19-3591

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 FOR *AMICUS CURIAE* CENTER FOR REPRODUCTIVE RIGHTS IN SUPPORT OF APPELLEES

HILLARY SCHNELLER
CENTER FOR REPRODUCTIVE RIGHTS
Attorneys for Amicus Curiae Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, New York 10038
(917) 637-3777
hschneller@reprorights.org

CORPORATE DISCLOSURE STATEMENT

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

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

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

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

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

INTRODUCTION

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

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

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

This Court should reject this Rule and its sweeping and unprecedented affront to pregnant people, mothers, and families.

ARGUMENT

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

For decades, the government made public-charge determinations without considering actual or predicted use of programs that assist with healthcare, food, and housing.[2] The Rule now reformulates the U.S. Department of Homeland Security ("DHS") assessment of whether a person is "likely at any time to become a public charge" by supplanting this long-standing approach with newly exclusionary definitions and criteria.[3] Critical programs never before relevant in the public-charge assessment will be classed as "public benefits,"[4] including Medicaid, Supplemental

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

[3] 8 C.F.R. § 212.21(a).

[4] 8 C.F.R. § 212.21(b).

Nutrition Assistance Program Participation ("SNAP"), and housing benefits. Even provisional use of included benefits will be weighed as a "negative factor."[5]

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

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

[5] 8 C.F.R. § 212.21(a), (d).

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

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

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

Extensive public health research establishes that, while prenatal care can improve certain health outcomes, other improvements require health promotion

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

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

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

Postpartum care beyond sixty days is also not exempt under the Rule, although it is critical to safeguard the health of birthing people and their children. Pregnancy-related deaths occur throughout the first year after birth,[12] and more than half (62%) of pregnancy-related deaths that occur between 43 and 365 days postpartum are

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

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

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

preventable with appropriate care.[13] Recognizing these risks, maternal mortality review committees, the American Medical Association, and the American College of Obstetricians and Gynecologists have recommended individualized, on-going postpartum care, with at least twelve months of postpartum coverage.[14] This medical consensus highlights that the Rule's exemption of just 60 days of Medicaid after pregnancy is inadequate to meet the healthcare needs of people who have given birth.

Moreover, the Rule's chilling effect is likely to overpower its narrow exemptions and result in disenrollment from a range of programs. Growing fear, confusion, language and cultural barriers, and lack of trust that the law will be applied fairly will chill many from accessing even the few programs that are exempt, including Medicaid during pregnancy and for sixty days after, the Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC"), and the Children's Health Insurance Program ("CHIP"). Although the Rule is blocked, confusion about its scope, and fear of deportation or harm to citizenship eligibility,

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[13] *Id.*

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

has already led many individuals, including pregnant people and families with young children, to disenroll from critical programs. In recent interviews with health providers, nearly all respondents reported that many pregnant immigrant women were delaying prenatal care, or seeking care less frequently, and declining to enroll or disenrolling from Medicaid due to such fear.[15] This was the case even after applicants were told that Medicaid coverage for pregnant women is not penalized under the Rule.[16] According to one estimate, **"**If the rule leads to disenrollment rates ranging from 15% to 35% among Medicaid and CHIP enrollees who are noncitizens or live in a household with a noncitizen, between 2.0 to 4.7 million individuals could disenroll," thereby "reducing access to care and contributing to worse health outcomes."[17]

The Rule has similarly hampered enrollment in WIC. Evidence demonstrates that WIC improves breastfeeding rates and length, nutritional intake, and early

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

[16] *Id*.

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

cognitive development of children.[18] Since the Rule's announcement, however, pregnant immigrants have avoided WIC, with a noticeable decline in caseloads.[19] WIC agencies in at least 18 states report that enrollment has declined by approximately 20%; and a Texas WIC agency reports a decline of 75 to 90 participants per month due to fears of being designated a public charge.[20] Health center providers uniformly report that immigrant patients are confused about the new Rule, who is subject to it, and which programs are included.[21]

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

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

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

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

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

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

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

The Rule's failure to exempt SNAP is especially damaging to the wellbeing of mothers, children, and families. More than 34 million low-income people receive SNAP benefits.[23] Women comprise more than half (57%) of SNAP participants, and nearly two-thirds (64%) of non-elderly adult participants.[24] SNAP benefits are particularly critical for single parents, as single-parent households comprise nearly

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

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

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

two-thirds of SNAP households with children.[25] While many immigrants are already excluded from SNAP, fear of a public charge designation under the Rule may push eligible parents, or those with eligible children, away from SNAP. From 2017 to the first half of 2018, SNAP participation declined among eligible immigrant families even while their employment remained constant, suggesting that they were withdrawing from the program due to fear that the Rule engenders.[26] Declines are troubling given that SNAP's benefits are extensively documented; food insecurity and reductions in support from public programs are associated with negative outcomes, including maternal depression and physical, psychosocial, and academic challenges among children.[27]

Access to stable housing is also essential for promoting maternal and child health. Pregnant people are particularly vulnerable to homelessness, and homelessness increases the risk of preterm delivery, low birthweight, and

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[25] *Id.*

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

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

pregnancy-related complications.[28] Homeless pregnant women, compared to pregnant women with stable housing, had increased odds of hypertension, prolonged pregnancy, deficiency and other anemia, OB-related trauma to perineum and vulva, nausea and vomiting, hemorrhage, early or threatened labor, and other birth complications.[29] Housing instability postpartum can expose families to extended periods of toxic stress, increasing the risk of infant mortality and improper brain development for children during critical periods.[30] In spite of the incontrovertible benefits of stable housing, the Rule penalizes any current or predicted use of housing assistance.

The limited eligibility of immigrants for Medicaid, SNAP, and housing assistance does not render the Rule innocuous. As discussed, the Rule's chilling effects have already caused immigrants who are eligible for essential programs to disenroll. And regardless of current eligibility, the Rule's consideration of future use of these programs relies on the false premise that such use is a form of dependency.

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

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

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

To the contrary, these programs improve maternal, child, and family health outcomes and increase the ability of women and families to participate in social and economic life.

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

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

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

Prior to the Rule, to make a public charge determination, officials considered age, health, family status, assets, resources, financial status, and education and skills as required by statute.[31] In addition to expanding the list of public charge programs as discussed above, the Rule established new factors that count as "positives" and "negatives" in the determination. Positive factors include being of working age, employed, in good health without a physical or mental disability, and with income

[31] 8 U.S.C. § 1182(a)(4)(B)(i).

above 125% of the federal poverty line.[32] Having private health insurance coverage or having income above 250% of the federal poverty level are "heavily weighted positive factors."[33] Negative factors include having income less than 125% of the poverty line, education less than a high school diploma, limited English proficiency, and poor health.[34] Having a medical condition likely to require extensive treatment, no private health insurance, and lack of employment unless serving as a primary caregiver are considered "heavily weighted negative factors," a formulation that entrenches and encourages discrimination against people with disabilities.[35]

The Rule's new negative factors systematically disadvantage women, particularly those who are parents with caregiving responsibilities that limit their employment options, pushing them toward low-wage jobs with few to no employee benefits. Data shows that 28% of people who originally entered the U.S. without legal permanent resident status are parents.[36] Women who are parents are more likely than men to have caregiving responsibilities and often shoulder the dual burden of working and caregiving, which prevents them from qualifying for the Rule's

[32] 8 C.F.R. § 212.21(b).

[33] 8 C.F.R. § 212.22(c)(1).

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

[35] 8 C.F.R. § 212.22(c)(1).

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

exemption for primary caregivers.[37] Among immigrant women, 62.5% work full-time (as compared to 75.7% of immigrant men), while 27.8% work part-time (as compared to 13.1% of immigrant men).[38] Moreover, almost one-third of immigrant women work in service occupations, as compared to 19% of immigrant men.[39] Service jobs often entail low wages, unpredictable hours, and lack of health insurance coverage and paid sick leave.[40] Lower income and lack of critical employee benefits have contributed to higher poverty rates among immigrant

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

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

[39] *Id.*

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

women, with 20% living below the federal poverty line as compared to 17% of immigrant men.[41] The difference is starker among parents, with 28% of immigrant women and 21% of immigrant men who are single parents living below 100% of the poverty line. [42] The Rule's negative treatment of income less than 125% of the poverty line is thus especially punitive for this group. Negative consequences of the Rule are also exacerbated for parenting women with disabilities, who are not only penalized for having a disability, but who are also more likely than women without disabilities to work part-time, have lower earnings, and live in poverty.[43]

In addition, the Rule treats women unequally by incorporating programs, like Medicaid, SNAP, and housing assistance, that are especially critical to women seeking to raise families in healthy environments with autonomy and dignity. Women who are parents, especially single parents and parents with a disability, use Medicaid and food and housing assistance at higher rates that reflect the demands of providing for children. Sixty-four percent of all non-elderly adult SNAP recipients

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

[42] *Id.*

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

are women,[44] as are 58 percent of Medicaid recipients[45] and 70 percent of household heads receiving rental housing assistance from HUD.[46] And women are more likely to be single parents with sole financial responsibility for a household that includes children.[47] Parenting women with disabilities—for whom preconception and postpartum care is essential for ensuring a healthy and dignified pregnancy and postpartum experience—are doubly penalized for both having a disability, and for use or predicted use of Medicaid prior to pregnancy and afterwards.[48]

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

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

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

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

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

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

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

The Court should consider the Rule in the context of the Constitution's core commitment to sex equality, which disfavors laws that penalize women's equal participation on the basis of their role in bearing and raising children. Although constitutional sex discriminations claims are not raised in this case, these commitments flow from the Fifth and Fourteenth Amendments, which include equal protection guarantees that prohibit discrimination based on sex and the related liberty right to bear and raise children. The Supreme Court has assessed these rights in cases dealing with access to public benefits, holding that it is unconstitutional for the government to allocate or withhold benefits based on assumptions or actual

differences in the roles that women and men play in caring for families. While this jurisprudence developed at a time when laws involving benefits made sex-based distinctions on their face, it articulates principles that are no less relevant when a law systematically disadvantages women because of heightened caregiving obligations, or assumes that those obligations render women more likely to be "dependent" on support in the future.

The core holding of the landmark equal protection case *Frontiero v. Richardson*, 411 U.S. 677 (1973), impugns the inequality that the Rule embeds. In *Frontiero*, the Court struck down a law that automatically granted a dependent allowance to wives of military personnel, irrespective of financial status, but required proof that husbands were actually financially dependent on their military spouse in order for them to qualify. *Id.* at 690-91. The Court premised its decision on concerns that differential treatment of men and women "frequently bears no relation to ability to perform or contribute to society," and thus laws distinguishing "between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of individual members." *Id.* at 686-87. *Frontiero* made clear that laws embedded with gendered notions of dependency and ability to contribute to society are constitutionally suspect, in particular when their effect is to denigrate women's legal status. *Id.*

The same logic informed the Court in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), which held that a provision in the Social Security Act providing survivors benefits based on a deceased spouse's earnings to widowed mothers with minor children but not widowed fathers violated equal protection. *Id.* at 653. It reasoned that by encouraging widowed mothers to forgo employment, the provision made impermissible "gender-based generalizations" that mothers should care for children and fathers should work. *Id.* at 645. The Court also noted that the provision penalized mothers who chose to work and accrue benefits in their lifetimes but could not pass them on to their widowed spouses. *Id.* In doing so it violated equal protection by treating mothers and fathers differently based on their preferences about what role to play in caring for their families—whether assumed or actual. Applying similar reasoning, the Supreme Court in *Califano v. Goldfarb*, 430 U.S. 199 (1977), struck down a Social Security Act provision that awarded survivors benefits to the wife of a deceased man regardless of her financial dependency, but to the husband of a deceased woman only if his income actually depended on his wife. *Id.* at 201-02. The Court wrote that "gender-based differentiation created by [the provision] …. is forbidden by the Constitution, at least when supported by no more substantial justification than 'archaic and overbroad' generalizations, or 'old notions,' such as 'assumptions as to dependency,' that are more consistent with 'the role-typing

society has long imposed,' than with contemporary reality." *Id.* at 206-07 (citations omitted).

While *Frontiero, Wiesenfeld* and *Califano* address only laws that made facial distinctions between men and women in allocating benefits, their underlying premise applies here: constitutional equality concerns arise when a law disadvantages women or men, mothers or fathers, because of actual differences in caregiving obligations that fall more heavily on women, or assumptions about future dependency tied to gender roles and caring for children.[49] The Court made the point even more explicitly in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), in which it upheld the Family Medical Leave Act as a proper exercise of Congress's Fourteenth Amendment power to rectify past discrimination against mothers based on the "formerly state-sanctioned stereotype that only women are responsible for family caregiving." *Id.* at 737.

A second line of cases addressing the liberty right to make decisions about having and raising children without suffering government-imposed economic penalties buttresses this premise. In *Cleveland Board of Education v. LaFleur*, 414

[49] In *Personnel Administration of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the Supreme Court held that facially neutral laws that have the effect of disadvantaging men or women are not unconstitutional for that reason alone, but rather must have "a gender-based discriminatory purpose." *Id.* at 276. The Rule is gender neutral on its face, and Plaintiffs-Appellees have not made such claims.

U.S. 632 (1974), the Supreme Court struck down school board regulations that required pregnant teachers to take unpaid leave for several months before and after giving birth, based on the assumption that pregnant women and new mothers are physically unable to work. The Court held that the government could not make a broad determination about pregnant women that would prevent them from continuing their paid employment and "[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." *Id.* at 640. The Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), relied on the right to liberty to highlight that 'the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives," *id.* at 856, and while tradition has viewed women as maternal caregivers—and women often shoulder family obligations in reality—it does not permit "the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture." *Id.* at 852.

In sum, concerns arise under the Constitution's equal protection and liberty guarantees when a law penalizes women for the roles they play in caring for children and families, whether caregiving obligations fall more heavily on women in actuality, or the law makes assumptions about dependency or inability to self-

support. The Rule is incompatible with that premise: it singles out factors that systematically disadvantage women and mothers on account of their caregiving roles, and deploys those factors to make an assumption about future dependency, defined as use of programs that mothers, more than fathers, rely on to provide for their families. This is true even if the Rule does not facially categorize on the basis of sex. The Rule's penalties operate at the intersection of gender, family, and caregiving in a way that is profoundly unequal.

CONCLUSION

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

Respectfully submitted,

Dated: January 31, 2020

/s/ Hillary Schneller
HILLARY SCHNELLER
Counsel of Record for Amicus Curiae
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3777
hschneller@reprorights.org

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 4,785 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type style.

Dated: January 31, 2020

By: /s/ Hillary Schneller
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served via electronic filing on all parties or their counsel of record in this case on January 31, 2020.

Dated: January 31, 2020

By: /s/ Hillary Schneller
Counsel for Amicus Curiae