at 51,244.

85 *Id*. The Department increases all wages by a factor of 1.47 to account for a "benefits-to-wage multiplier." *Id*. n.713. We agree with this analysis and adopt it.

86 *Id.* at 51,244.

87 *See infra*, pp. 81-82.

88 Calculation: 124,151 / (311,878 + 124,151) = 28.47%.

population reside. In California in 2019, the statewide minimum wage will be $11.00 per hour for employers with 25 or fewer employees; it will be $12.00 per hour for employers with more than 26 employees.[89] Those wages will increase to $15 per hour by 2023.[90] Adjusted for benefits, the $15 per hour minimum is $22.05 per hour.[91] The minimum wage in San Francisco is already $15 per hour.[92] The minimum wage in Los Angeles will be $14.25 on July 1, 2019 for large businesses.[93] California represents roughly 12.1 percent of the U.S. population.[94]

In New York City, the minimum wage for large employers (11 or more employees) reaches $15 per hour at the start of 2019 and $15 per hour for all employers by the start of 2020.[95] (That is the equivalent to $22.05 per hour adjusted for benefits.) Long Island and Westchester reach the same rate in 2021, and the rest of the State will follow.[96] New York represents roughly 6.1 percent of the U.S. population.[97]

In sum, the Department's assumption that *all* I-485 applicants have an opportunity cost pegged to minimum wage is obviously invalid. For that to be true, it would mean that the average earning capacity across *every* I-485 applicant—all 436,029 per year—is merely the national minimum wage. Given that the minimum wage is far higher for a substantial part of the population by virtue of state and municipal wage laws, that assumption is necessarily wrong. It must also be wrong because many I-485 applicants earn a wage greater than (or have earning capacity greater than) minimum wage.

Instead of using the federal minimum wage, the Department should have used national average hourly wage as a reasonable measure of opportunity cost. The Department admits as much in explaining its decision to apply an average hourly wage for filers of an affidavit of support or requesting extension of stay or change of status, where the Department "assumes that individuals are dispersed throughout the various occupational groups and industry sectors of the U.S.

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89 *See Minimum Wage*, Cal. Dep't of Indus. Relations (captured Dec. 9, 2018), perma.cc/27K9-ZRF8.

90 *Id*.

91 Calculation: $15 * 1.47 = $22.05.

92 *Minimum Wage Ordinance*, City & Cty. of San Francisco Office of Labor Standards Enforcement, perma.cc/CW9F-4WNX.

93 *Honest Work, Fair Pay*, L.A. Cty. (captured Dec. 9, 2018), perma.cc/Z6P8-4NSV.

94 *See QuickFacts: California*, U.S. Census Bureau (captured Dec. 9, 2018), perma.cc/U8TR-GGUX. Calculation: 39,536,653 (population of California) / 325,719,178 (population of U.S.) = 12.13%.

95 *See New York State's Minimum Wage*, N.Y. State (captured Dec. 9, 2018), perma.cc/CRH8-PJ8P.

96 *Id*.

97 *See QuickFacts: New York*, U.S. Census Bureau (captured Dec. 9, 2018), perma.cc/ZY43-9C88. Calculation: 19,849,399 (population of New York) / 325,719,178 (population of U.S.) = 6.09%.

economy."[98] Absent any evidence to the contrary, such reasoning should be applied to all filers for I-485s—as well as the entire affected population.

Moreover, the Department errs in its calculation of the "mean hourly wage"—which it calculates as $24.34 per hour.[99] The Department relies on statistics from the Department of Labor, Bureau of Labor Statistics (BLS), that were issued in May 2017.[100] But that wage rate has since increased. According to the Department's preferred source, the BLS, in November 2018, the average hourly wage earned in the private sector was $27.35.[101] Applying the Department's benefits-to-wage multiplier of 1.47 (also based on BLS data),[102] the appropriate benchmark for opportunity costs for U.S.-based applicants is a weighted mean hourly wage of $40.20.[103] Given that the costs will accrue prospectively, it is irrational for the Department to use data that is more than a year old.

As for applications from individuals outside the United States, we estimate global average wage via the Purchasing Power Parity (PPP) adjusted International Labor Organization (ILO) figure as of 2012 ($1,480 per month, or $8.54 per hour).[104] We then applied the annual average global real wage growth rate, as reported by the ILO, for each year between 2012 and 2017, to arrive at global average wage in 2017 of $9.55 per hour.[105] For a blended average wage, assuming equal contributions from U.S. and non-U.S. participants, we took the average of the U.S. average wage ($40.20 per hour) and the average global wage ($9.55 per hour) to yield $24.88 per hour.[106]

For Diversity Visa immigrant applicants, we applied the average global wage ($9.55 per hour) for the opportunity cost of time spent on I-944 paperwork, because such filers more typically lack a direct nexus with from relatives or other sponsors already in the United States. For all other Department of State immigrant visa applicants (family- and employment-based), we applied the blended average wage ($24.88 per hour), since most of these filers will work in partnership with a U.S. sponsor. For each Department of State nonimmigrant category, we applied the blended

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98 83 Fed. Reg. at 51,245.

99 *Id*. at 51,245 & n.715.

100 *Id*.

101 *Economic News Release, Table B-3*, Bureau of Labor Statistics, perma.cc/5KWN-J952 (last modified Dec. 7, 2018).

102 83 Fed. Reg. at 51,244 & n.713.

103 Calculation: $20.75 * 1.47 = $40.2045.

104 Ruth Alexander, *Where Are You on the Global Pay Scale?*, BBC News (Mar. 29, 2012), perma.cc/WR4D-BP6Q. ILO reported annual global wages in 2012 of $1,480 per month, or $17,760 per year. Assuming a 2,080-hour work year (52 weeks per year multiplied by 40 hours a week), average hourly global wages were approximately $8.54.

105 A fulsome explanation is in the appendix, at page 78, *infra*.

106 Calculation: ($40.20 + $9.55) / 2) = $24.88.

average wage ($24.88 per hour), since such filers will typically work in partnership with a U.S. sponsor, such as a U.S. relative, U.S. company, or other U.S. organization.

4. The Department uses an incorrect time estimate.

The Department offers no rational basis to conclude, as it does, that the proposed Form I-944 would be completed, on average, within 4.5 hours.[107] Instead, Boundless's empirical observations indicate that the proposed Form I-944 will take the average applicant at least 18 hours to complete.

The proposed Form I-944 would require each declarant to gather extensive information. That information includes, but is not limited to, "evidence of your relationship to each individual in your household such as a birth certificate, marriage certificate, or affidavit about your relationship"; copies of IRS receipts of all tax returns filed in the last three years, or the tax returns of any individual who claimed you as a dependent; evidence of any "additional income"; documentary evidence showing the amount you have in your checking account, savings account, any annuities, any stocks, any bonds, any certificates of deposit, any retirement or educational account, and any real estate holdings; documentary evidence of any mortgages, car loans, credit card debt, education-related loans, tax debts, liens, and personal loans; a credit report, or a credit agency report of "no record found"; if applicable, documentary evidence of the resolution of any previous bankruptcy; if applicable, documentary evidence of health insurance; and, if applicable, documentary evidence showing the receipt of unemployment benefits.[108]

This new form would require an individual to access what would likely amount to dozens of different sources of information. In addition to filling out the Form, at minimum, an applicant would have to obtain several letters establishing a five-year employment history. The applicant would likely have to contact a variety of state and federal agencies to obtain other information, such as marriage certificates and birth records. The applicant would have to search diligently through personal records, and most would be obligated to obtain copies of records from banks and other financial institutions. The applicant would be required to obtain copies of educational records, like transcripts of diplomas. This all takes substantial time. And the Department's estimate is flawed for multiple reasons.

First, the Department's estimate is flawed because it is pegged to a flawed estimate of how long it takes the average applicant to complete the current Form I-485.

The Department estimates that, at present, an average applicant takes 6.25 hours to fill out a Form I-485.[109] Based on Boundless's expertise and experience in helping numerous individuals

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[107] 83 Fed. Reg. at 51,254.

[108] *Id.* at 51,284-85.

[109] *Id.* at 51,247.

complete their paperwork to apply for permanent residence, we have observed that the average Form I-485 applicant is obligated to spend approximately 12 hours to accumulate pertinent information and complete the form, based on the Department's definition: "including the time for reviewing instructions, gathering the required documentation and information, completing the [form], preparing statements, attaching necessary documentation, and submitting the [form]."[110] This 12-hour estimate is corroborated by a senior adviser in immigration law at Boundless and the managing attorney of an immigration law firm, whose extensive first-hand experience in observing clients complete Form I-485 confirms that figure.[111] Therefore, even with a known form, the Department is underestimating the time burden by almost a factor of two.

Second, the Department errs because it assumes that the proposed I-944 would take *less* time (4.5 hours) to fill out than its estimate of the I-485 (6.25 hours).[112]

The proposed Form I-944 (15 pages), however, is a much more complicated form than the Form I-485 (13 pages, excluding straightforward yes-or-no questions), with far more onerous evidentiary requirements.[113] It defies credulity that DHS would estimate the average completion time for the proposed Form I-944 as 4.5 hours, which is less than its estimate for completing Form I-485.

Altogether, based on Boundless's expertise and experience in helping numerous individuals to complete a variety of different immigration-related forms, we expect that the average applicant would be obligated to spend at least 18 hours to complete the proposed Form I-944, which is 50 percent more time than our empirically grounded estimate for Form I-485. Once more, this estimate is supported by a senior adviser in immigration law at Boundless and the managing attorney of an immigration law firm, "[b]ased on [her] longstanding experience in immigration law, counseling and representing individuals" who complete such immigration forms.[114]

The opportunity cost on a per-applicant basis is thus far higher than the Department suggests. It is at least, on average, $723.60 per U.S.-based applicant.[115] For Diversity Visa

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110 *Id.*

111 Decl. of Anjana Prasad, App. 1.

112 83 Fed. Reg. at 51,247.

113 *Supra*, p. 25.

114 Decl. of Anjana Prasad, App. 1-2.

115 Calculation: $40.20 per hour * 18 hours = $723.60.

applicants, the opportunity cost is $171.90.[116] For all other non-U.S. based applicants, the opportunity cost is $447.84.[117]

5. The Department fails to address attorneys' fees.

The Department fails to account for the substantial legal fees that would be borne by many—if not most—applicants obligated to file the proposed Form I-944.

We have asked leading immigration practitioners to estimate the per-applicant cost of reviewing and filing the proposed Form I-944. Six separate practitioners have confirmed that the likely cost would range between $1,000 and $2,500 per applicant.[118] We therefore estimate, conservatively, that the average cost imposed on each applicant based in the U.S. (or his or her employer sponsor) would be $1,667 per application. This is based on the average of the costs estimated by the six practitioners. The precise calculations are included in an addendum at the end of this comment letter.[119]

Boundless estimates that for applications and petitions typically involving an employer sponsor or other institutional sponsor (*e.g.*, Forms I-129 and I-539), legal counsel will be retained 95 percent of the time, while for other types of applications and petitions (*e.g.*, Form I-485 for family-based applicants), legal counsel will be retained 30 percent of the time.[120]

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[116] Calculation: $9.55 per hour * 18 hours = $171.90.

[117] Calculation: $24.88 per hour * 18 hours = $447.84.

[118] These practitioners include: (1) a law firm partner and former general counsel of the U.S. Immigration Naturalization Service who has more than 30 years of experience in immigration law and related areas (Decl. of Paul W. Virtue, App. 7 (estimating increased costs of $1,250 to $1,500 in legal fees per applicant)); (2) a law firm partner who has advised clients through every major immigration policy change since 1986 (Decl. of Elizabeth E. Stern, App. 3 (estimating increased costs of $1,250 to $1,500 in legal fees per applicant)); (3) a law firm partner who provides immigration compliance advice across a variety of industry sectors, including financial services and banking, technology and communications, security and defense, manufacturing, and retail (Decl. of Grace Shie, App. 4 (estimating increased costs of $1,000 to $1,500 in legal fees per applicant)); (4) a law firm member and founding chair of the firm's immigration practice (Decl. of Susan J. Cohen, App. 6 (estimating increased costs of $2,500 in legal fees per applicant)); (5) an owner of an Illinois-based law firm that regularly assists clients with immigration-benefits applications (Decl. of Shereen Ahmed, App. 5 (estimating increased costs of $1,500 in legal fees per applicant)); and (6) a founding partner of an immigration law firm (Greg Siskind Letter, App. 8-9 (estimating increased costs of $1,500 to $2,500 per applicant)).

[119] *See infra*, pp. 80-81.

[120] To be clear, the most predictive data—the number of individuals who currently use legal counsel for these kinds of applications—is solely in the possession of the Department. The Department has not provided this data in the course of this rulemaking. The Department is obligated to provide this information and then allow the public to comment accordingly.

For non-U.S. Diversity Visa applicants, we discount the average attorney-fee cost to $397.[121] And, for blended costs for all other non-U.S. visa applicants, we calculate a blended rate of $1,032 per average attorney fee.[122]

D. Boundless's model corrects for these errors—and shows substantially greater direct costs that dwarf any claimed benefit from the proposed rule.

In view of the Department's substantial failures in the construction of its model, Boundless supplies an alternative economic model that shows substantially more "direct costs" imposed by the proposed Form I-944.

In particular, Boundless models the potential impacts of the proposed Form I-944 as it would be implemented in practice, correcting the Department's erroneous time and cost estimates and accounting for effects that the Department did not so much as attempt to consider in its modeling. This modeling, for instance, accounts for the wholly unaddressed—and very substantial—costs of legal fees that would arise if the proposed Form I-944 is implemented.[123] Significantly, it also calculates the effects of State Department adjudications that the Department's modeling disregards entirely, notwithstanding the Department's admission that the State Department would amend its guidance to align with the Department's proposed rule.[124]

The Department is in sole possession of the complete information necessary to conduct a comprehensive economic analysis. Given the Department's failure to undertake that analysis, however, we seek to model the true likely costs of the proposed Form I-944.

Boundless models the likely effects of the proposed rule on both principal and derivative applicants. The Department's draft Form I-944 instructions confirm that, for adjustment of status applicants, "[w]hether you are a principal or derivative applicant, you must file your own Form I-944." Likewise, applicants filing Forms I-539 and I-129 would be required to file the proposed Form I-944 upon instruction, "whether you are a principal or derivative beneficiary." Given that *all* adjustment-of-status applicants and as much as 100 percent of I-539 and I-129 applicants would be required to file the proposed Form I-944—and because the Department has offered no limiting mechanism in its proposed rule—it is reasonable to include both principals and derivatives (*i.e.*, dependents) in the modeling of State Department immigrant and nonimmigrant adjudications.[125]

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[121] The full calculation is available in the addendum. *See infra*, p. 82.

[122] *Id*.

[123] *See supra*, p. 27.

[124] *See* 83 Fed. Reg. at 51,135.

[125] The Department makes clear that a Form I-944 will be required for all individuals filing a Form I-485 for adjustment of status. 83 Fed. Reg. at 51,118. For these same reasons, it is apparent that an individual filing for an immigrant visa with the Department of State will likewise always be obligated to file a Form I-944. *Id.* The Department asserts that an I-944 may be requested during a request for evidence ("RFE") in connection with the filing of a Form

At bottom, Boundless seeks to properly reckon the drastically underestimated direct costs of the Department's proposed rule. Weighing these enormous direct costs against the three paragraphs of alleged (but ultimately absent) "benefits" that the Department puts on the other side of the ledger[126] compels the conclusion that the proposed rule is exceedingly bad policy based on this cost-benefit analysis alone, even setting aside its numerous other adverse policy consequences described in greater detail above and below. Factoring in the other direct and indirect costs identified throughout these comments, and disregarded by the Department, the Department's cost-benefit analysis goes even further astray.

Estimated Figures	DHS Estimate	Boundless Estimate
Hours to complete	4.5	18
Minimum hourly wage (U.S.)	$10.66	N/A
Average hourly wage (U.S.)	$35.78	$40.20
Average hourly wage (global)	N/A	$9.55
Average hourly wage (blended)	N/A	$24.88
Credit report cost	$19.95	$19.95
Legal fees (U.S.)	N/A	$1,667
Legal fees (global, inferred)	N/A	$396
Legal fees (blended, inferred)	N/A	$1,031

The table above synthesizes the Department's erroneous (and unsupported) time and cost figures for the proposed Form I-944 and identifies Boundless's corrections to those figures, which are used in the modeling summarized in the table below.

I-129, Form I-129CW, or a Form I-539. *Id.* The Department, moreover, states that it may request a Form I-944 at a frequency rate somewhere between 10% and 100%. *Id.* In view of the position that the Department has taken as to Form I-485s, Boundless has constructed its model with the view that the Department and State Department will ultimately require a Form I-944 in all immigrant and nonimmigrant visa categories to which the Department asserts that the public-charge admissibility test applies.

[126] *Infra*, pp. 57-59.

Projected Form I-944 Costs[127]

Form I-944 Cost Estimates	Annual Population	Opportunity Cost per Hour	Total Opportunity Cost	Additional to Baseline Cost	Credit Report Cost	Percent with Counsel	Legal Fees	Total Legal Fees	Total Annual Cost	Total Ten-Year Cost
DHS filers:										
Form I-485 filers	436,029	$40.20	$315,510,874	$2,921,397	$8,698,787	48.50%	$1,667	$352,527,590	$679,658,647	$6,796,586,471
Form I-129 filers	471,444	$40.20	$341,137,023	$9,476,028	$9,405,312	95%	$1,667	$746,602,607	$1,106,620,971	$11,066,209,707
Form I-129CW filers	6,307	$40.20	$4,563,745	$126,771	$125,825	95%	$1,667	$9,988,081	$14,804,421	$148,044,211
Form I-539 filers	195,699	$40.20	$141,607,796	$3,933,550	$3,904,195	95%	$1,667	$309,918,721	$459,364,263	$4,593,642,627
Subtotal	*1,109,480*		*$802,819,439*	*$16,457,746*	*$22,134,118*			*$1,419,036,999*	*$2,260,448,302*	*$22,604,483,016*
State Department immigrant visas:										
Diversity visas (DV)	55,222	$9.55	$9,490,394		$1,101,679	30%	$396	$6,559,074	$17,151,147	$171,511,467
Immediate relatives	267,608	$24.88	$119,845,766		$5,338,788	30%	$1,031	$82,808,284	$207,992,838	$2,079,928,384
Family-sponsored preferences	228,588	$24.88	$102,371,049		$4,560,339	30%	$1,031	$70,734,004	$177,665,393	$1,776,653,927
Employment-based preferences	25,311	$24.88	$11,335,228		$504,952	95%	$1,667	$40,083,589	$51,923,770	$519,237,699
Subtotal	*576,730*		*$243,042,437*		*$11,505,759*			*$200,184,952*	*$454,733,148*	*$4,547,331,476*
State Department nonimmigrant visas:										
Temporary Visitors (B-1/B-2)	10,322,437	$24.88	$4,622,800,097		$205,932,614	30%	$1,031	$3,194,156,601	$8,022,889,312	$80,228,893,120
Treaty Traders and Investors (E-1/E-2)	60,960	$24.88	$27,300,326		$1,216,152	95%	$1,031	$59,733,956	$88,250,435	$882,504,349
Australian specialty workers (E-3/E-3D/E-3R)	11,317	$24.88	$5,068,116		$225,770	95%	$1,031	$11,089,194	$16,383,079	$163,830,794
Students (F-1)	729,269	$24.88	$326,595,650		$14,548,909	30%	$1,031	$225,663,587	$566,808,145	$5,668,081,452
Spouses and children of students (F-2)	42,993	$24.88	$19,253,806		$857,702	30%	$1,031	$13,303,554	$33,415,063	$334,150,625
Temporary workers (H-1B)	193,383	$24.88	$86,604,732		$3,857,995	95%	$1,031	$189,493,826	$279,956,553	$2,799,565,534
Temporary workers (H-2A)	125,131	$24.88	$56,038,757		$2,496,367	95%	$1,031	$122,614,528	$181,149,652	$1,811,496,525
Temporary workers (H-2B)	82,921	$24.88	$37,135,341		$1,654,274	95%	$1,031	$81,253,271	$120,042,886	$1,200,428,856
Spouses and children of H workers (H-4)	131,583	$24.88	$58,928,131		$2,625,081	95%	$1,031	$128,936,568	$190,489,780	$1,904,897,797
Exchange Visitors (J-1)	381,006	$24.88	$170,629,906		$7,601,078	30%	$1,031	$117,897,947	$296,128,931	$2,961,289,309
Spouse or child of exchange visitors (J-2)	49,406	$24.88	$22,125,893		$985,646	30%	$1,031	$15,288,043	$38,399,583	$383,995,826
Intracompany transferees (L-1)	90,086	$24.88	$40,344,025		$1,797,212	95%	$1,031	$88,273,971	$130,415,207	$1,304,152,071
Spouses and children of intracompany transferees (L-2)	93,066	$24.88	$41,678,588		$1,856,663	95%	$1,031	$91,194,036	$134,729,287	$1,347,292,867
Vocational students (M-1)	14,483	$24.88	$6,486,156		$288,940	30%	$1,031	$4,481,656	$11,256,752	$112,567,519
Spouses or children of vocational students (M-2)	614	$24.88	$274,974		$12,249	30%	$1,031	$189,995	$477,218	$4,772,181
Aliens of extraordinary ability (O-1)	17,388	$24.88	$7,787,221		$346,899	95%	$1,031	$17,038,680	$25,172,800	$251,727,996
Support workers for O-1s (O-2)	7,783	$24.88	$3,485,360		$155,263	95%	$1,031	$7,626,074	$11,266,697	$112,666,968
Spouses and children of Os (O-3)	4,855	$24.88	$2,174,442		$96,865	95%	$1,031	$4,757,747	$7,029,054	$70,290,545
Athletes, artists, entertainers, and support workers (P-1/P-2/P-3)	40,440	$24.88	$18,110,560		$806,774	95%	$1,031	$39,626,464	$58,543,798	$585,437,982
Spouses and children of Ps (P-4)	1,466	$24.88	$656,623		$29,251	95%	$1,031	$1,436,711	$2,122,585	$21,225,851
Cultural exchange participants (Q-1)	2,161	$24.88	$967,603		$43,104	30%	$1,031	$668,572	$1,679,279	$16,792,793
Religious workers (R-1)	5,989	$24.88	$2,681,935		$119,473	30%	$1,031	$1,853,102	$4,654,509	$46,545,090
Spouses and children of religious workers (R-2)	2,382	$24.88	$1,066,576		$47,513	30%	$1,031	$736,958	$1,851,047	$18,510,468
NAFTA professionals (TN)	14,940	$24.88	$6,690,550		$298,045	95%	$1,031	$14,639,131	$21,627,726	$216,277,263
Spouses and children of TNs (TD)	9,277	$24.88	$4,154,522		$185,072	95%	$1,031	$9,090,223	$13,429,817	$134,298,168
Subtotal	*12,435,334*		*$5,569,039,889*		*$248,084,909*			*$4,441,044,397*	*$10,258,169,195*	*$102,581,691,949*
Total	**14,121,543**		**$6,614,901,765**		**$281,724,786**			**$6,060,266,347**	**$12,973,350,644**	**$129,733,506,441**

In sum, even setting aside all of the other, substantial costs associated with the proposed rule that we describe above and below, the direct costs created by the Form I-944 are enormous. And they dwarf the estimates the Department has identified.

The Department asserts that, assuming 100 percent of applicants filing a Form I-485, I-129, I-129CW, and I-539 are obligated to file a Form I-944,[128] the annual direct costs of the proposed rule would amount to $129,596,485 annually. Our estimate of that same universe of filers (correctly adjusted to the proper number) demonstrates that the total costs would be $2,260,448,302 *annually*. This is over 17 times greater than the Department estimated.[129] The cost over ten years would be 22,604,483,020 (undiscounted).

However, the Department has failed to address the 576,730 annual applicants applying for immigrant visas with the Department of State, and it has likewise failed to consider at least 12,435,334 annual applicants applying for nonimmigrant visas with the Department of State. Once these additional applicants are accounted for, the total *annual* cost of the Form I-944 grows to $12,973,350,644. This means that the Department's calculation is actually off by a factor of 100.[130] The cost over ten years would be $129,733,506,440 (undiscounted).

Cost Type	DHS Estimate	Boundless Estimate (DHS filers only)	DHS Underestimates by a Factor of	Boundless Estimate (including DHS and State filers)	DHS Underestimates by a Factor of
One-year cost	$129,596,485	$2,260,448,302	17.44	$12,973,350,644	100.11
Ten-year cost	$1,295,968,450	$22,604,483,016	17.44	$129,733,506,441	100.11

E. The proposed rule would have widespread adverse health impacts, including substantial effects on U.S.-citizen children.

The Department's proposed rule would reduce the use of—and chill—vital public-health programs. These health effects would be felt nationally, including by U.S.-citizen children. For its part, the Department readily acknowledges these "[w]orse health outcomes."[131] It enumerates some of them.

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[127] The complete series of assumptions for creating this table is described at length in the addendum to this comment letter, at pages 69 to 83 below. Additionally, assumptions are described in the preceding several pages.

[128] The Department offers a "lower bound" if the rate of request for a Form I-944 turns out to be lower. If that were to prove true in practice, our total cost estimate would decrease likewise—but the factor by which the Department's analysis is off would remain the same.

[129] Calculation: $2,260,448,302 / $129,596,485 = 17.44.

[130] Calculation: $12,973,350,644 / $129,596,485 = 100.11.

[131] 83 Fed. Reg. at 51,270.

- "[I]ncreased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children, and reduced prescription adherence."[132]

- "Increased use of emergency rooms and emergent care as a method of primary health care due to delayed treatment."[133] Absent proper healthcare, immigrants would likely be forced to receive necessary medical treatment in an emergency room. Emergency rooms must, under federal law, screen all patients, deliver ancillary services to all affected individuals, and treat any emergency conditions—regardless of the individual's ability to pay.[134] Those reactive-care costs necessitated by the proposed rule would be passed on directly to American taxpayers. And emergency room bills are staggeringly high compared to the cost of visits to a traditional doctor's office.[135]

- "Increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated."[136]

- "Increases in uncompensated care in which a treatment or service is not paid for by an insurer or patient."[137] Immigrants would likely forego primary healthcare as a result of the proposed rule and be forced to take to the emergency room for treatment. Since 2000,

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[132] *Id. See generally* Sharon Parrott et al., *Trump "Public Charge" Rule Would Prove Particularly Harsh for Pregnant Women and Children*, Ctr. for Budget & Policy Priorities, 3 (May 1, 2018), perma.cc/K6JD-T75V ("The harm would be particularly acute for pregnant women and young children—and the young children affected would typically be *citizen* children . . . . The impacts for these children can start before birth, when the lack of prenatal care and nutrition assistance for their mothers could affect their birth and early health outcomes, and extend decades into the future, diminishing their opportunity to thrive in tangible and entirely preventable ways."); *id.* ("Women who qualify for Medicaid that would cover prenatal care and labor and delivery may feel that they face the impossible choice of (1) risking a public charge determination by signing up for this coverage, (2) finding a way to pay thousands of dollars for labor and delivery, as well as prenatal and postpartum care, or (3) going without needed care."); *id.* at 4 ("A pregnant woman or mother of an infant (generally a citizen) might avoid enrolling herself and her child in WIC, which provides critical nutrition assistance to pregnant and breastfeeding women, infants, and preschoolers.").

[133] 83 Fed. Reg. at 51,270.

[134] *See* 42 U.S.C. § 1395dd.

[135] *See, e.g.*, Nolan Caldwell et al., *"How Much Will I Get Charged for This?" Patient Charges for Top Ten Diagnoses in the Emergency Department*, 8 Pub. Libr. Sci. One 1, 2 (2013) (observing that, for the ten most common diagnoses in the emergency room, "the median charge for outpatient conditions in the emergency room was $1233"); T.J. Raphael, *The Curious Case of the $629 ER Bill—And One Expensive Band-Aid*, Pub. Radio Int'l (Oct. 16, 2017), perma.cc/V5ST-8597 (one-year-old child taken to emergency room with a heavily bleeding finger, given a Band-Aid, and sent home with a $629 hospital bill).

[136] 83 Fed. Reg. at 51,270. *See, e.g.*, Devin Miller, *AAP, Members Speak Out Against 'Public Charge' Proposal*, Am. Acad. of Pediatricians News (Oct. 16, 2016), perma.cc/M5YZ-95TG ("[C]hildren enrolled in Medicaid are twice as likely to have routine checkups and vaccinations than uninsured children.").

[137] 83 Fed. Reg. at 51,270.

hospitals have provided more than $576 billion in uncompensated care, with much of that burden being passed along to American taxpayers.[138]

Outside studies universally agree that the health effects of the proposed would be severe and enormous. The Department's inclusion of Medicaid as an eligible benefit "would likely lead to broad declines in participation in Medicaid and other programs among immigrant families, including their primarily U.S.-born children."[139] As the Kaiser Family Foundation notes, despite past efforts to assure families that Medicaid and CHIP could not be used in public-charge determinations, many eligible immigrants did not enroll themselves or their children because they feared that it would negatively affect their status.[140] Naturally, "[t]he proposed rule would amplify these fears," leading to a large "chilling effect."[141] If, for instance, Medicaid and Children's Health Insurance Program enrollment decreased by 15 percent, an estimated 875,000 "*citizen children* with a noncitizen parent could drop Medicaid/CHIP coverage despite remaining eligible."[142]

The proposed rule would have serious effects on Medicaid and CHIP coverage, including coverage of U.S.-citizen children. "Medicaid and CHIP play a key role in covering citizen children with a noncitizen parent, but they remain more likely than those with U.S. born parents to be uninsured."[143] As a result of the policy change, "increased fears would likely extend beyond individuals directly affected by the policy to the broader immigrant community."[144] And as a result of those increased fears, "it is likely that fewer eligible individuals would enroll themselves and their children in health coverage and individuals currently enrolled in programs would disenroll themselves and their children despite remaining eligible for coverage."[145] Using disenrollment rates ranging from 15 to 35 percent, the Kaiser Family Foundation calculates that "an estimated 875,000 to 2 million citizen children with a noncitizen parent could drop Medicaid/CHIP coverage despite remaining eligible, and their uninsured rate would rise from 8% to between 14% and 22%."[146] Decreased participation in these programs "would negatively affect the financial stability of families and the growth and healthy development of their children."[147] For its part, the California

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138 *See Uncompensated Hospital Care Cost Fact Sheet*, Am. Hosp. Ass'n, 1 (Dec. 2017), perma.cc/82KX-WBGX.

139 *Proposed Changes to "Public Charge" Policies for Immigrants: Implications for Health Coverage*, Henry J. Kaiser Family Found., 4 (Sept. 2018), goo.gl/5E4Qki.

140 *See id.*

141 *Id.*

142 *Id.* (emphasis added).

143 Samantha Artiga et al., *Potential Effects of Public Charge Changes on Health Coverage for Citizen Children*, 4 (May 2018), perma.cc/5SJY-YFMJ.

144 *See id.* at 5 & n.4.

145 *Id.* at 5.

146 *Id.* at 6.

147 *See id.* at 6 & n.8.

Health Care Foundation estimates that "700,000 to 1.7 million children in need of medical attention living with a noncitizen adult could be disenrolled from Medicaid/CHIP coverage," including "143,000 to 333,000 children with at least one potentially life-threatening condition."[148] At health centers, as many as 646,000 patients across all 50 States would lose Medicaid coverage.[149]

The chilling effect of the proposed rule would likely be very substantial.[150] The Migration Policy Institute estimates that the share of noncitizens who use one or more benefits that would affect the Department's new, discretionary public-charge determinations would expand from three percent to *47 percent*.[151] Of course, the proposed rule "would overwhelmingly affect legally present immigrants because unauthorized immigrants are already ineligible for most means-tested public benefits" under PRWORA.[152] "[I]f immigrants' use patterns were to follow those observed during the late 1990s" after public confusion and fear as a result of PWRORA, "there could be a decline of between 20 percent and 60 percent" in enrollment.[153] After PRWORA, the report observes, there were massive decreases in enrollment in government programs, even for those whose eligibility remained technically unaffected by the policy change.[154] Using a lower-bound estimate, the Migration Policy Institute expects approximately 5.4 million immigrants and their children to disenroll from programs if the proposed rule is implemented; using an upper-bound estimate, that figure may be as high as 16.2 million.[155] The report confirms that "the great majority of children" affected—approximately 90 percent—would be U.S.-citizen children.[156]

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[148] *Changing Public Charge Immigration Rules: The Potential Impact on Children Who Need Care*, Cal. Health Care Found., 3 (Oct. 2018), perma.cc/V4HW-Z9BB.

[149] Leighton Ku et al., *How Could the Public Charge Proposed Rule Affect Community Health Centers?*, George Wash. Univ. & RCHN Cmty. Health Found., 5-7 (Nov. 2018), perma.cc/H98L-VT3V.

[150] *See generally* Jeanne Batalova et al., *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefit Use*, Migration Policy Inst. (June 2018), perma.cc/79L3-TMRY.

[151] *Id.* at 3. Using conservative estimates, the Migration Policy Institute calculated that "69 percent of green-card applicants" "would have at least one demographic or socioeconomic characteristic considered a negative factor [for purposes of public charge], with 43 percent having two or more such factors." Randy Capps et al., *Gauging the Impact of DHS' Proposed Public-Charge Rule on U.S. Immigration*, Migration Policy Inst., 7, 10 (Nov. 2018), perma.cc/47WJ-S3XP.

[152] Jeanne Batalova et al., *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefit Use*, Migration Policy Inst., 2 (June 2018), perma.cc/79L3-TMRY.

[153] *Id.* at 4.

[154] *See, e.g.*, *id.* at 15 (noting that food stamp use "fell by 60 percent among refugees even though the law did not restrict their eligibility for the program").

[155] *Id.* at 23.

[156] *Id.*

At bottom, these enormous effects would be "far-reaching and felt immediately."[157] Indeed, using U.S. Census Bureau data, one organization estimates that "22.2 million noncitizens and a total of 41.1 million noncitizens and their family members currently living in the United States (12.7% of the total U.S. population) could potentially be impacted as a result of the proposed changes in public charge policy. Of citizen family members, more than half (10.7 million) are citizen children living in families with one or more noncitizen family members."[158] The Fiscal Policy Institute expects the chilling effect to be even larger, affecting 24 million people.[159] Those effects are expected to have a disparate impact on communities of color, as the proposed rule would affect as many as 18.3 million members (or one-third) of the Hispanic and Latino community in the United States.[160]

Already, before the proposed rule has even taken effect, chilling effects have been observed—and widely.[161] Commenters have already documented their first-hand experiences with this.[162] Reports have indicated that immigrant families in America today "are experiencing

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[157] *See id.* at 30.

[158] *Public Charge Proposed Rule: Potentially Chilled Population Data*, Manatt, Phelps & Phillips, LLP (Oct. 11, 2018), goo.gl/nWawDr.

[159] "*Only Wealthy Immigrants Need Apply": How a Trump Rule's Chilling Effect Will Harm the U.S.*, Fiscal Policy Inst., 1 (Oct. 10, 2018), goo.gl/FTyqxQ.

[160] *See Public Charge Proposed Rule: Potentially Chilled Population Data*, Manatt, Phelps & Phillips, LLP (Oct. 11, 2018), goo.gl/nWawDr.

[161] *See, e.g.*, Helena Bottemiller Evich, *Immigrants, Fearing Trump Crackdown, Drop Out of Nutrition Programs*, Politico (Sept. 3, 2018), goo.gl/WTXYut ("Agencies in at least 18 states say they've seen drops of up to 20 percent in enrollment, and they attribute the change largely to fears about the immigration policy."); David Super, *Trump's 'Public Charge' Rule for Immigrants Attacks a Problem that Doesn't Exist*, L.A. Times (Sept. 28, 2018), goo.gl/jrQX2z ("Already the mere threat of a reduced chance at a future green card is having a broad chilling effect. Agencies that provide food and prenatal healthcare—services that aren't even in the scope of the new rule—report that pregnant women are declining to enroll or dropping out for fear of being deemed a public charge."); Riham Feshir, *'Public Charge' Rule Blamed for 'Chilling Effect' Among Immigrants*, Minn. Pub. Radio News (Oct. 23, 2018), goo.gl/tDrVWw (recounting stories of those exempt from the proposed rule who have nonetheless "considered canceling their public benefits for fear that their participation would hinder their ability to become citizens"); Sharon Parrott et al., *Trump "Public Charge" Rule Would Prove Particularly Harsh for Pregnant Women and Children*, Ctr. for Budget & Policy Priorities, 4 (May 1, 2018), perma.cc/K6JD-T75V ("In recent weeks, service providers reported that families said they were afraid to apply for WIC benefits" that are outside the scope of the proposed rule.); Zaidee Stavely, *Trump's Proposed Regulations Limiting Benefits for Immigrants Could Hurt Many US-Born Children*, EdSource (Nov. 14, 2018), perma.cc/V5H6-7KDG ("Administrators at community clinics, school-based health centers and agencies serving children say some parents in California are already choosing not to enroll or withdrawing their children from health and nutrition programs."). *See also* Claudia Schlosberg & Dinah Wiley, *The Impact of INS Public Charge Determinations on Immigrant Access to Health Care* (May 22, 1998), perma.cc/AQ55-FDLU (discussing similar chilling effect in 1998 and collecting stories about how "immigrants' fears of public charge determinations are having devastating, widespread impact[s] on the ability and willingness of immigrants to access public health and health care services").

[162] *See, e.g.*, Meredith Niess Comment (Oct. 23, 2018) (primary care physician in a community health clinic: "[J]ust this past week, a woman with asthma and hypertension chose to forego medication and the insurance to cover it for fear of how it may affect her immigration status in the future.").

resounding levels of fear and uncertainty."[163] That fear and uncertainty would certainly manifest here, as we have already observed.

In sum, the Department's proposed rule would worsen public health throughout the Nation, both through the direct regulation of benefits and through the chilling of those benefits. In the process, the health of U.S. citizens—many of whom are children—would suffer. The Department must examine and quantify these costs.

F. The proposed rule would worsen poverty, including among U.S. citizens and children.

The Department acknowledges that the proposed rule would likely "decrease disposable income and increase the poverty of certain families and children, including U.S. citizen children."[164] That assessment is correct.

The benefits that the Department seeks to preclude the use of—and chill—lift millions of people, and particularly children, out of poverty each year. The U.S. Census Bureau estimates that SNAP benefits alone lifted more than 3.4 million people out of poverty—almost half of whom were children—in 2017 alone.[165] Housing subsidies took more than 2.9 million people out of poverty that same year.[166] Medicaid alone is estimated to reduce child poverty by 5.3 percent.[167]

It is a policy and moral imperative for the federal government to combat poverty, especially child poverty. Beyond that, poverty, especially child poverty, is extremely costly for the United States. Child poverty alone costs the United States economy more than *$1 trillion* annually, or more than 5 percent of America's GDP.[168]

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[163] Samantha Artiga, *Living in an Immigrant Family in America*, Henry J. Kaiser Family Found., 1 (Dec. 2017), perma.cc/HK7S-7AC9.

[164] 83 Fed. Reg. at 51,277.

[165] Liana Fox, *The Supplemental Poverty Measure: 2017*, U.S. Census Bureau, 29 (Sept. 2018), goo.gl/kkx4dk. *See also* Jennifer Laird et al., *Foregoing Food Assistance Out of Fear*, SocArXiv, 13 (Nov. 15, 2018), goo.gl/DW4sD1 ("up to 2.7 million U.S. citizen children could lose access to SNAP" under the proposed rule).

[166] Liana Fox, *The Supplemental Poverty Measure: 2017*, U.S. Census Bureau, 29 (Sept. 2018), goo.gl/kkx4dk.

[167] Karina Wagnerman, *Research Update: Medicaid Pulls Americans Out of Poverty*, Georgetown Univ. Health Policy Inst. (Nov. 20, 2017), perma.cc/MS5T-SEZM (citing Dahlia K. Remler et al., *Estimating the Effects of Health Insurance and Other Social Programs on Poverty Under the Affordable Care Act*, 36 Health Aff. 1828 (2017)). *See also* Benjamin D. Sommers & Donald Oellerich, *The Poverty-Reducing Effect of Medicaid*, 32 J. Health Econ. 816 (2013) (finding that Medicaid kept at least 2.6 million Americans out of poverty in 2010); Matt Broaddus, *Medicaid at 50: Cuts Poverty, Boosts Financial Health*, Ctr. on Budget & Policy Priorities (July 27, 2015), perma.cc/AKB2-DTBD.

[168] *See* Michael McLaughlin & Mark R. Rank, *Estimating the Economic Cost of Childhood Poverty in the United States*, 42 Soc. Work Res. 73, 78 (2018).

Growing up in poverty can have lifelong deleterious effects. "[C]hildren born into poorer families fall into poorer health as they age. These children arrive at the doorstep of adulthood not only in poorer health but also with lower educational attainment."[169] "[C]ontrolling for parental income, education and social class," researchers have observed that "children who have experienced poorer uterine environments and poorer health in childhood have significantly lower educational attainment, poorer health and lower socioeconomic status as adults."[170] Indeed, children "born into poorer families experience[] poorer childhood health, lower investments in human capital and poorer health in adulthood, all of which are associated with a lower probability of employment and lower earnings in middle age—the years in which they themselves become parents."[171] These costs are lifelong and affect the vitality of the entire American economy—as well as, of course, the individuals most directly affected.

UNICEF recently reported on how high-income countries are performing on the worldwide Sustainable Development Goal of reducing poverty, especially as it pertains to children.[172] The United Nations held up America as an example: that "the United States [is] in the bottom reaches of this league table is proof that high national income alone is no guarantee of a good record in sustaining child well-being."[173] The United States was in those bottom reaches, indeed: out of 37 countries, the United States was ranked number 33 as it pertained to child poverty.[174] The Department confesses that its policy would make the United States' track record even worse.[175] Outside research confirms that assessment. In considering SNAP benefits alone, researchers estimate that "up to 7.9 million people (2.9 million of whom would be U.S.-citizen children) could lose access to food assistance," likely resulting in a "substantial increase in the child poverty rate" if the proposed rule is finalized.[176]

Despite all of this, the Department makes no attempt to examine or quantify the long-lasting economic repercussions of this worsened poverty.

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169 Anne Case et al., *The Lasting Impact of Childhood Health and Circumstance*, 24 J. Health Econ. 365, 366 (2005).

170 *Id.* at 367.

171 *Id.* at 368.

172 Chris Brazier, *Building the Future: Children and the Sustainable Development Goals in Rich Countries*, U.N. Int'l Children's Emergency Fund (June 2017), perma.cc/4ANR-B8X2.

173 *Id.* at 9.

174 *Id.* at 10.

175 *See* 83 Fed. Reg. at 51,277.

176 Jennifer Laird et al., *Foregoing Food Assistance Out of Fear*, SocArXiv, 14 (Nov. 15, 2018), goo.gl/DW4sD1.

G. The proposed rule would damage the U.S. economy.

As the Department recognizes, there would be substantial "downstream and upstream" economic effects as the result of the policy.[177]

Again, however, the Department does not estimate (as it must) how many people it actually intends to bar from the United States[178] or how many "increased denial[s] of applications for extension of stay or change of status" it anticipates.[179] Thus, it is impossible for the public to perform any comprehensive economic analysis of these downstream and upstream effects; they are necessarily and inextricably tied to the number of individuals whom the Department plans to bar from living and doing business in the United States. By withholding this critical information, the Department deprives the regulated public from engaging in the comprehensive economic analysis that the Department itself should have undertaken in the first instance.

With that said, based on the limited data provided, the potential economic effects are staggering. Due to decreased enrollment in SNAP and Medicaid alone, the Fiscal Policy Institute estimates that the proposed rule could lead to economic ripple effects of anywhere between $14.5 and $33.8 billion, with between approximately 100,000 and 230,000 jobs lost.[180] Health centers alone would be forced to drop as many as 6,100 full-time medical staff.[181] Of course, the proposed rule seeks to regulate much more than those two benefits, so the direct economic effects of the proposed rule would be much larger.

The immediate ten-year difference in transfers—$22.7 billion[182]—would have an enormous impact on the U.S. economy. When combined with the fact that those receiving public benefits in the first instance would be among the likeliest to inject money directly back into the U.S. economy (that is, have the highest marginal propensity to consume), the multiplier effect would make the effect of this $22.7 billion figure even larger.

In addition to these substantial costs are another class of costs that go unconsidered in the proposed rule. The proposed rule does not consider—at all—the economic effects that would result

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177 *See, e.g.*, 83 Fed. Reg. at 51,118.

178 *Id.* at 51,260.

179 *Id.* at 51,277.

180 *"Only Wealthy Immigrants Need Apply": How a Trump Rule's Chilling Effect Will Harm the U.S.*, Fiscal Policy Inst., 5 (Oct. 10, 2018), goo.gl/FTyqxQ. *See also* Cindy Mann et al., *Medicaid Payments at Risk for Hospitals Under the Public Charge Proposed Rule*, Manatt, Phelps & Phillips, LLP, 11 (Nov. 2018), goo.gl/s8uacx ("Under the public charge proposed rule, an estimated $68 billion in healthcare services for Medicaid and CHIP enrollees who are noncitizens ($26 billion) or the citizen family members of a noncitizen ($42 billion) would be at risk of chilling impacts.").

181 Leighton Ku et al., *How Could the Public Charge Proposed Rule Affect Community Health Centers?*, George Wash. Univ. & RCHN Cmty. Health Found., 5 (Nov. 2018), perma.cc/H98L-VT3V.

182 83 Fed. Reg. 51,274.

from additional individuals being barred from entering the United States on public-charge grounds. Those individuals, if admitted, would pay U.S. taxes, contribute to the U.S. workforce, and purchase U.S. goods and services. The Department altogether neglects to estimate the proposed number of people who would actually be excluded as a result of the policy,[183] so the public is unable to calculate the expected economic effect of these impacts. Those effects should have been considered in the first instance; in the absence of the pertinent information, the regulated public cannot reasonably assess the severity of such effects in the second instance. These effects would likely be substantial.

The Department observes that the proposed rule would likely "result in reduced revenues for healthcare providers participating in Medicaid, pharmacies that provide prescriptions to participants in the Medicare Part D Low Income Subsidy (LIS) program, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, agricultural producers who grow foods that are eligible for purchase using SNAP benefits, or landlords participating in federally funded housing programs."[184] That, of course, is all true—but only a fraction of how the proposed rule would effect "downstream and upstream impacts." Later in the proposed rule, the Department notes that the proposed rule would likely "decrease disposable income."[185] That disposable income would be used at *all* businesses throughout the U.S. economy. The Department fails to connect the dots: it disregards that disposable income in assessing the downstream and upstream economic effects of the policy, instead considering only those businesses directly tied to the programs that the Department wishes to include in public-charge determinations.

Given these substantial insufficiencies, the Department's economic analysis is far from complete. If the Department does not withdraw its proposed rule entirely, it must issue supplemental rulemaking, undertaking full and thoughtful economic analyses of these effects that went unmentioned and unquantified in its proposed rule.

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[183] *See, e.g.*, *id.* at 51,260.

[184] 83 Fed. Reg. at 51,118. The Department does not quantify, or attempt to quantify, any of these costs. Since the Department has issued its proposed rule, others have undertaken such analysis, demonstrating that it is far from impossible for the government to do so. *E.g.*, Cindy Mann et al., *Medicaid Payments at Risk for Hospitals Under the Public Charge Proposed Rule*, Manatt, Phelps & Phillips, LLP, 5 (Nov. 2018), goo.gl/s8uacx ("Because hospitals provide a substantial share of the care delivered to Medicaid and CHIP enrollees, their payments at risk under the public charge proposed rule total an estimated $17 billion in 2016."). Nor does the Department cite any of the easily accessible information bearing on this economic impact. *See, e.g., Supplemental Nutrition Assistance Program*, Farmers Market Coal. (last visited Nov. 21, 2018), perma.cc/D6MA-UH7H ("[M]ore than $22.4 million" in SNAP benefits was spent at farmers markets in 2017, supporting "farmers and farmers markets in all 50 states."); *Fiscal Year 2017 At a Glance*, U.S. Dep't of Agric., 2 (2017), perma.cc/V7NW-AB58 (more than $1.3 billion in SNAP benefits was spent at large grocery stores, $1.3 billion at medium grocery stores, and $800 million at small grocery stores; more than $18 billion was spent at supermarkets).

[185] 83 Fed. Reg. at 51,277.

H. The proposed rule would create an immigration benefits system that is arbitrary in its application—and that rests on improper factors.

The Department's proposed rule would create an unlawfully arbitrary scheme for the administration of immigration benefits.

Although the Department suggests that an individual's demonstration that his or her income qualifies as 250 percent of the federal poverty level is a "positive factor" for an applicant, the Department makes clear it is not alone sufficient. As the Department says, "[a] heavily weighed factor could be outweighed by countervailing evidence in the totality of the circumstances."[186]

The Department, moreover, identifies a litany of additional factors to address in the "public charge" analysis that far exceed those identified in the statutory text. In the Department's view, credit scores—which often turn in significant part on the length one has held a credit card—will become a component of whether one is eligible for immigration benefits.[187] The Department will consider whether the individual has health insurance.[188] It will take into account if an individual has previously sought a fee waiver *duly authorized by the Department*.[189] The Department will examine an individual's professional certifications or licenses.[190] It seeks to smuggle into the immigration process an English-language requirement with no clearly defined standards regarding what qualifies as sufficient proficiency.[191] And, more broadly, it offers a series of factors that will implicate the "public charge" determination—including, but not limited to, health, family status, economic circumstances, and educational attainment—without any limitations on the Department's discretion as to how these factors will apply.

At bottom, the Department offers no analysis or modeling on what effect any—much less all—of these considerations will have on its grant of immigration benefits. What is more, the Department offers no concrete way in which any of this will be measured or weighed. The Department simply offers that "[i]f the negative factors outweigh the positive factors, then the alien would be found to be inadmissible as likely to become a public charge; if the positive factors outweigh the negative factors, then the alien would not be found inadmissible as likely to become a public charge."[192] But, since these factors are not quantified, the net result is virtually unfettered discretion placed in the immigration officers making the adjudication. This is not an objective,

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[186] *Id.* at 51,198.

[187] *See id.* at 51,188-89.

[188] *Id*. at 51,189.

[189] *Id*. at 51,188.

[190] *See id*. at 51,192-93.

[191] *Id*. at 51,195-96.

[192] *Id.* at 51,178.

reasonable, or fair system. Instead, the proposed rule will result in an arbitrary and capricious system for adjudicating immigration applications.

The Department must establish regulations that permit the regulated public to understand, with clarity, how the rules will apply in the future and who will (and will not) be eligible. The proposed rule fails that basic requirement.

IV. The Proposed Rule Is Unlawful.

A. The proposed construction of "public charge" is substantively unlawful.

The Department's interpretation of "public charge" unlawfully deviates from the technical meaning of that term. "Public charge" is a statutory term that has existed since the 1880s. Case law and statutory history confirm that a "public charge" was always limited to someone who was primarily dependent on the government or institutionalized, long-term, because he or she could not sustain himself or herself. The Department's radical redefinition of the term "public charge" substantially deviates from this technical meaning—and is thus unlawful.

To begin with, it is well established that, when Congress reuses a term that has taken on specific, technical meaning, that developed meaning presumably governs unless Congress expressly redefines the term. This past Term, for example, the Supreme Court reiterated that when "Congress used the materially same language" in a later statute that lower courts had "consistently construed" with a specific meaning, Congress "presumptively was aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning."[193]

That is the case here. The term "public charge" long predates its modern incorporation into the INA. The term "public charge" appeared in federal immigration law at least as early as 1882, when Congress prohibited the landing of any "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge."[194] The legislative concerns were distinctly tied to immigrants who became wards of the state—that is, were committed to "poor-houses and alms-houses" and thus entirely dependent on the state for support.[195]

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[193] *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018). *See also Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.").

[194] 22 Stat. 214, 214 (1882). *See also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 Colum. L. Rev. 1833, 1847 (1993).

[195] *See* 13 Cong. Rec. 5109 (1882) (statement of Senator Van Voorhis, describing concern that recent immigrants become "a public charge" because they "get into our poor-houses and alms-houses").

Courts consistently interpreted the term "public charge" to equate to an individual who is principally and permanently dependent on the state—not to a person's relative poverty or inability to find work due to depressed market conditions. In *Gegiow v. Uhl*, the Supreme Court addressed whether the "public charge" provision excluded Russian aliens on the ground that they arrived with very little money and the labor market in the city of their destination was oversupplied.[196]

Justice Holmes, writing for the Court, observed that the statute placed the term "persons likely to become a public charge" in the same series as "paupers and professional beggars, . . . idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living, convicted felons, prostitutes, and so forth."[197] Thus, Justice Holmes concluded that "[t]he persons enumerated, in short, are to be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions. . . . Presumably it is to be read as generically similar to the others mentioned before and after."[198]

Following *Gegiow*, the Second Circuit, in *Howe v. United States*, held that by the term "public charge," Congress meant "to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future."[199] That is to say, to qualify as a "public charge," an individual must be so principally dependent on the state that he or she is institutionalized. Federal courts frequently overturned immigration officials' determinations that an alien was a "public charge" upon finding that the alien was employed or able to be gainfully employed.[200]

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[196] 239 U.S. 3, 9-10 (1915) ("The single question on this record is whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked.").

[197] *Id*. at 10.

[198] *Id*. *See, e.g., Ex parte Mitchell*, 256 F. 229, 233 (N.D.N.Y. 1919) (discussing *Gegiow v. Uhl* by noting "the Supreme Court says the words 'likely to become a public charge' are 'to be read as generically similar to the others mentioned before and after'; that is, generically similar to 'paupers' and to 'professional beggars.'").

[199] 247 F. 292, 294-95 (2d Cir. 1917) (holding that alien detained and ordered deported due to writing a bad check in Canada before entering into the United States could not be labeled as a "public charge" and deported on that ground).

[200] *See, e.g., United States ex rel. Mantler v. Comm'r of Immigration*, 3 F.2d 234, 236 (2d Cir. 1924) (concluding there was no evidence alien was a public charge at the time of her entry where she had been employed as a maid since the time of her entry and was in good physical condition); *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922) ("Here is an able-bodied woman of the age of 25 years, with a fair education, with no mental or physical disability, with some knowledge of English, skilled as a seamstress and a manufacturer of artificial flowers, with a disposition to work and support herself, and having a well-to-do sister and brother-in-law, domiciled in this country, who stand ready to receive and assist her. We cannot see how it can be said that there was any evidence that she was likely to become a public charge."); *Williams v. United States*, 206 F. 460, 461 (2d Cir. 1913) (finding alien was not liable to become a "public charge" since there was testimony alien was an actress and there was no "proof she [had] been supported by charity or at the expense of the public"); *Ex parte Mitchell*, 256 F. 229, 230 (N.D.N.Y. 1919) (finding that an "alien who [was] a woman 42 years of age, in good health, a nurse on occasion, a preacher of the gospel, and . . . [was] able to earn her own living and always has done so" was not a "public charge"); *United States v. Williams*, 204 F. 828, 829 (S.D.N.Y. 1913) (alien not likely to become a "public charge" by reason of owing money to another

When Congress adopted the Immigration and Nationality Act of 1952 ("INA"), it reused the "public charge" term.[201] Because Congress reused a term that had a longstanding, technical definition, and did so without redefining the term, the preexisting construction governs.[202]

The Department proposes to define "public charge" in a way wholly incompatible with this technical definition. The technical meaning of the term corresponds to the current construction of "public charge"—that term is limited to individuals who are principally dependent on the state for support. The Department's proposal to redefine a "public charge" as one who receives benefits in an amount equivalent to 15 percent of the federal poverty level wholly departs from the technical meaning of the term. It is thus unlawful.

B. The extension of the public charge analysis to extension-of-stay applicants and others is unlawful.

The extension of public-charge determinations to extension-of-stay applicants is unlawful. The Department is "proposing to require an applicant for an extension of stay or change of status to attest that he or she has neither received since obtaining the nonimmigrant status he or she seeks to extend or to which he or she seeks to change, is not receiving, nor is likely to receive at any time in the future one or more public benefits as defined in this proposed rule."[203]

But, as the Department rightly observes, "the INA does not indicate that aliens seeking an extension of stay or change of status must establish self-sufficiency."[204] Likewise, the Department concedes that "Section 212(a)(4) of the Act, does not, however, directly apply to applications for extension of stay or change of status because extension of stay and change of status applications are not applications for a visa, admission, or adjustment of status."[205] It says this repeatedly: "the public charge inadmissibility determination does not directly apply" to those "aliens who seek to change their nonimmigrant status or extend their nonimmigrant stay."[206]

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and where there was no evidence in the record he could not earn a living); *United States v. Redfern*, 180 F. 500, 502 (E.D. La. 1910) (alien not liable to become a "public charge" where alien and her husband were found to be "strong, healthy, and intelligent" and the couple earned enough in daily wages to prevent them from becoming a public charge); *United States v. Lipkis*, 56 F. 427, 428 (S.D.N.Y. 1893) (manual laborer was found not to be a "public charge" as "his health, capacity for work, and the probability that he will obtain work, furnish ordinary and sufficient security, in the ordinary course of things, against any such liability").

[201] 8 U.S.C. § 1182(a)(4) ("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.").

[202] *Lamar, Archer & Cofrin, LLP*, 138 S. Ct. at 1762; *Bragdon*, 524 U.S. at 645; *Lorillard*, 434 U.S. at 580.

[203] 83 Fed. Reg. at 51,135.

[204] *Id.* at 51,136.

[205] *Id.* at 51,125.

[206] *Id.* at 51,123.

Congress has specifically and clearly determined the category of immigration benefits and applications to which the "public charge" analysis attaches. The Department cannot revise this legislative determination. Its attempt to do so is unlawful. The Department has no legal authority to adopt this element of the proposed rule.

C. The proposed rule is arbitrary and capricious—and issued without the procedures required by the Administrative Procedure Act.

The Administrative Procedure Act (APA) precludes the Department from acting in a way that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[207] Moreover, it is elementary that "[u]nexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[208] For several reasons, the proposed rule is just such an arbitrary and capricious policy.

1. The proposed rule does not provide a reasoned explanation for departing from the Department's definition of "public charge."

The Department is "proposing a new definition of public charge" vastly different than the one it has relied upon for decades.[209] The Department (and its predecessors) has long held that, to qualify as a "public charge," one must be "primarily dependent" on public benefits.[210] The proposed definition does not "require a primary dependence on the government in order for someone to be a public charge."[211] Instead, the Department proposes to establish a vastly lower threshold, declaring any individual who receives 15 percent of the federal poverty level in benefits (pegged to a household size of one person, regardless of the individual's actual household size) as a public charge.[212] Several aspects of this determination render it arbitrary and capricious—and therefore unlawful.

First, the Department supplies no non-arbitrary rationale to support its new definition of a "public charge." The Department now "proposes to consider receipt of monetizable public benefits . . . where the cumulative value of one or more of the listed benefits exceeds 15 percent of the Federal Poverty Guidelines (FPG) for a household of one within any period of 12 consecutive months."[213] The reason: "DHS believes that the 15 percent threshold is a reasonable approach."[214]

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[207] 5 U.S.C. § 706(2)(A).

[208] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (citation and quotation marks omitted).

[209] 83 Fed. Reg. at 51,159.

[210] *Id.* at 51,163.

[211] *Id.* at 51,158.

[212] *Id.*

[213] *Id.* at 51,164.

[214] *Id.* at 51,165.

Why is that so? Because "DHS believes that an individual who receives monetizable public benefits in excess of 15 percent of FPG is neither self-sufficient nor on the road to achieving self-sufficiency."[215]

The Department offers no reasoning or data whatsoever to support these conclusions. The Department fails to describe why "self-sufficiency" is the proper test for a "public charge." Setting aside the fundamental, threshold problem, the Department offers no data to conclude that its proposed 15-percent test is instructive on the question of self-sufficiency. The Department has apparently not considered whether individuals or households that meet this threshold could maintain "self-sufficiency" without receipt of these benefits. Without that analysis, the test is entirely arbitrary and capricious. Rather, to make this judgment—and implement this policy—the Department must have an objective rationale that connects its proposed 15-percent threshold to its proffered standard of "self-sufficiency."[216]

Second, to the extent that the Department offers any reasoning, it is deeply flawed. In the Department's own accounting, relying on dictionary definitions, a "public charge" is "an impoverished or ill individual who receives public benefits for a substantial component of their support and care can be reasonably viewed as being a public charge."[217] But the plain meaning of a "substantial component" is 50 percent or more. To the extent that dictionaries offer quantitative definitions of "substantial," they confirm that the term means "in the main" or "of or relating to the main part of something."[218] The Department's own understanding of "public charge" thus confirms what has always been the law—one is a "public charge" only if one relies on public benefits at a rate of 50 percent of more.

In fact, the Department's reasoning is internally contradictory. The Department *acknowledges* that a "public charge" is limited to those who rely on public benefits "for a substantial component of their support and care."[219] But then, in describing the 15-percent threshold that the Department would adopt, the Department states its belief "that receipt of such benefits even in a relatively small amount or for a relatively short duration would in many cases be sufficient to render a person a public charge."[220] This latter concession is necessary, given that

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[215] *Id*.

[216] The Department cannot supply this data in the first instance in its final rule. This is the most critical material for which the public must be allowed to evaluate and comment. Boundless believes that it is *impossible* for the Department to make this necessary showing. If the Department nonetheless attempts to do so, the Department must give the public an opportunity to rebut its analysis. Failure to do so would constitute procedural error under the APA.

[217] 83 Fed. Reg. at 51,158.

[218] *Webster's Third New International Dictionary* 2280 (1981).

[219] 83 Fed. Reg. at 51,158.

[220] *Id*. at 51,164.

its test sweeps in an individual who receives as little as $1,812 in benefit equivalents over a 12-month period.[221]

In other words, the Department *admits* that its new definition of "public charge" would encompass individuals who receive "a relatively small amount" of benefits—even though the Department simultaneously concedes that, properly defined, "public charge" is limited to those individuals for whom public benefits are a "substantial component" of their support and care. The Department's position is obviously and baldly inconsistent. It cannot legally proceed with its proposal. Doing so would be arbitrary and capricious.

Third, the Department proposes a definition of "public charge" that departs from the considered views of every other agency it has identified as addressing the issue. The Department concedes:

> The current policy's definition is consistent, in some respects, with how other agencies have defined dependence in certain contexts. For example, in certain congressional reports, HHS has defined welfare dependence as "the proportion of individuals who receive more than half of their total family income in one year from the Temporary Assistance for Needy Families (TANF) program, the Supplemental Nutrition Assistance Program (SNAP) and/or the Supplemental Security Income (SSI) program." The IRS has also defined a qualifying dependent child as one who cannot have provided more than half of his or her own support for the year and a qualifying dependent relative as generally someone who depends on another for more than half of his or her total support during the calendar year. Within the context of preparing reports to Congress on welfare dependence or constructing certain tax rules, a "primary dependence" approach may be appropriate. As HHS has noted, "using a single point—in this case 50 percent—yields a relatively straightforward measure that can be tracked easily over time, and is likely to be associated with any large changes in total dependence."[222]

The Department provides no reason to depart from the standards that now broadly govern across the federal government. The Department supplies no reason why these other agencies' determinations are wrong. Nor does the Department address the practical problems created by agencies having different thresholds for assessing "public charge."

For all of these reasons, the Department's proposal to substantially reduce the threshold for finding an individual a "public charge" is arbitrary, capricious, or otherwise unlawful. The Department has no lawful authority to promulgate this policy.

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[221] *Id.*

[222] *Id.* at 51,164.

2. The proposed rule does not provide a reasoned explanation for changing the Department's longstanding policy of not considering non-cash benefits in public-charge determinations.

The Department also fails to provide a reasoned basis for including non-cash benefits in future public-charge adjudications and departing from its prior policy.

The Department asserts that its proposed rule "would improve upon the 1999 Interim Field Guidance by removing the artificial distinction between cash and non-cash benefits."[223] The decades-used field guidance established this distinction after the agency "consulted with Federal benefit-granting agencies such as the Department of Health and Human Services (HHS), the Social Security Administration (SSA), and the Department of Agriculture (USDA)."[224] The agencies uniformly "advised that the best evidence of whether an individual is relying primarily on the government for subsistence is either the receipt of public cash benefits for income maintenance purposes or institutionalization for long-term care at government expense."[225] SSA expressed that receiving supplemental security income "show[ed] primary dependence on the government for subsistence fitting the INS definition of public charge provided that all of the other factors and prerequisites for admission or deportation have been considered or met."[226] And USDA made clear that "neither the receipt of food stamps nor nutrition assistance provided under the Special Nutrition Programs administered by [USDA] should be considered in making a public charge determination."[227]

The Department fails to provide a reasoned justification to depart from its prior decision. It has not identified why prior agency decision-making on this question was flawed. Nor does the Department begin to attempt to quantify the very substantial reliance interests that have emerged based on receipt of certain forms of public benefits.

3. The proposed rule does not provide a reasoned explanation for changing the Department's policy to promulgate an income threshold set at 250 percent of the federal poverty guidelines as a "heavily weighed" factor.

The Department has no reasoned explanation for establishing 250 percent of the federal poverty guidelines as a "heavily weighed" factor. The Department states only that, "[b]ecause many public benefit programs determine eligibility based on the FPG, individuals living above

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223 *Id.* at 51,123.

224 *Id.* at 51,133.

225 *Id.*

226 *Id.*

227 *Id.*

250 percent of the FPG are less likely to receive public benefits."[228] The Department's argument is hard to follow—it has no explanation for why it has chosen 250 percent. The Department cannot merely pick a number without reasoned support.

And while the Department includes this "heavily weighed" factor as a "positive factor[]," its commentary suggests that failure to meet this threshold would qualify as a *negative* factor: "an alien with an annual income of less than 250 percent of FPG would not *automatically* be inadmissible."[229]

This therefore constitutes a surreptitious attempt to effectively raise the income threshold to 250 percent, without any legal basis for doing so. Indeed, the Department does not consider its previously adopted 1989 final rule, stating that "[a]n alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level is not excludable."[230] And in reaching its arbitrary 250-percent threshold, the Department makes no mention of IIRIRA's establishing a substantially lower 125-percent threshold for a sponsor submitting an affidavit of support.[231]

What the Department proposes to do is to effectively double the 125-percent federal-poverty-guidelines threshold created by Congress—and apply it to applicants rather than sponsors, whether that sponsor is a family member or an employer. The Department has no legal basis to rewrite the statute in this way, and its attempt to do so is arbitrary and capricious.

As a policy matter, it bears mention that this arbitrarily selected 250-percent threshold—if strictly applied, as the Department's language suggests it would be—would have devastating effects. According to data analyzed by Boundless through its customer database, "more than half (53%) of foreign-born spouses who are currently eligible for green cards could suddenly find themselves ineligible" if the proposed rule is enacted.[232] If enacted, nearly 200,000 married couples in the United States would "be faced with a wrenching choice: leave the United States, or live apart."[233] These grave effects, among many others, make the Department's arbitrary choice of this threshold, too, especially troubling.

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228 *Id.* at 51,204.

229 *Id.* (emphasis added).

230 *See* 54 Fed. Reg. at 29,454.

231 *See* 8 U.S.C. § 1183a(a)(1)(A) (sponsor must agree to support the sponsored noncitizen "at an annual income that is not less than 125 percent of the Federal poverty line").

232 *Looming Immigration Directive Could Separate Nearly 200,000 Married Couples Each Year*, Boundless Immigration Inc. (Sept. 24, 2018), perma.cc/4SEJ-M6W6, https://www.boundless.com/blog/looming-immigration-directive-separate-nearly-200000-married-couples/.

233 *Id.*

4. The proposed rule's solicitude for U.S. servicemembers arbitrarily disregards U.S. veterans and first responders—and it confirms the arbitrariness of the proposed rule.

The proposed rule provides a carve-out for U.S. servicemembers. The Department states that it "proposes to exclude consideration of the receipt of any public benefits by active duty servicemembers, including those in the Ready Reserve of the U.S. Armed Forces, and their families."[234] It explains that "[t]he United States Government is profoundly grateful for the unparalleled sacrifices of the members of our armed services and their families."[235] The Department recognizes that, "as a consequence of the unique compensation and tax structure afforded by Congress to aliens enlisting for military service, some active duty alien servicemembers, as well as their spouses and children, as defined in section 101(b) of the Act, may rely on SNAP and other listed public benefits."[236] "As a result, the general standard proposed in this rule could result in a finding of inadmissibility under section 212(a)(4) when such aliens apply for adjustment of status."[237]

While Boundless agrees with the Department's commendation of the sacrifices of U.S. servicemembers, this proposed carve-out renders the proposed rule unlawfully arbitrary and capricious for multiple reasons.

First, the Department seeks to provide this exception to the new regulation only to active-duty servicemembers and those in the Ready Reserve.[238] Once an individual leaves active or reserve duty, then this exception would apparently terminate immediately. Thus, if a U.S. servicemember leaves the military upon the completion of his or her enlistment, is honorably discharged, and takes up a private job at the very same salary, that individual's family may then immediately become subject to the proposed public-charge regulations—and thus be ineligible for admissibility and adjustment of status. Having served the Nation, these individuals and their families should not become subject to the baleful effects of the proposed public charge rule the moment that they depart the military. The Department's failure to include military veterans within this carve-out is arbitrary and capricious.

Second, the carve-out also fails to include many other members of the public who have jobs of comparable importance to national security. For example, there is no exemption for non-uniform support members working for or on behalf of the U.S. military, those working for state or

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234 83 Fed. Reg. at 51,173.

235 *Id*.

236 *Id*.

237 *Id*.

238 *Id*.

local law enforcement, those working for prisons, or working as firefighters or as emergency medical technicians. No doubt the "United States Government is profoundly grateful for the unparalleled sacrifices"[239] of police officers, firefighters, and emergency medical technicians—but the proposed rule would render countless numbers of first responders within the newly expanded ambit of "public charges."

Take for example, EMTs. According to the Bureau of Labor Statistics, the lower 10 percent of emergency medical technicians earn $21,880 per year or less, and the median EMT earns $33,380.[240] This is roughly equivalent to—if not less than—the earnings of enlisted soldiers, who, with two years or less of service, earn between $19,659 and $35,330 annually.[241] It makes no sense for the Department to establish a special rule for active-duty U.S. servicemembers while denying those benefits to first responders on whom the Nation's domestic security depends. This is the hallmark of an arbitrary and capricious policy.

Third, the Department's recognition that active-duty U.S. servicemembers would qualify as "public charges" under the plain terms of the proposed rule is proof positive that the proposal is bad policy. The rulemaking asserts that "[t]he primary benefit of the proposed rule would be to help ensure that aliens who apply for admission to the United States, seek extension of stay or change of status, or apply for adjustment of status are self-sufficient."[242] But the Department has set the threshold for what it believes to be "self-sufficient" so high that, by the Department's own admission, members of the active U.S. military would not qualify.[243] This is principally because of the "compensation" that Congress has set for military salaries.[244]

This confirms that the Department has set the threshold for "self-sufficiency"—or "public charge"—in an unreasonable way. To begin with, in setting the salary levels for members of the U.S. military, Congress has surely determined that the salary levels are sufficient to render our servicemembers "self-sufficient." The Department's proposed rulemaking conflicts with congressional judgment on this matter.

What is more, employment as an active-duty member of the U.S. military has long been viewed as an honorable, stable job that provides a gateway for all individuals in this country—regardless of race, economic background, social class, or other forms of difference—to succeed in

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239 *Id*.

240 *EMTs and Paramedics*, Bureau of Labor Statistics (last modified Apr. 13, 2018), goo.gl/SgwZ4a.

241 *Military Careers*, Bureau of Labor Statistics (last modified Apr. 13, 2018), goo.gl/v23VNr.

242 83 Fed. Reg. at 51,118.

243 *Id*. at 51,173.

244 *Id*.

life. But the Department has set the threshold for "public charge" so high that many active-duty members of the military would now qualify. This defies common sense.

In sum, active-duty members of the military are not "public charges." The answer is not to exempt active-duty servicemembers from the "public charge" regulation; it is to embrace a reasonable definition of "public charge" so that active-duty servicemembers are not rendered "public charges" to begin with.

Fourth, while applying the proposed rule to servicemembers would have baleful policy consequences—a conclusion with which the Department agrees[245]—the Department lacks legal authority to exempt the "public charge" analysis from a whole segment of the population. The relevant statute regarding "public charge" applies to "[a]ny alien."[246] The Department has stated no basis on which it can exclude certain individuals from the generally applicable proposed definition of "public charge." Rather, the proposed rule would almost certainly apply to servicemembers like the rest of the population. Because the proposed rule would therefore have an effect on "military readiness and recruitment,"[247] the Department should abandon the proposal.

5. The Department fails to assess the impact on returning lawful permanent residents.

Tucked into a footnote, the Department makes a stunning assertion—that it seeks to apply the "public charge" analysis to any *lawful permanent resident* who returns to the United States following a trip abroad that exceeds 180 days.[248] The Department, however, has failed to undertake any of the analysis necessary to determine the implications of doing so.

The Department does not, for example, quantify how many lawful permanent residents seek to reenter the country each year after an absence of 180 days or more. Given than an individual may travel to another country to care for a sick family member and be required to remain abroad for the duration of an illness—as just one example—it is very likely that substantial numbers of individuals would fall within this category. While the Department has, or could obtain, this information, it does not supply it.

Nor does the Department begin to assess the rate at which it would seek to deny admission to U.S. lawful permanent residents—that is, individuals who have structured their lives in the United States based on the existing regulatory structure, including the prevailing definition of "public charge." These individuals have very substantial reliance interests in the United States—

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245 *Id.*

246 8 U.S.C. § 1182(a)(4).

247 *See* 83 Fed. Reg. at 51,173.

248 *Id.* at 51,135 n.176.

they have homes, property, cars, and other assets here. Many of their family members, including children and spouses, reside here. They have jobs and education and responsibilities here. Yet the Department asserts that, under the proposed policy, leaving the country for 180 days may permanently lead to someone's banishment from this country, notwithstanding their present status as a *lawful permanent resident*.

Now, based on a government adjudicator's discretionary determination, a "returning resident who receives any of the [listed] public benefits could potentially be found to likely become a public charge at the airport."[249] Moreover, the proposed rule seems to place the burden of proof on a returning resident to establish that he or she is *not* inadmissible as a public charge[250]—a clear violation of *Woodby v. INS*[251] and *Landon v. Plasencia*,[252] as has recently been affirmed by the Board of Immigration Appeals in *Matter of Rivens*.[253]

This proposed rule would therefore upset very significant, established reliance interests. The Department's failure to take these reliance interests into account—much less address them—renders the proposed rulemaking facially unlawful.[254] And the Department's shifting of the burden of proof runs afoul of controlling precedent.

D. The Department's failure to conduct a robust cost-benefit analysis—and the overwhelming costs associated with the proposed rule—confirm that it is unlawful.

In conducting rulemaking under the APA, the Department must assess the benefits *and costs* of proposed rulemaking. Its failure to do so—as well as its failure to adequately address evidence bearing on this analysis—is arbitrary and capricious. Moreover, Executive Orders 12,866 and 13,563 direct an agency to assess the costs and benefits of available regulatory alternatives and to select the regulatory approach that maximizes net benefits.[255]

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[249] Cyrus Mehta, *The Vulnerable Returning Green Card Holder Under the Proposed Public Charge Rule*, Insightful Immigration Blog (Oct. 15, 2018), perma.cc/UR3A-2EMB (describing example of an elderly parent of a U.S. citizen who has a green card, travels to China for six months to dispose of valuable ancestral property, and returns to the United States to face a potentially adverse public-charge adjudication).

[250] *Id.*

[251] 385 U.S. 276 (1996).

[252] 459 U.S. 21 (1982).

[253] 25 I&N Dec. 623 (BIA 2011).

[254] *Encino Motorcars, LLC*, 136 S. Ct. at 2126; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[255] 83 Fed. Reg. at 51,227. *See* Exec. Order No. 12,866 ("In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives."); *id.* ("Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need."); Exec. Order No. 13,563 ("[E]ach agency is directed to use the best available techniques to quantify anticipated

Here, the Department altogether failed to use *any* techniques, let alone the "best available techniques,"[256] to undertake a compliant cost-benefit analysis. The Department fails to even gesture at quantifying the most crucial costs of its proposed rule. And even its skeletal cost-benefit analysis demonstrates that this proposed rule, if adopted, would produce a substantial net cost on the United States.

1. The Department's cost-side analysis fails to identify and quantify critical effects stemming from its proposed rule, but even the deficient cost-side analysis illustrates the baleful effects of the proposed rule.

The Department enumerated just some of the costs expected to result from the proposed rule.[257] For instance:

- It anticipates the proposed rule to result in undiscounted direct costs of up to *$1.3 billion* over a ten-year period simply related to the completion of new forms;[258]

- It expects a "reduction in transfer payments from the federal and state government"[259] to the tune of *$22.27 billion* over ten years,[260] which would have "downstream and upstream impacts on state and local economies, large and small businesses, and individuals";[261] and

- It anticipates "[w]orse health outcomes," "[i]ncreased use of emergency rooms and emergent care as a method of primary health care," "[i]ncreased prevalence of communicable diseases," "[i]ncreases in uncompensated care," "[i]ncreased rates of poverty and housing instability," and "[r]educed productivity and educational attainment."[262]

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present and future benefits and costs as accurately as possible."); *id.* (an agency must "tailor its regulations to impose the least burden on society").

256 Exec. Order No. 13,563.

257 83 Fed. Reg. at 51,244-74.

258 *Id.* at 51,273.

259 *Id.* at 51,260.

260 *Id.* at 51,274.

261 *Id.* at 51,268.

262 *Id.* at 51,270. The Department further notes that another set of costs would be those "associated with familiarization with the provisions of the rule." *Id.* at 51,269-70. But the Department only discusses the burden on entities in terms of *reading* the proposed rule. The Department fails to discuss the costs of *communicating* that reading to the communities that these entities serve—creating and updating flyers and website pages, directly answering the community's questions about complex provisions of the proposed rule, doing community outreach, and beyond.

But in its 30-page endeavor to isolate just some of the costs that the Department itself expects to arise from the proposed rule, the Department's attempts at quantifying costs range from nonexistent to facially indefensible.

In estimating the "chilling effect" associated with the proposed rule, for instance, the Department makes the observation that "previous studies examining the effect of PRWORA in 1996 showed a reduction in enrollment from 21 to 54 percent."[263] The previous studies, which "had the benefit of retrospectively analyzing the chilling effect of PRWORA using actual enrollment data," found that the decline in enrollment in certain programs "was steepest among legal immigrants."[264] Inexplicably, the Department disregarded the 21 to 54 percent chilling effect that was empirically, historically observed.[265] The Department's substitute chilling analysis—which results in a 2.5 percent rate[266]—is implausible. Indeed, the Department fails to offer any non-arbitrary basis to reach this asserted chilling rate, notwithstanding historic chilling data showing a vastly higher effect.

Moreover, the proposed rule would likely have a chilling effect on immigration to the United States overall—an effect that the Department does not consider. The Department makes no attempt to estimate the impact of individuals who will likely forego coming to America, where they would face a wholly discretionary, little-understood determination as to whether they can stay and do business in America. That chilling effect could also have an enormous economic impact. One in every ten people employed at a privately owned company in the United States works at an immigrant-owned firm.[267] First- or second-generation immigrant-founded Fortune 500 companies alone employ more than 12.8 million people and boast a combined revenue of $5.3 trillion.[268] Small businesses with at least one international founder employed 4.7 million American workers in 2007.[269] Throughout the United States, new immigrants account for an average of 16.7 percent of all business owners across all States.[270] As other nations are "employing aggressive recruitment strategies" to attract this vital international talent, the Department proposes a policy that would

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263 *Id.* at 51,266.

264 *Id.*

265 *See id.*

266 *Id.*

267 Robert W. Fairlie, *Open for Business: How Immigrants Are Driving Small Business Creation in the United States*, P'ship for a New Am. Econ., 14 (Aug. 2012), perma.cc/DD4E-AAVD.

268 *Immigrant Founders of the 2017 Fortune 500*, Ctr. for Am. Entrepreneurship (2017), goo.gl/tokHPK.

269 James Jennings et al., *Immigrant Entrepreneurs: Creating Jobs and Strengthening the U.S. Economy in Growing Industries*, Immigrant Learning Ctr., Inc., 2 (Apr. 2013), perma.cc/4TRV-HHV6.

270 Robert W. Fairlie, *Estimating the Contribution of Immigrant Business Owners to the U.S. Economy*, U.S. Small Bus. Admin., 23 (Nov. 2008), perma.cc/JR5G-HF72.

likely curtail the inflow of this talent.[271] The economic effects are potentially enormous and should have been considered in the Department's analysis.[272]

That chilling effect would be even greater in that the Department now proposes to consider past receipt of a fee waiver as a negative factor in its discretionary analysis.[273] One study showed that providing fee vouchers to mitigate the high cost of naturalization increased naturalization application rates by approximately 41 percent.[274] The study illustrates that the high cost of naturalization is a barrier for many people; the Department nonetheless hopes to chill people from accessing relief from that barrier. The United States' naturalization rate, in fact, is substantially "lower than that of other traditional immigrant-receiving countries," which deprives the United States of the benefits of naturalization.[275] The Department's policy would do further damage to that rate.

Additionally, the Department fails to even attempt to quantify the "downstream and upstream impacts on state and local economies, large and small businesses, and individuals"[276]—what may well be most significant economic costs associated with the proposed rule. The Department, notwithstanding its directive to "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible,"[277] elected not to use *any* techniques to do so.

In a similar vein, the Department makes no effort to quantify the "[w]orse health outcomes," "[i]ncreased use of emergency rooms and emergent care as a method of primary health care," "[i]ncreased prevalence of communicable diseases," "[i]ncreases in uncompensated care," "[i]ncreased rates of poverty and housing instability," and "[r]educed productivity and educational attainment"[278] that it itself expects to follow from its proposed rule.

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[271] *Not Coming to America: Why the U.S. is Falling Behind in the Global Race for Talent*, P'ship for a New Am. Econ. & P'ship for N.Y.C., 1 (May 2012), perma.cc/2PUZ-HQKY.

[272] Moreover, the Department should have considered the economic effect of "[s]anctioning low-income, less educated immigrants who use public benefits soon after they arrive in the country and preventing them from attaining permanent residence." Leighton Ku & Drishti Pillai, *The Economic Mobility of Immigrants: Public Charge Rules Could Foreclose Future Opportunities*, George Wash. Univ., 5 (Nov. 2018), goo.gl/zMdx44. This effect will "reduce[] [immigrants'] ability to contribute to the overall U.S. economy." *Id.* Again, without consideration of these economic effects, the Department's economic analysis is incomplete.

[273] 83 Fed. Reg. at 51,187-88.

[274] *See* Jens Hainmueller et al., *A Randomized Controlled Design Reveals Barriers to Citizenship for Low-Income Immigrants*, 115 Proc. Nat'l Acad. Sci. U.S. Am. 939, 939 (2018).

[275] *See id.*

[276] *Id.* at 51,268-69.

[277] Exec. Order No. 13,563.

[278] 83 Fed. Reg. at 51,270.

The failure of the Department to assess these issues is fatal to the policy. To begin with, having failed to meaningfully address these implications, the public is left with no meaningful basis to comment on the proposed rule.[279] Beyond that, the Department acts in an arbitrary and capricious manner by failing to even attempt to quantify the enormous negative consequences that the Department acknowledges would follow from the proposed rule.

The Department asserts that it 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."[280] The Department's "qualitative[] acknowledge[ment]" is wholly inappropriate. Agencies *must* "use the best available techniques to *quantify* anticipated present and future benefits and costs as accurately as possible."[281] Executive Order 13,563 does not permit for a qualitative recognition of a potential cost; it requires that the agency use the best-available techniques to quantify the potential effects of the proposed rule.[282]

The Department concludes its examination of the costs of its proposed rule with a catch-all statement that "the proposed rule is likely to produce various other unanticipated consequences and indirect costs."[283] It then "requests comments on other possible consequences of the rule and appropriate methodologies for quantifying" them.[284] That gets the rulemaking process backwards: it is incumbent on the agency to identify and quantify the costs, not to place the burden on the public.[285]

The Department repeatedly eschews its responsibility to identify and quantify the costs of its proposed rule. Even so, the 30-page perfunctory overview it offers in lieu of the required cost-side analysis demonstrates that the costs of the proposed rule would be very substantial.

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[279] If the Department seeks to quantify these costs, as it is legally obligated to do, it will be incumbent on the Department to provide for a new public comment period that will allow the public to react accordingly.

[280] 83 Fed. Reg. at 51,260.

[281] Exec. Order No. 13,563 (emphasis added).

[282] Buried in a discussion of the National Environmental Policy Act, the Department expands upon its statement: "DHS cannot estimate with any degree of certainty to what extent the potential for increased findings of inadmissibility on public charge grounds would result in fewer individuals being admitted to the United States." 83 Fed. Reg. at 51,277.

[283] *Id.* at 51,270.

[284] *Id.*

[285] *See* Exec. Order No. 12,866 ("In deciding whether and how to regulate, agencies should assess *all* costs and benefits of available regulatory alternatives.") (emphasis added).

2. The three paragraphs of "benefits" identified in the proposed rule dissipate upon examination.

The Department's 30-page—yet still underdeveloped—assessment of the anticipated costs of its proposed rule stands in stunning contrast to its *three-paragraph* assessment of the anticipated "benefits."[286] And, in reality, all of those "benefits" dissipate upon even the most cursory of looks.

The Department notes that the "[t]he primary benefit of the proposed rule would 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) and instead, will rely on their financial resource[s], and those of family members, sponsors, and private organizations."[287] The Department's blunt confession that it cannot "determine whether immigrants are net contributors or net users of government-supported public assistance programs,"[288] however, immediately guts the "primary benefit" of this proposed rule in its entirety. That alone is fatal to this rulemaking process.

Rather than trying to assess or quantify the economic impact of the "primary benefit" of its rule, the Department simply notes that it is "difficult to determine" because the answer "depends on the data source, how the data are used, and what assumptions are made for analysis."[289] This cannot satisfy the Department's burden, as that same rationale could be used in every single agency rulemaking, absolving any agency of its obligations to address real evidence and provide concrete analysis. The APA's requirements cannot be disregarded through such platitudes.

For the propositions that "there is a lack of academic literature and economic research examining the link between immigration and public benefits" and that it is "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," the Department cites four pages of a single, non-academic book.[290] In fact, the first proposition is unsupported, even tangentially, by a single word on the cited pages.[291] What is more, that same chapter[292] cites multiple sources of "academic literature

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[286] 83 Fed. Reg. 51,274.

[287] *Id. See also id.* at 51,118 ("The primary benefit of the proposed rule would be to help ensure that aliens . . . are self-sufficient, *i.e.*, do not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their family, sponsor, and private organizations."); *id.* at 51,229 (same).

[288] *Id.* at 51,235.

[289] *Id.* at 51,235-36.

[290] *Id.* at 51,235-36 (citing George J. Borjas, *We Wanted Workers: Unraveling the Immigration Narrative* 175-76, 190-91 (2016)).

[291] *See* Borjas, *supra*, at 175-76, 190-91.

[292] *Id.* at 171-91.

and economic research" examining just that link—directly contradicting the proposition that it is impossible to determine.[293] Indeed, the evidence is overwhelming that immigration contributes substantially to the U.S. economy in net terms.[294]

It is telling, moreover, that the Department purports to rely virtually entirely on work by George Borjas. But Borjas' work—focusing on the Mariel Boatlift—has been widely and conclusively criticized.[295] In view of all of the contrary economic analysis, the Department's purported reliance on the Borjas analysis is thus arbitrary and capricious.[296]

Moreover, Borjas himself was a member of both National Academy of Science reports that exhaustively describe the economic benefits of immigration.[297] The first panel, of which Borjas was a member, underwent extensive economic and statistical analysis and concluded that "admitting one immigrant will generate a net gain of $80,000 when added up over three centuries."[298] Borjas notes that the estimates in the first report "became 'conventional wisdom'

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[293] *See, e.g., id.* at 174 (CBO report concluding that a "path to legalization" would "produce a surplus of $25 billion for government coffers"), *id.* at 185 (NAS, concluding that "admitting one immigrant will generate a net gain of $80,000 when added up over three centuries"); *id.* at 186 (Council of Economic Advisers white paper concluding that, in the long-run, there would be a "positive fiscal impact" of approximately "$80,000 per immigrant on average"); *id.* at 187-88 (NAS report concluding that immigrants would have a positive long-run fiscal impact of approximately $53 thousand, using a 75-year timespan and the CBO-projected future path of taxes and spending).

[294] *See, e.g., Congressional Budget Office Cost Estimate*, Cong. Budget Office (June 4, 2007), perma.cc/8S73-7X5Q; *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration*, Nat'l Acads. of Sci., Eng'r & Med. (1997), goo.gl/p82ZAo; *Immigration's Economic Impact*, The White House, Council of Econ. Advisers (June 20, 2007), perma.cc/BZQ3-8V6E; *The Economic and Fiscal Consequences of Immigration*, Nat'l Acads. of Sci., Eng'r & Med. (2017), goo.gl/9xjiwp.

[295] *See, e.g.*, Giovanni Peri & Vasil Yasenov, *The Labor Market Effects of a Refugee Wave: Synthetic Control Method Meets the Mariel Boatlift* (June 2017), perma.cc/4P9U-YD2C; Michael Clemens, *There's No Evidence That Immigrants Hurt Any American Workers*, Vox (Aug. 3, 2017), goo.gl/kSqPs6; Michael Clemens, *What the Mariel Boatlift of Cuban Refugees Can Teach Us About the Economics of Immigration: An Explainer and a Revelation*, Ctr. for Glob. Dev. (May 22, 2017), perma.cc/YN4V-FT92; David Roodman, *Why a New Study of the Mariel Boatlift Has Not Changed Our Views on the Benefits of Immigration* (Feb. 20, 2017), goo.gl/mafjJu; Alex Nowrasteh, *The Mariel Boatlift Raised the Wages of Low-Skilled Miamians*, Cato Inst. (Jan. 2, 2017), perma.cc/SDA3-PCSQ; Alan de Brauw, *Does Immigration Reduce Wages?*, Cato Inst. (2017), perma.cc/D6Y5-ZXHR; David Card & Giovanni Peri, *Immigration Economics by George J. Borjas: A Review Essay*, 54 J. Econ. Literature 1333 (2016); Alan de Brauw & Joseph R. D. Russell, *Revisiting the Labor Demand Curve: The Wage Effects of Immigration and Women's Entry into the U.S. Labor Force, 1960-2010*, Int'l Food Policy Research Inst. Discussion Paper No. 1402 (2014), goo.gl/DzFHEA.

[296] In fact, Borjas criticizes the theory underlying the Department's proposed tightening of public charge rules. Borjas correctly observes that the Department's "solution" of "further tighten[ing] the welfare eligibility rules for immigrants" necessarily "creates additional problems." Borjas, *supra*, at 208. Indeed, "because immigrant households often qualify for assistance by virtue of having US-born children," the Department's proposed rule would "require that we treat minor US citizens differently depending on where their parents were born." *See id.* at 208-09.

[297] *See The New Americans: Economic, Demographic, and Fiscal Effects of Immigration*, Nat'l Acads. of Sci., Eng'r & Med. (1997), goo.gl/p82ZAo; *The Economic and Fiscal Consequences of Immigration*, Nat'l Acads. of Sci., Eng'r & Med. (2017), goo.gl/9xjiwp.

[298] Borjas, *supra*, at 185.

and were referred to frequently in subsequent years."[299] He himself observes, based on that report, that "immigrants seem to be a very good deal" in the long run.[300] And the second panel, of which Borjas was a member, concluded that immigrants would have a net positive long-run fiscal impact of approximately $53,000, using a 75-year timespan and the CBO-projected future path of taxes and spending.[301]

As the literature shows, it is possible for the Department to quantify these important issues. The Department has simply failed to do so, notwithstanding its legal obligations. The Department has likely not quantified these facets of its analysis because doing so would fatally undermine the proposed regulation.

The Department waves at a second minuscule proposed "benefit": "the elimination of Form I-864W."[302] Form I-864W's "elimination," however, comes only from the fact that the information on that form "would now be captured using Form I-485."[303] For the Department to "eliminate" a four-page form by folding it into a different form requiring *much more* information is not a benefit.

Last, the Department states that establishing a public charge bond "would potentially allow an immigrant the opportunity to be admitted although he or she was deemed likely to become a public charge."[304] This "benefit," too, collapses immediately. The Department itself notes that this "potential[]" is seemingly coterminous with being admitted in the first place: "The same factors that weighed positively when making the public charge inadmissibility determinations will generally indicate that offering the option of a public charge bond to an alien is warranted."[305] And the Department declines to estimate how many discretionary public-charge bonds it expects to actually issue.[306] Once more, this "benefit" is nonexistent.

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[299] *Id.* at 182.

[300] *Id.* at 185.

[301] *Id.* at 187-88.

[302] 83 Fed. Reg. at 51,274.

[303] *Id.*

[304] *Id.* at 51,274.

[305] *Id.* at 51,221.

[306] *See id.* at 51,260 (noting that "the proposed public charge bond process would be new and historical data are not available to predict future estimates" and estimating only the per-applicant cost of the process rather than the cumulative cost). Elsewhere in the proposed rule, the Department makes just these "future estimates," as it must. *See, e.g.*, *id.* at 51,254 (estimating 382,264 people would file the newly created Form I-944 annually).

E. The proposed rule violates the Regulatory Flexibility Act.

The Regulatory Flexibility Act requires agencies to consider the potential impact of regulation on small entities during rulemaking.[307] The Department failed to meet that requirement.

The Department recognizes that components of the proposed rule "would directly regulate small entities."[308] The Department notes that individuals whose applications for a stay or a change of status are rejected would result in employers "los[ing] the beneficiary as an employee" and "incur[ring] labor turnover costs" as a result.[309] But the Department does not consider these effects in its initial regulatory flexibility analysis. And the Department altogether ignores the business community's interest in stability in employment, even if certain employees are ultimately granted stay or a change of status. In other words, now, virtually *every* application would be a discretionary nail-biter—a nightmare for the regulated business community.

Instead of performing the statutorily *required* analysis, the Department baldly states, without explanation, that it cannot do so. The Department states that it "cannot determine the number of small entities that might be impacted."[310] It then states that it "cannot predict the exact impact" to "small entities at this time," instead offering only its "expect[ation] that obligors would be able to pass along the costs of this rulemaking to the aliens."[311]

The Department provides no basis to suggest why it could not estimate the number of affected small entities. And in any event, the Department did not comply with its statutory mandate: under the plain language of the RFA, the Department "*shall* describe the impact"[312] of its proposed rule. The Department explicitly eschewed that statutory requirement, stating that it "cannot predict" that impact.

The direct costs of the proposed rule alone trigger analysis under the Regulatory Flexibility Act. As we showed earlier, each business-related application (in which counsel will be hired) will have a cost-increase of at least $2,410.55 per employee.[313] The costs are thus readily assessable—but the Department has not even attempted to consider them. Given that small businesses hire tens of thousands of immigrants each year at the very least, the requirements of the Regulatory Flexibility Act are readily triggered.

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307 *Id.* at 51,274.

308 *Id.*

309 *Id.* at 51,275.

310 *Id.*

311 *Id.*

312 5 U.S.C. § 603(a).

313 *Supra*, pp. 21-27. Calculation: $19.95 (credit report) + $723.60 (opportunity cost) + $1,667 (legal fee) = $2,410.55.

This impact, moreover, does not scratch the surface of the true impact of the proposed rule. Just some of the "impact[s]" that the Department failed to isolate and consider in its initial regulatory impact analysis are:

- how "los[ing]" potential employees and "incur[ring] labor turnover costs" would affect small entities;[314]

- how "[r]educed productivity and educational attainment," "[w]orse health outcomes," and "[i]ncreased prevalence of communicable diseases,"[315] among other anticipated results of the proposed rule, would affect small entities' productivity and performance capacity;

- how the direct economic effects of the proposed rule would affect small entities' balance sheets as a result of a $22.7 billion ten-year decrease in transfer payments;[316]

- how the "downstream and upstream impacts"[317] of the proposed rule would affect small entities, including through a "decrease" in consumers' "disposable income";[318] and

- how a decline in immigration as a result of the proposed rule would affect small entities, especially given the acknowledged success of immigrant entrepreneurs. Small businesses with at least one international founder employed 4.7 million American workers in 2007.[319]

The Department avows that it considered "a range of potential alternatives to the proposed rule."[320] In reality, the Department considered a "no action" plan, which it found insufficient in that it would "not adequately ensure the self-sufficiency of aliens subject to the public charge

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314 83 Fed. Reg. at 51,275.

315 *Id.* at 51,270

316 *Id.* at 51,274.

317 *Id.* at 51,268.

318 *Id.* at 51,277.

319 James Jennings et al., *Immigrant Entrepreneurs: Creating Jobs and Strengthening the U.S. Economy in Growing Industries*, Immigrant Learning Ctr., Inc., 2 (Apr. 2013), perma.cc/4TRV-HHV6. *See generally* Sari Pekkala Kerr & William R. Kerr, *Immigrants Play a Disproportionate Role in American Entrepreneurship*, Harvard Bus. Review (Oct. 3, 2016), goo.gl/5Cd1A3; Robert W. Fairlie, *Estimating the Contribution of Immigrant Business Owners to the U.S. Economy*, U.S. Small Bus. Admin. (Nov. 2008), perma.cc/JR5G-HF72; Robert W. Fairlie, *Open for Business: How Immigrants Are Driving Small Business Creation in the United States*, P'ship for a New Am. Econ. (Aug. 2012), perma.cc/DD4E-AAVD; Marcia Drew Hohn, *Immigrant Entrepreneurs: Creating Jobs and Strengthening the Economy*, U.S. Chamber of Commerce & Am. Immigration Council (Jan. 2012), perma.cc/L8MS-5ZZG; Stuart Anderson, *Immigrants and Billion Dollar Startups*, Nat'l Found. for Am. Policy (Mar. 2016), perma.cc/6ZTT-UX43; Stuart Anderson, *American Made 2.0: How Immigrant Entrepreneurs Continue to Contribute to the U.S. Economy*, Nat'l Venture Capital Ass'n (June 2013), perma.cc/YPF4-LSQ4.

320 83 Fed. Reg. at 51,276.

ground of inadmissibility."[321] The only other option the Department considered was a "broader alternative," which it states it ultimately declined to adopt because of an interest in "administrability and predictability."[322] The Department apparently declined to consider a narrower alternative.[323] That is inexplicable. And, as we stated before, the "primary benefit" that the Department cites again here to explain why the "no action" plan is "not adequate[]" is entirely unsupported by *any* analysis.[324] Thus, the Department's rejection of the "no action" plan is also unsupported.

F. The proposed rule does not adhere to the federalism obligations set forth in Executive Order 13,132.

The Department asserts that "this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement."[325] Executive Order 13,132, however, renders this assertion hollow. Rather, as the Executive Order holds, "'[p]olicies that have federalism implications' refers to regulations . . . that have substantial direct effects on the States" or "the relationship between the national government and the States."[326]

The proposed rule has obvious and substantial direct effects on States and the relationship between the national government and the States. The proposed rule speaks time and again to those effects. For example:

- The Department is "considering including [the Children's Health Insurance Program, or CHIP] in a final rule."[327] This program is "funded jointly by states and the federal government" and "imposes a significant expense upon multiple levels of government."[328] "CHIP is administered by states in accordance with federal requirements."[329]

- The Department expects that "the 10-year discounted amount of state transfer payments of this proposed policy would be approximately $9.65 billion."[330] This reduction may "have

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321 *Id.*

322 *Id.*

323 *See id.*

324 *Supra*, pp. 57-59.

325 83 Fed. Reg. at 51,276.

326 Exec. Order No. 13,132.

327 83 Fed. Reg. at 51,174.

328 *Id.*

329 *Id.* at 51,173.

330 *Id.* at 51,118.

downstream and upstream impacts on state and local economies."[331] In making the calculation of $9.65 billion, the Department repeatedly underscored that it is operating under the assumption that "the state share of federal financial participation (FFP) is *50 percent*."[332]

- Moreover, the "[s]tates have developed widely varying approaches to time limits. Currently, 40 states have time limits that can result in the termination of families' welfare benefits; 17 of those states have limits of fewer than 60 months."[333] This proposed rule would establish a 36-month limit.[334]

- At the same time, while creating a national rule that would affect all of the States, the Department altogether failed to coordinate with the States or perform the necessary analysis to project the proposed rule's impacts on them: "DHS analyzes federal funds only as we are not readily able to track down and identify the state funds."[335] This rule, which would drastically affect state transfer payments, warrants coordinating with the States to "track down" the relevant information. Executive Order 13,132 requires the Department to do so.

G. The proposed rule violates the Treasury General Appropriations Act of 1999.

The Department "has determined that the proposed rule may decrease disposable income and increase the poverty of certain families and children, including U.S. citizen children."[336] Nonetheless, the Department asserts that it "has determined that the benefits of the action justify the financial impact on the family."[337]

The statute requires that "each agency shall . . . provide an *adequate rationale* for implementation of each policy or regulation that may negatively affect family well-being."[338] Again, as we have explained at length, the Department's three-paragraph discussion of the "benefits" of this program is plainly insufficient to the task.[339] It is not a close call.

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331 *Id.*

332 *See, e.g.*, *id.* at 51,118, 51,228, 51,268, 51,274 (emphasis added).

333 *Id.* at 51,165.

334 *See id.*

335 *Id.* at 51,268 n.856. The Department's hedge—"readily"—underscores that the Department is very much "able" to perform this task.

336 *Id.* at 51,277.

337 *Id.*

338 Pub. L. 105-277, § 654, 112 Stat. 2681-529 (1998) (emphasis added) (codified as a note to 5 U.S.C. § 601).

339 *See supra*, pp. 57-59.

H. The proposed rule violates the Paperwork Reduction Act of 1995.

The Department estimates that it would take individuals 4.5 hours to complete the newly created Form I-944 and another hour to complete the newly created Form I-945.[340] These forms would apply to hundreds of thousands of people—at a minimum.[341] And, as we have described above,[342] the Department has egregiously miscalculated the likely time and cost figures.

In any event, given the Department's lack of support for *any* "benefits" arising from the collection of this information,[343] the proposed rule is in violation of the Paperwork Reduction Act. Under the statute, "[w]ith respect to the collection of information and the control of paperwork," the government "shall . . . maximize the practical utility of and public benefit from information collected."[344] The government has demonstrated no practical utility or public benefit to be derived from the collection of this information.[345] Moreover, the government "shall determine whether the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility." [346] It has not done so.[347]

I. The proposed rule violates federal disability law.

29 U.S.C. § 794(a) states that no one with a disability shall, "solely by reason of her or his disability," "be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency." The Department baldly states that "an alien with a disability is not being treated differently" by the proposed rule.[348] But the regulation actually—and nakedly—discriminates on the basis of a disability. An individual's disability, the Department states, would now be considered "as part of the health factor."[349] Thus, the proposed rule states that an individual's disability would be an affirmative reason, at least in part, on which the government would take adverse action against an individual.

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340 83 Fed. Reg. at 51,259.

341 *See, e.g., id.* at 51,254 (estimating 382,264 people would be per se required to file the newly created Form I-944 annually, with many more subject to this requirement at the discretion of adjudicators).

342 *Supra*, pp. 12-31.

343 *Supra*, pp. 57-59.

344 *See* 44 U.S.C. § 3504(c).

345 *Supra*, pp. 57-59.

346 *See id.* § 3508.

347 *Supra*, pp. 57-59.

348 83 Fed. Reg. at 51,184.

349 *Id.*

The Department asserts that "an applicant's disability could not be the sole basis for a public charge inadmissibility finding."[350] But the patent violations of the Rehabilitation Act and the Americans with Disabilities Act[351] are not remedied by the Department's proposal that it will act adversely against individuals with disabilities only for the *partial* reason that an individual has a disability. At bottom, the proposed regulation creates a circumstance in which two otherwise identically situated individuals may receive different outcomes based solely on the fact that one has a disability and the other does not. The Department does not deny that this is a natural reading of the proposed rule—and that result would blatantly violate the Rehabilitation Act and the Americans with Disabilities Act.

J. The proposed rule violates the Constitution.

The government may not "deny to any person within its jurisdiction the equal protection of the laws."[352] The Department acknowledges that its action would likely "decrease disposable income and increase the poverty of certain families and children, including U.S. citizen children."[353] The Department thus acknowledges that its proposed rule would likely have the legal effect of unequally administering key benefit programs to U.S.-citizen children based on circumstances out of their control—whether one of their parents is a noncitizen. "Of citizen family members" expected to be affected by the proposed rule, "more than half (10.7 million) are citizen children living in families with one or more noncitizen family members."[354] Moreover, because the proposed rule facially implicates national origin, strict scrutiny applies.[355] This precludes the Department from moving forward.

What is more, the unequal application of these laws would be distributed along racial lines: the effects of the proposed rule are expected to have a disparate impact on communities of color, affecting as many as 18.3 million members (or one-third) of the Hispanic and Latino community in the United States.[356] As Boundless has recently observed, the Department's proposed 250-percent-FPG threshold would have "have disproportionate effects based on national origin and ethnicity, blocking 71% applicants from Mexico and Central America, 69% from Africa, and 52%

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350 *Id.*

351 42 U.S.C. § 12101 *et seq.*

352 U.S. Const., amend. XIV, § 1.

353 83 Fed. Reg. at 51,277.

354 *Public Charge Proposed Rule: Potentially Chilled Population Data*, Manatt, Phelps & Phillips, LLP (Oct. 11, 2018), goo.gl/nWawDr.

355 *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("Classifications based on race or national origin . . . are given the most exacting scrutiny.").

356 *See Public Charge Proposed Rule: Potentially Chilled Population Data*, Manatt, Phelps & Phillips, LLP (Oct. 11, 2018), goo.gl/nWawDr.

from Asia—but only 36% from Europe, Canada and Oceania."[357] As such, any Equal Protection Clause challenge to determine whether discriminatory purpose with respect to a particular racial background was a motivating factor will "demand[] a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[358]

V. If The Department Proceeds With Its Proposed Rule, It Must Cure Several Core Defects And Restart The Public Comment Process.

As we have explained, the Department has run afoul of elementary principles of agency rulemaking. If it decides to move forward with its proposed rule—and it should not—it must cure a host of procedural defects and give the public adequate time to submit additional comments. The Department must, for instance:

- identify and quantify the numbers of prospective applicants whom its proposal would render ineligible for immigration benefits—and who would likely be denied admission as a result of this proposed rulemaking;[359]

- correct its egregiously flawed economic calculation of the costs of the proposed Form I-944;[360]

- estimate the direct costs imposed by application of the proposed rule by the Department of State and U.S. Customs and Border Protection;[361]

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[357] *Looming Immigration Directive Could Separate Nearly 200,000 Married Couples Each Year*, Boundless Immigration Inc. (Sept. 24, 2018), perma.cc/4SEJ-M6W6, https://www.boundless.com/blog/looming-immigration-directive-separate-nearly-200000-married-couples/ (citing Jeanne Batalova et al., *Through the Back Door: Remaking the Immigration System via the Expected "Public-Charge" Rule*, Migration Policy Inst. (Aug. 2018), perma.cc/3TZJ-U9VY).

[358] *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The President's extensive comments on immigration during the midterm election campaign—many of which occurred contemporaneously with the notice-and-comment period for this proposed rule—would form the basis for some of that "sensitive inquiry." *See, e.g.*, *President Trump Rally in North Carolina*, C-SPAN, at 19:50-20:08 (Oct. 26, 2018), goo.gl/4fGhUS (President Trump suggesting that the political opposition wants to "invite caravan after caravan" into the United States and "sign them up for free healthcare, free welfare, [and] free education"); *President Trump at Campaign Rally in Wilkes-Barre, Pennsylvania*, C-SPAN, at 47:25-47:53 (Aug. 2, 2018), goo.gl/JJYzd5 (President Trump referring to his presidential campaign announcement, in which he referred to Mexican immigrants as "rapists" and asserted that they were "bringing drugs" and "bringing crime": "Coming down the escalator, and you remember what I said. . . . I mentioned words—I won't even mention them tonight because there's a lot of young people here. But I mentioned words, and everybody thought it was wonderful. . . . Guess what? What I said is peanuts compared to what turns out to be the truth. It's peanuts.").

[359] *Supra*, pp. 8-10.

[360] *Supra*, pp. 12-31.

[361] *Supra*, pp. 14-18.

- examine and quantify the costs of detrimental health effects throughout the Nation;[362]
- examine and quantify the costs of worsened poverty throughout the Nation;[363]
- undertake full and thoughtful economic analyses of "downstream and upstream" economic effects that went unmentioned and unquantified in its proposed rule;[364]
- provide a reasoned explanation for departing from the Department's definition of "public charge";[365]
- provide a reasoned explanation for changing the Department's longstanding policy of not considering non-cash benefits in public-charge determinations;[366]
- provide a reasoned explanation for changing the Department's policy to promulgate an income threshold set at 250 percent of the federal poverty guidelines as a "heavily weighed" factor;[367]
- assess the impact of the proposed rule on returning lawful permanent residents;[368]
- undertake a compliant cost-benefit analysis, quantifying key costs that went unquantified in this proposed rule and considering key costs such as chilling on immigration to the United States overall that went wholly unconsidered;[369]
- perform a compliant initial regulatory flexibility analysis under the Regulatory Flexibility Act;[370] and
- perform a federalism summary impact statement, coordinating with the States as required.[371]

If, as it must, the Department develops this data and supplies this analysis, it is obligated to open a new notice-and-comment period to allow the public to opine on this policy in view of

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362 *Supra*, pp. 31-36.

363 *Supra*, pp. 36-37.

364 *Supra*, pp. 38-39.

365 *Supra*, pp. 44-47.

366 *Supra*, p. 47.

367 *Supra*, pp. 48-49.

368 *Supra*, pp. 51-52.

369 *Supra*, pp. 52-59.

370 *Supra*, pp. 60-62.

371 *Supra*, pp. 62-63.

the concrete, operative data. Otherwise, the public would be deprived of their ability to comment based on the most essential analysis at issue.

To be clear, even if all of the proposed rule's many procedural defects were cured, the proposed rule would remain substantively unlawful—and bad policy. But, as a procedural matter, these steps (along with the other steps highlighted throughout these comments, at minimum) must be undertaken before the Department may proceed.

VI. Conclusion.

Boundless submits that the Department should withdraw its proposed rule and allow public-charge determinations to proceed according to the Department's well-considered, decades-old policies. The proposed rule is unsound policy: it would have a devastating impact on the national economy and public health, among several other adverse consequences. It is also substantively and procedurally unlawful. The Department should not, therefore, proceed with the proposed rule.

Addendum: Cost Modeling Methodology

In these comments,[372] we estimate the direct costs of the proposed Form I-944 compliance requirement as described in the proposed rule, using publicly available data. This addendum further articulates our underlying assumptions and calculations. If the Department disagrees with our model, the Department must identify why any assumption or calculation is wrong, supply a basis for using alternative data, and then recalculate the direct costs of the proposed rule using proper methodology.

I. Affected Populations.

A. DHS filers.

The Department underestimates the annual number of individuals who would likely be compelled to submit Form I-944, and we seek to correct this defect.

i. Form I-485 filers.

Table 40 of the proposed rule is titled "Total Estimated Population of Individuals *Seeking* Adjustment of Status Who Were Exempt from Public Charge Adjudication," and the Department states that it "estimates the projected annual average total population of adjustment *applicants* that would be subject to public charge review for inadmissibility by DHS is 382,264."[373]

The Department purports to draw the data in Table 40 of the proposed rule[374] from Table 7 of the Department's *Yearbook of Immigration Statistics 2016*.[375] Table 7, however, is titled "Persons *Obtaining* Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2016."[376] The Department has thus mischaracterized this data as presenting the total annual number of applications, when in fact this data presents the total annual number of *approvals*. Because the Department's grant rate of such applications is less than 100 percent, the approval number will always be less than the number of applications.

That same error infects Table 38 of the proposed rule.[377] That table purports to present the "Total Population Applying for Adjustment of Status," and it likewise relies on Table 7 from the

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372 *See supra*, p. 30.

373 83 Fed. Reg. at 51,240-41 (emphasis added).

374 *Id*. at 51,241.

375 *See 2016 Yearbook of Immigration Statistics*, Tbl. 7, Dep't of Homeland Sec. (last published Dec. 18, 2017), perma.cc/3MHX-VPCG. We have attached Table 7 at App. 25-29.

376 *See id*. at 51,238.

377 *See* 83 Fed. Reg. at 51,238.

2012 to 2016 editions of the *Yearbook of Immigration Statistics*.[378] Once again, the underlying data describes the number of *granted* applications resulting in adjustments—not the total number of adjustment applications.

To correct this defect, we used the Department's own data that offers more accurate numbers. Each quarter, U.S. Citizenship and Immigration Services (USCIS) publishes a "Data Set" titled *Data Set: All USCIS Application and Petition Form Types*.[379] This data is currently only available for the full Fiscal Years of 2013 through 2017, which we compiled for purposes of this cost analysis.[380]

Moreover, this data distinguishes among family-based Forms I-485, employment-based Forms I-485, and four different categories of humanitarian Forms I-485, including general asylum adjustments, general refugee adjustments, Indo Chinese adjustments, and adjustments pursuant to the Cuban Adjustment Act.[381] Because the proposed I-944 requirement would apply to *all* employment-based and family-based I-485 applications, those are the proper numbers to be used.[382]

	Family AOS		Employment AOS		Total AOS	
Fiscal Year	**Received**	**Approved**	**Received**	**Approved**	**Received**	**Approved**
2013	276,975	293,565	106,571	135,999	383,546	429,564
2014	280,290	248,850	122,532	126,939	402,822	375,789
2015	298,398	249,732	123,239	117,416	421,637	367,148
2016	338,013	278,523	128,858	110,406	466,871	388,929
2017	365,716	275,931	139,555	114,480	505,271	390,411
Average ('13-'17)	**311,878**	**269,320**	**124,151**	**121,048**	**436,029**	**390,368**
Acceptance rate		**86%**		**98%**		**90%**

[378] *Id*.

[379] This data is available here: https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-all-uscis-application-and-petition-form-types.

[380] We have attached these full-year reports at App. 53-58.

[381] *See* App. 53-58.

[382] *See* 83 Fed. Reg. at 51,238-41. The Department adjusted adjustment-of-status applications downward to account for applications exempt from the public charge requirement. None of the adjustment of status applications identified here, however, are exempt. Thus no downward adjustment of the number is appropriate.

According this data,[383] the five-year average of Form I-485 family-based and employment-based adjustment of status applications *received* by USCIS—and thus subject to the Department's new Form I-944 requirement—is 436,029, not 382,264. The Department must therefore use the correct number of anticipated applications in making its calculation.

ii. Form I-129 filers.

Table 42 of the proposed rule is titled "Total Estimated Population of Beneficiaries Seeking Extension of Stay or Change of Status through an Employer Petition Using Form I-129, Fiscal Year 2012 – 2016," and it appears to properly focus on the number of applications actually received, not just those approved by the Department.[384] However, the total number presented in this table (336,335)[385] is significantly lower than the five-year average from Fiscal Years 2013 to 2017 in the "All USCIS Application and Petition Form Types" data set (471,444).[386] There is no way for the public to understand why this discrepancy exists, because the Department's data citation for Table 42 is "USCIS analysis of data provided by USCIS, Office of Performance & Quality," which is not a public data source.[387] Since both Table 4 and Table 57 of the proposed rule indicate that all status categories using the Form I-129 are subject to public-charge review,[388] the most recent public data from USCIS should be used in lieu of the opaque internal data presented by the Department.

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[383] This data is drawn from App. 53-58, the year-end data titled "Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status." This data is available on the USCIS webpage: https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-all-uscis-application-and-petition-form-types.

[384] 83 Fed. Reg. at 51,243.

[385] *Id*.

[386] *See* App. 53-58.

[387] 83 Fed. Reg. at 51,243.

[388] *Id*. at 51,137-46, 51,278-79.

Instead, the proper data—drawn from the publicly available data from USCIS's "Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status"—is as follows:[389]

USCIS "All Forms" Data	
Fiscal Year	**I-129 Forms Received**
2013	404,520
2014	432,987
2015	483,643
2016	509,636
2017	526,435
Total received ('13-'17)	**2,357,221**
Average ('13-'17)	**471,444**

The Department should therefore use the annual figure of 471,444 Form I-129 applications. If this public data is wrong, it is incumbent on the Department to explain why the public data is wrong, provide correct data with verification, and then reopen the comment period. In all events, the Department must correct its flawed analysis.

iii. Form I-129CW filers.

USCIS does not provide enough detail in its public "All Forms" dataset to perform the same analysis presented above for Form I-129 filers. Therefore, we were compelled to use the Department's average annual population number (6,307) in Table 43 of the proposed rule,[390] though we suspect that this too may be an underestimate.

iv. Form I-539 filers.

Table 44 of the proposed rule is titled "Total Estimated Population of Individuals Seeking Extension of Stay or Change of Status Using Form I-539, Fiscal Year 2012 – 2016," and it appears to properly focus on the number of applications actually received, not just those approved by the Department.[391] However, the total number presented in this table (174,866) is significantly lower than the five-year average from Fiscal Years 2013 to 2017 in the "All USCIS Application and

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[389] Once again, this data is drawn from App. 53-58, the year-end data titled "Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status." This data is available on the USCIS webpage: https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-all-uscis-application-and-petition-form-types.

[390] 83 Fed. Reg. at 51,243.

[391] *Id.* at 51,244.

Petition Form Types" data set (195,698).[392] There is no way for the public to understand why this discrepancy exists, because the Department's data citation for Table 44 is "USCIS analysis of data provided by USCIS, Office of Performance & Quality," which is not a public data source.[393] Since both Table 4 and Table 57 of the proposed rule suggest that all major status categories using Form I-539 are subject to public-charge review,[394] the most recent public data from USCIS should be used in lieu of the opaque internal data presented by the Department.

That data demonstrates the following:[395]

USCIS "All Forms" Data	
Fiscal Year	**I-539 Forms Received**
2013	148,274
2014	182,184
2015	199,820
2016	214,785
2017	233,430
Total received ('13-'17)	**978,493**
Average ('13-'17)	**195,698**

B. State Department immigrant visa filers.

The Department does not include *any* estimate of the annual number of individuals who would likely be compelled to submit Form I-944 as part of an immigrant visa application filed with the Department of State, and we seek to correct this defect.

Because the State Department does not publish a quarterly "All Forms" report equivalent to the USCIS data described above, we used a different estimation method for the number of relevant applications likely *received* by the State Department each year (not only those approved).

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[392] *See* App. 53-58.

[393] 83 Fed. Reg. at 51,244.

[394] *Id*. at 51,137-46, 51,278-79.

[395] Again, this data is drawn from App. 53-58, the year-end data titled "Number of Service-wide Forms by Fiscal Year To-Date, Quarter, and Form Status." This data is available on the USCIS webpage: https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-all-uscis-application-and-petition-form-types.

First, using the Department's *Yearbook of Immigration Statistics* for years 2013 to 2017, specifically the "New Arrivals" column of Table 7[396]—we compiled the number of applications for lawful permanent residence *approved* by State Department officials in Fiscal Years 2013 to 2017 for each immigrant visa category subject to a public-charge inadmissibility determination according to Table 4 of the proposed rule.[397]

Next, we inferred the State Department approval rate based on an empirical estimate of the Department's approval rate for comparable Form I-485 applications for adjustment of status, drawn from the "All USCIS Application and Petition Form Types" data set. As we described above,[398] over a period of five years, the Department's average acceptance rate for family-based adjustment of status applications was 86 percent; for employment-based applications, 98 percent. The overall average acceptance rate was 90 percent.

On the assumption that the Department of State acceptance rate is comparable to the Department's for comparable applications, we divided each of the *granted* immigrant visa population sizes by 90 percent to yield the estimated number of *received* immigrant visas. Thus, we estimate that the anticipated number of immigrant filings processed by the State Department annually will be:

	Issued								
	2017	**2016**	**2015**	**2014**	**2013**	**Total '13-'17**	**Annual average**	**Inferred grant rate (percentage mirroring USCIS adjustment of status)**	**Inferred number of applications**
Diversity visas (DV)	51,592	49,865	47,934	53,490	45,618	248,499	49,700	90%	55,222
Immediate relatives (IR)	264,277	309,404	234,874	188,328	207,355	1,204,238	240,848	90%	267,608
Family-sponsored preferences (FB)	218,760	222,971	197,127	205,902	183,888	1,028,648	205,730	90%	228,588
Employment-based preferences (EB)	24,525	24,253	22,069	21,951	21,101	113,899	22,780	90%	25,311

C. State Department nonimmigrant visa filers.

The State Department publishes an annual data set called *Worldwide NIV Workload by Visa Category*,[399] which includes not only all visas *issued* by State Department officials for each nonimmigrant category, but also all visas *refused*. The sum of these two numbers is the "Total

396 The 2017 data is available at https://www.dhs.gov/immigration-statistics/yearbook/2017/table7. All the relevant tables are appended as App. 10-52.

397 83 Fed. Reg. at 51,137-46.

398 *See supra*, p. 70.

399 This data is available at perma.cc/A7HC-96Y8.

Workload" for each nonimmigrant category—in other words, the total number of applications received in a given year.

We used the "Total Workload" numbers published by the State Department for Fiscal Years 2013 through 2017, including each major nonimmigrant category that would be subject to public charge review according to Table 4 of the proposed rule.[400]

[400] 83 Fed. Reg. at 51,137-46.

Visa Category	Average Annual Applications, '13 to '17	2017	2016	2015	2014	2013
A1	12,915	12,521	12,938	13,038	13,001	13,075
A2	114,976	112,988	115,029	112,582	117,329	116,950
A3	1,811	1,841	1,598	1,689	2,013	1,915
B1	57,003	54,964	55,053	58,491	60,436	56,069
B1/B2	8,578,376	8,845,755	9,573,530	9,397,240	7,944,862	7,130,492
B2	159,932	99,995	106,510	140,626	230,776	221,752
BBBCC	1,476,340	1,403,501	1,468,041	1,543,866	1,490,943	1,475,347
BBBCV	50,787	47,374	53,758	41,766	37,854	73,183
C1	15,356	14,746	15,343	14,541	16,548	15,601
C1/D	300,207	316,096	315,684	300,102	286,778	282,374
C2	22	32	18	33	14	13
C3	10,031	8,612	9,414	10,206	11,837	10,087
CW1	6,308	8,677	11,643	4,727	3,308	3,187
CW2	1,075	1,039	1,359	996	952	1,028
D	7,454	8,122	7,035	7,156	7,101	7,855
E1	9,449	9,022	10,475	9,600	9,331	8,817
E2	51,511	57,753	57,613	52,132	46,607	43,450
E2C	183	173	97	216	110	317
E3	5,690	6,325	6,346	6,349	5,032	4,399
E3D	3,932	4,576	4,731	4,140	3,411	2,802
E3R	1,695	2,482	2,176	1,482	1,349	984
F1	729,269	608,631	718,342	856,251	768,631	694,488
F2	42,993	42,408	43,723	44,705	43,677	40,450
G1	6,820	7,030	6,855	6,710	6,862	6,645
G2	17,532	18,210	18,790	18,833	16,472	15,355
G3	397	401	475	484	314	313
G4	25,542	26,467	25,091	23,786	24,340	28,027
G5	955	946	892	1,002	916	1,017
H1B	193,383	215,303	203,647	192,194	179,408	176,364
H1B1	1,149	1,544	1,417	1,167	957	660
H1C	1	1	1	1	0	0
H2A	125,131	175,831	147,048	120,552	98,982	83,243
H2B	82,921	93,515	96,002	78,872	78,635	67,581
H3	2,285	1,570	1,824	1,983	2,691	3,358
H4	131,583	153,128	143,714	134,732	118,179	108,162
I	16,406	16,599	16,991	16,463	15,821	16,155
J1	381,006	398,985	389,270	376,642	373,860	366,275
J2	49,406	49,220	48,965	50,576	50,615	47,653

Visa Category	Average Annual Applications, '13 to '17	2017	2016	2015	2014	2013
K1	49,761	55,359	60,895	43,898	51,763	36,891
K2	5,411	7,792	5,798	4,442	5,188	3,834
K3	200	84	119	209	420	169
K4	44	27	25	46	76	45
L1	90,086	94,801	95,342	92,399	85,297	82,590
L2	93,066	97,455	97,893	96,912	88,255	84,814
M1	14,483	13,025	14,441	14,660	15,386	14,904
M2	614	604	563	566	663	674
N8	32	28	45	34	24	28
N9	10	9	8	17	10	5
NATO1	13	7	10	26	15	9
NATO2	5,785	6,036	5,794	5,641	5,925	5,531
NATO3	1	0	2	1	3	0
NATO4	217	225	170	261	214	216
NATO5	45	23	42	33	65	63
NATO6	523	566	538	508	475	530
NATO7	3	3	3	0	3	4
O1	17,388	20,993	19,245	16,735	15,164	14,805
O2	7,783	9,295	8,424	6,704	7,054	7,436
O3	4,855	6,054	5,763	4,765	4,063	3,632
P1	28,389	28,929	29,600	28,726	27,209	27,481
P2	129	131	90	118	169	138
P3	11,922	12,675	13,278	11,375	11,043	11,237
P4	1,466	1,738	1,409	1,428	1,214	1,542
Q1	2,161	2,229	2,285	2,163	2,270	1,856
R1	5,989	6,642	5,991	5,713	5,632	5,965
R2	2,382	3,109	2,596	2,232	2,071	1,900
S5	0	0	0	0	0	1
S6	0	0	0	0	0	0
S7	5	0	3	6	4	10
T1	1	0	0	0	1	0
T2	151	91	109	149	158	249
T3	461	411	378	489	501	524
T4	32	26	37	29	36	31
T5	36	35	61	21	20	43
T6	12	25	9	2	0	0
TD	9,277	10,678	10,873	9,561	8,054	7,218
TN	14,940	19,067	17,159	14,982	12,633	10,857
U1	398	387	445	385	361	414
U2	237	255	226	250	254	201
U3	1,976	1,828	1,732	2,005	2,464	1,851
U4	104	104	111	131	97	77
U5	80	73	94	67	96	71
Totals	**13,042,537**	**13,227,202**	**14,093,044**	**14,013,695**	**12,424,729**	**11,454,013**

II. Opportunity Cost Of Time.

For the U.S. average private sector hourly wage, we began with the Bureau of Labor Statistics' (BLS) figure as of October 2018 ($27.35 per hour).[401] We then applied the Department's benefits-to-wage multiplier of 1.47 (also based on BLS data),[402] yielding a weighted average U.S. hourly wage of $40.20.

For the global average wage, we began with the purchasing power parity (PPP) adjusted International Labor Organization (ILO) figure as of 2012 ($1,480 per month, or $8.54 per hour).[403] We then applied the annual average global real wage growth rate, as reported by the ILO,[404] for each year between 2012 and 2017, to arrive at global average wage in 2017 of $9.55. We did not apply a benefits-to-wage multiplier, as such a figure was not available to us as a global average. Therefore the global average wage of $9.55 is likely an underestimate.

	Average global wage (PPP adjusted)			Average global real wage growth
Year	Monthly	Annual	Hourly	
2012	$1,480	$17,760	$8.54	
2013	$1,520	$18,240	$8.77	2.70%
2014	$1,553	$18,641	$8.96	2.20%
2015	$1,588	$19,051	$9.16	2.20%
2016	$1,626	$19,508	$9.38	2.40%
2017	$1,655	$19,859	$9.55	1.80%

For a blended average wage, assuming equal contributions from U.S. and non-U.S. participants, we took the average of the U.S. average wage ($40.20) and the average global wage ($9.55), to yield $24.88 per hour.[405]

A. DHS filers.

As described in greater detail in the comments above, the appropriate opportunity cost of time for filers within the United States is based on the U.S. average hourly wage ($40.20), which we applied to each category of such filers (Forms I-485, I-129, I-129CW, and I-539).

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401 *Economic News Release, Table B-3*, Bureau of Labor Statistics, perma.cc/V4GS-BXQF (last modified Nov. 2, 2018).

402 83 Fed. Reg. at 51,244 & n.713.

403 Ruth Alexander, *Where Are You on the Global Pay Scale?*, BBC News (Mar. 29, 2012), perma.cc/WR4D-BP6Q. ILO reported annual global wages in 2012 of $1,480 per month, or $17,760 per year. Assuming a 2080-hour work year (52 weeks per year multiplied by 40 hours a week), average hourly global wages were approximately $8.54.

404 *Global Wage Report 2018/19*, Int'l Labor Org., 3 (2018), perma.cc/6TMB-VQEE.

405 Calculation: ($40.20 + $9.55) / 2) = $24.88.

B. State Department immigrant visa filers.

For Diversity Visa immigrant applicants, we applied the average global wage ($9.55 per hour) for the opportunity cost of time spent on Form I-944 paperwork, because such filers more typically lack a direct nexus with relatives or other sponsors already in the United States. For all other State Department immigrant visa applicants (family- and employment-based), we applied the blended average wage ($24.88 per hour), since most of these filers will work in partnership with a U.S. sponsor.

C. State Department nonimmigrant visa filers.

For each nonimmigrant category of State Department filer, we applied the blended average wage ($24.88 per hour), since such filers will typically work in partnership with a U.S. sponsor, such as a U.S. relative, U.S. company, or other U.S. organization.

III. Time Burden.

As articulated in the comments above,[406] Boundless has empirically observed that the average Form I-485 applicant is obligated to spend approximately 12 hours to accumulate pertinent information and complete the form, based on the Department's definition: "including the time for reviewing instructions, gathering the required documentation and information, completing the [form], preparing statements, attaching necessary documentation, and submitting the [form]."[407] The Department's own estimate for the completion time of Form I-485 is 6.25 hours, without any explanation or methodology to back up this assertion.[408]

The proposed Form I-944 (15 pages) is a much more complicated form than the I-485 (13 pages, excluding straightforward yes-or-no questions), including far more onerous evidentiary requirements.[409] Therefore, the Department's estimated I-944 completion time of only 4.5 hours is not credible. Based on Boundless's expertise and experience in helping numerous individuals to complete a variety of different immigration-related forms, we expect that the average applicant would be obligated to spend at least 18 hours to complete the proposed Form I-944, which is 50 percent more time than our empirically grounded estimate for Form I-485.[410]

Throughout this cost model, we use 18 hours as the average time burden for Form I-944 filers.

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406 *Supra*, pp. 25-26.

407 83 Fed. Reg. at 51,247; Decl. of Anjana Prasad, App. 1.

408 83 Fed. Reg. at 51,247.

409 *Supra*, p. 26.

410 Decl. of Anjana Prasad, App. 1-2.

IV. Additional To Baseline Opportunity Cost Of Time.

In Table 47 of the proposed rule, the Department presents the opportunity cost of time "Additional to Baseline" (*i.e.*, the status quo) for four different forms that, in the Department's estimation, would take somewhat longer to complete under the proposed rule.[411] We preserved the same additional-to-baseline time estimates (ten minutes for Form I-485; 30 minutes for Forms I-129, I-129CW, and I-539)[412] and simply multiplied these time burdens using the updated opportunity cost of time and affected population size figures described above.

V. Credit Report Cost.

The Department estimates that the required credit report will typically cost $19.95 to obtain.[413] We retained this estimate in our model and applied it to State Department filers as well. Even though State Department filers are, by definition, not resident in the United States, this number represents the cost (direct or indirect) of obtaining comparable evidence of credit history or timely bill payment, as required under the proposed rule.

VI. Legal Fees.

The Department fails to account for the reality that many filers will engage legal counsel to assist them in completing Form I-944, resulting in considerable fees (not just the filer's own opportunity cost of time).

Based on our survey of leading practitioners of U.S. immigration law, as described in the above comments,[414] we received the following six estimates of the per-applicant cost in legal fees for reviewing and filing the proposed Form I-944:[415]

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411 83 Fed. Reg. at 51,253.

412 *Id*. at 51,252.

413 *Id.* at 51,254 ("DHS estimates the cost of obtaining a credit report and credit score would be $19.95 per applicant, as this is the amount that two of the three major credit bureaus charge.").

414 *Supra*, pp. 26-27.

415 These practitioners include: (1) a law firm partner and former general counsel of the U.S. Immigration Naturalization Service who has more than 30 years of experience in immigration law and related areas (Decl. of Paul W. Virtue, App. 7 (estimating increased costs of $1,250 to $1,500 in legal fees per applicant)); (2) a law firm partner who has advised clients through every major immigration policy change since 1986 (Decl. of Elizabeth E. Stern, App. 3 (estimating increased costs of $1,250 to $1,500 in legal fees per applicant)); (3) a law firm partner who provides immigration compliance advice across a variety of industry sectors, including financial services and banking, technology and communications, security and defense, manufacturing, and retail (Decl. of Grace Shie, App. 4 (estimating increased costs of $1,000 to $1,500 in legal fees per applicant)); (4) a law firm member and founding chair of the firm's immigration practice (Decl. of Susan J. Cohen, App. 6 (estimating increased costs of $2,500 in legal fees per applicant)); (5) an owner of an Illinois-based law firm that regularly assists clients with immigration-benefits applications (Decl. of Shereen Ahmed, App. 5 (estimating increased costs of $1,500 in legal fees per applicant)); and

Practitioner Estimate or Range	Midpoint
(1) $1,250 to $1,500	$1,375
(2) $1,250 to $1,500	$1,375
(3) $1,000 to $1,500	$1,250
(4) $2,500	$2,500
(5) $1,500	$1,500
(6) $1,500 to $2,500	$2,000
Average	**$1,667**

A. DHS filers.

Since all of these filers are already within the United States, we assume that when counsel is engaged to help complete a Form I-944, the average fee will be $1,667.

We further assume that nearly all (95 percent) of Form I-129, I-129CW, and I-539 filers will use a U.S. lawyer, either because they have an employer sponsor or are relatively sophisticated filers.

Similarly, we assume that nearly all (95 percent) of employment-based adjustment of status applicants will use a U.S. lawyer. We assume that family-based adjustment of status applicants, however, will only use a lawyer 30 percent of the time, since *pro se* representation is more common in these categories.

Overall, this means that a blended average of 48.5 percent of I-485 adjustment of status applicants[416] would use a U.S. lawyer, based on previously discussed populations:[417]

(6) a founding partner of an immigration law firm (Greg Siskind Letter, App. 8-9 (estimating increased costs of $1,500 to $2,500 per applicant)).

[416] Calculation: (0.715*.3) + (0.285*.95) = 0.48525.

[417] *See supra*, p. 22.

	Family-based	Employment-based
Annual population	311,878	124,151
Share of total	71.50%	28.50%
Lawyer use (assumed)	30%	95%
Blended lawyer use		**48.50%**

B. State Department immigrant visa filers.

Immigrant visa applicants abroad may engage non-U.S. lawyers, who are permitted to enter their appearance before the Department in matters that are outside the geographical confines of the United States, including applications or petitions filed at U.S. consulates. Such lawyers would typically file Form G-28I with the Department, which means that the Department could estimate the share of such filers who are represented by a non-U.S. attorney.

The Department has made no such attempt in the proposed rule, however—nor has it made the relevant data public. Therefore, we must make an informed estimate of how frequently immigrant applicants abroad would engage a non-U.S. lawyer to help complete the proposed Form I-944, and how much such lawyers (or alternative intermediaries) would charge in legal fees.

First, since our average global hourly wage ($9.55) is 23.8 percent of our average U.S. hourly wage ($40.20),[418] we assume that global average legal fees are also 23.8 percent of U.S. average legal fees ($1,667),[419] or approximately $397.

Second, as with U.S.-based adjustment of status applicants, we assume that only 30 percent of Diversity Visa and family-based immigrant visa applicants will use a lawyer, while nearly all (95 percent) of employment-based applicants will use a lawyer.

Finally, for Diversity Visa applicants we use the average non-U.S. legal fee of $397, on the assumption that such applicants typically will not have help from relatives or other sponsors already in the United States. For family-based applicants, however, we use a blended legal fee of $1,032 (average of $1,667 and $397), since such applicants will typically work in partnership with a U.S. sponsor. For employment-based applicants, we use the U.S. average legal fee of $1,667, as such applicants will typically be represented by a sophisticated U.S. organizational sponsor.

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418 *Supra*, p. 78.

419 *Supra*, pp. 26-27.

C. State Department nonimmigrant visa filers.

We applied the blended legal fee ($1,032) for all nonimmigrant categories, assuming that such applicants will typically have some nexus with a U.S. organization.

We further assumed that nearly all (95 percent) of employment-based and other sophisticated nonimmigrant visa applicants will use a lawyer, while only 30 percent of students, exchange visitors, and religious workers will use an attorney.