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April 25, 2022

Mr. Andrew Parker, Branch Chief
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Residence and Naturalization Division
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U.S. Citizenship and Immigration Services
5900 Capital Gateway Drive
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Via Electronic Submission: www.regulations.gov

RE: Comments on behalf of The State of Indiana and undersigned States to the Department of Homeland Security, Notice of Proposed Rulemaking, "Public Charge Ground of Inadmissibility," 87 FR 10570, DHS Docket No. USCIS-2021-0013 (Feb. 24, 2022)

Dear Mr. Parker:

The States of Indiana, Alabama, Arizona, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, South Carolina, Utah, and West Virginia submit the following comments regarding Department of Homeland Security's ("DHS") February 24, 2022, Notice of Proposed Rulemaking, 87 FR 10570 (Feb. 24, 2022) ("Proposed Rule").

I. Summary

Indiana, like most states, administers and supports public assistance programs designed to provide relief to its citizens. In addition to unemployment, housing, and education programs, the state also administers federal programs, such as the Children's Health Insurance Program ("CHIP"), Supplemental Nutrition Assistance Program ("SNAP"), Medicaid, First Place Program, and Next Home Program. Other

states also have assistance programs specific to their state. While these assistance programs come at a high cost to Indiana, the other undersigned States, and taxpayers, the Proposed Rule would not include these benefits in determining whether an alien would become reliant on public assistance as part of the public charge analysis. The states administer billions of dollars of non-cash benefits each year. Under the Proposed Rule, only "cash" benefits, such as Supplemental Security Income ("SSI") and Temporary Assistance for Needy Families ("TANF"), would be considered in determining whether an alien would be a public charge.

The narrow definitions employed by the Proposed Rule distort the actual cost of immigrants' participation in public assistance programs and ignore the harm that such costs inflict on the states. The states bear the brunt of the expenses that—for the purposes of this rule—DHS does not consider in its determination of a public charge. Put simply, the 2019 Final Public Charge Rule ("2019 Final Rule") saved states money and the Proposed Rule will cost the states.

The Proposed Rule is ineffective and will encourage the use of public benefits by aliens while simultaneously rendering useless the public charge ground of inadmissibility. In drafting this rule, DHS appears to be more concerned with the chilling effect of the public charge ground of inadmissibility on aliens' willingness to accept public benefits. DHS should be focused on holding our national values of self-sufficiency sacred. If the Proposed Rule is promulgated, certain classes of aliens will know that upon entering the United States they will be able to rely on government welfare programs, without fear of repercussions, as they build their lives in the states and eventually seek to obtain some form of lawful status. This policy will serve as an incentive for more immigration to our country under the Biden Administration's relaxed immigration regulations.

Under the guise of "long-standing precedent," the Proposed Rule seeks to narrowly define critical concepts, including "public charge," and the types of public benefits that could lead to such a determination. In doing so, the Proposed Rule ignores Congressional intent dating back to the late nineteenth century in favor of an interim guidance memo that was never meant to be the equivalent of a final agency rule. Additionally, in differentiating between types of public benefits, the Proposed Rule uses semantics as facts to argue substantive differences between cash and non-cash benefits.

While failing to justify any policy determination or provide any reasoned analysis other than to rebuke the previous administration, the Proposed Rule makes it impossible for an adjudicator to determine whether an alien is, in fact, a public charge. The Proposed Rule removes the concept of weighted evidence, which

empirically demonstrates whether a person is more or less likely to become a public charge. Additionally, the notion that the mere presence of an affidavit of support of the immigrant in the record is sufficient to overcome the burden is nonsensical. The federal government has never effectively implemented processes for holding affiants accountable and deeming them credible.

Third, the Proposed Rule arbitrarily limits its applicability to exclude applicants for change and extension of status. Even as the Proposed Rule acknowledges that the Secretary has the discretion to set conditions, it ignores public charge bond provisions and eliminates exclusions for military personnel included in the 2019 Final Rule.

The timing for this Proposed Rule could not be worse. The United States is in the midst of an unprecedented border crisis because the Biden Administration has opened the southern border and effectively ended immigration enforcement.

The Proposed Rule needlessly exacerbates an already explosive situation. Any changes to the Proposed Rule that create the appearance of facilitating access to public benefits for aliens will only serve to attract more immigration.

II. The Proposed Rule Does Not Align with Congressional Intent.

The Immigration and Nationality Act (INA) provides that, among a variety of other reasons, an alien is ineligible for admission into the United States and for an "adjustment of status" (i.e., a green card conferring "lawful permanent resident" status) if the alien is "in the opinion of the consular officer . . . or in the opinion of the Attorney General . . . likely at any time to become a public charge."[1] Congress has never defined the term "public charge." It first appeared in statute in the Immigration Act of 1882, where Congress barred the admission of "any person unable to take care of himself or herself without becoming a public charge."[2] Subsequent immigration legislation specified prohibitions and inadmissibility of those found to be public charges. To provide further clarity, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA").[3] It included a statement of national policy on welfare and immigration, which states:

> (1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes. (2) It continues to be the immigration policy of the United States that – (A)

[1] 8 U.S.C. § 1182(a)(4)(A).
[2] Immigration Act of 1882, ch. 376, sec.2, 22 Stat. 213 (1882).
[3] Public Law 104-193, 110 Stat. 2105.

> aliens within the Nations border not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organization, and (B) the availability of public benefits not constitute an incentive for immigration to the United States….[4]

PRWORA went on to restrict the federal benefits that aliens were able to receive and, more relevant to this discussion, broadly defined federal public benefits.[5]

After PRWORA, the former Immigration and Naturalization Service undertook rulemaking on public charge and simultaneously issued interim field guidance on the same. The guidance, commonly known as the Pearson Memo,[6] forms the basis for the definitions that DHS now proposes to include in its Proposed Rule. That long-standing field guidance issued as interim guidance is now considered the precedential basis for agency action. However, this consideration is without merit. The definitions are too restrictive and fly in the face of the Congressional statement of national policy outlined in PRWORA.

In keeping with the Pearson Memo, the Proposed Rule defines a public charge as an alien who is primarily dependent on the government for subsistence and sets forth that this is "a better interpretation of the statute and properly balances the competing policy objectives established by Congress."[7]

However, this statement does not further the policy objectives established by Congress. Congressional policy objectives are reflected in more than a century of statutes aimed at ensuring that aliens were not relying on public benefits. Congress did not want aliens drawn into this country with the promise of reliance on public benefits at taxpayers' expense. *See Cook Cty. v. Wolf*, 962 F.3d 208, 250 (7th Cir. 2020) (Barrett, J., dissenting). This is not an altruistic policy or even one based on merely American ideals; this is fiscal in nature. By limiting the determination for public charge purposes to someone "primarily dependent" on benefits, the Proposed Rule ignores the fact that the alien may still be dependent on costly benefits even if not primarily relying on a benefit for income subsistence. This definition allows many aliens receiving public benefits to easily evade a finding or determination that they are, in fact, a public charge.

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[4] *Id*. at Section 400.
[5] *Id* at Section 401(c).
[6] Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 65 Fed. Reg. 28689 (Effective May 21, 1999).
[7] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570, 10606 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245).

DHS does not believe that the definition should "include a person who receives benefits from the government to help to meet some needs but is not primarily depending on the government and instead has one or more sources of independent income or resources upon which the individual primarily relies."[8] This is, at best, semantics as DHS seeks to differentiate the utilization of benefits. The goal is to avoid reliance on the government for support. It is unclear from this Proposed Rule why an alien who relies on support, regardless of the type and regardless of the use, should not be evaluated as a potential public charge simply because it does not meet DHS's primary reliance burden.

As to the benefits considered, irrespective of the definition of federal benefits as legislated by Congress in PRWORA and under the guise of being "fair and humane,"[9] the Proposed Rule purports to define public charge as only cash benefits for income maintenance purposes or long-term institutionalization, when at government expense. Focusing on the former, this definition relegates public charge determinations to only those aliens receiving SSI, cash assistance under TANF, or other state, local, or tribal cash programs.[10] The Proposed Rule endeavors to broadly encompass the scope, but the definition restricts those benefits considered in an analysis.

With the focus on cash benefits, DHS explains that many public assistance programs meet particular needs and are geared toward individuals who also have other means of primary support. While true, this fact does not lessen an individual's reliance on a public assistance program or suggest that an individual is not primarily reliant on it. Instead, DHS asserts that because it believes that most non-cash benefit programs are supplemental, the nature of those programs is sufficiently distinct from cash programs because individuals are not primarily relying on them. However, Congress was concerned about aliens relying on all government-funded welfare programs, not only receiving income-deriving benefits. There is simply no functional difference between a cash and a non-cash benefit. Both stem from public funds used for public benefits that are equally relied on by those who cannot afford to meet some need. A recipient of federal or state housing assistance significantly relies on the government, as do the recipients of Medicaid or other state low or no-cost medical benefits. Yet, under this Proposed Rule, neither of those public benefits, nor any other benefit that does not directly provide cash to a

[8] *Id*.
[9] U.S. Dep't of Homeland Security, DHS Proposes Fair and Humane Public Charge Rule (Feb. 17, 2022), https://www.dhs.gov/news/2022/02/17/dhs-proposes-fair-and-humane-public-charge-rule.
[10] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570, 10669 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245).

recipient, could be considered in determining whether an alien is a public charge. DHS either outright ignores these and other significant benefits, or it draws an artificial distinction between income-deriving cash benefits and other significant non-cash benefits.

This logic wholly ignores state costs. For example, in Indiana, as of March 2022, Medicaid expenditures totaled more than $12.4 billion[11] with a total enrollment of more than two million residents.[12] Additionally, SNAP monthly expenditures in Indiana during February 2022 were more than $150 million[13] and provided benefits to more than 618,000 individuals encompassing roughly 289,000 households.[14] None of the individuals in those households seeking an immigration benefit could be adjudged as a public charge based on that receipt. During the same month, Indiana provided TANF grants, benefits that would subject someone to a public charge determination, to only approximately 4,500 families statewide. The total cost was under $1 million.[15] As these illustrations demonstrate, the Proposed Rule affects only a small population of aliens. Lastly, Indiana's prekindergarten pilot program had a fiscal year 2021 budget of more than $16 million.[16] Pursuant to the Proposed Rule, none of the above-referenced benefits would be considered in a public charge determination. Residents of Indiana rely on the disbursement of these benefits regardless of their designation as "non-cash" under this Proposed Rule.

DHS relies on a flawed premise that, for public charge purposes, the analysis should rest on how the benefit is used by the individual. Instead, DHS should only look to whether an individual is, in fact, relying on a public benefit at all. If the goal is to ensure that aliens are not reliant on the government, the focus should be on how much the government spends on the benefit, not simply whether the benefit is income-deriving.

DHS should withdraw this flawed definition of public benefit and promulgate a new rule and definition that align with Congress' intent and the way states and the federal government distribute monies for public benefits. While a *de minimis*

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[11] Medicaid, Annual Medicaid & CHIP Expenditures, https://www.medicaid.gov/state-overviews/scorecard/annual-medicaid-chip-expenditures/index.html.
[12] State of Indiana, Medicaid Monthly Enrollment Reports (Mar. 2022) https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.in.gov%2Ffssa%2Fompp%2Ffiles%2FIHCP-Monthly-Enrollment-Report-March-22.xlsx&wdOrigin=BROWSELINK.
[13] State of Indiana, Division of Family Resources, Statewide Monthly Management Report February 2022 (Mar. 2022) Monthly Management Report (in.gov).
[14] *Id.*
[15] *Id.*
[16] State of Indiana, Office of Early Childhood and Out-of-School Learning, On My Way Pre-K October 2021 Report (Oct. 12, 2021) OMWPK 2021 Annual Report (in.gov).

exception to certain benefits programs may be appropriate, it is not appropriate to exclude whole programs where Indiana is spending upwards of $12.4 billion per year. It is unfathomable for DHS to suggest that an alien in receipt of such a benefit should not, at a minimum, be subject to a public charge determination. It is contrary to our national principle of self-sufficiency.

III. The Proposed Rule Fails to Consider the Administrative Burdens or Costs to the States.

Citing relevant executive orders, the Proposed Rule provides an economic analysis purporting to consider the cost of implementing this Proposed Rule on the affected population and the government. This analysis fails to consider the administrative burdens placed on each state that undertakes the responsibility of administering the public benefits considered in this analysis. DHS should not rely on this analysis and consider additional factors as discussed below.

The lengthy economic analysis focuses on the chilling effect of implementing a more expansive public charge definition than what is proposed. Beyond the typical cost analysis to process and adjudicate an application under this rule, DHS seems concerned with only the impact of disenrollment from public benefits. As a result, aliens will forego enrollment entirely.

In its analysis, DHS argues that disenrollment or forgoing enrollment has downstream economic impacts that, largely due to fewer transfer payments, will negatively affect the economy. However, DHS readily acknowledges it is unable to "quantify the State portion of the transfer payment due to a lack of data related to State-level administration of these public benefit programs."[17] This contradicts DHS's argument that the economic analysis provides a transparent picture of the public benefit administration and the economy should this Proposed Rule become final.

Additionally, while DHS focuses on a reduction of transfer payments as a net negative, it fails to explore the savings to taxpayers on either the state or federal side. Indiana and the other undersigned States spend millions of dollars per year administering its public benefits system, which provides billions of dollars per year. Clearly, any reduction in payments because of this rule would impact Indiana and every other state. DHS must broadly analyze those impacts and include its findings in the analysis. Assuming that DHS's analysis is correct, this must result in savings

[17] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570, 10663 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245).

to the taxpayers that are quantifiable and must be included to supply a complete analysis.

Additionally, DHS neglects to analyze the effect of any larger alternative that, more consistently with Congressional intent, ensures that aliens seeking admission or other benefits do not become a public charge. Accordingly, such an analysis should not be limited to the chilling effect on aliens already present in the United States, but the benefit for the taxpayers and reduction of burdens on our already overwhelmed public benefits systems. DHS's limited analysis denies its true intent and ignores its charge to faithfully execute the immigration laws of this nation as mandated by Congress.

IV. The Proposed Rule Fails to Justify its Policy Decisions.

Throughout its discussion of the proposed regulatory changes, DHS continually references the agency's perceived disagreements with the 2019 Final Rule, rather than valid justifications for the changes. While the Biden Administration is within its discretion to take a different approach from previous administrations, proposed rules require justification and stated reasoning when amending regulations.[18] In the instant case, many of the decisions appear to be made simply because they are in contravention of the 2019 Final Rule. This violates the Administrative Procedure Act ("APA"), which prohibits agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[19]

In determining whether an alien is a public charge, DHS's Proposed Rule focuses only on the statutorily enumerated minimum requirements and the affidavit of support. While Indiana and the other undersigned States certainly agrees with DHS's proposal that adjudicators utilize a totality of the circumstances approach, as required by law, our agreement with the process ends there.

In the 2019 Final Rule, officers were provided with prescribed standards for how to address the statutory factors and made clear what should be viewed positively and negatively in the adjudication.[20] DHS now finds that this was too complicated of a process and prefers a return to the "long-standing and straightforward framework."[21] This is not a reasoned analysis. DHS refuses to recognize that the

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[18] "The APA requires an agency to provide notice of a proposed rule, an opportunity for comment, and statement of the basis and purpose of the final rule adopted. *American Medical Ass'n v. Reno*, 57 F. 3d 1129, 1132 (DC Cir. 1995).

[19] 5 U.S.C. § 706(2)(A).

[20] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41502 (Finalized Aug. 14, 2019) (to be codified at 8 C.F.R. parts 103, 212, 213, 214, 245, and 248).

[21] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245). NPRM at 10617.

2019 standards were included to better instruct officers instead of providing nothing more than a list with no other guidance.

It is well-known that the public charge ground of inadmissibility has been under-utilized for many years largely because of a lack of legal precedent and clear field guidance. With no other guidance in the past 23 years since the Pearson Memo (in effect since 1999), it is confounding why DHS now feels that this is the best approach to follow. Clearly, officers were unable to follow this guidance as it was simply being ignored. DHS needs to provide clearer standards within the regulatory text to give better instruction to its officers.

Additionally, the Proposed Rule notes that the 2019 Final Rule required an evaluation of the sponsor's affidavit of support.[22] DHS now believes that such an evaluation is unnecessary and that simply having an affidavit of support in the record should be sufficient for the alien to meet his or her burden in the adjudication. In making this determination, DHS correctly declares that the affidavit of support is an enforceable contract.[23] Nevertheless, to suggest this as a reason for not making an independent determination is insincere and not a justification for a policy decision. DHS conveniently ignores the long-standing history of the government failing to hold sponsors accountable. If DHS is going to simply consider a properly filed affidavit as sufficient evidence of support, DHS must take additional steps in this regulation to reform the affidavit of support and hold accountable those that are in breach of this enforceable contract.

In the 2019 Final Rule, DHS opted to apply the rule to those aliens changing or extending their nonimmigrant status in the United States.[24] DHS correctly concedes that an applicant for extension or change of status is not an applicant for adjustment of status or admission. DHS acknowledges it has the discretion to set conditions on granting those applications and petitions.[25] Still, DHS fails to provide any reasoned analysis as to why these aliens should not be subject to the Proposed Rule. It opines that these nonimmigrants are generally not eligible for various types of public benefits and that certain nonimmigrant classes must, as a condition of

[22] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41504 (Finalized Aug. 14, 2019) (to be codified at 8 C.F.R. parts 103, 212, 213, 214, 245, and 248).
[23] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245). NPRM at 10618.
[24] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41507 (Finalized Aug. 14, 2019) (to be codified at 8 C.F.R. parts 103, 212, 213, 214, 245, and 248).
[25] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570, 10600 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245).

admission, provide sufficient funds.[26] Indiana and the undersigned States do not contest DHS's discretion to set conditions as noted above. Yet, if these classes of aliens ultimately receive certain public benefit programs, DHS cannot simply hide behind discretion. Indiana, and every other state, have a right to understand why DHS intends, as a policy choice, to use its discretion to include the public charge determination as a condition. To simply say that it will not act in this manner is insufficient and does not provide a meaningful opportunity to comment on the Proposed Rule.

The 2019 Final Rule significantly amended provisions related to public charge bonds, which provided, for the first time, a workable framework to realistically implement and actually use public charge bonds as a part of U.S. immigration law.[27] DHS declines to make any change to the existing framework, instead finding that the "existing regulations provide an adequate framework for DHS to exercise its discretion . . . ."[28] The existing framework is only adequate if, in DHS's discretion, the decision is to never use this authority. In fact, DHS notes that this is not a priority given that there is a small pool of instances where it would be inclined to use this authority.

The public charge bond, much like the affidavit of support, is a tool to ensure compliance with the immigration law and guarantee that an alien will not ultimately become a public charge in the United States. It stands to reason that DHS, the department tasked with administering our nation's immigration laws, would want to use the tools at its disposal to carry out such a task. Accordingly, it is troubling that the Proposed Rule so plainly states DHS's intention to largely ignore its discretion under this authority and to underutilize the public charge bond to the extent that amending the relevant regulations is not necessary. The justification for such a policy choice is lacking in the Proposed Rule but is quite apparent—DHS intends to eviscerate the public charge ground of inadmissibility. Indiana and the undersigned States ask DHS to reconsider its position on public charge bonds and make needed reforms in the same manner as the 2019 Final Rule. This ensures that bonds feasibly operate.

Lastly, DHS departs from the 2019 Final Rule and no longer excludes military service members from consideration based on receipt of public benefits. In the 2019

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[26] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570, 10601 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245).
[27] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41504 (Finalized Aug. 14, 2019) (to be codified at 8 C.F.R. parts 103, 212, 213, 214, 245, and 248).
[28] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570, 10626 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245).

Final Rule, DHS excluded active-duty U.S. service members and their spouses and children from consideration if they received benefits.[29] In this Proposed Rule, DHS no longer believes that is appropriate. Yet again, it is not something that was considered in the 1999 Interim Field Guidance, and that faux-precedent weighs heavily in this Proposed Rule. DHS maintains that U.S. service members do not typically receive the income-deriving benefits that give rise to public charge determinations.[30] Indiana and the undersigned States are appalled by this analysis and the assertion that these brave men and women and their families should not be provided with special dispensation based on their service to this country. Even so, this Proposed Rule carves out exemptions and exclusions for all manner of benefits and classes of aliens. But these exceptions will swallow the rule. In brief, DHS erred in excluding U.S. servicemembers and their families from that already expansive list.

V. Conclusion

For the reasons set forth above, Indiana and the undersigned States strongly oppose this Proposed Rule and urge DHS to withdraw it.

Sincerely,

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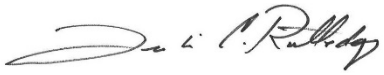
[29] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41501 (Finalized Aug. 14, 2019) (to be codified at 8 C.F.R. parts 103, 212, 213, 214, 245, and 248).
[30] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570, 10623 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245).



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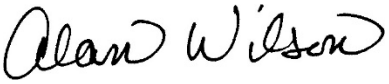

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