NO. 19-2222

# United States Court of Appeals

*for the*

# Fourth Circuit

CASA DE MARYLAND, INC.; ANGEL AGUILUZ;
MONICA CAMACHO PEREZ,

*Plaintiffs-Appellees,*

– v. –

DONALD J. TRUMP, in his official capacity as President of the United States; CHAD WOLF, in his official capacity as Acting Secretary of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY; KENNETH T. CUCCINELLI, II, in his official capacity as Acting Director, U.S. Citizenship and Immigration Services; U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT GREENBELT IN CASE NO. 8-19-CV-02715-PWG, HONORABLE PAUL W. GRIMM, U. S. DISTRICT COURT JUDGE

## BRIEF OF *AMICUS CURIAE* CENTER FOR REPRODUCTIVE RIGHTS IN SUPPORT OF PLAINTIFFS-APPELLEES

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## CORPORATE DISCLOSURE STATEMENT

*Amicus Curiae* Center for Reproductive Rights is a 501(c)(3) not-for-profit charitable organization incorporated in Delaware. The Center for Reproductive Rights has no parent corporation. It does not issue stock.

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*Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974)....................22

*Frontiero v. Richardson*, 411 U.S. 677 (1973)....................20

*Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003)....................22

*Personnel Administration of Massachusetts v. Feeney*, 442 U.S. 256 (1979)....................22

*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)....................23

*Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) ....................20

STATUTES

8 U.S.C. § 1182(a)(4)(B)(i)....................14

OTHER AUTHORITIES

REGULATIONS AND GUIDANCE

8 C.F.R. § 212.21(a)....................4

8 C.F.R. § 212.21(b). ....................4, 14

8 C.F.R. § 212.21(b)(2)....................10

8 C.F.R. § 212.21(b)(3)....................10

8 C.F.R. § 212.21(b)(4)....................10

8 C.F.R. § 212.21(b)(6)......................................................................................10

8 C.F.R. § 212.21(d). ...........................................................................................4

8 C.F.R. § 212.22(b)(2)(B) ..................................................................................14

8 C.F.R. § 212.22(b)(4)(i)(B)...............................................................................14

8 C.F.R. § 212.22(b)(5)(ii)(B) ..............................................................................14

8 C.F.R. § 212.22(b)(5)(ii)(D). .............................................................................14

8 C.F.R. § 212.22(c)(1) ...................................................................................14, 15

Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (August 14, 2019). ..........................................................................................4

Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999). ..................................................3

**INTERNATIONAL LAW AUTHORITIES**

Comm. on the Elimination of Discrimination against Women, General recommendation No. 26 on women migrant workers, U.N. Doc. CEDAW/C/2009/ WP.1/R (Dec. 5. 2008)........................................................28

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, *opened for signature* Dec. 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85 ...............................................24

Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 ..........................................................................................25

Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 ...........................................................................25

G.A. Res. 217 (III) A, art. 1, Universal Declaration of Human Rights (Dec. 10, 1948) ...........................................................................................25

International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171. ......24, 25, 26

International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 ........................................25

International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, S. Treaty Doc. 95-18, 660 U.N.T.S. 195 ...........................................................24, 25, 27

Rep. of the Working Group on the issue of discrimination against women in law and in practice, on its mission to the United States (Nov. 30-Dec. 11, 2015), Rep. ¶ 68, U.N. Doc. A/HRC/32/44/Add.2 (June 7, 2016)..................................................................29

Rep. of the Working Group on the Universal Periodic Review: United States of America, ¶¶ 176.331-333, U.N. Doc. A/HRC/30/12 (July 20, 2015) ..........................................................................................29

Special Rapporteur on extreme poverty and human rights on his mission to the United States of America, ¶ 59, U.N. Doc. A/HRC/38/33.Add.1 (May 4, 2018) (by Philip Alston)....................................30

Transcript of Michael H. Posner, Assistant Sec'y of State, Bureau of Democracy, Human Rights, and Labor, *Address to the Am. Society of Int'l Law: The Four Freedoms Turn 70* (Mar. 24, 2011), https://2009-2017.state.gov/j/drl/rls/rm/2011/159195.htm. ...............................25

U.N. Human Rights Comm., Concluding observations on the fourth periodic report of the United States of America, ¶ 15, U.N. Doc. CCPR/C/USA/CO/4, (April 23, 2014). ..........................................................26

U.N. Human Rights Comm., General comment No. 36 Article 6: right to life ¶ 3, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).....................................26

U.N. Comm. on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*,* ¶ 15, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014)..........................................................27

Vienna Convention on the Law of Treaties, art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 ...................................................25

**ADDITIONAL AUTHORITIES**


Allison Bovell-Ammon et al., *Trends in Food Insecurity and SNAP Participation Among Immigrant Families of U.S.-Born Young Children*, 6 CHILDREN 1, 9 (Apr. 4, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6517901/pdf/children-06-00055.pdf. ....................11

American College of Obstetricians & Gynecologists, *ACOG Statement on AMA Support for 12 Months of Postpartum Coverage under Medicaid* (June 12, 2019), https://www.acog.org/About-ACOG/News-Room/Statements/2019/AMA-Support-for-12-Months-Postpartum-Medicaid-Coverage?IsMobileSet=false ....................7

Ariel Ruiz et al., *Immigrant Women in the United States,* Migration Policy Inst. (Mar. 20, 2015), https://www.migrationpolicy.org/article/immigrant-women-united-states. ....................16

Cynthia Hess et al., *The Status of Women in the States*: *2015*, Inst. For Women's Policy Research 60 (May 2015), https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/R400-FINAL%208.25.2015.pdf.. ....................16

Emily E. Petersen et al., *Vital Signs: Pregnancy-Related Deaths, United States, 2011-2015, and Strategies for Prevention, 13 States, 2013-2017*, Ctrs. For Disease Control & Prevention, Morbidity and Mortality Weekly Report (May 10, 2019), https://www.cdc.gov/mmwr/volumes/68/wr/mm6818e1.htm. ....................7

Gretchen Livingston, *About One-Third of U.S. Children Are Living With An Unmarried Parent*, Pew Research Ctr. (April 27, 2018), https://www.pewresearch.org/fact-tank/2018/04/27/about-one-third-of-u-s-children-are-living-with-an-unmarried-parent/ ....................18

Heather Boushey & Bridget Ansel, *Working By the Hour: The Economic Consequences of Unpredictable Scheduling Practices*, Wash. Ctr. for Equitable Growth (Sept. 2016), http://equitablegrowth.org/wp-content/uploads/2016/09/090716-unpred-sched-practices.pdf ....................16

Institute for Women's Policy Research, *Spotlight on Immigrant Women: Employment and Earnings*, https://statusofwomendata.org/immigrant-women/spotlight-on-immigrant-women-employment-and-earnings-data/. ....................15

Jennifer Tolbert et al., *Impact of Shifting Immigration Policy on Medicaid Enrollment and Utilization of Care among Health Center Patients*, Issue Brief, Kaiser Family Found. (Oct. 2019), http://files.kff.org/attachment/Issue-Brief-Impact-of-Shifting-Immigration-Policy-on-Medicaid-Enrollment-and-Utilization-of-Care-among-Health-Center-Patients....................8, 9, 10

John Cook & Karen Jeng, *Child Food Insecurity: The Economic Impact on Our Nation*, Feeding Am. (2009), https://www.nokidhungry.org/sites/default/files/child-economy-study.pdf....................12

Kaiser Family Found., *Medicaid Enrollment by Gender* (2013), https://www.kff.org/medicaid/state-indicator/medicaid-enrollment-by-gender/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D ....................17

Kaiser Family Found., *Medicaid's Role for Women*, (Mar. 28, 2019), http:// https://www.kff.org/womens-health-policy/fact-sheet/medicaids-role-for-women/. ....................5

Lena O'Rourke, *Trump's Public Charge Proposal is Hurting Immigrant Families Now*, Protecting Immigrant Families (July 2019), https://protectingimmigrantfamilies.org/wp-content/uploads/2019/07/PIF-Documenting-Harm-Fact-Sheet-UPDATED-JULY.pdf ....................9

Lorraine Byrnes & Mary Hickey, *Perinatal Care for Women with Disabilities: Clinical Considerations*, 12 J. for Nurse Practitioners 503, 505-07 (2016), https://www.npjournal.org/article/S1555-4155(16)30300-2/pdf ........................................................................ 18

Michael C. Lu et al., *Preconception Care Between Pregnancies: The Content of Internatal Care*, 10 Maternal and Child Health J. S107, S108 (July 1, 2006), https://link.springer.com/content/pdf/10.1007/s10995-006-0118-7.pdf ........................................................................................ 6

National Council on Disability, *Chapter 13: Supporting Parents with Disabilities and Their Families in the Community*, in Rocking the Cradle: Ensuring the Rights of Parents with Disabilities & Their Children 193, 201 (Sept. 17, 2012), https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf ........................................................................... 17

Nicholas J. Kasselbaum et al., *Global, Regional, and National Levels of Maternal Mortality, 1990-2015: A Systematic Analysis for the Global Burden of Disease Study 2015*, 388 The Lancet 1775, 1784-86 (Oct. 8, 2016), https://www.thelancet.com/action/showPdf?pii=S0140-6736%2816%2931470-2 ........................................................................ 5

Press Release, American Medical Association, *AMA Adopts New Policies at 2019 Annual Meeting* (June 12, 2019), https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-2019-annual-meeting .................................................... 7

Robin E. Clark et al., *Homelessness Contributes To Pregnancy Complications*, 38 Health Affairs 139, 142-43 (2019), https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2018.05156.. ................ 12

San Francisco Dep't of Public Health, *Health Brief: Health Impacts of Family Housing Insecurity* 2 (Feb. 2019), https://www.sfdph.org/dph/files/EHSdocs/ehsCEHPdocs/Housing_Insecurity_SFDPH_Report.pdf.......................................................... 13

Sarah Jane Glynn, *An Unequal Division of Labor: How Equitable Workplace Policies Would Benefit Working Mothers*, Ctr. for Am. Progress (May 2018), https://cdn.americanprogress.org/content/uploads/2018/05/180502 59/Parent-Time-Use.pdf... ....................................................................15

Samantha Artiga et al., *Estimated Impacts of Final Public Charge Inadmissibility Rule on Immigrants and Medicaid Coverage*, Issue Brief, Kaiser Family Found. (Sept. 2019), http://files.kff.org/attachment/Issue-Brief-Estimated-Impacts-of-Final-Public-Charge-Inadmissibility-Rule-on-Immigrants-and-Medicaid-Coverage...........................................................9, 15

Sohni V. Dean et al., *Preconception Care: Closing the Gap in the Continuum of Care to Accelerate Improvements in Maternal, Newborn and Child Health*, 11 Reprod. Health 1, 4 (Sept. 26, 2014), https://reproductive-health-journal.biomedcentral.com/articles/10.1186/1742-4755-11-S3-S1 .....................6

Steven Carlson & Zoë Neuberger, *WIC Works: Addressing the Nutrition and Health Needs of Low-Income Families for 40 Years*, Ctr. On Budget & Policy Priorities (May 4, 2015), http://nevadawic.org/wp-content/uploads/2013/02/CBPP-WIC-Works-Research-Article-5-4-15.pdf.....................................................................9

SNAP Web Tables, *Supplemental Nutrition Assistance Program Participation and Costs*, (data as of Dec. 6, 2019), https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAPsummary-12.19.pdf.....................................................................11

U.S. Dep't of Agriculture, *Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2018* (Nov. 2019), https://fns-prod.azureedge.net/sites/default/files/resource-files/Characteristics2018.pdf. ..................................................................11

U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, *TED: The Economics Daily*, *95 Percent of Managers and 39 Percent of Service Workers Offered Medical Benefits in March 2017* (July 27, 2017), https://www.bls.gov/opub/ted/2017/95-percent-of-managers-and-39-percent-of-service-workers-offered-medical-benefits-in-march-2017.htm (insurance coverage)..........................................16

U.S. Dep't of Agriculture, *Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2018* (Nov. 2019), https://fns-prod.azureedge.net/sites/default/files/resource-files/Characteristics2018.pdf. ....................................................................17

U.S. Dep't of Housing & Urban Dev., *Characteristics of HUD-Assisted Renters and Their Units in 2013* 1, 21 (July 2017), https://www.huduser.gov/portal/sites/default/files/pdf/characteristics-hud-assisted.pdf. ....................................................................18

## INTERESTS OF AMICUS CURIAE[1]

The Center for Reproductive Rights ("the Center" or "*Amicus*") respectfully submits this brief as *amicus curiae* to support affirmance of the district court's order granting preliminary injunction.

*Amicus* is a global human rights organization that uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to respect, protect, and fulfill. In the United States, the Center focuses on ensuring that all people have access to a full range of high-quality reproductive healthcare before, during, and after pregnancy. Since its founding in 1992, the Center has been involved in nearly all major litigation in the U.S. concerning reproductive rights in state and federal courts, including the U.S. Supreme Court. To carry out its work, the Center promotes the domestic and international application of international human rights instruments.

The Center is well-suited to serve as *Amicus* as it has a vital interest in ensuring that all individuals have equal access to reproductive healthcare services and the resources necessary to support autonomy in every stage of reproductive life.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amicus* states that counsel for all parties consented to the filing of this Amicus Brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party, and no person other than amicus, made a monetary contribution intended to fund the preparation or submission of this brief.

## INTRODUCTION

In August 2019, the U.S. Department of Homeland Security ("DHS") published 84 Fed. Reg. 41,292 (Aug. 14, 2019) (the "Rule"). The Rule affords officials unprecedented power to deny a noncitizen entry or a status adjustment if they are deemed likely to become a "public charge." It adds vital healthcare, nutrition, and housing assistance programs to the list of benefits that contribute to a public-charge designation, based on any past, current, or predicted future use. The Rule furthermore specifies factors that the government will consider in its prospective public-charge determination, including whether a person has a health condition likely to require extensive treatment, whether their income falls below 125% of the poverty line, and whether they are employed, if they are not a primary caregiver.

If allowed to take effect, the Rule will impose serious harms on pregnant people, mothers, and families. The Rule will deter people from accessing programs that have evidence-based health benefits for maternal and child health. It will also harm those currently ineligible for benefits by purporting to predict future use based on factors that disproportionately disadvantage women and mothers, who are more likely to balance employment and caregiving obligations. The Rule may not facially discriminate on the basis of sex, but its unequal treatment of women, mothers, and families is in tension with the Constitution's equal protection and liberty guarantees.

These provisions register concern with laws that penalize women for the caregiving roles they play, whether such obligations fall more heavily on women in actuality, or based on stereotyped assumptions about inability to self-support.

The harms that the Rule imposes on the health of immigrant women, children, and families furthermore undermine their human rights, as guaranteed under core treaties that the U.S. has ratified. Namely, the Rule contravenes human rights obligations to respect, protect, and fulfill non-discriminatory access to services essential for the life, health, and dignity of immigrants and non-immigrants alike. In so doing, the Rule increasingly distances the U.S. from robust international commitments to immigrants' human rights. This Court should reject this Rule and its sweeping and unprecedented affront to pregnant people, mothers, and families.

## ARGUMENT

### I. The Rule Will Place Multiple Burdens on Pregnant People, Mothers, and Families By Depriving Them of Resources Necessary for Reproductive Health, Well-Being, and Autonomy.

For decades, the government made public-charge determinations without considering actual or predicted use of programs that assist with healthcare, food, and housing.[2] The Rule now reformulates the U.S. Department of Homeland Security ("DHS") assessment of whether a person is "likely at any time to become a public

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

charge" by supplanting this long-standing approach with newly exclusionary definitions and criteria.[3] Critical programs never before relevant in the public-charge assessment will be classed as "public benefits,"[4] including Medicaid, Supplemental Nutrition Assistance Program Participation ("SNAP"), and housing benefits. Even provisional use of included benefits will be weighed as a "negative factor."[5]

The Rule's expansion to include vital programs, and the fear it engenders around accessing any public assistance whether included or not, undermines the general interest in public health and imposes particular harms on pregnant people, mothers, and families. DHS's amendment to "exclude[] consideration of the receipt of Medicaid by aliens under the age of 21 and pregnant women during pregnancy and during the 60-day period after pregnancy" falls far short of ameliorating those harms.[6] Nor does the government's assertion that the majority of those subject to the Rule are not eligible for most public benefits and are therefore unlikely to be penalized for program use or to forgo benefits that would otherwise have improved their health and well-being.[7] The Rule's chilling effects have already caused

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[3] 8 C.F.R. § 212.21(a).

[4] 8 C.F.R. § 212.21(b).

[5] 8 C.F.R. § 212.21(a), (d).

[6] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,297.

[7] *Id.* at 41,313-41,314.

immigrants to disenroll from and forego essential programs for which they are eligible. And the penalization of future predicted use blatantly ignores that these benefits are essential to the health and autonomy of women, children, and families.

### A. The Rule will impede access to essential benefits before, during, and after pregnancy by including Medicaid in the public-charge determination and chilling access to other programs.

Congress created the Medicaid program in 1965 to further the goal of providing low-income individuals with dignified healthcare in their communities. And in the over half-century since, Medicaid has advanced reproductive health and justice by expanding access to public insurance that millions of people, especially women, count on to build healthy, self-determined lives and families.[8] The Rule undermines Medicaid's essential public health role by penalizing past, present, and predicted future use, and generating confusion that will chill access. This is especially concerning because the U.S. has the highest maternal mortality rate among developed countries and is the only one in which the rate is rising.[9] The Rule's narrow Medicaid exception for women during pregnancy and sixty days

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[8] *See* Kaiser Family Found., *Medicaid's Role for Women*, (Mar. 28, 2019), http:// https://www.kff.org/womens-health-policy/fact-sheet/medicaids-role-for-women/.

[9] *See* Nicholas J. Kasselbaum et al., *Global, Regional, and National Levels of Maternal Mortality, 1990-2015: A Systematic Analysis for the Global Burden of Disease Study 2015*, 388 The Lancet 1775, 1784-86 (Oct. 8, 2016), https://www.thelancet.com/action/showPdf?pii=S0140-6736%2816%2931470-2.

postpartum is wholly inadequate to safeguard access to critical services, and neglects the importance of preconception and postpartum care.

Extensive public health research establishes that, while prenatal care can improve certain health outcomes, other improvements require health promotion before, between, and long after pregnancy.[10] Preconception care, for example, plays a critical role in addressing health risks. A systematic review found that preconception care improves the identification and management of conditions that may increase risks during pregnancy, lowers rates of neonatal mortality, and improves outcomes including smoking cessation, increased use of folic acid, breastfeeding, and adequate prenatal care.[11] Despite preconception care's proven role in health promotion, it is not exempt under the Rule and counts toward a public-charge determination if a person is deemed likely to use it in the future.

Postpartum care beyond sixty days is also not exempt under the Rule, although it is critical to safeguard the health of birthing people and their children. Pregnancy-

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[10] *See, e.g.*, Michael C. Lu et al., *Preconception Care Between Pregnancies: The Content of Internatal Care*, 10 Maternal and Child Health J. S107, S108 (July 1, 2006), https://link.springer.com/content/pdf/10.1007/s10995-006-0118-7.pdf.

[11] Sohni V. Dean et al., *Preconception Care: Closing the Gap in the Continuum of Care to Accelerate Improvements in Maternal, Newborn and Child Health*, 11 Reprod. Health 1, 4 (Sept. 26, 2014), https://reproductive-health-journal.biomedcentral.com/articles/10.1186/1742-4755-11-S3-S1.

related deaths occur throughout the first year after birth,[12] and more than half (62%) of pregnancy-related deaths that occur between 43 and 365 days postpartum are preventable with appropriate care.[13] Recognizing these risks, maternal mortality review committees, the American Medical Association, and the American College of Obstetricians and Gynecologists have recommended individualized, on-going postpartum care, with at least twelve months of postpartum coverage.[14] This medical consensus highlights that the Rule's exemption of just 60 days of Medicaid after pregnancy is inadequate to meet the healthcare needs of people who have given birth.

Moreover, the Rule's chilling effect is likely to overpower its narrow exemptions and result in disenrollment from a range of programs. Growing fear, confusion, language and cultural barriers, and lack of trust that the law will be applied fairly will chill many from accessing even the few programs that are exempt,

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[12] Emily E. Petersen et al., *Vital Signs: Pregnancy-Related Deaths, United States, 2011-2015, and Strategies for Prevention, 13 States, 2013-2017*, Ctrs. For Disease Control & Prevention, Morbidity and Mortality Weekly Report (May 10, 2019), https://www.cdc.gov/mmwr/volumes/68/wr/mm6818e1.htm.

[13] *Id*.

[14] *See* American College of Obstetricians & Gynecologists, *ACOG Statement on AMA Support for 12 Months of Postpartum Coverage under Medicaid* (June 12, 2019), https://www.acog.org/About-ACOG/News-Room/Statements/2019/AMA-Support-for-12-Months-Postpartum-Medicaid-Coverage?IsMobileSet=false; *see also* Press Release, American Medical Association, *AMA Adopts New Policies at 2019 Annual Meeting* (June 12, 2019), https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-2019-annual-meeting.

including Medicaid during pregnancy and for sixty days after, the Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC"), and the Children's Health Insurance Program ("CHIP"). Although the Rule is blocked, confusion about its scope, and fear of deportation or harm to citizenship eligibility, has already led many individuals, including pregnant people and families with young children, to disenroll from critical programs. In recent interviews with health providers, nearly all respondents reported that many pregnant immigrant women were delaying prenatal care, or seeking care less frequently, and declining to enroll or disenrolling from Medicaid due to such fear.[15] This was the case even after applicants were told that Medicaid coverage for pregnant women is not penalized under the Rule.[16] According to one estimate, "If the rule leads to disenrollment rates ranging from 15% to 35% among Medicaid and CHIP enrollees who are noncitizens or live in a household with a noncitizen, between 2.0 to 4.7 million individuals could

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[15] Jennifer Tolbert et al., *Impact of Shifting Immigration Policy on Medicaid Enrollment and Utilization of Care among Health Center Patients*, Issue Brief, Kaiser Family Found. (Oct. 2019), http://files.kff.org/attachment/Issue-Brief-Impact-of-Shifting-Immigration-Policy-on-Medicaid-Enrollment-and-Utilization-of-Care-among-Health-Center-Patients.

[16] *Id.*

disenroll," thereby "reducing access to care and contributing to worse health outcomes."[17]

The Rule has similarly hampered enrollment in WIC. Evidence demonstrates that WIC improves breastfeeding rates and length, nutritional intake, and early cognitive development of children.[18] Since the Rule's announcement, however, pregnant immigrants have avoided WIC, with a noticeable decline in caseloads.[19] WIC agencies in at least 18 states report that enrollment has declined by approximately 20%; and a Texas WIC agency reports a decline of 75 to 90 participants per month due to fears of being designated a public charge.[20] Health

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[17] Samantha Artiga et al., *Estimated Impacts of Final Public Charge Inadmissibility Rule on Immigrants and Medicaid Coverage*, Issue Brief, Kaiser Family Found. (Sept. 2019), http://files.kff.org/attachment/Issue-Brief-Estimated-Impacts-of-Final-Public-Charge-Inadmissibility-Rule-on-Immigrants-and-Medicaid-Coverage.

[18] *See e.g.*, Steven Carlson & Zoë Neuberger, *WIC Works: Addressing the Nutrition and Health Needs of Low-Income Families for 40 Years*, Ctr. On Budget & Policy Priorities (May 4, 2015), http://nevadawic.org/wp-content/uploads/2013/02/CBPP-WIC-Works-Research-Article-5-4-15.pdf.

[19] Tolbert, *supra* n.15.

[20] Lena O'Rourke, *Trump's Public Charge Proposal is Hurting Immigrant Families Now*, Protecting Immigrant Families (July 2019), https://protectingimmigrantfamilies.org/wp-content/uploads/2019/07/PIF-Documenting-Harm-Fact-Sheet-UPDATED-JULY.pdf.

center providers uniformly report that immigrant patients are confused about the new Rule, who is subject to it, and which programs are included.[21]

WIC, CHIP, and Medicaid before, during, and after pregnancy play a crucial role in supporting healthy maternal outcomes and family well-being. The far-reaching consequences that flow from expanding the public charge definition cannot be mitigated by too-narrow exemptions that fail to dispel confusion and fear around access to benefits that promote the health of families.

### B. The Rule sweeps in other public benefits, including food and housing assistance, that are critical to reducing maternal morbidity and improving health outcomes.

Healthy families depend not only on reliable access to quality healthcare, but also on consistent access to nutrition and shelter. The Rule undercuts immigrants' ability to obtain these resources for their families by sweeping in programs that provide vital supplemental nutritional assistance, housing vouchers, rental assistance, and public housing among those with punitive immigration consequences.[22] In so doing, the Rule will unnecessarily extend a host of serious harms to the mental, physical, economic, and social health of future generations.

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[21] Tolbert, *supra* n.15.

[22] 8 C.F.R § 212.21(b)(2), (3), (4), (6).

The Rule's failure to exempt SNAP is especially damaging to the wellbeing of mothers, children, and families. More than 34 million low-income people receive SNAP benefits.[23] Women comprise more than half (57%) of SNAP participants, and nearly two-thirds (64%) of non-elderly adult participants.[24] SNAP benefits are particularly critical for single parents, as single-parent households comprise nearly two-thirds of SNAP households with children.[25] While many immigrants are already excluded from SNAP, fear of a public charge designation under the Rule may push eligible parents, or those with eligible children, away from SNAP. From 2017 to the first half of 2018, SNAP participation declined among eligible immigrant families even while their employment remained constant, suggesting that they were withdrawing from the program due to fear that the Rule engenders.[26] Declines are troubling given that SNAP's benefits are extensively documented; food insecurity

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[23] SNAP Web Tables, *Supplemental Nutrition Assistance Program Participation and Costs*, (data as of Dec. 6, 2019), https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAPsummary-12.19.pdf.

[24] U.S. Dep't of Agriculture, *Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2018* (Nov. 2019), https://fns-prod.azureedge.net/sites/default/files/resource-files/Characteristics2018.pdf.

[25] *Id.*

[26] *See* Allison Bovell-Ammon et al., *Trends in Food Insecurity and SNAP Participation Among Immigrant Families of U.S.-Born Young Children*, 6 CHILDREN 1, 9 (Apr. 4, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6517901/pdf/children-06-00055.pdf.

and reductions in support from public programs are associated with negative outcomes, including maternal depression and physical, psychosocial, and academic challenges among children.[27]

Access to stable housing is also essential for promoting maternal and child health. Pregnant people are particularly vulnerable to homelessness, and homelessness increases the risk of preterm delivery, low birthweight, and pregnancy-related complications.[28] Homeless pregnant women, compared to pregnant women with stable housing, had increased odds of hypertension, prolonged pregnancy, deficiency and other anemia, OB-related trauma to perineum and vulva, nausea and vomiting, hemorrhage, early or threatened labor, and other birth complications.[29] Housing instability post-partum can expose families to extended periods of toxic stress, increasing the risk of infant mortality and improper brain development for children during critical periods.[30] In spite of the incontrovertible

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[27] John Cook & Karen Jeng, *Child Food Insecurity: The Economic Impact on Our Nation*, Feeding Am. (2009), https://www.nokidhungry.org/sites/default/files/child-economy-study.pdf.

[28] Robin E. Clark et al., *Homelessness Contributes To Pregnancy Complications*, 38 Health Affairs 139, 142-43 (2019), https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2018.05156.

[29] *Id.* at 142 ("This was the case even when adjusting for co-occurring alcohol and drug use disorders, anxiety and depressive disorders.").

[30] San Francisco Dep't of Public Health, *Health Brief: Health Impacts of Family Housing Insecurity* 2 (Feb. 2019),

benefits of stable housing, the Rule penalizes any current or predicted use of housing assistance.

The limited eligibility of immigrants for Medicaid, SNAP, and housing assistance does not render the Rule innocuous. As discussed, the Rule's chilling effects have already caused immigrants who are eligible for essential programs to disenroll. And regardless of current eligibility, the Rule's consideration of future use of these programs relies on the false premise that such use is a form of dependency. To the contrary, these programs improve maternal, child, and family health outcomes and increase the ability of women and families to participate in social and economic life.

## II. The Rule Fails to Comport with Fundamental Aspects of Sex Equality and Self-determination in Matters Involving the Family That the Constitution Protects.

The Rule's expanded list of programs and newly specified "positive" and "negative" factors disproportionately disadvantage women, especially those who are parents. Even without making facial distinctions based on sex, the Rule is in tension with the Constitution's equal protection and liberty guarantees because it penalizes women for the roles they play in caring for children and families.

### A. The Rule treats women unequally by penalizing low-income, single parents with caregiving responsibilities.

https://www.sfdph.org/dph/files/EHSdocs/ehsCEHPdocs/Housing_Insecurity_SFDPH_Report.pdf.

Prior to the Rule, to make a public charge determination, officials considered age, health, family status, assets, resources, financial status, and education and skills as required by statute.[31] In addition to expanding the list of public charge programs as discussed above, the Rule established new factors that count as "positives" and "negatives" in the determination. Positive factors include being of working age, employed, in good health without a physical or mental disability, and with income above 125% of the federal poverty line.[32] Having private health insurance coverage or having income above 250% of the federal poverty level are "heavily weighted positive factors."[33] Negative factors include having income less than 125% of the poverty line, education less than a high school diploma, limited English proficiency, and poor health.[34] Having a medical condition likely to require extensive treatment, no private health insurance, and lack of employment unless serving as a primary caregiver are considered "heavily weighted negative factors," a formulation that entrenches and encourages discrimination against people with disabilities.[35]

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[31] 8 U.S.C. § 1182(a)(4)(B)(i).

[32] 8 C.F.R. § 212.21(b).

[33] 8 C.F.R. § 212.22(c)(1).

[34] 8 C.F.R. § 212.22(b)(2)(B), (4)(i)(B), (5)(ii)(B), (5)(ii)(D).

[35] 8 C.F.R. § 212.22(c)(1).

The Rule's new negative factors systematically disadvantage women, particularly those who are parents with caregiving responsibilities that limit their employment options, pushing them toward low-wage jobs with few to no employee benefits. Data shows that 28% of people who originally entered the U.S. without legal permanent resident status are parents.[36] Women who are parents are more likely than men to have caregiving responsibilities and often shoulder the dual burden of working and caregiving, which prevents them from qualifying for the Rule's exemption for primary caregivers.[37] Among immigrant women, 62.5% work full-time (as compared to 75.7% of immigrant men), while 27.8% work part-time (as compared to 13.1% of immigrant men).[38] Moreover, almost one-third of immigrant women work in service occupations, as compared to 19% of immigrant men.[39] Service jobs often entail low wages, unpredictable hours, and lack of health

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[36] Artiga, *supra* n.17.

[37] Sarah Jane Glynn, *An Unequal Division of Labor: How Equitable Workplace Policies Would Benefit Working Mothers*, Ctr. for Am. Progress (May 2018), https://cdn.americanprogress.org/content/uploads/2018/05/18050259/Parent-Time-Use.pdf.

[38] Institute for Women's Policy Research, *Spotlight on Immigrant Women: Employment and Earnings*, https://statusofwomendata.org/immigrant-women/spotlight-on-immigrant-women-employment-and-earnings-data/.

[39] *Id.*

insurance coverage and paid sick leave.[40] Lower income and lack of critical employee benefits have contributed to higher poverty rates among immigrant women, with 20% living below the federal poverty line as compared to 17% of immigrant men.[41] The difference is starker among parents, with 28% of immigrant women who are single parents living below 100% of the poverty line.[42] The Rule's negative treatment of income less than 125% of the poverty line is thus especially punitive for this group. Negative consequences of the Rule are also exacerbated for parenting women with disabilities, who are not only penalized for having a

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[40] *See e.g.*, Cynthia Hess et al., *The Status of Women in the States*: *2015*, Inst. For Women's Policy Research 60 (May 2015), https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/R400-FINAL%208.25.2015.pdf (women's wages); U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, *TED: The Economics Daily*, *95 Percent of Managers and 39 Percent of Service Workers Offered Medical Benefits in March 2017* (July 27, 2017), https://www.bls.gov/opub/ted/2017/95-percent-of-managers-and-39-percent-of-service-workers-offered-medical-benefits-in-march-2017.htm (insurance coverage); Heather Boushey & Bridget Ansel, *Working By the Hour: The Economic Consequences of Unpredictable Scheduling Practices*, Wash. Ctr. for Equitable Growth (Sept. 2016), http://equitablegrowth.org/wp-content/uploads/2016/09/090716-unpred-sched-practices.pdf (unpredictable scheduling).

[41] Ariel Ruiz et al., *Immigrant Women in the United States,* Migration Policy Inst. (Mar. 20, 2015), https://www.migrationpolicy.org/article/immigrant-women-united-states.

[42] *Id.*

disability, but who are also more likely than women without disabilities to work part-time, have lower earnings, and live in poverty.[43]

In addition, the Rule treats women unequally by incorporating programs, like Medicaid, SNAP, and housing assistance, that are especially critical to women seeking to raise families in healthy environments with autonomy and dignity. Women who are parents, especially single parents and parents with a disability, use Medicaid and food and housing assistance at higher rates that reflect the demands of providing for children. Sixty-four percent of all non-elderly adult SNAP recipients are women,[44] as are 58 percent of Medicaid recipients[45] and 70 percent of household heads receiving rental housing assistance from HUD.[46] And women are more likely

[43] National Council on Disability, *Chapter 13: Supporting Parents with Disabilities and Their Families in the Community*, in Rocking the Cradle: Ensuring the Rights of Parents with Disabilities & Their Children 193, 201 (Sept. 17, 2012), https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf.

[44] U.S. Dep't of Agriculture, *Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2018* (Nov. 2019), https://fns-prod.azureedge.net/sites/default/files/resource-files/Characteristics2018.pdf.

[45] Kaiser Family Found., *Medicaid Enrollment by Gender* (2013), https://www.kff.org/medicaid/state-indicator/medicaid-enrollment-by-gender/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

[46] U.S. Dep't of Housing & Urban Dev., *Characteristics of HUD-Assisted Renters and Their Units in 2013* 1, 21 (July 2017), https://www.huduser.gov/portal/sites/default/files/pdf/characteristics-hud-assisted.pdf.

to be single parents with sole financial responsibility for a household that includes children.[47] Parenting women with disabilities—for whom preconception and postpartum care is essential for ensuring a healthy and dignified pregnancy and postpartum experience—are doubly penalized for both having a disability, and for use or predicted use of Medicaid prior to pregnancy and afterwards.[48]

Further, deploying factors such as current income, employment, and insurance status to determine that a person is likely to use Medicaid, food and housing assistance, or other aid programs sometime in the future embeds bias against immigrant women and mothers throughout the assessment: first, the factors disadvantage them; second, the assumption is made that they will become dependent in the future; and finally, the definition of "dependency" includes use of programs that allow women, in particular, to raise families in healthy environments with autonomy and dignity. The Rule's features impede gender and reproductive equality at each of these steps.

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[47] Gretchen Livingston, *About One-Third of U.S. Children Are Living With An Unmarried Parent*, Pew Research Ctr. (April 27, 2018), https://www.pewresearch.org/fact-tank/2018/04/27/about-one-third-of-u-s-children-are-living-with-an-unmarried-parent/.

[48] Lorraine Byrnes & Mary Hickey, *Perinatal Care for Women with Disabilities: Clinical Considerations*, 12 J. for Nurse Practitioners 503, 505-07 (2016), https://www.npjournal.org/article/S1555-4155(16)30300-2/pdf.

**B. Constitutional principles of equality protect the right to have and care for children and families free from penalties based on sex, in particular those rooted in assumptions about dependency.**

The Court should consider the Rule in the context of the Constitution's core commitment to sex equality, which disfavors laws that penalize women's equal participation on the basis of their role in bearing and raising children. Although constitutional sex discriminations claims are not raised in this case, these commitments flow from the Fifth and Fourteenth Amendments, which include equal protection guarantees that prohibit discrimination based on sex and the related liberty right to bear and raise children. The Supreme Court has assessed these rights in cases dealing with access to public benefits, holding that it is unconstitutional for the government to allocate or withhold benefits based on assumptions or actual differences in the roles that women and men play in caring for families. While this jurisprudence developed at a time when laws involving benefits made sex-based distinctions on their face, it articulates principles that are no less relevant when a law systematically disadvantages women because of heightened caregiving obligations, or assumes that those obligations render women more likely to be "dependent" on support in the future.

The core holding of the landmark equal protection case *Frontiero v. Richardson*, 411 U.S. 677 (1973), impugns the inequality that the Rule embeds. In *Frontiero* the Court struck down a law that automatically granted a dependent

allowance to wives of military personnel, irrespective of financial status, but required proof that husbands were actually financially dependent on their military spouse in order for them to qualify. *Id.* at 690-91. The Court premised its decision on concerns that differential treatment of men and women "frequently bears no relation to ability to perform or contribute to society," and thus laws distinguishing "between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of individual members." *Id.* at 686-87. *Frontiero* made clear that laws embedded with gendered notions of dependency and ability to contribute to society are constitutionally problematic, in particular when their effect is to denigrate women's legal status. *Id.*

The same logic informed the Court in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), which held that a provision in the Social Security Act providing survivors benefits based on a deceased spouse's earnings to widowed mothers with minor children but not widowed fathers violated equal protection. *Id.* at 653. It reasoned that by encouraging widowed mothers to forgo employment, the provision made impermissible "gender-based generalizations" that mothers should care for children and fathers should work. *Id.* at 645. The Court also noted that the provision penalized mothers who chose to work and accrue benefits in their lifetimes but could not pass them on to their widowed spouses. *Id.* In doing so it violated equal protection by treating mothers and fathers differently based on their preferences about what role

to play in caring for their families—whether assumed or actual. Applying similar reasoning, the Supreme Court in *Califano v. Goldfarb*, 430 U.S. 199 (1977), struck down a Social Security Act provision that awarded survivors benefits to the wife of a deceased man regardless of her financial dependency, but to the husband of a deceased woman only if his income actually depended on his wife. *Id.* at 201-02. The Court wrote that "gender-based differentiation created by [the provision] …. is forbidden by the Constitution, at least when supported by no more substantial justification than 'archaic and overbroad' generalizations, or 'old notions,' such as 'assumptions as to dependency,' that are more consistent with 'the role-typing society has long imposed,' than with contemporary reality." *Id.* at 206-07 (citations omitted).

While *Frontiero, Wiesenfeld* and *Califano* address only laws that made facial distinctions between men and women in allocating benefits, their broad underlying premise applies here: constitutional equality concerns arise when a law disadvantages women or men, mothers or fathers, because of actual differences in caregiving obligations that fall more heavily on women, or assumptions about future dependency tied to gender roles and caring for children.[49] The Court made the point

[49] In *Personnel Administration of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the Supreme Court held that facially neutral laws that have the effect of disadvantaging men or women are not unconstitutional for that reason alone, but rather must have

even more explicitly in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), in which it upheld the Family Medical Leave Act as a proper exercise of Congress's Fourteenth Amendment power to rectify past discrimination against mothers based on the "formerly state-sanctioned stereotype that only women are responsible for family caregiving." *Id.* at 737.

A second line of cases addressing the liberty right to make decisions about having and raising children without suffering government-imposed economic penalties buttresses this premise. In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the Supreme Court struck down school board regulations that required pregnant teachers to take unpaid leave for several months before and after giving birth, based on the assumption that pregnant women and new mothers are physically unable to work. The Court held that the government could not make a broad determination about pregnant women that would prevent them from continuing their paid employment and "[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." *Id.* at 640. The Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), relied on the right to liberty to highlight that 'the ability of women to

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"a gender-based discriminatory purpose." *Id.* at 276. The Rule is gender neutral on its face, and Plaintiffs-Appellees have not made such claims.

participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives," *id.* at 856, and while tradition has viewed women as maternal caregivers—and women often shoulder family obligations in reality—it does not permit "the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture," *id.* at 852.

In sum, concerns arise under the Constitution's equal protection and liberty guarantees when a law penalizes women for the roles they play in caring for children and families, whether caregiving obligations fall more heavily on women in actuality, or the law makes assumptions about dependency or inability to self-support. The Rule is incompatible with that premise: it singles out factors that systematically disadvantage women and mothers on account of their caregiving roles, and deploys those factors to make an assumption about future dependency, defined as use of programs that mothers, more than fathers, rely on to provide for their families. This is true even if the Rule does not facially categorize on the basis of sex. The Rule's penalties operate at the intersection of gender, family, and caregiving in a way that is profoundly unequal.

## III. The Harms the Rule Imposes on the Health of Immigrant Women, Children, and Families Undermine their Human Rights.

Human rights belong to all people, including immigrants, and include rights to life, equality and non-discrimination, health (including sexual and reproductive

health), and family life. International human rights law provides persuasive authority that can assist this Court's analysis of the issues raised in this case. So do official decisions and statements made by United Nations ("U.N.") treaty monitoring bodies ("TMBs") and U.N. and human rights experts regarding U.S. human rights obligations and the threats to human dignity such as those posed by a rule that intensifies fear, isolation, and deprivation within immigrant communities. The U.S. has ratified core international human rights treaties that impose international legal obligations related to non-discrimination, healthcare access, reproductive rights, and immigrants' rights. These include the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 ("ICCPR"); the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, S. Treaty Doc. 95-18, 660 U.N.T.S. 195 ("ICERD"); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, *opened for signature* Dec. 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85. As a State party to these treaties, the U.S. is obligated to respect, protect, and fulfill the human rights of all people within its borders.[50]

[50] In addition, the U.S. has signed but not yet ratified other human rights treaties that safeguard rights implicated in this case, including the Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3; the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for*

### A. The Rule's harms to immigrant women, mothers, and families violate human rights standards that affirm an individual's right to access healthcare, including reproductive healthcare, free from discrimination

Human rights are based in the principles of universality and non-discrimination, as set forth in the Universal Declaration of Human Rights: "all human beings are born free and equal in dignity and rights." G.A. Res. 217 (III) A, art. 1, Universal Declaration of Human Rights (Dec. 10, 1948) ("UDHR"). See also ICCPR, art. 2.1, 26; ICERD, art. 2(a), 5; and ICESCR, art. 2.2.

The ICCPR affirms that all people have an inherent right to life, prohibits States from arbitrarily taking a person's life, and requires governments to take positive steps to prevent loss of life. U.N. Human Rights Comm., General comment No. 36 Article 6: right to life, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019). Moreover,

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*signature* Dec. 18, 1979, 1249 U.N.T.S. 13; and the International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 ("ICESCR").

Under international law, the U.S. has an obligation to refrain from actions that would defeat the object and purpose of treaties it has signed, even if the treaties have not been ratified. *See* Vienna Convention on the Law of Treaties, art. 18*, opened for signature* May 23, 1969, 1155 U.N.T.S. 331; *see also* Transcript of Michael H. Posner, Assistant Sec'y of State, Bureau of Democracy, Human Rights, and Labor, *Address to the Am. Society of Int'l Law: The Four Freedoms Turn 70* (Mar. 24, 2011), https://2009-2017.state.gov/j/drl/rls/rm/2011/159195.htm. ("While the United States is not a party to the [ICESCR], as a signatory, we are committed to not defeating the object and purpose of the treaty.").

the right to life "should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity." *Id.* at ¶ 3. Recognizing the role that material conditions play in sustaining human life, the Human Rights Committee (the U.N. TMB charged with monitoring state compliance with the ICCPR) has determined that upholding the right to life requires States to ensure access to "essential goods and services such as food, water, shelter, healthcare, electricity and sanitation," *id.* at ¶ 26, as well as reproductive healthcare including abortion care and quality prenatal healthcare "for women and girls, in all circumstances." *Id.* at ¶ 8. During its most recent review of U.S. compliance with ICCPR, the Human Rights Committee urged the U.S. to "facilitate access to adequate healthcare, including reproductive health-care services," for both documented and undocumented immigrants. U.N. Human Rights Comm., Concluding observations on the fourth periodic report of the United States of America, ¶ 15, U.N. Doc. CCPR/C/USA/CO/4, (April 23, 2014).

The ICERD obligates governments to "guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of . . . [t]he right to housing" and "[t]he right to public health, medical care, social security and social services," among others. ICERD, art. 5(e)(iv). The Committee overseeing compliance with the ICERD has

noted particular concern with access to reproductive healthcare for immigrants. In 2014, at the conclusion of its periodic review of U.S. compliance with the ICERD, the Committee expressed concern over the exclusion of undocumented immigrants and their children from healthcare coverage under the Affordable Care Act, as well as limitations on coverage for documented and undocumented immigrants in Medicaid and CHIP, "resulting in difficulties for immigrants in accessing adequate health care." U.N. Comm. on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, ¶ 15, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014). To address these human rights concerns, the CERD Committee recommended that the U.S. "take concrete measures" to ensure that all immigrants "have effective access to affordable and adequate health-care services" and to address maternal mortality and eliminate racial disparities in reproductive health. *Id.* at ¶ 15(a)-(c).

Treaty monitoring bodies and other human rights experts appointed by the U.N. Human Rights Council have further articulated the importance of ensuring access to reproductive health services, particularly for immigrant women. As noted by the Committee overseeing implementation of the Convention on the Elimination of Discrimination Against Women, migrant and immigrant women are especially vulnerable to human rights abuses, and often unable to access reproductive health services. *See, e.g.*, Comm. on the Elimination of Discrimination against Women,

General recommendation No. 26 on women migrant workers, U.N. Doc. CEDAW/C/2009/ WP.1/R (Dec. 5. 2008).

By punishing immigrants for use of certain assistance programs for which they are eligible, or if they are deemed likely to use such programs in the future, the Rule contravenes the U.S.' human rights obligations to respect, protect, and fulfill non-discriminatory access to services essential for the life, health, and dignity of immigrants and non-immigrants alike. It furthermore violates reproductive rights by punishing women, mothers, and families for using, or potentially using, resources necessary to freely make decisions about life and family, including decisions about whether, when, and how to have and raise children.

### B. The Rule reinforces international experts' concerns about increasingly harsh U.S. policies that violate immigrants' human rights, including access to reproductive healthcare.

In assessing the U.S.' compliance with its human rights commitments, international human rights experts have consistently expressed concern over policies that restrict immigrants' access to healthcare, including and especially reproductive healthcare. As the number and severity of policy changes detrimental to immigrants' health have escalated over the last few years, these experts and the international human rights community have reacted to these measures with increasing alarm. The Rule further distances the U.S. from increasingly robust international commitments to immigrants' human rights.

In 2015, the U.N. Working Group on the issue of Discrimination Against Women conducted an official mission to the U.S., finding that "immigrant women face severe barriers in accessing sexual and reproductive health services." Rep. of the Working Group on the issue of discrimination against women in law and in practice, on its mission to the United States (Nov. 30-Dec. 11, 2015), Rep. ¶ 68, U.N. Doc. A/HRC/32/44/Add.2 (June 7, 2016). That same year, a Universal Periodic Review of the U.S. human rights record was conducted through the U.N. Human Rights Council, raising concerns about the treatment of immigrants in the U.S., including immigrants' inadequate access to healthcare in general. *See* Rep. of the Working Group on the Universal Periodic Review: United States of America, ¶¶ 176.331-333, U.N. Doc. A/HRC/30/12 (July 20, 2015).

In 2017, at the invitation of the U.S. government, the Special Rapporteur on extreme poverty and human rights completed an official visit, finding that "[f]emale immigrants, who often suffer racial discrimination from employers and find it more difficult to get jobs, experience higher poverty rates and have much less access to social protection benefits than other women." Special Rapporteur on extreme poverty and human rights on his mission to the United States of America, ¶ 59, U.N. Doc. A/HRC/38/33.Add.1 (May 4, 2018) (by Philip Alston). He noted that undocumented mothers of U.S. citizen children live "a shadow existence" in the U.S., thereby "undermin[ing] their ability to live a life in dignity" and expressed

concern that some immigrants are "excluded from coverage under the Affordable Care Act, and assistance such as the Supplemental Nutrition Assistance Program, the Temporary Assistance for Needy Families programme and housing benefits." *Id*.

These concerns and recommendations make clear that international human rights law prohibits the U.S. from jeopardizing the health and well-being of vulnerable immigrants to deter immigration. Foreclosing access to basic human necessities through immigration law is cruel policymaking that conflicts with international human rights standards and U.S. international legal obligations, in addition to imposing devastating consequences on the health and autonomy of people affected.

## CONCLUSION

Against this context of sweeping health-based, legal, and human rights harms, the district court's order granting preliminary injunction should be affirmed.

Respectfully submitted,

Dated: January 21, 2020

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,484 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: January 21, 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was served via electronic filing on all parties or their counsel of record in this case on January 21, 2020.

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