

19-3591-CV

United States Court of Appeals
for the
Second Circuit

STATE OF NEW YORK, CITY OF NEW YORK,
STATE OF CONNECTICUT, STATE OF VERMONT,

Plaintiffs-Appellees,

– v. –

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
SECRETARY CHAD F. WOLF, in his official capacity as
Acting Secretary of the United States Department of Homeland Security,
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,
DIRECTOR KENNETH T. CUCCINELLI II, in his official capacity as Acting
Director of United States Citizenship and Immigration Service, UNITED
STATES OF AMERICA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF ON BEHALF OF *AMICI CURIAE* JUSTICE IN AGING,
AMERICAN SOCIETY ON AGING, CARING ACROSS GENERATIONS,
JEWISH FAMILY SERVICE OF LOS ANGELES, THE JEWISH
FEDERATIONS OF NORTH AMERICA, THE NATIONAL ASIAN
PACIFIC CENTER ON AGING, NATIONAL COUNCIL ON AGING,
NATIONAL HISPANIC COUNCIL ON AGING, MAZON, PHI AND THE
CENTER FOR MEDICARE ADVOCACY IN SUPPORT OF PLAINTIFFS-
APPELLEES AND IN AFFIRMANCE OF THE DECISION BELOW**

RUSSELL L. HIRSCHHORN
PROSKAUER ROSE LLP
Attorney for Amici Curiae
Eleven Times Square
New York, New York 10036
(212) 969-3000

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
PRELIMINARY STATEMENT	9
THE FINAL RULE WILL MAKE IT IMPOSSIBLE FOR OLDER IMMIGRANTS TO PASS THE PUBLIC CHARGE TEST AND WILL IRREPARABLY HARM OLDER ADULTS AND THEIR FAMILIES.	10
CONCLUSION	26
CERTIFICATE OF COMPLIANCE.....	27
CERTIFICATE OF SERVICE	28

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Lau v. Nichols</i> , 414 U.S. 563 (1974).....	19
<i>State of Washington v. U.S. Dept. of Homeland Security</i> , No. 19-cv-05210, Dkt. 162 (E.D. Wash., Oct. 11, 2019).....	passim
STATUTES	
8 U.S.C. § 1152(a)(1)(A)	19
8 U.S.C. § 1153(a)	17
29 U.S.C. § 794.....	16
42 U.S.C. § 2000d.....	19
42 U.S.C. § 2000e	19
OTHER AUTHORITIES	
6 C.F.R. § 15.30	16
<i>2013-2017 American Community Survey 5-Year Public Use Microdata Sample (PUMS)</i> , United States Census Bureau, https://data.census.gov/mdat/?#/search?ds=ACSPUMS5Y2017	21
<i>2017 National Population Projections Tables, Table 2</i> , United States Census Bureau, https://www.census.gov/data/tables/2017/demo/popproj/2017- summary-tables.html	23
AARP Public Policy Institute, <i>Chronic Care: A Call to Action for Health Reform</i> (Mar. 2009), www.aarp.org/health/medicare- insurance/info-03-2009/beyond_50_hcr.html	15

Allison B. Orris et al., *DHS Public Charge Regulation Could Drive Medicaid Coverage Losses*, Manatt (Aug. 29, 2019), <https://www.manatt.com/Insights/Newsletters/Manatt-on-Health-Medicaid-Edition/DHS-Public-Charge-Regulation-Could-Drive-Medicaid>25

Centers for Medicare & Medicaid Services, *People Dually Eligible for Medicare and Medicaid Fact Sheet* (Mar. 2019), www.cms.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office/Downloads/MMCO_Factsheet.pdf..... 17

DHS, Office of Immigration Statistics, *2017 Yearbook of Immigration Statistics*, Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2017 (Oct. 2, 2018), <https://www.dhs.gov/immigration-statistics/yearbook/2017/table7>..... 17

Immigration & Naturalization Service, Office of Policy & Planning, *Legal Immigration, Fiscal Year 1997*, Table 1, www.dhs.gov/sites/default/files/publications/INS_AnnualReport_LegalImmigration_1997_1.pdf 18

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

Jeanne Batalova et al., *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families’ Public Benefits Use*, Migration Policy Institute (June 2018), www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families21

Jeanne Batalova, *Senior Immigrants in the United States*, Migration Policy Institute (May 30, 2012), <https://www.migrationpolicy.org/article/senior-immigrants-united-states>..... 14, 20

Karthick Ramakrishnan & Farah Ahmad, *Language Diversity and English Proficiency*, Center for American Progress (May 27, 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/04/AAPI-LanguageAccess1.pdf>20

Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard, Manatt (Oct. 11, 2018), <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population#DataDashboard>13, 18, 21

Robert Espinoza, *Immigrants and the Direct Care Workforce*, PHI (June 20, 2017), <https://phinational.org/resource/immigrants-and-the-direct-care-workforce/>22

The Emerging Needs of Asian American and Pacific Islander Older Adults, National Asian Pacific Center on Aging (Feb. 2017), napca.org/wp-content/uploads/2017/10/NAPCA-The-Emerging-Needs-of-AAPI-Older-Adults_Final-Report_Feb2017.pdf.....20

University of New Hampshire Institute on Disability/UCED, *2017 Disability Statistics Annual Report* (2018), https://disabilitycompendium.org/sites/default/files/user-uploads/2017_AnnualReport_2017_FINAL.pdf 15

All parties consent to the filing of this brief.

INTEREST OF AMICI CURIAE¹

Justice in Aging is a non-profit organization with the mission of improving the lives of low-income older adults living in the United States. For 47 years, Justice in Aging has used the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. Justice in Aging works to secure the opportunity for older adults to live with dignity, regardless of financial circumstances—free from the worry, harm, and injustice caused by lack of health care, food, or a safe place to sleep. Using its deep expertise in Social Security, Supplemental Security Income, Medicare, and Medicaid, Justice in Aging works to strengthen the social safety net and remove the barriers that low-income seniors face in trying to access the services they need. Justice in Aging also provides technical expertise to thousands of advocates across the country on how to help low-income older adults access the programs and services they need to meet their basic needs. Justice in Aging’s advocacy centers on policies and practices that have failed older adults who are people of color, people with limited English proficiency, women, and/or LGBTQ

¹ No party to the above-captioned action or any of their counsel, and no person or entity, other than amici, their members, or their counsel, authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. All parties consent to the filing of this brief.

individuals.

Founded in 1954 as the Western Gerontological Society, the American Society on Aging (“ASA”) is an association of diverse individuals bound by a common goal: to support the commitment and enhance the knowledge and skills of those who seek to improve the quality of life of older adults and their families. The membership of ASA is multidisciplinary and inclusive of professionals who are concerned with the physical, emotional, social, economic, and spiritual aspects of aging. No other organization in the field of aging represents the diversity of settings and professional disciplines reached by ASA. ASA’s 5,000 members are practitioners, educators, administrators, policymakers, caregivers, business people, researchers, and students. ASA is the go-to source to cultivate leadership, advance knowledge, and strengthen the skills of our members and others who work with and on behalf of older adults.

Caring Across Generations is a national movement of families, caregivers, people with disabilities, and aging Americans working to transform the way we care in this country. Caring Across Generations works with state and national organizations to elevate and center the voices, strengths, and needs of people who need care and the paid and unpaid caregivers who provide that care to demand and win change. By harnessing the power of online and grassroots organizing and culture change work, Caring Across Generations is shifting how our nation values

caregiving and calling for policy solutions that enable all of us to live well and age with dignity.

Jewish Family Service of Los Angeles (“JFS”) has 165 years of experience meeting the evolving needs of our diverse and changing community. Each year, JFS’s comprehensive family of services improves the quality of life for tens of thousands of people throughout Los Angeles, regardless of age, economic status, religion, ethnicity, nationality, sexual orientation, or gender identity. JFS staff and volunteers feed families, provide Los Angeles’s aging population with life-changing care, empower and shelter victims of domestic violence and their children, treat mental illness, and offer counseling to at-risk children and their families. JFS is a leading provider of services for older adults, including Survivors of the Holocaust, providing a comprehensive array of programs including care management, family consultation, counseling, support groups, advocacy, and other culturally appropriate, multilingual services.

The Jewish Federations of North America (JFNA) is the national, non-profit, umbrella organization for 146 Jewish federations and 300 network communities serving most major population centers across the country and a leading advocate for policies that improve quality of life and services for the most vulnerable. Founded in 1932, JFNA is now one of the nation’s largest philanthropies, raising and distributing more than \$3 billion annually for social welfare, social services,

and educational needs. JFNA also counts as partners hundreds of non-profit Jewish communal provider agencies, including 15 leading academic medical centers/health systems, 100 nursing homes and aging communities, 125 family & children's agencies, and 14 group homes, which provide health care, behavioral health care, long-term care services and supports, vocational training, nutrition, and other important services to more than one million clients. Today, JFNA's network of federations and partner agencies represents one of the largest, strongest, and most enduring social service systems in North America committed to ensuring that everyone can live with dignity and achieve a decent quality of life. Many of JFNA's federations and partner agencies both serve and employ legal immigrants who could be directly impacted by the final public charge rule.

The National Asian Pacific Center on Aging ("NAPCA") is a nonprofit organization with the mission to preserve and promote the dignity, well-being, and quality of life of Asian Americans and Pacific Islanders ("AAPI") as they age. AAPI aging adults are a diverse group who represent over 50 ethnicities and a linguistic heritage of over 100 languages. AAPI aging adults (as a whole) enjoy higher levels of educational attainment than the general population but also experience higher levels of health disparities, economic, housing, and transportation insecurity, and lower rates of civic participation as a result of prejudice and invisibility, limited English proficiency, cultural differences, and a

lack of culturally competent and linguistically appropriate services and programs. In 40 years, NAPCA has served tens of thousands of AAPI seniors and indirectly aided approximately 100,000 more to overcome their barriers toward economic security and healthy living. Each year, NAPCA continues to serve over 1,000 low-income diverse aging adults, and partners with over 400 local nonprofits throughout the country, with community service contributing more than \$1.1M of in-kind support back into their local communities.

For almost 70 years, the National Council on Aging (“NCOA”) has been a respected national leader and trusted partner to help people aged 60+ meet the challenges of aging. NCOA’s mission is to improve the lives of millions of older adults, especially those who are struggling. Through innovative community programs and services, online help, and advocacy, NCOA is partnering with nonprofit organizations, government, and business to improve the health and economic security of 10 million older adults by 2020. NCOA’s Center for Benefits Access helps community-based organizations find and enroll seniors and younger adults with disabilities with limited means into benefits programs for which they are eligible, so they can remain healthy, secure, and independent. The center develops and shares tools, resources, best practices, and strategies for benefits outreach and enrollment.

The National Hispanic Council on Aging is a non-profit, non-partisan

organization devoted to improving the lives of Hispanic older adults, their families and their caregivers. For 50 years, the National Hispanic Council on Aging has been a strong voice dedicated to promoting, educating, and advocating for research, policy, and practice in the priority areas of economic security, health, housing and leadership development. To achieve its mission, the National Hispanic Council on Aging has developed a Hispanic Aging Network of community-based organizations across the continental U.S., the District of Columbia, and Puerto Rico that reaches millions of Latinos each year. The National Hispanic Council on Aging also works to ensure the Hispanic community is better understood and fairly represented in U.S. policies.

MAZON: A Jewish Response to Hunger is a national nonprofit organization working to end hunger among people of all faiths and backgrounds in the U.S. For over 35 years, MAZON has been a national leader in identifying and assisting underserved and vulnerable populations who struggle with food insecurity. Since 2012, MAZON's policy and legislative priorities have included a specific focus on the escalating number of seniors struggling to meet their basic food and nutritional needs. MAZON works to ensure that there is a robust government nutrition safety net that is well-funded and easily accessed by those millions of seniors who must rely on it. MAZON works nationwide with hundreds of anti-hunger organizations to provide them with strategies to address the rising number of senior clients

turning to those programs, and to ensure that federal programs and policies are responsive to the nutrition needs of these seniors. MAZON's work includes a particular focus on LGBT seniors in partnership with leading advocacy groups like SAGE (Services & Advocacy for GLBT Elders) and the Williams Institute at UCLA School of Law to explore the unique barriers to food security faced by seniors who are LGBT and to craft viable actions to remove barriers they face to nutrition safety net programs.

PHI is a national non-profit based in the Bronx, New York, that works to transform eldercare and disability services by promoting quality direct care jobs as the foundation for quality care. For more than 25 years, PHI has established itself as the nation's leading expert on the direct care workforce, drawing our knowledge from research, policy analysis, and hands-on work with long-term care providers, direct care workers, and their clients in cities, suburbs, and small towns across America. PHI has a long and distinguished track record of bipartisan policy action. PHI believes that the new public charge rule will hurt many skilled and compassionate immigrant direct care workers across the country, as well as the millions of people who depend on these workers to support themselves and their families. Across the country, 4.5 million home care workers and nursing assistants provide daily support to older people and people with disabilities. As the U.S. population quickly ages, direct care workers will be in greater demand—and

immigrants will play a significant part in meeting this need.

The Center for Medicare Advocacy (the Center) is a national, nonprofit law organization, founded in 1986, that provides education, analysis, advocacy, and legal assistance to help older adults and people with disabilities access Medicare and necessary health care. The Center focuses on the needs of Medicare beneficiaries, people with chronic conditions, those in need of long-term care, and individuals who are dually eligible for Medicare and Medicaid. It provides training regarding Medicare and health care rights throughout the country. The Center also advocates on behalf of beneficiaries in administrative and legislative forums, and serves as legal counsel in litigation of importance to Medicare beneficiaries and others seeking health coverage.

Amici Justice in Aging, American Society on Aging, Caring Across Generations, Jewish Family Service of Los Angeles, The Jewish Federations of North America, The National Asian Pacific Center on Aging, National Council on Aging, National Hispanic Council on Aging, MAZON, PHI, and the Center for Medicare Advocacy (collectively, “Amici”) submit this brief to focus primarily on the harms the Inadmissibility on Public Charge Grounds final rule will have by specifically targeting older adults and their families.

PRELIMINARY STATEMENT

The Inadmissibility on Public Charge Grounds final rule (the “Final Rule”) shoves aside existing law and erects new—and often insurmountable—barriers to entry into the United States for older immigrants. The Final Rule’s radical changes unlawfully target older immigrants and their families and will cause serious and irreparable harm to them as well as their communities and health care systems. As Judge Peterson observed in *State of Washington v. U.S. Department of Homeland Security*, No. 19-cv-05210, at Dkt. 162, p.19 (E.D. Wash. Oct. 11, 2019) (“*State of Washington*”), “the Public Charge Rule will have a substantial negative impact on the elderly” and will make it nearly impossible for older immigrants to pass the public charge test.

As discussed below, the Final Rule makes sweeping changes to longstanding policy: it abolishes the “primarily dependent” test and provides that a public charge is an immigrant who receives one or more public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months), establishes an arbitrary minimum income threshold of 125% of the federal poverty level so as not to be considered a public charge, and introduces a weighting system that weighs factors in ways that directly disadvantage older immigrants. It also adds a multitude of public benefits that have never before been considered in determining

whether an immigrant is likely to be a public charge—many of which are critical to the livelihood of older adults—and abandons settled law that only cash assistance for income maintenance and government-funded long-term institutional care be considered (and even then only when it represents the majority of an immigrant’s support).

For the reasons stated herein, as well as those advanced by merits counsel, Amici respectfully request that the Court affirm the decision below.

THE FINAL RULE WILL MAKE IT IMPOSSIBLE FOR OLDER IMMIGRANTS TO PASS THE PUBLIC CHARGE TEST AND WILL IRREPARABLY HARM OLDER ADULTS AND THEIR FAMILIES.

The Final Rule creates a multitude of ways for individuals, and particularly low-income older adults, to fail the public charge test, and very few ways to overcome it; in particular:

- The Final Rule will make it impossible for older immigrants to pass the public charge test by expanding the public benefits to be considered, adding biased and heavily weighted factors, and adding an arbitrary income test;
- The Final Rule targets older immigrants and, in particular, those with disabilities or chronic health conditions;
- The Final Rule will prevent United States citizens from welcoming their noncitizen parents and harm older adults who rely on their families for support;

- The Final Rule disfavors immigrants who are not proficient in English notwithstanding the unlawfulness of such a rule and that a majority of older immigrants have limited English proficiency;
- The Final Rule will disproportionately harm older immigrants of color;
- The Final Rule threatens the wellbeing of caregivers, leaving many older adults and people with disabilities who are United States citizens without access to the caregiving they need; and
- The Final Rule will harm older immigrants and their families by discouraging enrollment in programs that improve health, food security, nutrition, and economic security.

1. The Final Rule will make it impossible for older immigrants to pass the public charge test by expanding the public benefits to be considered and adding biased heavily weighted factors and an arbitrary income test. As Judge Peterson observed in *State of Washington*, “[m]any elderly people rely on non-cash forms of public assistance like Medicaid, SNAP, and public housing and rental assistance.” *Id.* at p.20. The Final Rule significantly expands the public benefits to be considered in making a public charge determination by adding these and other forms of non-cash public assistance. *See* Final Rule, 84 Fed. Reg. 41,292 (Aug. 14, 2019). This expansion, particularly the inclusion of Medicaid,

perversely targets older adults: the use of public benefits is heavily weighted negatively and, when considered with the other factors, renders it virtually impossible for older immigrants to pass the public charge test.

Medicaid is a lifeline for many older adults to fill in the significant gaps in Medicare coverage, including access to oral health, transportation, and home and community-based services (“HCBS”). Medicaid HCBS, like personal care services and adult day health (both of which are not covered under Medicare) are critical in allowing older adults to maintain their health and vibrant lives with their families and in the community, often delaying and sometimes preventing admission to nursing facilities. Similarly, older adults, particularly those with limited means, rely on Medicaid-funded Medicare Savings Programs (“MSPs”) to afford their Medicare premiums and cost-sharing. Some MSPs even protect individuals from improper billing by their Medicare providers. MSPs are only available to people who qualify for Medicare, which means that they or their spouses must (with few exceptions) always have the requisite work history to access this benefit. It defies logic and reason to penalize individuals who, by definition, have contributed to society for using these benefits to which they are legally entitled.

The Final Rule also introduces a weighting system under which some factors receive greater significance than others in the public charge determination. *See*

Final Rule, 84 Fed. Reg. at 41,504. Being over 62 is a negative factor, and, as Judge Peterson observed in *State of Washington*, older immigrants are not likely to benefit from the heavily weighted *positive* factors, which include having household income, assets, or resources, and support of at least 250% of the federal poverty level, being currently employed in an industry with an annual income of at least 250% of the federal poverty level for the immigrant's household size, or having private health insurance. *Id.* at pp.20–21. It also weighs having an income of less than 125% of the federal poverty level as a negative factor, in essence applying an arbitrary and unprecedented income test in the evaluation of whether an immigrant will be a public charge. *Id.*

Over half of noncitizens age 62 and older live in low or moderate income households. *See Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard*, Manatt (Oct. 11, 2018), <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population#DataDashboard>. In fact, nearly 600,000 immigrants over age 61 have household incomes below 125% of the federal poverty level, and over 1.1 million have household incomes below 250% of the federal poverty level. *See id.* Under the Final Rule, these immigrants will have no “heavily weighed” positive factor to offset the fact that their age and income are considered negative factors.

The Final Rule's arbitrary income test discredits even full-time work at low wages—work performed by many immigrant older adults. *See* Final Rule, 84 Fed. Reg. at 41,502-04. Five million immigrants ages 65 and older are likely to have supported their families, have contributed to our nation's economy by, for example, paying taxes and contributing to Social Security, and have been integrated into the fabric of our country. *See* Jeanne Batalova, *Senior Immigrants in the United States*, Migration Policy Institute (May 30, 2012), <https://www.migrationpolicy.org/article/senior-immigrants-united-states>. Yet, under the Final Rule, they will be viewed as having failed to contribute to society.

Finally, even though the Final Rule recognizes caregiving as a valuable, creditable contribution, Final Rule, 84 Fed. Reg. at 41,502, 41,504, it is meaningless for older immigrants who face so many other factors expressly weighed against them by virtue of who they are.

In short, the Final Rule significantly expands the definition of public benefits, creates an arbitrary income test that most low-wage workers cannot meet, and assigns negative weight to other factors that are associated with having low-income, including, for example, if the immigrant: (i) is over the minimum early retirement age for Social Security (currently age 62); (ii) has a household size that makes the immigrant more likely than not to become a public charge; or (iii) lacks sufficient household assets to cover reasonably foreseeable medical costs related to

a medical condition. *See* 84 Fed. Reg. at 41,502–04. The Final Rule will thus inhibit immigrants who are not wealthy from being self-sufficient and make it nearly impossible for older immigrants to pass the public charge test. In fact, under the Final Rule, possessing any one negative factor and, in particular, one heavily weighted negative factor, will likely be dispositive in denying an immigrant admission to the United States.

2. The Final Rule specifically targets older immigrants, particularly those with disabilities and chronic health conditions. “Many of the Public Charge Rule’s negative factors inherently apply to the elderly.” *State of Washington* at p.19. For example, as Judge Peterson observed in *State of Washington*, “the new rule penalizes people with a medical diagnosis that will require extensive treatment, and most adults over fifty years old have at least one chronic health condition.” *Id.* at p.20. Furthermore, a third of adults age 65 and older have a disability. *See* AARP Public Policy Institute, *Chronic Care: A Call to Action for Health Reform*, 11–12, 16 (Mar. 2009), www.aarp.org/health/medicare-insurance/info-03-2009/beyond_50_hcr.html; University of New Hampshire Institute on Disability/UCED, *2017 Disability Statistics Annual Report* (2018), https://disabilitycompendium.org/sites/default/files/user-uploads/2017_AnnualReport_2017_FINAL.pdf.

Under the Final Rule’s weighting system, being age 62 or older or having a treatable medical condition will be held against immigrants seeking permanent legal status or lawful entry into the United States. *See* 84 Fed. Reg. at 41,504. An older immigrant, in fact, is more likely to be detrimentally impacted by the heavily weighted *negative* factors—such as having been diagnosed with a medical condition that is likely to require extensive medical treatment or that will interfere with the immigrant’s ability to provide for him- or herself. The Final Rule is so broad that virtually every older immigrant with any type of significant disability or health condition, as well as many immigrants with less significant disabilities, will have their disability or other chronic health conditions count against them in the public charge test.

Furthermore, the Final Rule’s discrimination based on one’s disability violates federal antidiscrimination laws, including the Rehabilitation Act of 1973, which prohibits any program or activity receiving federal financial assistance, including those conducted by the DHS, from excluding, denying benefits to, or discriminating against persons with disabilities. 29 U.S.C. § 794; 6 C.F.R. § 15.30. *See State of Washington* at p.46 (“the plain language of the Public Charge Rule casts doubt that DHS ultimately will be able to show that the Public Charge Rule is not contrary to the Rehabilitation Act”). It also unfairly tips the balance of factors against older adults dually eligible for Medicare and Medicaid, who already have

the receipt of Medicaid benefits held against them: 41% of dually eligible individuals have at least one mental health diagnosis, 49% receive long-term care services and supports, and 60% have multiple chronic conditions. *See* Centers for Medicare & Medicaid Services, *People Dually Eligible for Medicare and Medicaid Fact Sheet* (Mar. 2019), www.cms.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office/Downloads/MMCO_Factsheet.pdf.

3. The Final Rule will prevent United States citizens from welcoming their noncitizen parents and will harm older adults who rely on their families for support. Judge Peterson observed in *State of Washington* that “many elderly people rely on their families for support,” and “[a]lthough immigration law in the United States has traditionally favored family unification, the Public Charge Rule may penalize people for living with their families, counting their family reliance against them.” *Id.* at pp.19-20. United States citizens have long been able to welcome their parents because immigration law historically has favored family unification. *See, e.g.*, 8 U.S.C. § 1153(a) (“Preference allocation for family-sponsored immigrants.”). The number of noncitizen parents of United States citizens who have been admitted as lawful permanent residents nearly tripled between 1994 and 2017 and now accounts for almost 15% of all admissions and almost 30% of family-based admissions. *Compare* DHS, Office of Immigration

Statistics, *2017 Yearbook of Immigration Statistics*, Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2017 (Oct. 2, 2018), <https://www.dhs.gov/immigration-statistics/yearbook/2017/table7>, with Immigration & Naturalization Service, Office of Policy & Planning, *Legal Immigration, Fiscal Year 1997*, Table 1, www.dhs.gov/sites/default/files/publications/INS_AnnualReport_LegalImmigration_1997_1.pdf. Yet, the Final Rule penalizes families for living together and disincentivizes children from supporting their noncitizen parents or grandparents because adding a household member necessitates an increase in the household income required to avoid being deemed a public charge. *See* 84 Fed. Reg. at 41,501-04; *see also Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard*, Manatt (Oct. 11, 2018), <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population#DataDashboard> (explaining that over 750,000 immigrants over 61 and their families have household incomes below 125% of the federal poverty level, and over 1.6 million have household incomes below 250% of the federal poverty level). The Final Rule will prevent many United States citizens from welcoming noncitizen parents into the country even after they signed a commitment to support them.

4. The Final Rule targets immigrants who do not speak English well or at all, which is particularly harmful to older adults because a majority of older immigrants have limited English proficiency. The United States does not have a national language. As such, United States immigration law does not include English proficiency as a factor and, in fact, affirmatively prohibits discrimination based on nationality. *See* 8 U.S.C. § 1152(a)(1)(A) (“no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence”). Furthermore, federal civil rights laws protect limited English proficient persons from discrimination on the basis of English proficiency. *See, e.g.,* 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance, including the DHS); 42 U.S.C. § 2000e (prohibiting discrimination in employment on the basis of race, color, national origin, sex, or religion); *see also Lau v. Nichols*, 414 U.S. 563 (1974) (holding lack of supplemental language instruction for students with limited English proficiency violated the Civil Rights Act of 1964).

Nevertheless, the Final Rule arbitrarily forces English proficiency under the heading of “education and skills” and considers it as part of the public charge test. *See* 84 Fed. Reg. at 41,503-04. The impact on older immigrants is readily

apparent, since noncitizen parents of United States citizens are often not proficient in English. *See* Jeanne Batalova, *Senior Immigrants in the United States*, Migration Policy Institute (May 30, 2012), <https://www.migrationpolicy.org/article/senior-immigrants-united-states>. For instance, approximately 56%, or about 2.8 million, of the 5 million older immigrants in 2010 reported speaking English less than “very well.” *See id.* The percentage is even higher among Asian American older adults, 80% of whom are immigrants and nearly 60% of whom have limited English proficiency. *See The Emerging Needs of Asian American and Pacific Islander Older Adults*, National Asian Pacific Center on Aging (Feb. 2017), napca.org/wp-content/uploads/2017/10/NAPCA-The-Emerging-Needs-of-AAPI-Older-Adults_Final-Report_Feb2017.pdf; *see also* Karthick Ramakrishnan & Farah Ahmad, *Language Diversity and English Proficiency*, Center for American Progress (May 27, 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/04/AAPI-LanguageAccess1.pdf> (explaining that over 75% of the “Asian alone” population speaks a language other than English at home). By giving de-facto preference to individuals from English-speaking nations, the Final Rule undermines the careful balancing Congress created to move the country

away from the racist quota system.²

5. The Final Rule will disproportionately harm older immigrants of color and their families. While people of color account for approximately 36% of the United States population, they represent 90% of the 26 million people who are targeted by the Final Rule. *See 2013-2017 American Community Survey 5-Year Public Use Microdata Sample (PUMS)*, United States Census Bureau, <https://data.census.gov/mdat/?#/search?ds=ACSPUMS5Y2017>; *see also Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard*, Manatt (Oct. 11, 2018), <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population#DataDashboard>; Jeanne Batalova et al., *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use*, Migration Policy Institute (June 2018), www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families. These statistics strongly suggest that fewer

² The Immigration Act of 1965 abolished quotas based on national origin and immigrants were selected based on individual merit rather than race or national origin. *See* President Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill Liberty Island, New York (Oct. 3, 1965) (“This bill says simply that from this day forth those wishing to immigrate to America shall be admitted on the basis of their skills and their close relationship to those already here. . . . The fairness of this standard is so self-evident that we may well wonder that it has not always been applied. Yet the fact is that for over four decades the immigration policy of the United States has been twisted and has been distorted by the harsh injustice of the national origins quota system Today, with my signature, this system is abolished.”).

immigrants of color, including older adults, will be deemed admissible to the United States or eligible for green cards under the Final Rule. The Final Rule's disproportionate impact on communities of color provides additional evidence of the radical effect it will have in reshaping the country's population going forward. It will reduce the diversity of immigration to the United States and increase separation among immigrant families of color, many of whom include older adults. Health and economic disparities will also increase among older immigrants of color due to the Final Rule's targeting of benefits that these communities disproportionately rely on. By inhibiting the ability of families of color to support one another and thrive, the Final Rule also will perpetuate and further institutionalize disparities faced by people of color who are United States citizens.

6. The Final Rule threatens the wellbeing of hundreds of thousands older immigrant caregivers. An estimated one million immigrants work as providers of direct care services to older adults and people with disabilities, supplying critical assistance to millions of people who need help with dressing, bathing, eating, and other daily tasks both at home and in nursing facilities. *See* Robert Espinoza, *Immigrants and the Direct Care Workforce*, PHI (June 20, 2017), <https://phinational.org/resource/immigrants-and-the-direct-care-workforce/>. Nearly 33% of immigrant caregivers are themselves over 55 years of age. *See id.* at 4. Because caregiving jobs tend to be part-time and low-wage, many direct care

workers cannot meet the Final Rule's income threshold and also utilize public benefits programs to support themselves and their families. In fact, PHI's research shows that nearly 50% of immigrant direct care workers live at or below 200% of the federal poverty level, and 45% rely on programs such as SNAP and Medicaid. The vast majority of noncitizen direct care workers who access public benefits are women (88%), 46% are Latino, and 64% have a high school education or less. Not only will the Final Rule prevent many direct care workers from immigrating or accessing a path to citizenship, but by adding SNAP and Medicaid to the public charge determination, the Final Rule will chill participation in these programs and limit the direct care workers' access to food, healthcare, and other basic needs. The harm is two-fold when the caregivers' own health is compromised because they will be unable to provide quality care. For example, an immigrant direct care worker who is afraid to or cannot afford to see the doctor may not get vaccinated for the flu. If she subsequently gets sick, she jeopardizes her own health, other family members, and the older adults for whom she cares. Given that the number of adults age 85 and older is expected to triple by 2060, *2017 National Population Projections Tables, Table 2*, United States Census Bureau, <https://www.census.gov/data/tables/2017/demo/popproj/2017-summary-tables.html>, jeopardizing the direct care workforce will have catastrophic results on the health and wellbeing of our nation's seniors and persons with disabilities.

7. The Final Rule will harm older immigrants and their families by discouraging enrollment in programs that improve health, food security, nutrition, and economic security. Judge Peterson observed that taking into account non-cash forms of public assistance will “predictably lead[] to disenrollment from such programs” and, as a result, “elderly people will experience additional and exacerbated medical problems, ‘creating a new and uncompensated care burden on society.’” *State of Washington* at p.20. The Final Rule will impact older adults living in immigrant families in the United States who may stop accessing services they need, and that their own tax dollars support, out of fear of being penalized, and that will in turn increase poverty, hunger, ill health, and housing insecurity. Similarly, if immigrant families are afraid of being penalized for accessing nutrition assistance programs, older adults will be food insecure and at risk of malnutrition, which can cause or exacerbate other health conditions and unnecessarily burden the healthcare system. And, if immigrant families forgo benefits for fear of being penalized for seeking housing assistance, older adults with limited, fixed incomes will have fewer resources to spend on other basic needs, including food, medical expenses, transportation, and clothing.

These chilling effects have already been documented in immigrant communities as a result of the proposed rule published in October 2018. In fact, a survey of approximately 2,000 adults in immigrant families, found that “about

13.7% of respondents reported that they or a family member did not participate in a noncash government program such as Medicaid/CHIP, SNAP, or housing subsidies in 2018 for fear of risking the ability to obtain a green card.” *See* Allison B. Orris et al., *DHS Public Charge Regulation Could Drive Medicaid Coverage Losses*, Manatt (Aug. 29, 2019), <https://www.manatt.com/Insights/Newsletters/Manatt-on-Health-Medicaid-Edition/DHS-Public-Charge-Regulation-Could-Drive-Medicaid>. This trend was higher (20.7%) for adults in low-income families. *See id.* Amici have heard from service providers who serve older adults that older immigrants have stopped accessing these benefits as well due to fear of negative consequences for themselves or their families. For instance, NCOA surveyed agencies nationwide such as senior centers, State Health Insurance Assistance Programs, Benefits Enrollment Centers, and SNAP grantees. Forty-seven percent of responding organizations indicated they had noticed a chilling effect, and 45% had clients ask about dis-enrolling from benefits or refusing services after the rule change was proposed.

Looking ahead, the impact of the Final Rule will be significant for the estimated 23 million noncitizens and citizens in immigrant families who use public benefits today. Without ongoing coverage and assistance from important programs like Medicaid, these older adults will likely exacerbate existing health conditions and develop additional serious health care conditions, driving up the cost of care

and creating a new uncompensated care burden on society. Discouraging enrollment in Medicaid also jeopardizes important public-private partnerships that enable many older adults, citizens, and immigrants alike to receive care in their communities. The well-justified fear created by the Final Rule will extend far beyond any individual, and the widespread chilling effect that causes families to withdraw from benefits due to that fear is already evident as a result of publicity and confusion surrounding the proposed rule and now the Final Rule.

CONCLUSION

In short, the Final Rule will have significant negative consequences for older immigrants and their families and will cause them irreparable harm by erecting barriers to entry into the United States in ways that have never before been permitted and specifically target older immigrants. For all of the reasons stated herein and those set forth in Plaintiffs-Appellees' submissions and the submissions of other *amici*, Amici encourage the Court to affirm the decision below.

Dated: January 27, 2020

Respectfully submitted,

PROSKAUER ROSE LLP

By: /s/ Russell L. Hirschhorn

Russell L. Hirschhorn
Eleven Times Square
New York, NY 10036
212.969.3000
rhirschhorn@proskauer.com

Counsel for Amici Curiae

Federal Rules of Appellate Procedure Form 6. Certificate of Compliance With Type-Volume Limit

Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with the type-volume limit of Rules 29(a)(5), 32(a)(7)(B) and 32(g)(1) of the Federal Rules of Appellate Procedure and Second Circuit Local Rules 29.1(c) and 32.1(a)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

this document contains 5,682 words, **or**

this brief uses a monospaced typeface and contains _____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, size 14 font, **or**

this document has been prepared in a monospaced typeface using _____ with _____.

(s) /s/ Russell L. Hirschhorn
Attorney for Justice in Aging, et al.
Dated: January 27, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 27, 2020.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: January 27, 2020

By: /s/ Russell L. Hirschhorn
Russell L. Hirschhorn