No. 19-17213

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 4:19-cv-04717-PJH
Hon. Phyllis J. Hamilton

BRIEF OF AMICI CURIAE ASIAN AMERICANS ADVANCING JUSTICE | AAJC, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL WOMEN'S LAW CENTER AND 38 OTHER AMICI IN SUPPORT OF PLAINTIFFS-APPELLEES

Emily Tomoko Kuwahara (SBN 252411)
CROWELL & MORING LLP
515 South Flower St., 40th Floor
Los Angeles, CA 90071
Telephone: 213.622.4750
Facsimile: 213.622.2690
ekuwahara@crowell.com

Austin J. Sutta (SBN 300425)
CROWELL & MORING LLP
3 Embarcadero Center, 26th Floor
San Francisco, CA 94111
Telephone: 415.365.7404
Facsimile: 415.986.2827
asutta@crowell.com

Attorneys for Amici Curiae Asian Americans Advancing Justice | AAJC, Asian American Legal Defense and Education Fund, National Women's Law Center, and 38 other amici curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* Asian Law Alliance, California Women Lawyers, COALITION ON HUMAN NEEDS, GLBTQ Legal Advocate & Defenders, KWH Law Center for Social Justice and Change, National CAPACD, People For the American Way Foundation, Women's Bar Association of the State of New York, and Women's Institute for Freedom of the Press make the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

All other *amici curiae* are not corporations.

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I. INTEREST OF AMICI CURIAE

Asian Americans Advancing Justice | AAJC ("Advancing Justice - AAJC") is a nonprofit, nonpartisan organization that seeks to promote a fair and equitable society for all by working for civil and human rights and empowering Asian American, Native Hawaiian, and Pacific Islander communities. Advancing Justice - AAJC advances its mission through advocacy, public policy, public education, and litigation. Advancing Justice - AAJC is one of the nation's leading experts on issues of importance to the Asian American community, including immigration and immigrants' rights. Advancing Justice - AAJC is part of a national affiliation, Asian Americans Advancing Justice, made up of five separate and independent organizations, including affiliates in Atlanta, Chicago, Los Angeles, and San Francisco.

The **Asian American Legal Defense and Education Fund ("AALDEF")**, founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF advocates for fair immigration policies that recognize the human rights of undocumented immigrants in the United States, promote family reunification, enforce worker protections for all, eliminate racial and ethnic profiling, and end other discriminatory practices that violate due process. AALDEF also provides legal assistance to undocumented immigrants who

are eligible for the Deferred Action for Childhood Arrivals program and to individuals who are seeking to adjust their status to lawful permanent residence.

The National Women's Law Center ("NWLC") is a nonprofit legal advocacy organization dedicated to the advancement and protection of the legal rights of women and girls and the rights of all people to be free from sex discrimination. Since its founding in 1972, NWLC has focused on issues of key importance to women and girls, including economic security, employment, education, and health, with special attention to areas impacting low-income women and those who face multiple and intersecting forms of discrimination. NWLC has fought for gender equity in the courts, within public policy and through culture change in our larger society.

38 other organizations have signed on as *amici curiae.* Many have a long history of advocating for fair and humane immigration policy, healthcare access, civil rights, or equal access to justice for all, including minorities, women, survivors of sexual assault, LGBTQ and transgender individuals and the various constituents that make up the immigrant community. Those organizations join this brief to express their concern about the impact of the new public charge rule on the communities that they serve. They are:

- **Advocate for Youth**
- **Anti-Defamation League**
- **Apna Ghar, Inc. (Our Home)**

- **Asian Law Alliance**
- **Association of Asian Pacific Community Health Organizations**
- **California Asian Pacific Islander Legislative Caucus**
- **California Women Lawyers**
- **California Women's Law Center**
- **Chinses-American Planning Council**
- **COALITION ON HUMAN NEEDS**
- **End Rape on Campus**
- **Equal Rights Advocates**
- **Fred T. Korematsu Center for Law and Equality**
- **GLBTQ Legal Advocate & Defenders**
- **KWH Law Center for Social Justice and Change**
- **LatinoJustice PRLDEF**
- **Legal Aid at Work**
- **National Asian Pacific American Women's Forum**
- **National CAPACD**
- **National Crittenton**
- **National Network to End Domestic Violence (NNEDV)**
- **National Partnership for Women & Families**
- **OCA - Asian Pacific American Advocates**
- **Oklahoma Call for Reproductive Justice**

- **OneAmerica**
- **People For the American Way Foundation**
- **Planned Parenthood Federation of America**
- **Raising Women's Voices for the Health Care We Need**
- **Services, Immigrant Rights & Education Network (SIREN)**
- **SisterReach**
- **South Asian Americans Leading Together (SAALT)**
- **The Women's Law Center of Maryland**
- **Transgender Law Center**
- **UnidosUS**
- **Washington Lawyers' Committee for Civil Rights and Urban Affairs**
- **Women's Bar Association of the State of New York**
- **Women's Institute for Freedom of the Press**
- **Women's Law Project**

No party's counsel authored the brief in whole or in part, and no party, party's counsel, or person contributed money that was intended to fund preparing or submitting this brief.

All parties consent to the filing of this brief.

II. INTRODUCTION

The Trump Administration's latest attempt to exclude immigrants of color, this time by modifying the current standards for a "public charge," viewed in light

of the Administration's anti-immigrant statements and combined with the disproportionate impact of this new regulation on immigrants of color, establishes a discriminatory intent that permeates throughout the Administration's new public charge rule (the "Regulation"). The evidence of this discriminatory intent is vital context and background that this Court must consider as it analyzes whether the promulgation of the Regulation is "contrary to constitutional right" or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," such that the Regulation is likely to be set aside under the Administrative Procedures Act ("APA"). 5 U.S.C. § 706(2)(B).

The new Department of Homeland Security ("DHS") Regulation seeks to upend how public charge determinations have been implemented, adding a host of non-cash-based programs as well as other factors that may be considered. In contrast, throughout the history of the "public charge" rule, one thing has remained constant—"public charge" has always meant primary dependency on the government. In line with that, the rule is currently implemented via explicit standards that designate people primarily dependent on the government through cash assistance or institutionalization for long-term care as public charges.

But now, the punitive and subjective nature of the new Regulation is emblematic of the Trump Administration's well-documented animus toward immigrant communities of color, which has been recognized by courts around the country and by the media. As the architect of this Administration's immigration

policy, Stephen Miller acknowledges, the new public charge rule is "transformative." And the "transformation" will disproportionately fall on the shoulders of immigrant communities of color, which comprise approximately 90 percent of the 25.9 million people who would be impacted by the Regulation. Ted Hesson, *Emails Show Stephen Miller Pressed Hard to Limit Green Cards*, POLITICO (Aug. 2, 2019).[1] The Regulation's changes also create particular harms for immigrant women of color, including those who are elderly, pregnant, survivors of intimate partner violence, have disabilities and/or are lesbian, gay, bisexual, transgender, and queer ("LGBTQ") individuals.

Amici curiae respectfully submit that the Regulation's promulgation was motivated, at least in part, by racial animus, which provides important context to the analysis under the APA.[2] In granting the preliminary injunction, the district court found that the Regulation was likely in violation of the APA upon reviewing, *inter alia*, the history of public charge and the community impact. *City & Cty. of S.F. v. United States Citizenship & Immigr. Servs.*, 408 F. Supp. 3d 1057, 1102 (N.D. Cal. 2019) (considering the "history of the term" public charge and its "long-standing use and evolution in the immigration statutes," and concluding that

[1] https://www.politico.com/story/2019/08/02/stephen-miller-green-card-immigration-1630406.

[2] *Amici curiae* also respectfully submit that the Regulation is unconstitutional as violative of the Equal Protection Clause because its promulgation was motivated at least in part by racial animus. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

plaintiffs were likely to succeed in merits on claim that the Regulation is "unreasonable and not based on a permissible construction of the statute" and that the agency had not considered the impact on benefits enrollment in the states); *see Wash. v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 1191, 1213-14 (E.D. Wash. Oct. 11, 2019) (considering the Regulation's chilling effect on public benefits access and the positive association between Medicaid access and self-sufficiency in determining "whether Congress has expressed its intent regarding the public charge statute" under *Chevron*); *N.Y. v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 349 (S.D.N.Y. 2019) (finding that the government failed to "articulate why they are changing the public charge definition, why this new definition is needed now, or why the definition set forth in the Rule—which has absolutely no support in the history of U.S. immigration law—is reasonable").

Therefore, *amici* provide further historical perspective on public charge, the relevant background surrounding this Regulation, and the negative impact on immigrant communities of color, women, and LGBTQ immigrants as additional context for this Court's consideration. As the court in *New York v. United States Department of Homeland Security* found, "[t]he consequences that Plaintiffs must address, and America must endure, will be personal and public disruption, much of which cannot be undone. Overnight, the Rule will expose individuals to economic insecurity, health instability, denial of their path to citizenship, and potential deportation—none of which is the result of any conduct by those such injuries will

affect. It is a rule that will punish individuals for their receipt of benefits provided by our government, and discourages them from lawfully receiving available assistance intended to aid them in becoming contributing members of our society." *Id*. at 350.

Accordingly, *amici*, who serve immigrant communities impacted by the public charge rule change across the country, urge the Court to uphold the preliminary injunction issued by the district court, and in particular, support a nationwide injunction as issued by the district court in the Eastern District of Washington in *State of Washington v. United States Department of Homeland Security*, 408 F. Supp. 3d 1191 (on appeal, Ninth Circuit No. 19-35914). "Allowing uneven application of nationwide immigration policy flies in the face" of the requirements for uniform immigration rules. *See Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) ("Congress has instructed that the immigration laws of the United States should be enforced vigorously and *uniformly*; and the Supreme Court has described immigration policy as a comprehensive and *unified* system.") (citation and quotation marks omitted) (emphases in original). A nationwide preliminary injunction is the standard remedy for the enjoinment of agency regulations that will echo nationally under the APA. *Id.* at 512 (nationwide injunctions are "commonplace").

III. ARGUMENT

A. A Public Charge Has Been Defined as Dependency on the Government

The concept of a "public charge" can be traced back to colonial "poor laws," which required towns to provide aid, often in the form of shelter in almshouses, for its permanent residents who could not provide for themselves. *See* Medha D. Makhlouf, *The Public Charge Rule as Public Health Policy*, 16 IND. HEALTH L. REV. 177, 179-80 (2019). The localities could also expel non-residents who became dependent on the town. *Id.* In 1882, Congress passed the first federal law prohibiting the landing of "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." Immigration Act of 1882, 22 Stat. 214 (1882); *see also* Torrie Hester et al., *Historians' Comment on Proposed Rule on Inadmissibility on Public Charge Grounds* (Oct. 5, 2018) at 2.[3] In 1891, this provision was changed to include those who were "likely to become a public charge." Makhlouf, 16 IND. HEALTH L. REV. at 184-85. In 1999, the INS reaffirmed that a "public charge" refers to an immigrant considered primarily dependent on the government for subsistence, as demonstrated by either receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense. *See, e.g.,* Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. at 28,677.

[3] https://www.ilcm.org/wp-content/uploads/2018/10/Historians-comment-FR-2018-21106.pdf.

The new Regulation, however, dramatically expands the applicability of the public charge test beyond cash assistance and institutionalization, marking a significant departure from the past. When the expanded list of criteria is examined in light of the current Administration's statements and positions on immigration, it becomes clear that this change in the public charge rule is being used to target certain populations of immigrants and is motivated by racial animus.

B. The Trump Administration's Discriminatory Statements Establish an Inference that the Regulation is Motivated by Racial Animus

The Trump Administration's racist, anti-immigrant statements, combined with the disproportionate impact of the new regulation on immigrants of color, establish discriminatory intent. *Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 415 (D. Mass. 2018) ("[T]he combination of a disparate impact on particular racial groups, statements of animus by people plausibly alleged to be involved in the decision-making process, and an allegedly unreasoned shift in policy [is] sufficient to allege plausibly that a discriminatory purpose was a motivating factor in a decision."). In case after case, courts have examined the "disheartening number" of discriminatory statements made by President Trump and denied the government's motions to dismiss, repeatedly finding that such statements are "more than sufficient to support a plausible inference of the President's animus based on race and/or national origin/ethnicity against non-white immigrants." *Saget v. Trump*, 345 F. Supp. 3d 287, 303 (E.D.N.Y. 2018). The

revision to the public charge rule appears to be another vehicle through which this Administration endeavors to effectuate its "'wider strategic goal' on immigration," proffering a pretextual justification in order to veil its discriminatory intent. *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1100 (N.D. Cal. 2018). Indeed, as the court in *New York v. United States Department of Homeland Security* found, the Regulation is "simply a new agency policy of exclusion in search of a justification." 408 F. Supp. 3d at 349.

1. President Trump's Statements Establish an Inference of Animus

Federal courts have consistently found President Trump's statements sufficient to establish an inference that a challenged policy was motivated by racial animus. In *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 277 (E.D.N.Y. 2018), the court denied the government's motion to dismiss Plaintiffs' equal protection claim, finding it was plausible that President Trump's decision to end the Deferred Action for Childhood Arrival ("DACA") program "was substantially motivated by discriminatory animus" toward Latinos and Mexicans in particular. The court considered statements made by the President, including: "(1) then-candidate Trump's assertions that Mexican immigrants are not Mexico's 'best,' but are 'people that have lots of problems,' 'the bad ones,' 'criminals, drug dealers, [and] rapists'; (2) Trump's characterization of individuals who protested outside a campaign rally as 'thugs who were flying the Mexican flag'; (3) Trump's statements that a U.S.-born federal judge of Mexican descent could not fairly

preside over a lawsuit against Trump[] . . . because the judge was 'Mexican' and Trump intended to build a wall along the Mexican border; and (4) . . . characterizations of Latino/a immigrants as criminals, 'animals,' and 'bad hombres.'" *Id*. at 276–77 (citations omitted). The court noted that these "racial slurs" constituted "overt expressions of prejudice," and concluded "[a]t the very least, one might reasonably infer that a candidate who makes overtly bigoted statements on the campaign trail might be more likely to engage in similarly bigoted action once in office." *Id*. at 278.

In *Regents of University of California v. United States Department of Homeland Security*, 298 F.Supp.3d 1304, 1314 (N.D. Cal. 2018), another case challenging the Administration's DACA rescission, the court examined statements of animus made by Candidate and President Trump, including (1) his tweet that "[d]ruggies, drug dealers, rapists and killers are coming across the southern border," and corresponding question, "When will the U.S. get smart and stop this travesty?;" (2) his claim that the Mexican government "send[s] the bad ones over because they don't want to pay for them;" and (3) his reference to undocumented immigrants as "animals" who are responsible for "the drugs, the gangs, the cartels, the crisis of smuggling and trafficking, MS 13." In denying the government's motion to dismiss plaintiff's equal protection claim, the court determined that President Trump's "clear cut indications of racial prejudice on the campaign trail" constituted "[c]ircumstantial evidence of intent" admissible to show a

discriminatory purpose, reasoning, "[t]hese statements were not about the rescission [of DACA] . . . but they still have relevance to show racial animus against people south of our border," and found that such allegations "raise a plausible inference that racial animus towards Mexicans and Latinos was a motivating factor in the decision to end DACA." *Id.* at 1314-15 (citations omitted).

Similarly, in *Saget*, 345 F. Supp. 3d at 303, the court found Plaintiffs had plausibly alleged that President Trump's decision to end Temporary Protected Status ("TPS") for Haitians was predicated upon an animus "based on race . . . against non-white immigrants in general and Haitians in particular," thereby violating the Equal Protection Clause. The court relied upon statements made by President Trump, including: his remark that 15,000 Haitians who had received visas in 2017 "all have AIDS;" his statement that once Nigerian immigrants had seen the United States, they would never go back to their "huts" in Africa; his question posed in a meeting about a draft immigration plan regarding Haiti, among other countries in Latin America and Africa, wherein he asked, "Why are we having all these people from shithole countries come here?," coupled with his question, "Why do we need more Haitians?," prior to insisting that they be removed from an immigration deal; and his expressed preference for more immigrants from countries like Norway, which is predominantly white. *Id.* (citations omitted). Denying defendants' motion to dismiss, the court held, "[t]hese allegations are more than sufficient to support a plausible inference of the

President's animus based on race and/or national origin/ethnicity against non-white immigrants in general and Haitians in particular." *Id.*

In *CASA de Maryland, Inc. v. Trump*, 355 F. Supp. 3d 307 (D. Md. 2018), a similar equal protection challenge was brought to the decision to terminate TPS status for El Salvador. Denying the government's motion to dismiss, the court considered "a lengthy list of disparaging statements and actions made by President Donald Trump regarding Latino immigrants," including President Trump's "refus[al] to condemn two of his supporters who 'urinated on a sleeping Latino man and beat him with a metal pole,' instead saying only that they were 'passionate,'" and a speech he gave in Poland wherein he "expressed the need to protect 'the West' and 'civilization' against forces from 'the South or the East.'" *Id*. at 315. The court noted that Defendants could not argue that President Trump's statements were not evidence of discriminatory motive, stating, "[o]ne could hardly find more direct evidence of discriminatory intent towards Latino immigrants. He has broadly painted Latino immigrants as drug-users, criminals, and rapists." *Id.* at 325. The court observed, "[r]acially charged code words may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications." *Id*. at 326 (citations omitted).

In *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1100 (N.D. Cal. 2018), another equal protection challenge to the termination of TPS designations for Haiti, Sudan,

El Salvador, and Nicaragua, the court determined that plaintiffs had provided sufficient evidence that "President Trump harbors an animus against non-white, non-European aliens which influenced his (and thereby the Secretary's) decision to end the TPS designation," and granted plaintiffs' motion for a preliminary injunction. The court considered the following statements made by President Trump: his call for "'a total and complete shutdown of Muslims entering the United States'"; a speech wherein "he used MS-13 – a gang . . . having ties to Mexico and Central America – to disparage immigrants, indicating that they are criminals and comparing them to snakes"; and a statement wherein he told "European leaders that they 'better watch themselves' because a wave of immigration of (*sic*) 'changing the culture of their countries,' which he characterized as being 'a very negative thing for Europe.'" *Id*. at 1100-01.

Finally, in *New York v. United States Department of Commerce*, 315 F. Supp. 3d 766, 810 (S.D.N.Y. 2018), the New York District Court denied the government's motion to dismiss plaintiffs' equal protection claim challenging the addition of a citizenship question on the 2020 census questionnaire, and catalogued President Trump's statements referring to immigrants of color, including: "(1) his assertion . . . that certain immigrants 'turn out to be horrendous . . . . They're not giving us their best people, folks,'; and (2) his comment . . . that '[w]e have people coming into the country, or trying to come in. . . . You wouldn't believe how bad these people are. These aren't people, these are animals . . . .'"

2. Statements by Trump Administration Officials Also Establish an Inference of Racial Animus

Trump Administration officials involved in the public charge decision-making process have also made statements demonstrating racial animus. For example, when asked whether the Regulation aligns with the ethos inscribed on The New Colossus, the sonnet at the base of the Statute of Liberty reading, "[G]ive me your tired, your poor, your huddled masses yearning to be free," Kenneth T. Cuccinelli II, acting director of USCIS, claimed the poem was, in fact, referring to "people coming from Europe," and added his own caveat: "Give me your tired and your poor who can stand on their own two feet, and who will not become a public charge." Jacey Fortin, *'Huddled Masses' in Statue of Liberty Poem are European, Trump Official Says*, N.Y. TIMES (Aug. 14, 2019).[4]

This statement is consistent with Cuccinelli's historical rhetoric and policy positions regarding immigrants of color. In 2008 as a Virginia state senator, Cuccinelli introduced legislation that would have allowed employers to fire those who didn't speak English in the workplace, who would then be ineligible for unemployment benefits. Elaina Plott, *The New Stephen Miller*, THE ATLANTIC (Aug. 14, 2019).[5] On a talk radio show in 2012, Cuccinelli compared immigrants to rats, opining that a D.C. law that prevented animal workers from killing rats "is worse than our immigration policy. You can't break up rat families." Marc Fisher,

[4] https://www.nytimes.com/2019/08/14/us/cuccinelli-statue-liberty-poem.html.
[5] https://www.theatlantic.com/politics/archive/2019/08/who-is-ken-cuccinelli/596083/.

Cuccinelli, a Righteous, Faith-Driven Warrior Who Delights in Provocation, Will Join Trump Administration, THE WASH. POST (May 22, 2019).[6] Further, Cuccinelli was a founding member of State Legislators for Legal Immigration ("SLLI"), a group that described undocumented immigrants as "foreign invaders" responsible for "serious infectious diseases, drug running, gang violence, human trafficking, terrorism."[7] Andrew Kaczynski, *Trump Official Has Talked About Undocumented Immigrants as 'Invaders' Since at Least 2007*, CNN POLITICS (Aug. 17, 2019).[8] Speaking with Breitbart radio in October 2018 about Central American migrants reportedly planning to seek asylum in the U.S., Cuccinelli argued states could use "war powers" to block their entry, stating "[w]e've been being invaded for a long time, and so the border states clearly qualify here to utilize this power themselves . . . [a]nd because they're acting under war powers, there's no due process . . . Literally, you don't have to keep them, no catch and release, no nothing. You just point them back across the river and let them swim for it." *Id.*

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[6] https://www.washingtonpost.com/politics/cuccinelli-a-righteous-faith-driven-warrior-who-delights-in-provocation-will-join-trump-administration/2019/05/21/ffb2f1d4-7bde-11e9-a5b3-34f3edf1351e_story.html?noredirect=on.

[7] SLLI has highlighted its "working partnership" with the Federation for American Immigration Reform, which has been listed as a hate group by the Southern Poverty Law Center since 2007 for its white nationalist agenda. Heidi Beirich, *Attacking the Constitution: State Legislators for Legal Immigration & the Anti-Immigrant Movement,* SOUTHERN POVERTY L. CTR. (Mar. 1, 2011), https://www.splcenter.org/ 20110228/attacking-constitution-state-legislators-legal-immigration-anti-immigrant-movement.

[8] https://www.cnn.com/2019/08/17/politics/kfile-ken-cuccinelli-immigration-invasion-rhetoric/index.html.

And most recently in December 2019, after five Jewish people were stabbed during a Hanukkah celebration, Cuccinelli, while acting director of USCIS, tweeted that the alleged attacker, a black man, is the son of an "illegal alien" that came from a family lacking "American values." Zolan Kanno-Youngs, *Immigration Official Tweets, Then Deletes, Accusation Against Monsey Suspect*, THE N.Y. TIMES, (Dec. 30, 2019).[9]

Stephen Miller, President Trump's senior policy advisor, also has a history of anti-immigrant sentiment. Miller has his own interpretation of The New Colossus, telling a reporter, "[t]he poem that you're referring to was added later. It's not actually part of the original Statue of Liberty." Peter Baker, *Trump Supports Plan to Cut Legal Immigration by Half*, THE N.Y. TIMES, (Aug. 2, 2017).[10] While discussing the methodology utilized by the Administration to determine how to institute travel restrictions, Miller allegedly argued that additional African and Asian nations should face restrictions as well, stating, "[t]hese are shitty countries with lots of criminals. Why aren't they under restrictions?" Jason Zengerle, *How America Got to 'Zero Tolerance' on Immigration: the Inside Story*, THE N.Y. TIMES MAG. (July 16, 2019)[11]. In an attempt to demonize immigrants, Miller reportedly pressured U.S. Immigration and

[9] https://www.nytimes.com/2019/12/30/us/politics/cuccinelli-monsey-stabbing.html.
[10] https://www.nytimes.com/2017/08/02/us/politics/trump-immigration.html.
[11] https://www.nytimes.com/2019/07/16/magazine/immigration-department-of-homeland-security.html.

Customs Enforcement officials to include more details, such as pending criminal charges, in press releases about immigrants they had apprehended, detained or planned to report, possibly in violation of their privacy rights. Gabby Orr & Andrew Restuccia, *How Stephen Miller Made Immigration Personal*, POLITICO (Apr. 22, 2019).[12] A subsequent policy crafted by Miller required that federal agencies write new rules that exclude non-citizens from protections under federal privacy law. *Id.*

But perhaps most alarming are the over 900 e-mails Miller sent to a Breitbart News editor from 2015 to 2016, in which he fed xenophobic stories and purported crime statistics regarding immigrants of color to the news outlet while citing a variety of sources tied to white nationalists and white supremacist organizations, succeeding in having such stories regularly published. Paul Farhi, *White House Aide Stephen Miller Held Wide Say Over Breitbart News, According to Emails*, THE WASH. POST (Nov. 19, 2019)[13]; *see also* Michael Edison Hayden, *Stephen Miller's Affinity for White Nationalism Revealed in Leaked Emails*, SOUTHERN POVERTY LAW CENTER, (Nov. 12, 2019).[14] Following the release of the e-mails, over 100 members of the House of Representatives and 50 national civil rights

[12] https://www.politico.com/story/2019/04/22/stephen-miller-immigration-trump-1284287.
[13] https://www.washingtonpost.com/lifestyle/style/white-house-aide-stephen-miller-held-wide-sway-over-breitbart-news-according-to-emails/2019/11/19/23e473fa-0ae8-11ea-8397-a955cd542d00_story.html.
[14] https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails.

groups sent letters to President Trump calling for Miller's resignation, asserting that "[s]upporters of white supremacists and neo-Nazis should not be allowed to serve at any level of government, let alone in the White House." The Leadership Conference on Civil & Human Rights, *Letter to the White House: Civil Rights Groups Call for Stephen Miller's Removal*, (Nov. 18, 2019).[15] But, amid these calls, Mr. Miller remains a trusted advisor.

Finally, DOJ and DHS have gone so far as to issue erroneous reports about crimes committed by immigrants to bolster claims that immigrants are criminals, and to allegedly substantiate President Trump's assertion that family-based immigration – so-called "chain migration' – is a threat. Ellen Nakashima, *Justice Dept. Admits Error But Won't Correct Report Linking Terrorism to Immigration*, THE WASH. POST (Jan. 3, 2019).[16] Following a lawsuit, DOJ acknowledged their statistics contained "editorial errors" and "could cause some readers of the report to question its objectivity," and that in future reports, the DOJ could "strive to minimize the potential for misinterpretation." *Id*. But, DOJ refused to retract or correct the document. *Id.*

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[15] https://civilrights.org/resource/letter-to-the-white-house-civil-rights-groups-call-for-stephen-millers-removal/.

[16] https://www.washingtonpost.com/world/national-security/justice-dept-admits-error-but-wont-correct-report-linking-terrorism-to-immigration/2019/01/03/cd29997a-0f69-11e9-831f-3aa2c2be4cbd_story.html?noredirect=on&utm_term=.c7ef942c5829.

3. Other Immigration-Related Policies Demonstrate Racial Bias

These racist and anti-immigrant statements have manifested via the current Administration's immigration policies. The Administration has attempted to: (1) end DACA and TPS designations; (2) ban entry of nationals from eight Muslim-majority countries[17]; (3) slash refugee admissions[18]; (4) impose new restrictions on asylum seekers[19]; (5) make changes to the processing of immigration applications[20]; (6) end parole for Filipino WWII veterans[21]; (7) end the *Flores* settlement, which limits prolonged detention of children[22]; and (8) deny deportation

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[17] Executive Order 13769 of January 27, 2017, 82 Fed. Reg. at 8977, https://www.govinfo.gov/content/pkg/FR-2017-02-01/pdf/2017-02281.pdf.

[18] *An Overview of U.S. Refugee Law and Policy,* AMERICAN IMMIGRATION COUNCIL (Jan. 8, 2020), https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy.

[19] Jasmine Aguilera, *Trump's New Restrictions on Asylum Seekers Violate U.S. and International Law, Experts Say*, TIME (July 24, 2019), https://time.com/5626498/trump-asylum-rule-international-law/.

[20] Stuart Anderson, *USCIS Immigration Delays Grow Longer and Longer*, FORBES (Jan. 31, 2019), https://www.forbes.com/sites/stuartanderson/2019/01/31/uscis-immigration-delays-grow-longer-and-longer/#24a22b3c2254.

[21] *USCIS to End Certain Categorical Parole Programs*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Aug. 2, 2019), https://www.uscis.gov/news/news-releases/uscis-end-certain-categorical-parole-programs?utm_source=NCAPA+Mailing+List&utm_campaign=7d6254c499-EMAIL_CAMPAIGN_2019_08_02_09_52_COPY_01&utm_medium=email&utm_term=0_57801d6f38-7d6254c499-228973925&mc_cid=7d6254c499&mc_eid=511cfa134e.

[22] Geneva Sands, *Trump administration to allow longer detention of migrant families*, CNN POLITICS (Aug. 22, 2019), https://www.cnn.com/2019/08/21/politics/immigration-family-detention-flores/index.html.

deferral requested for medical reasons.[23] The Regulation's drastic changes to the public charge rule provide yet another example of this Administration's anti-immigrant and racist policies.

C. The Regulation Will Disproportionately Impact Immigrants of Color

These drastic revisions to the public charge determination process will disproportionately impact immigrant communities of color. The new Regulation significantly expands the applicability of the public charge test. The Regulation requires the agency to consider whether the individual's annual household gross income is at least 125% of the federal poverty level ("FPL"), and it includes as a "heavily weighted positive factor" an income of at least 250% of the FPL. Regulation, to be codified as 8 CFR §§ 212.22(c)(2)(i), 212.22(b)(4)(i). The Regulation also sets thresholds relating to the receipt of public benefits, instructing that the totality of circumstances[24] determination looks to "all factors that are

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[23] Shannon Dooling, *Trump Administration ends protection for migrants' medical care*, NPR (Aug. 27, 2019), https://www.npr.org/2019/08/27/754634022/trump-administration-ends-protection-for-migrants-medical-care.

[24] The Regulation's changes to the totality of the circumstances test further enable a discriminatory application. Previously, affidavits of support were regularly used to override public charge determinations. The new Regulation, however, instructs officials not only to consider whether the applicant has a legally sufficient affidavit of support, but also to independently weigh the *sponsor's* income and resources, relationship to the applicant and likelihood of supporting the applicant, or "any other related considerations." 84 Fed. Reg. at 41,397. The Regulation does not identify the standards for evaluating these factors. *Id.* The Regulation thus invites officials to make decisions based on their personal assumptions, signaling a dangerous departure from the standards-driven practice of the public charge rule of the past several decades.

relevant to whether the alien is more likely than not" to receive one or more of the newly expanded categories of public benefits for an aggregate of 12 months over a 36-month period. 84 Fed. Reg. at 41,502 (to be codified as 8 C.F.R. § 212.22(a)). The newly expanded list of public benefits now includes healthcare coverage through Medicaid, Supplemental Nutrition Assistance Program (SNAP), and Section 8 rental assistance.

Immigrant communities of color comprise 90% of the 25.9 million people who would be impacted by the Regulation. *See* Custom Tabulation by Manatt Phelps & Philips LLP, *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard* (Oct. 11, 2018).[25] Among those potentially affected by the Regulation, an estimated 70% are Latinx, 12% are Asian American and Pacific Islander, and 7% are Black. *Id.*

Additionally, the Regulation will likely create a higher risk of denial for immigrants from Mexico and Central America (with 60% of recent immigrants having two or more negative factors), the Caribbean (48%), Asia (41%), South America (40%), and Africa (34%), compared to the risk for immigrants from Europe, Canada, Australia, and New Zealand, only 27% of whom could be expected to have two or more negative factors. Randy Capps et al., *Gauging the*

[25] https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population (using 2012-2016 5-Year American Community Survey Public Use Microdata Sample (ACS/PUMS); 2012-2016 5-Year American Community Survey (ACS) estimates accessed via American FactFinder; Missouri Census Data Center (MCDC)).

Impact of DHS' Public-Charge Rule on U.S. Immigration, MIGRATION POL'Y INST. (Nov. 2018).[26] Also, Mexican and Central American immigrants, the express targets of President Trump's statements of racial animus, will be most significantly affected by the Regulation. 26% of immigrants in the U.S. come from Mexico, making it the top country of origin. Phillip Connor & Gustavo López, *5 Facts About the U.S. Rank in Worldwide Migration*, PEW RES. CTR. (May 18, 2016).[27]

1. The English Proficiency Requirement is a Proxy for Race

Under the enjoined Regulation, immigration officers would be permitted to consider English proficiency or limited English proficiency ("LEP") as a positive or negative factor. As outlined below, English-language proficiency serves as a way to restrict non-white immigration.[28] Of the total foreign-born LEP population residing in the U.S., 39% were born in Mexico, comprising the largest group by far, followed by Chinese LEP immigrants at 6%. Jeanne Batalova & Jie Zong, *The Limited English Proficient Population in the United States*, MIGRATION POL'Y

[26] https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration.

[27] https://www.pewresearch.org/fact-tank/2016/05/18/5-facts-about-the-u-s-rank-in-worldwide-migration/; Jynnah Radford, *Key Findings About U.S. Immigrants*, PEW RES. CTR. (June 17, 2019), https://www.pewresearch.org/fact-tank/2019/06/17/key-findings-about-u-s-immigrants/.

[28] DHS justified adding English proficiency as a factor in the public charge determination based on a general correlation between English proficiency and employment and/or income. But those factors are already considered, making the addition of this factor of English proficiency superfluous, except as a way to further weed out generally non-white immigrants.

INST. (July 8, 2015).[29] Further, 64% of the total U.S. LEP population speaks Spanish. *Id*. Fifty-two percent of Asian American immigrants and approximately 45% of foreign-born Pacific Islanders are LEP. *Inside the Numbers: How Immigration Shapes Asian American and Pacific Islander Communities,* ASIAN AMERICANS ADVANCING JUSTICE, 14 (June 12, 2019).[30] Hmong, Cambodian, Vietnamese, Laotian, Nepalese, Korean, and Chinese American immigrant seniors range from between 95%-84% LEP. *Id.* In 2017, approximately 46% of South American immigrants over age 5 reported LEP. Jie Zong & Jeanne Batalova, *South American Immigrants in the United States*, MIGRATION POL'Y INST. (Nov. 7, 2018).[31] Half or more of Venezuelans, Peruvians, Colombians, and Ecuadorans reported LEP. *Id.* Thus, as detailed here, discriminating against individuals who have LEP is another way to discriminate on the basis of race.

2. Chilling Effects Were Evident Before the Regulation Was Finalized

A 2019 study conducted by the Urban Institute found extensive evidence of chilling effects in immigrant communities of color even before the Regulation was finalized. Hamutal Bernstein, et al., *One in Seven Adults in Immigrant Families*

[29] https://www.migrationpolicy.org/article/limited-english-proficient-population-united-states#Age,%20Race,%20and%20Ethnicity.
[30] https://www.advancingjustice-aajc.org/sites/default/files/2019-07/1153_AAJC_Immigration_Final_0.pdf.
[31] https://www.migrationpolicy.org/article/south-american-immigrants-united-states#EnglishProficiency.

Reported *Avoiding Public Benefit Programs in 2018*, URBAN INST. (May 2019).[32] For example, Latinx adults in immigrant families were more than twice as likely as non-Hispanic white and non-Hispanic non-white adults in immigrant families to report chilling effects in their families. *Id.* at 2. In other words, immigrant communities of color are increasingly avoiding health, nutrition, or social services out of fear.[33] This study also found that chilling effects extended to families where all non-citizen members had green cards (14.7%) or where all foreign-born members were naturalized citizens (9.3%). *Id.*

3. Visa Denials Show the Regulation is Excluding Immigrants of Color

In January 2018, the Trump Administration announced revisions to the Foreign Affairs Manual ("FAM"), which provides instructions to officials in U.S. embassies and consulates abroad. *Changes to the 'Public Charge' Instructions in the U.S. State Department's Manual*, NAT'L IMMIGR. L. CTR.(Feb. 8, 2018).[34] The 2018 FAM guidance included changes to the treatment of a sponsor's affidavit of support and the use of non-cash benefits. In the months after the FAM revisions

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[32]https://www.urban.org/sites/default/files/publication/100270/one_in_seven_adults_in_immigrant_families_reported_avoiding_publi_7.pdf ("Urban Institute Study").

[33] The failure of the Administration to address the disparate impact of the Regulation further evidences a discriminatory intent sufficient to sustain an arbitrary and capricious claim made pursuant to the Administrative Procedure Act, given the manner in which Defendants ignore the number of studies and comments documenting the disparate impact on immigrants of color.

[34] https://www.nilc.org/wp-content/uploads/2018/02/NILC-FAM-Summary-2018.pdf.

had taken effect, preliminary data showed 12,179 immigrant visa rejections between October 1, 2018 and July 29, 2019. Ted Hesson, *Exclusive: Visa Denials to Poor Mexicans Skyrocket Under Trump's State Department*, POLITICO (Aug. 6, 2019).[35] The State Department had denied 5,343 immigrant visa applications for Mexican nationals on public charge grounds, up over 750-fold from fiscal year 2016. *Id.* Visa applicants from countries including India, Pakistan, Bangladesh, Haiti, and the Dominican Republic also saw significant increases in denials predicated on the risk of becoming a public charge. *Id.* This spike in visa denials shows the Trump Administration is using the public charge rule to exclude immigrants of color.

D. Immigrant Women of Color and LGBTQ Immigrants of Color Are Particularly and Severely Harmed by the Regulation

The Regulation is particularly harmful to immigrant women of color, many of whom can ill afford to lose access to programs that support their safety, independence, and economic security for fear of harming their immigration status. For example, immigrant women of color are generally at higher risk of economic insecurity than men, and are overrepresented in low-wage jobs. *The Impact of Immigrant Women on America's Labor Force*, AM. IMMIGR. COUNCIL (Mar. 8, 2017).[36] Further, immigrant women of color face a substantial wage gap as

[35] https://www.politico.com/story/2019/08/06/visa-denials-poor-mexicans-trump-1637094.
[36] https://www.americanimmigrationcouncil.org/research/impact-immigrant-women-americas-labor-force.

compared to native-born men: Black, Latinx, and Asian immigrant women make 62, 47, and 88 cents respectively for every dollar made by a white, non-Hispanic native-born man.[37]. And more than half of all immigrant women live in a household with children, compared to 43 percent of immigrant men and 28 percent of native-born women, putting additional strain on already limited resources. Ariel G. Ruiz, Jie Zong, & Jeanne Batalova, *Immigrant Women in the United States,* MIGRATION POL'Y INST. (Mar. 20, 2015).[38]

The Regulation will cause concrete harm to immigrant women's health by discouraging their use of food, housing assistance, and health coverage. In 2016, women constituted almost 47% of non-citizen Medicaid recipients, compared to men at 39% and children at 14%.[39] And, though pregnant women's use of Medicaid is exempted under the final rule, the Regulation will likely discourage women from obtaining prenatal care, exacerbating already elevated maternal and infant

[37] Nat'l Women's Law Ctr. Calculations based on U.S. Census Bureau, 2018 Current Population Survey, using Sarah Flood, Miriam King, Renae Rodgers, Steven Ruggles, and J. Robert Warren. *Current Population Survey Data for Social, Economic and Health Research*, IPUMS CPS, https://doi.org/10.18128/D030.V6.0. For Asian women, the disparities are even starker for certain Asian subgroups; for instance, Burmese and Hmong women make 50 and 57 cents to the dollar respectively. Morgan Harwood, *Equal Pay for Asian American and Pacific Islander Women*, Nat'l Women's Law Ctr. (Mar. 2019) at 2, https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/03/Asian-Women-Equal-Pay-3.7.19-v2.pdf.

[38] https://www.migrationpolicy.org/article/immigrant-women-united-states.

[39] Nat'l Women's Law Ctr. Calculations based on U.S. Census Bureau, 2018 Current Population Survey, using Sarah Flood, Miriam King, Renae Rodgers, Steven Ruggles, and J. Robert Warren. *Current Population Survey Data for Social, Economic and Health Research*, IPUMS CPS, https://doi.org/10.18128/D030.V6.0.

mortality rates among Black and Latinx women. *Infant Mortality*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Mar. 27, 2019);[40] *Pregnancy Mortality Surveillance System*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 4, 2019).[41] Likewise, women with disabilities rely upon benefits like SNAP and Medicaid. The Regulation further targets women with chronic health conditions and disabilities by allowing DHS to consider health conditions as part of the totality of circumstances test.

Additionally, the Regulation has a detrimental impact on immigrant women who are survivors of domestic violence and sexual assault. Some groups of women of color face higher rates of intimate partner violence. *National Intimate Partner & Sexual Violence Survey: 2010 Summary Report*, CTRS. FOR DISEASE CONTROL AND PREVENTION, 39-40 & TBL. 4.3 (Nov. 2010).[42] The Regulation incentivizes survivors to remain in the households of their sponsors, regardless of safety concerns, to the extent they are dependent on their sponsors' household income to satisfy the Regulation's requirements. Without access to resources from public benefits and work authorization, immigrant survivors may stay longer in abusive relationships and sustain more severe physical and emotional consequences as a result than non-immigrant survivors. Giselle Aguilar Hass, Psy.D., et al., *Battered Immigrants and*

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40 https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm.

41 https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-mortality-surveillance-system.htm.

42 https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

U.S. Citizen Spouses, Legal Momentum (Apr. 24, 2006) at 2.[43] The Regulation thus puts immigrant survivors of domestic violence at risk by disincentivizing the use of essential economic supports.

Finally, the Regulation has significantly harmful effects on LGBTQ immigrants of color and their families. Of the 637,000 documented LGBT foreign-born adults in the U.S., approximately 77% are non-white. Gary J. Gates, *LGBT Adult Immigrants in the United States*, THE WILLIAMS INST. (Mar. 2013).[44] Because of continuing discrimination, LGBTQ immigrants face additional challenges in accessing and maintaining education, employment, housing, and health care, and may be more likely to need assistance with basic family supports. *Serving LGBTQ Immigrants and Building Welcoming Communities*, CTR. FOR AM. PROGRESS (Jan. 24, 2018).[45] Further, available statistics show that LGBT immigrants of color are more likely than white LGBT immigrants to experience discrimination while receiving health care services and to receive substandard care. *When Health Care Isn't Caring: LGBT Immigrants and Immigrants Living with HIV*, Lambda Legal.[46]

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[43] http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/BB_RSRCH_ImmVictims_Battered_Imm.pdf.

[44] https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTImmigrants-Gates-Mar-2013.pdf.

[45] https://www.americanprogress.org/issues/lgbt/reports/2018/01/24/445308/serving-lgbtq-immigrants-building-welcoming-communities/.

[46] https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-insert_lgbt-immigrants-and-immigrants-living-with-hiv.pdf. There were not

In sum, this Regulation puts immigrant women of color, including survivors, and LGBTQ individuals, in the untenable position of living in fear that the use of Medicaid, nutrition or housing assistance could negatively impact their immigration status. As a result, the very health, well-being, and safety of the most vulnerable immigrant women are at stake in this case.

IV. CONCLUSION

For the foregoing *reasons*, *amici curiae* respectfully urge the Court to affirm the grant of the preliminary injunction entered by the district court.

Dated: January 23, 2020

Respectfully Submitted,

s/ Emily Tomoko Kuwahara

Emily Tomoko Kuwahara
CROWELL & MORING LLP
515 South Flower St., 40th Floor
Los Angeles, CA 90071
Telephone: 213.622.4750
Facsimile: 213.622.2690
ekuwahara@crowell.com

Austin Sutta
CROWELL & MORING LLP
3 Embarcadero Center, 26th Floor
San Francisco, CA 94111
Telephone: 415.365.7404
Facsimile: 415.986.2827
asutta@crowell.com
Attorneys for Amici Curiae

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enough transgender or gender non-conforming respondents to the survey born outside the United States to analyze these groups separately.

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