UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MAKE THE ROAD NEW YORK, ET AL.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:19-cv-07993-GBD
KEN CUCCINELLI, ET AL,	)	
Defendants.	)	

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BRIEF OF *AMICI CURIAE* PUBLIC HEALTH, HEALTH POLICY, MEDICINE, AND NURSING DEANS, CHAIRS AND SCHOLARS; THE AMERICAN PUBLIC HEALTH ASSOCIATION; AND THE AMERICAN ACADEMY OF NURSING IN SUPPORT OF PLAINTIFFS

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CORPORATE DISCLOSURE STATEMENT

Amici deans, chairs and scholars are individuals and, as such, do not have a parent company and no publicly held company has a 10% or greater ownership interest in any said *amici*.

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INTEREST OF *AMICI CURIAE*

Amici have sought leave to file the instant brief. *Amici* include: (i) deans of schools of public health, public policy, medicine, and nursing, as well as academic chairs and faculty researchers (the "Deans, Chairs, and Scholars"); (ii) the American Public Health Association ("APHA"); and (iii), the American Academy of Nursing (the "Academy"). *Amici* seek to inform the Court about the public health impact of the "Public Charge" Rule and believe this case provides an appropriate vehicle for the Court to find that Defendants' approval of the Rule and their intention to implement the Rule are contrary to federal law.

The Deans, Chairs, and Scholars are individuals who are recognized among the nation's leading figures in the field of health policy and public health. *Amici* possess particular expertise on health determinants, methods for lowering barriers to effective health care services, and the broader public health consequences of governmental policies. A full list of the Deans, Chairs, and Scholars is included below.

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No party or counsel for a party authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. Preparation of this brief was supported under an award from the Robert Wood Johnson Foundation to the George Washington University Milken Institute School of Public Health. The views expressed by *amici* do not necessarily reflect the position of the Foundation.

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INTRODUCTION

This Court has been asked to evaluate whether defendants United States Citizenship and Immigration Services ("USCIS"), the USCIS Acting Director, the U.S. Department of Homeland Security ("DHS") and the Acting Secretary of DHS (collectively "the Defendants") acted arbitrarily, capriciously, and contrary to law when they promulgated a new rule that bars admission and lawful permanent residence to people determined "likely to become a public charge." *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248) (the "Rule"). Defendants ignored or dismissed the majority of more than 266,000 comments that warned that the Rule was a threat to immigrants' health, access to health care, and broader public health concerns. The implications of this ill-advised Rule are enormous and already evident.

The Rule's consequences are not limited to immigrants and their families. Roughly half of all Americans live in a county in which immigrants constitute ten percent of all residents; fifty million Americans live in counties in which immigrants represent one-quarter or more of the population. In short, this Rule threatens a public health crisis on a national scale.

Therefore, because Defendants acted unreasonably and with absolute disregard for public health, Defendant's promulgation of this Rule is arbitrary and capricious, an abuse of discretion, and contrary to law. As such, the Rule should be vacated.

ARGUMENT

I. The Rule Threatens Public Health on a National Scale.

A. The Rule will have a chilling effect on immigrant-participation in essential health programs, negatively impacting their overall health outcomes.

The Rule is already having a chilling effect as immigrants and their families opt to forgo critical benefits to which they are entitled for fear of being deemed a "public charge." The

Rule's low income, age, and medical condition tests mean that children who use Medicaid to receive treatment for asthma (a chronic condition that must be managed) run a "public charge" risk, as do pregnant women experiencing complications of pregnancy such as diabetes. No use of Medicaid is safe, even when Defendants ostensibly permit it. Not surprisingly, given the terms of the Rule and the policy aura coming from the administration that surrounds it, the Urban Institute reported that "about one in seven adults in immigrant families (13.7 percent) reported 'chilling effects,' in which the respondent or a family member did not participate in a noncash government benefit program in 2018 for fear of risking future green card status. This figure was even higher, 20.7 percent, among adults in low-income immigrant families." Hamutal Bernstein, et al., *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018*, Urban Institute (May 2019). Relatedly, the Migration Policy Institute ("MPI") estimated the chilling effect could claim 47 percent of the U.S. noncitizen population. Notably, these individuals live in families with 12 million U.S.-citizen family members, two-thirds of which are children. *See* Jeanne Batalova, et al., *Millions Will Feel Chilling Effect of U.S. Public-Charge Rule That is Also Likely to Reshape Legal Immigration*, Migration Policy Institute (Aug. 2019).

The two largest racial/ethnic immigrant groups, Latinos and Asian American/Pacific Islanders (AAPI), lie at greatest risk. Approximately 16.4 million people live in benefit-receiving families with at least one Latino noncitizen, while three million live in such families with at least one AAPI noncitizen. *See id*. According to the MPI, "[i]f program disenrollment follows the patterns observed in the 1990s, as many as 20 percent to 60 percent of immigrants could withdraw from benefit programs. If significant numbers of immigrants and their family members withdraw from public benefit programs because of real or perceived fears that they will not be able to sponsor a family member, be refused a permanent or temporary visa, or be

deported, the impacts of the rule on their health and wellbeing could be deep and long-lasting." *Id.*; *see also* Hamutal Bernstein, et al., *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018*, Urban Institute (May 2019) (observing "chilling effects in families with various mixes of immigration and citizenship statuses, including 14.7 percent of adults in families where all noncitizen members had green cards and 9.3 percent of those in families where all foreign-born members were naturalized citizens").

The Rule's chilling effects even extend to everyday matters. Researchers for the Urban Institute found that many immigrant families are increasingly avoiding routine activities, such as interacting with teachers or school officials, health care providers, and the police, which poses risks for their well-being and the communities in which they live. *Id.*; *see also* The Children's Partnership, *California Children in Immigrant Families: The Health Provider Perspective. Infographic* (2018) (noting a 42 percent increase in missed scheduled health care appointments for children with at least one immigrant parent since the inception of this Administration's anti-immigrant rhetoric).

Defendants are keenly aware of the chilling effect this Rule will have on immigrants seeking health care. Defendants estimate implementation of the Rule will lead to a reduction in Federal and State government payments to individuals under public benefits programs of "approximately $2.47 billion annually due to disenrollment and forgone enrollment . . . ." 84 Fed. Reg. at 41,485. After ten years, Defendants estimate the reduction will total approximately $21 billion. *Id.* However, Defendants' own analysis recognizes that their reduction estimates are artificially low. When using disenrollment/forgone enrollment percentages attributed to implementation of the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193, 110 Stat. 2105 (1996) ("PRWORA," known as "welfare reform"), actual estimates

of public benefits program Rule-driven reductions range from approximately $12.2 billion to $31.4 billion annually. *See* U.S. Dep't of Homeland Security, *Regulatory Impact Analysis, Inadmissibility on Public Charge Grounds, Final Rule,* DHS Docket No.: USCIS-2010-0012, RIN: 1615-AA22, Table 20 (Aug. 2019).

B. The Rule will result in significant disenrollment from health care programs.

The Rule's chilling effect will cause a substantial drop in enrollment in the Supplemental Nutrition Assistance Program ("SNAP," formerly "Food Stamps"), Medicaid and other essential health care programs, impeding access to preventive and acute care, and resulting in worse health outcomes and a spike in premature deaths. Providers have already reported increasing concerns among parents about enrolling their children in Medicaid and food programs. Kaiser Family Foundation, *Changes to "Public Charge" Inadmissibility Rule: Implications for Health and Health Coverage* (Aug. 2019). The same effect has been observed in the Special Supplemental Nutrition Program for Women, Infants and Children ("WIC"): WIC agencies in certain states attribute decreasing enrollment largely to fears about the Rule. *Id.* Despite Defendants' protest that WIC is exempt, a drop is not surprising; WIC not only provides food but a means of finding children and families who need health care. Moreover, disenrollment from programs such as SNAP or Section 8 housing assistance place children of immigrants at risk of food insecurity, malnutrition, poverty, and homelessness, likely resulting in increased health care costs long term, particularly for children with special needs. Leah Zallman, et al., *Implications of Changing Public Charge Immigration Rules for Children Who Need Medical Care*, JAMA Pediatrics (July 1, 2019); *see also* California Health Care Foundation, *Changing Public Charge Immigration Rules: The Potential Impact on Children Who Need Care* (Oct. 2018) ("Parents choosing to disenroll from SNAP or housing assistance is likely to increase poverty and homelessness rates

— two principal determinants of health.…While harmful to all children, the loss of such supports for families could take a particularly hard toll on children in need of medical attention.").

Medicaid coverage is associated with increased access to health care services, increase in the ability of people to obtain preventive and acute care services, increase in low-income families' financial security and improvements in a variety of health outcomes. Larisa Antonisse, et al., *The Effects of Medicaid Expansion under the ACA: Updated Findings from a Literature Review*, Kaiser Family Foundation (Mar. 2018); *see also* Benjamin Sommers, et al., *Health Insurance Coverage and Health — What the Recent Evidence Tells Us*, New England Journal of Medicine (Aug. 10, 2017). But families may avoid Medicaid, even Rule-exempt children and pregnant women, out of fear that Medicaid telegraphs long-term health care needs.

This drop in enrollment will reduce access to care, contributing to worse health outcomes. *See* Kaiser Family Foundation, *Changes to "Public Charge" Inadmissibility Rule: Implications for Health and Health Coverage* (Aug. 12, 2019). As more immigrants and their children miss doctor visits, the broader U.S. public could face increased health risks. Jeanne Batalova, et al., *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrants Families' Public Benefits Use*, Migration Policy Institute (June 2019); *see also* Krista Perreira, et al., *A New Threat to Immigrants' Health - The Public-Charge Rule*, The New England Journal of Medicine (2018) (noting the Rule will lead to reductions in prenatal and postnatal care, which will cause higher rates of low birth weight, infant mortality, and maternal morbidity, as well as forgone routine checkups, immunizations and cancer screenings); Wendy E. Parmet, *The Health Impact of The Proposed Public Charge Rules*, Health Affairs Blog (Sept. 27, 2018) (the Rule will make immigrants avoid medical testing and examinations, leading to more undiagnosed and untreated medical conditions); Letter from HIV Medicine Association

(HIVMA), Infectious Diseases Society of America (IDS), Pediatric Infectious Diseases Society (PIDS), and the Ryan White Medical Providers Coalition (RWMPC) to Samantha Deshommes, Chief Regulatory Coordination Division, USCIS (Dec. 10, 2018) (stating that the Rule will make more people avoid preventive services or abandon treatment for HIV-AIDS, tuberculosis and other infectious diseases, and will depress vaccination rates, increasing the likelihood of outbreaks of vaccine-preventable diseases, such as measles, mumps and varicella, threatening public health for all); Camilo Montoya-Galvez, *Immigrants already dropping benefits ahead of new Trump rule, California counties say*, CBS News (2019); Mitchell Katz & Dave Chokshi, *The "Public Charge" Proposal and Public Health: Implications for Patients and Clinicians*, JAMA (Nov. 27, 2018) (stating that the Rule will lead to increased prevalence of obesity and malnutrition, reduced prescription adherence, and increased risks of outbreaks of transmissible disease).

Disenrollment and altogether avoiding enrollment in health care programs will disproportionately affect community health centers, which anchor primary health care in medically underserved communities that often are home to large numbers of immigrants. Health centers are designed to encourage early entry and use of highly-effective primary care. Federally-qualified health centers are required by law to provide primary medical care to all patients, including Medicaid beneficiaries, in medically underserved areas. These centers must provide care regardless of a person's ability to pay and must charge reduced fees to patients making up to twice the Federal Poverty Guidelines, and waive fees entirely for those below the federal poverty line. *See* 42 U.S. §§ 254b(k)(3)(E) & G(i)-(iii); 42 C.F.R. § 51c.303(f). In response to the Rule's implementation, immigrant patients may avoid health care altogether or, if

they do continue to use care, they may forgo Medicaid enrollment, depriving health centers of their largest funding source. This in turn will lead to major financial strain.

Researchers from the George Washington University Milken Institute School of Public Health estimate conservatively that, under the Rule, health centers nationally could lose between 165,000 and 495,000 Medicaid patients annually. As Medicaid revenue falls, health centers will lose overall patient care capacity, with the total number of patients served declining between 136,000 and 407,000 nationally; California alone could lose service capacity for as many as 142,000 patients and New York health centers could see total patient care capacity drop by over 77,000. Other states in which health centers show high losses in overall patient care capacity include Arizona, Colorado, Florida, Illinois, Massachusetts, New Jersey, Texas and Washington. The estimated Medicaid revenue losses driving this decline in care capacity are enormous, ranging from $164 million to $493 million nationally. Peter Shin, et al., *How will the Public Charge Rule Affect Community Health Centers and the Communities they Serve?*, GW Health Policy & Management Matters (Sept. 5, 2019).[1] Likewise, other researchers have found Rule-driven funding losses will impact hospital and emergency room services. *See* Cindy Mann, et al., *Medicaid Payments at Risk for Hospitals Under the Public Charge Proposed Rule*, Manatt (Nov. 2018) (discussing impact of reduced Medicaid coverage on delivery of hospital services); Mitchell Katz & Dave Chokshi, *The "Public Charge" Proposal and Public Health: Implications for Patients and Clinicians*, JAMA (Nov. 27, 2018) ("At the system level, increased visits would

[1] The losses estimated by Shin, et al. are based on final Medicaid coverage loss estimates prepared by Dr. Leighton Ku and presented in his Declaration, *infra*. Dr. Shin's final estimate is somewhat lower than the earlier estimate he prepared regarding the impact of the proposed rule. Because the Final Rule contains Medicaid exemptions for children and pregnant women, which were taken into account by the Ku estimate, the health center impact estimate was revised in turn. Dr. Ku's statement regarding the health center impact is entirely correct, since his statement reports on the earlier Shin estimates, not the new one.

further strain emergency departments with nonurgent patients. Greater numbers of uninsured patients will further shift costs of care to safety-net health systems, for which financial viability is already in peril.").

Moreover, the Rule's impact on the Medicaid program can be expected to lead to higher mortality rates. Research shows expanding Medicaid eligibility correlates with significantly lower mortality, particularly disease-related deaths (e.g., as opposed to accidents) with the effect increasing over time. *See* Sarah Miller, et al., *Medicaid and Mortality: New Evidence from Linked Survey and Administrative Data*, National Bureau of Economic Research (Working Paper No. 26081, July 2019). Rule-driven coverage reductions will change this. In fact, public health expert Dr. Leighton Ku estimates that between 1 million and 3.1 million members of immigrant families will forgo Medicaid or disenroll following the Rule's implementation. This includes between 600,000 and 1.8 million adults 21 or older who will not receive Medicaid and between otherwise eligible 400,000 to 1.2 million children 21 or younger who will not receive Medicaid because they are members of immigrant families. *See La Clinica de la Raza, et al. v. Trump, et al.*, 4:19-cv-4980-PJH, Declaration of Leighton Ku, PhD, MPH in support of Plaintiffs' Motion for A Preliminary Injunction ¶ 45 (Dkt. No. 37, Sept. 1, 2019). Dr. Ku goes on to state that the Rule may "eventually increase the number of premature deaths by between 1,300 and 4,000." *Id*. ¶ 56.

II. Defendants Unlawfully Ignored or Otherwise Dismissed the Majority of Over 266,000 Public Comments Warning the Rule Would Create Serious Public Health Risks for Individuals and Communities.

It is settled that "[f]ederal administrative agencies are required to engage in 'reasoned decision-making . . . . Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. It follows

that agency action is lawful only if it rests on a consideration of the relevant factors." *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (internal citation and quotation marks omitted).

Such relevant factors for consideration include public comments made during the rulemaking process. *See Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000). While not all comments carry the same weight, federal agencies must respond to comments that "would require a change in the agency's proposed rule." *City of Portland, Oregon v. E.P.A.*, 507 F.3d 706, 715 (D.C. Cir. 2007). Where, as here, the agency addresses public comments in a "conclusory manner," the agency has failed to provide a "reasoned explanation" for its decision. *Int'l Union, United Mine Workers of America v. Mine Safety & Health Admin.*, 626 F.3d 84, 94-95 (D.C. Cir. 2010); *Lilliputian Systems, Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014).

It is clear, moreover, that agencies must evaluate the fuller meaning of their rules, including their indirect effects on the broader population in addition to those directly regulated. Agencies have a duty reasonably to consider the human and health costs of their rules; "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Michigan v. EPA*, 135 S. Ct. at 2707. It follows that final agency actions such as the Rule are arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2), if the agency failed to "examine the relevant data," "consider an important aspect of the problem," or "articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted); *Ass'n of Civilian Technicians N.Y. Council v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985), *cert. denied*, 474 U.S. 846 (1985) (agency must provide "reasoned explanation of why the new rule effectuates the statute as well or better

than the old rule"); *Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994) (record must show agency addressed significant objections and court must remand where "agency [] relied on factors which Congress has not intended it to consider").

There could be no more powerful example of a rule that simply fails on all counts than this Rule. Not only is it contrary to Congressional intent, but the Rule was adopted in blatant disregard of warnings expressed in the majority of the 266,000 comments filed. These comments documented the Rule's direct impact on the health, housing and nutritional status of individuals subject to its terms. In particular, Defendants ignored the perverse incentives the Rule creates for immigrants and their families to avoid services for health conditions that could require "extensive" treatment – an astounding invitation for people with serious health needs to turn away from sources of health care, health supports, shelter, and nutrition – not just services that are designated "public benefits," but all services. Enrollment and use of public services becomes Exhibit A of their undesirability under the Rule, triggering an immense "chilling effect." Yet Defendants downplayed the Rule's impact, using a 2.5 percent disenrollment estimate wholly inconsistent with their own studies. *See* Defendants' *Regulatory Impact Analysis, Inadmissibility on Public Charge Grounds, Final Rule*, DHS Docket No.: USCIS-2010-0012, RIN: 1615-AA22, Table 19 *and accompanying text* (Aug. 2019). Defendants themselves acknowledge that previous public benefits limitations in PRWORA (welfare reform) led to dramatic enrollment reductions that ranged from twenty-one to fifty-four percent across population categories and types of benefits. *Id.*

Despite these clear impacts, Defendants believe their sole responsibility is to assure that immigrants will live up to their idea of "self-sufficiency," even if it means acting contrary to law and threatening public health. Even as they admit the massive harms the Rule is likely to trigger,

see 84 Fed. Reg. at 41,306-16, Defendants essentially shrug them off with what boils down to a "not our problem" stance: "[we] acknowledge[] that individuals subject to this rule may decline to enroll in, or may choose to disenroll from, public benefits for which they may be eligible under PRWORA, in order to avoid negative consequences as a result of this final rule….But regardless, [we] decline[] to limit the effect of the rulemaking to avoid the possibility that individuals subject to this rule may disenroll or choose not to enroll, as self-sufficiency is the rule's ultimate aim." *Id.* at 41,312-13.

The record, even as described by Defendants, makes abundantly clear the public health consequences that the Rule can be expected to produce: (i) a general withdrawal from public services, including community-wide services offering health, nutrition, public housing, child care and other critical benefits; (ii) an undermining of efforts to protect health and safety with lasting community-wide impact; (iii) increased hunger, food insecurity, homelessness, and needless hardship from the effect of poverty; (iv) increased uncompensated health care costs; and (v) increased threats to public health as people forgo services as basic as immunizations, fearing they will be caught using a public health service or perhaps worse, be found to have a medical condition requiring ongoing treatment – as noted a "highly negative factor" in Defendants' proposed scheme.

In spite of these multiple warnings, Defendants do "not believe that it is sound policy to ignore the longstanding self-sufficiency goals set forth by Congress or to admit or grant adjustment of status applications of aliens who are likely to receive public benefits designated in this rule to meet their basic living needs in an [sic] the hope that doing so might alleviate food and housing insecurity, improve public health, decrease costs to states and localities, or better guarantee health care provider reimbursements." 84 Fed. Reg at 41,314. In fact, Defendants

believe, without evidence, that they "will strengthen public safety, health, and nutrition through this rule by denying admission or adjustment of status to aliens who are not likely to be self-sufficient." *Id*. This hardly qualifies as "reasoned decision making" sufficient for this Rule to survive judicial review – ". . . we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Department of Commerce v. New York*, 588 U.S. ___, 139 S.Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)). The Rule must be vacated.

CONCLUSION

For the foregoing reasons, Defendants should be enjoined from implementing the Rule. Moreover, Defendants' approval of the Rule should be vacated and remanded to the agency.

Respectfully submitted,

Dated: September 10, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2019, I caused the foregoing document to be served on the parties' counsel of record electronically by means of the Court's CM/ECF system.

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