No. 19-3169

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

COOK COUNTY, ILLINOIS, an Illinois governmental entity; and
ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC.,

Plaintiffs-Appellees,

v.

CHAD F. WOLF, in his official capacity as Acting Secretary of the U.S. Department of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; KENNETH T. CUCCINELLI, II, in his official capacity as Acting Director of United States Citizenship and Immigration Services; and UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency,

Defendants-Appellants.

On Appeal from the United States District Court, Northern District of Illinois
Case No. 1:19-cv-06334 (Hon. Gary S. Feinerman)

BRIEF OF *AMICI CURIAE* IMMIGRATION LAW PROFESSORS SUBMITTED IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN FAVOR OF AFFIRMANCE

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Dated: January 24, 2020

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Appellate Court No: 19-3169

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici are professors and scholars of immigration law who have testified, lectured, researched, written, and advocated at length regarding our nation's immigration laws, including the historical context in which those laws were enacted and how they have been interpreted over time. This brief reflects *amici*'s long-standing interest in and knowledge regarding the use of "public charge" determinations to exclude or remove noncitizens. A list of *amici* appears in the Appendix to this brief.[1]

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Starting in 1882, federal immigration law has provided for the exclusion of a noncitizen likely to become a "public charge." In the ensuing 130 years, Congress, courts and the executive branch have consistently interpreted this term to refer to persons who depend primarily on the government for financial assistance. As reflected by Congress' subsequent revisions of immigration law, numerous judicial rulings, and agency publications, public charge determinations are based on the totality of the relevant circumstances. Although some discretion is allowed in making public charge determinations given the likelihood of varying

[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici curiae* or their counsel, contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

circumstances, Congress and the courts have consistently determined that the most important consideration is whether an individual is willing and able to work. Conversely—and critical to the issue before this Court—an individual's receipt of non-cash benefits has *never* been a permissible factor relevant to a public charge finding. To the contrary, non-cash relief programs have always been a means of *preventing* a noncitizen from becoming a public charge.

The new rule issued by the Department of Homeland Security ("DHS") departs significantly from this carefully developed, long-standing meaning. As DHS admits, the rule "redefines the term 'public charge' to mean an alien who receives one or more designated 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)." Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,295 (Aug. 14, 2019). Moreover, "public benefit" is now defined to "include cash benefits for income maintenance, SNAP, most forms of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher (HCV) Program, Section 8 Project-Based Rental Assistance, and certain other forms of subsidized housing," a definition DHS expressly acknowledges to be a break from prior interpretations. *Id.* The new rule also allows a public charge finding without regard to the value of benefits received: "DHS may find an alien inadmissible under the standard, even though the alien who exceeds the duration

threshold may receive only hundreds of dollars, or less, in public benefits annually." *Id*. at 41,360-61. By declaring that the receipt of two types of benefits in a single month is somehow the receipt of benefits for a two-month period, DHS now permits a public charge finding based on non-cash benefits received over a very short duration.

As demonstrated by the legal history and context of the public charge language included in federal immigration statutes, DHS's new rule is not only arbitrary and illogical, it is contrary to existing law. Congress intended that the term "public charge" apply to those likely to depend primarily on the government for their subsistence. This intent is not only clear from the plain meaning of the act and legislators' contemporaneous statements; it is exactly how courts and prior administrations have interpreted the term for more than a century.

ARGUMENT

The Immigration and Nationality Act ("INA") requires that all noncitizens who seek to be lawfully admitted into the United States prove they are not inadmissible. 8 U.S.C. §§ 1225(a), 1361. A noncitizen may be deemed inadmissible on a number of grounds, including that he/she is "likely at any time to become a public charge." *Id*. § 1182(a)(4)(A).

The use of the term "public charge" as an exclusion category in federal immigration law dates back to 1882. Although changes have been made to this

statute since 1882, this term has remained. Consequently, the meaning of "public charge" as used in the current statute necessarily depends on the historical context and meaning ascribed to it originally and over time.[2] The relevance of judicial and administrative interpretations is also critical here because the legislative history includes discussion of those interpretations in connection with consideration of various amendments.

Set forth below is a survey of the original statute, relevant amendments, judicial construction, and agency interpretations of the term "public charge" since 1882.[3] This survey demonstrates that the term has always been intended by

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[2] *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (citation omitted); *I.N.S. v. St. Cyr*, 533 U.S. 289, 313 n.35 (2001) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.").

[3] The public charge provision has been the subject of considerable analysis and commentary, *see, e.g.*, HOUSE JUDICIARY COMM., 100TH CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT: HISTORICAL BACKGROUND AND ANALYSIS 119-25 (Comm. Print 1988), with many scholars criticizing misuse of the provision to discriminate against disadvantaged individuals, *see, e.g.*, DEIRDRE M. MOLONEY, NATIONAL INSECURITIES: IMMIGRANTS AND U.S. DEPORTATION POLICY SINCE 1882 (2012); Lisa Sun-Hee Park, *Perpetuation of Poverty through Public Charge*, 78 DEN. U. L. REV. 1161, 1172 (2001); *see also* Rebecca Kidder, *Administrative Discretion Gone Awry: The Reintroduction of the Public Charge Exclusion for HIV-Positive Refugees and Asylees*, 106 YALE L.J. 389, 422 (1996) (noting that an executive agency has no authority to make a unilateral decision to extend the scope of the public charge exclusion). Moreover, although the policy considerations underlying DHS's new rule are beyond the scope of this brief, the rule appears to ignore the substantial contributions made by immigrants throughout this country's history. As recognized by numerous legal scholars, "immigrants contribute significantly to our nation's economy and

Congress to mean a noncitizen who will depend primarily on the government for subsistence, and the receipt of non-cash benefits has never been considered relevant to this inquiry. The statutory history and case law also reflect that the public charge determination is to be made based on the totality of the relevant circumstances, with no one circumstance determinative other than long-term institutionalization or the receipt of cash benefits for income maintenance.

I. EARLY CASE LAW EMPHASIZED THAT WHETHER AN IMMIGRANT WAS WILLING AND ABLE TO WORK WAS THE KEY FACTOR IN PUBLIC CHARGE DETERMINATIONS; RECEIPT OF NON-CASH BENEFITS WAS NOT A FACTOR

Nineteenth-century dictionaries defined "charge" as "[t]he person or thing committed to another[']s custody, care or management; a trust. Thus the people of a parish are called the minister[']s charge." *E.g.*, *Charge*, WEBSTER'S DICTIONARY (1828 online ed.), https://perma.cc/T3CB-5HUT.[4] Accordingly, a "public charge" was envisioned as a person entrusted to the public for custody, care or management, *i.e.*, a person primarily dependent on the public or government for

culture, making the denial of services a marker of exploitation rather than a necessary policy choice." Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARVARD CIV. RIGHTS-CIV. LIBS. L. REV. 159, 161 (1998). "Immigrants help create jobs, contrary to the zero-sum mythology that every immigrant's job is one denied a native worker . . . . The number of jobs available is actually dynamic: as more people begin working and spending their earnings, demand for goods and services increases, requiring more labor." *Id.* at 176.

[4] This definition was repeated in the 1886 edition. *See Charge*, WEBSTER'S DICTIONARY (1886 online ed.), https://archive.org/details/webstercomplete00webs/page/218.

subsistence. It was with this backdrop that the initial immigration laws employed the term "public charge."

A. 1882 Immigration Act

The first immigration statute to include the term "public charge" as a ground for exclusion was An Act to Regulate Immigration, ch. 376, 22 Stat. 214 (1882) (the "1882 Act"). The law allowed for exclusion if the immigrant was "found, upon examination by the reviewing commission, board, or officers," to be a "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." *Id.* § 2. With respect to immigrants allowed to enter the country, however, the 1882 Act provided for "the support and relief of such immigrants . . . as may fall into distress or need public aid." *Id.* The statute imposed on each admitted noncitizen a 50-cent tax for the creation of an "immigrant fund" to be used, at least in part, "for the care of immigrants arriving in the United States [and] for the relief of such as are in distress." *Id.* § 1.

Thus, the 1882 Act expressly contemplated that some admitted immigrants were likely to receive government assistance; yet that fact did not cause them to be labeled public charges. *See Edye v. Robertson*, 112 U.S. 580, 590-91 (1884) ("That the purpose of [the 1882 Act and similar state laws] is humane, is highly beneficial to the poor and helpless immigrant, and is essential to the protection of the people in whose midst they are deposited by the steam-ships, is beyond

dispute"). Consistent with the notion that the need for some temporary relief did not render an immigrant a public charge, legislative debate on the 1882 Act noted that the public charge provision was intended to prevent foreign nations from "'send[ing] to this country blind, crippled, lunatic, and other infirm paupers, who ultimately become *life-long dependents on our public charities*.'" 13 Cong. Rec. 5066, 5108-10 (1882) (statement of Rep. Van Voorhis) (emphasis added). An early judicial decision made clear that public charge exclusion was authorized only if an immigrant was found to fall within one of the statutory categories: "The law has not authorized the commissioners, or any other officer, or this court, to say that these immigrants shall not land upon any other ground than one of the four [specified in the 1882 Act]." *In re O'Sullivan*, 31 F. 447, 448 (S.D.N.Y. 1887).

B. Immigration Act of 1891

Congress amended the law in 1891. The amended statute provided, in part:

> That the following classes of aliens shall be excluded from admission into the United States . . . : All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude [and] polygamists.

An Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens Under Contract or Agreement to Perform Labor, ch. 551, § 1, 26 Stat. 1084 (1891). The amendment added the forward-looking phrase

"persons likely to become a public charge," and included the term "paupers" in the list of excluded categories.

The 1891 amendment also provided that "any alien who becomes a public charge within one year after his arrival in the United States from causes existing prior to his landing therein shall be deemed to have come in violation of law and shall be returned . . . ." *Id.* § 11. This gave rise to a two-step analysis: (i) whether, at the time of entry, the noncitizen is likely to become a public charge, and (ii) whether, after some period of time, the noncitizen has, in fact, become a public charge due to causes that existed before he/she arrived. Although the time period applicable to the second step has grown (first to two years, then to five), this general scheme remains in place today.

An early case interpreting the 1891 amendment overturned a public charge determination involving a 40-year-old man, with 25 years of experience as a cabinet-maker and no family, who was willing and able to work, and who had not been an inmate of an almshouse or been convicted of a crime. *See In re Feinknopf*, 47 F. 447, 447-48 (E.D.N.Y. 1891). This case not only recognizes that a decisionmaker must consider the totality of circumstances in making a public charge determination, but also suggests that the term "public charge" does not automatically include persons who may need temporary assistance until employed.

Similarly, in *United States v. Lipkis*, 56 F. 427, 428 (S.D.N.Y. 1893), the court confirmed that an able-bodied man, capable of working and "likely to procure remunerative work in his trade," is not likely to become a public charge, absent some other negative factor. By contrast, the man's wife was found to have become a public charge after she "became insane, and was sent to the public insane asylum" and "was there attended to for a considerable period at the expense of the municipality." *Id.* Additional rulings from the 1890s further demonstrate that temporary relief did not make one a public charge; indeed, temporary aid was seen as a means of *preventing* one from becoming a public charge. *See, e.g.*, *Yeatman v. King*, 51 N.W. 721, 723 (N.D. 1892) (noting the "obligation" to keep those "destitute of means and credit from becoming a public charge by affording them temporary relief"); *Cicero Twp. v. Falconberry*, 42 N.E. 42, 44 (Ind. App. 1895) ("The mere fact that a person may occasionally obtain assistance from the county does not necessarily make such person a pauper or a public charge.").

C. 1903 and 1907 Immigration Acts

After inserting a semi-colon between "paupers" and "persons likely to become a public charge" in 1903, *see* An Act to Regulate the Immigration of Aliens Into the United States, ch. 1012, § 2, 32 Stat. 1213 (1903), Congress revised the statute in 1907 to exclude "persons not comprehended within any of the foregoing excluded classes who are . . . mentally or physically defective, such

mental or physical defect being of a nature which may affect the ability of such alien to earn a living." An Act to Regulate the Immigration of Aliens Into the United States, ch. 1134, § 2, 34 Stat. 898 (1907). Neither amendment affected prior interpretation, although the latter reinforced the view that the key inquiry is the immigrant's "ability . . . to earn a living."

D. *Gegiow v. Uhl*

After the act was again amended in 1910 (with no change to the public charge language), *see* An Act to Amend an Act entitled An Act to Regulate the Immigration of Aliens Into the United States, ch. 128, § 2, 36 Stat. 263 (1910), the Supreme Court addressed the public charge provision in *Gegiow v. Uhl*, 239 U.S. 3 (1915). The question presented was "whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked." *Id.* at 9-10. The immigrants at issue had been detained for deportation based on a finding that they were "bound for Portland, Oregon, where the reports of industrial conditions show that it would be impossible . . . to obtain employment." *Id.* at 8.

The Supreme Court rejected the public charge determination, explaining that "[t]he statute deals with admission to the United States, not to Portland," and noting that it "would be an amazing claim of power if commissioners decided not to admit aliens because the labor market of the United States was overstocked."

Id. at 10. The Court reasoned that, because the public charge ground for exclusion was "mentioned between paupers and professional beggars," the term should be construed as similar to those categories. *Id.* The Court then held that those likely to become public charges "are to be excluded on the ground of *permanent personal objections accompanying them* irrespective of local conditions." *Id.* (emphasis added).

Gegiow teaches that the statutory term "public charge" cannot encompass persons who have a temporary concern, such as a brief inability to support themselves. *See also Howe v. United States*, 247 F. 292, 294 (2d Cir. 1917) ("Congress meant the act to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future."). *Gegiow* also confirms the limits placed on immigration commissioners and the duty of courts to ensure that agencies responsible for implementing the immigration laws not exceed their authority:

> The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act. The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases.

239 U.S. at 9.

E. Immigration Act of 1917 and Subsequent Interpretations

Congress again amended the statute in 1917, this time moving the "public charge" reference to the end of the list of factors that can support exclusion. *See* An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29, § 3, 39 Stat. 874 (1917). The legislative history indicates that

> [t]he purpose of [moving the clause] is to overcome recent decisions of the courts limiting the meaning" of the phrase "because of its position between other descriptions ["paupers" and "professional beggars"] conceived to be of the same general and generical nature. (See especially Gegiow v. Uhl, 239 U.S., 3.).

S. Rep. No. 352, at 5 (1916). This indicates that the public charge category was not to be limited to the personal characteristics or current economic status of the immigrant, but should be based on the totality of circumstances affecting whether the individual would be able to subsist on his/her own.

Later references in the Congressional Record reinforce this conclusion. *See* 70 Cong. Rec. 3560, 3620 (1929) (stating that the phrase "persons likely to become a public charge" was shifted "in order to indicate the intention of Congress that aliens shall be excluded upon said ground for economic as well as other reasons and with a view to overcoming the decision of the Supreme Court in *Gegiow v. Uhl*, 239 U. S. 3"); *see also* 80 Cong. Rec. 5829, 5872 (1936) (same). However, courts analyzing the 1917 amendment observed that, regardless of the position

within the statutory list of "persons likely to become a public charge," this term can only be viewed rationally as "one who is to be supported at public expense by reason of poverty" or other factors. *Ex parte Mitchell*, 256 F. 229, 230-31 (N.D.N.Y. 1919) (finding that a 42-year-old nurse in good health was not a public charge because she was "able to earn her own living" and adding that mere speculation about the possibility of becoming a public charge based on factors such as illness, a house fire, or bad investments does not make one likely to become a public charge).

Similarly, the Ninth Circuit agreed that the movement of the "public charge" exclusion within the statute "does not change the meaning," and that "it is still to be held that a person 'likely to become a public charge' is one who, by reason of poverty, insanity, or disease or disability, will probably become a charge on the public." *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922) (rejecting a public charge finding as to "an able-bodied" 25-year old woman "with a fair education, with no mental or physical disability, with some knowledge of English, skilled as a seamstress and a manufacturer of artificial flowers, with a disposition to work and support herself, and having a well-to-do sister and brother-in-law, domiciled in this country, who stand ready to receive and assist her"). As the Second Circuit subsequently confirmed in another case, "it is hard to say that a healthy adult immigrant, with no previous history of pauperism, and nothing to

interfere with his chances in life but lack of savings, is likely to become a public charge within the meaning of the statute." *U.S. ex rel. De Sousa v. Day*, 22 F.2d 472, 473-74 (2d Cir. 1927).

The common principle in these post-1917 rulings is that "[a] person likely to become a public charge is one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty," with the ultimate finding depending on the relevant facts presented. *See, e.g.*, *Wallis v. U.S. ex rel. Mannara*, 273 F. 509, 511 (2d Cir. 1921) (citing *Ex parte Mitchell*, 256 F. 229 (N.D.N.Y. 1919))*; cf. U.S. ex rel Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929) (addressing the 1917 amendment and holding that a public charge finding is appropriate "where the occasion leads to the conclusion that the alien will become destitute, though generally capable of standing on his own feet"). Post-1917 opinions also consistently confirm the restrictions placed on immigration officers when making public charge determinations:

> Whatever may have been the decisions before *Gegiow* . . . , that case settled the rule that there must be some evidence to support that finding . . . . The transposition of the phrase . . . has nothing to do with that question.

U.S. ex rel. Duner v. Curran, 10 F.2d 38, 41 (2d Cir. 1925) (finding the record in that case "destitute of the slightest evidence" that the children at issue were likely to become public charges); *see also U.S. ex rel. Berman v. Curran*, 13 F.2d 96, 98

(3d Cir. 1926) (finding no evidence supporting the finding that the petitioners—children in "good health"—were likely to become public charges).

F. Board of Immigration Appeals' Test for Deportability (1948)

In 1948, the Board of Immigration Appeals ("BIA") issued an order approved by the Acting Attorney General which made clear that the acceptance of non-cash benefits, for which repayment was not owed, did not make an individual a deportable public charge:

> First, we wish to make the following preliminary observation for the purpose of clarifying the issue. *The acceptance by an alien of services provided by a State or by a subdivision of a State to its residents, services for which no specific charge is made, does not in and of itself make the alien a public charge within the meaning of the 1917 act.* To illustrate, an alien who participates, without cost to him, in an adult education program sponsored by the State does not become a public charge. Similiarly [sic] with respect to an alien child who attends public school, or alien child who takes advantage of the free-lunch program offered by schools. We could go on *ad infinitum* setting forth the countless municipal and State services which are provided to all residents, alien and citizen alike, without specific charge of the municipality or the State, and which are paid out of the general tax fund. The fact that the State or the municipality pays for the services accepted by the alien is not, then, by itself, the test of whether the alien has become a public charge. . . .

Matter of B-, 3 I. & N. Dec. 323, 324-25 (A.G. 1948) (emphasis added).[5] Federal district courts had reached similar conclusions. *See, e.g.*, *Ex parte Orzechowska*, 23 F. Supp. 428, 429 (D. Or. 1938); *Ex parte Kichmiriantz*, 283 F. 697, 698 (N.D. Cal. 1922).

Numerous other BIA decisions affirmed that immigrants should not be deemed likely to become public charges upon admission if willing and able to work. *See, e.g.*, *In re T-*, 3 I. & N. Dec. 641, 644 (BIA 1949) (a woman "quite capable of earning her own livelihood" and a boy with "considerable training in the tailoring industry" are not inadmissible as likely to become public charges); *In re C-*, 3 I. & N. Dec. 96, 97 (BIA 1947) ("no likelihood" that an immigrant "in good health and is able and willing to go to work" will become a public charge); *In re H-*, 1 I. & N. Dec. 459, 459 (BIA 1943) (overturning public charge finding for an appellant who was "steadily employed" and "in good health"); *In re R-*, 1 I. & N. Dec. 209, 210 (BIA 1942) (reversing finding that immigrant was likely to become a public charge because he had only $78 at time of arrival, where "[n]othing in the record indicates that he was not able to work"); *In re V-*, 1 I. & N. Dec. 293, 295-96 (BIA 1942) (finding that an immigrant who "can obtain employment and owns

[5] For deportation proceedings, the BIA additionally required (1) an individualized bill for charges incurred, that is (2) presented to the noncitizen (or a family member) by the government, and (3) a failure to pay. *Matter of B-*, 3 I. & N. at 326.

his own home" is not likely to become a public charge, even though currently unemployed).

G. Immigration and Nationality Act of 1952

In 1952, Congress again revised the immigration laws. The revision included among the categories of inadmissible persons:

> (15) Aliens who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges.

An Act to Revise the Laws Relating to Immigration, Naturalization, and Nationality; and for Other Purposes, Pub. L. No. 414, § 212, 66 Stat. 163, 183 (1952) ("1952 Act"). In addition to adding the phrase "at any time" to expand the time horizon for public charge determinations, the amendment also added the phrase "in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission." Thus, Congress continued to eschew bright-line rules and confirmed the existing practice of allowing reviewing officers to make public charge determinations based on the totality of circumstances.

Following the passage of the 1952 Act, the BIA, noting the "extensive judicial interpretation" of the public charge provision, observed:

> The general tenor of the holdings is that the statute requires more than a showing of a possibility that the alien will require public support. Some specific circumstance,

> such as mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present. *A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge*, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency.

Matter of Martinez-Lopez, 10 I. & N. Dec. 409, 421-22 (BIA 1962) (emphasis added) (collecting cases). The Board then held that a 22-year old man with farming experience was not likely to become a public charge, despite the fact that he spoke no English, since he would work among people who spoke Spanish. *Id.* at 411.

The BIA has consistently followed these principles. Thus, twenty years later, the BIA continued to emphasize that the public charge determination must consider "the totality of the alien's circumstances," and held that "[t]he fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge." *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974); *see also Matter of Harutunian*, 14 I. & N. Dec. 583, 588 (BIA 1974) ("[W]hile economic factors should be taken into account, the alien's physical and mental condition, *as it affects ability to earn a living*, is of major significance.") (emphasis added) (citations omitted).

II. MORE RECENTLY, CONGRESS HAS REFUSED TO ALLOW THE PUBLIC CHARGE DETERMINATION TO FOCUS ON THE RECEIPT OF NON-CASH BENEFITS

More recent iterations of the public charge statute reflect a broader Congressional concern with the number of persons who rely on the welfare system, *i.e.*, cash assistance, to survive. Yet even in the face of this concern, Congress has not altered the core meaning of "public charge" in the immigration context. Congress and the executive branch have continued to exclude the receipt of in-kind benefits from the public charge framework.

A. Immigration Act of 1990

In 1990, Congress again revised the immigration laws, listing the following grounds for exclusion:

> (1) Health-Related Grounds
> . . .
> (2) Criminal and Related Grounds
> . . .
> (3) Security and Related Grounds
> . . .
> (4) Public Charge.—Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is excludable.

Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978. This revision removed references to "paupers," "professional beggars," and "vagrants," with the Congressional Record explaining:

> The bill removes some of the antiquated and unused exclusions that have been in our law since the early 1900's, ... These relics have been replaced by one generic standard which exclude aliens who are "likely to become a public charge."

136 Cong. Rec. 36797, 36844 (1990). This reference is consistent with the long-time approach of focusing on the noncitizen's ability to work or otherwise provide for him/herself.[6]

B. 1996 Immigration Act

In 1996, Congress again revised the immigration laws, using the same public charge language employed previously, but now listing five factors that "shall at a minimum" be considered when determining whether a noncitizen is likely to become a public charge:

> (I) age;
> (II) health;
> (III) family status;
> (IV) assets, resources, and financial status; and
> (V) education and skills.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 531, 110 Stat. 3009 (hereinafter "1996 Act"). It further provides that the agency "may also consider any affidavit of support . . . ." *Id.*

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[6] As of 1990, Black's Law Dictionary defined "public charge" as "an indigent. A person whom it is necessary to support at public expense by reason of poverty alone or illness and poverty." *Public Charge*, BLACK'S LAW DICTIONARY (6th ed. 1990).

The legislative history leading to the passage of the 1996 Act indicates that a group of legislators proposed to define "public charge" in the statute as including "any alien who receives benefits described in subparagraph (D) for an aggregate period of at least 12 months" (or 36 months in the case of a battered spouse or child). 142 Cong. Rec. 24313, 24425 (1996). The benefits listed in subparagraph D (receipt of which would brand a noncitizen as a public charge) included "means-tested public benefits." Significantly, a majority of Congress refused to enact that definition, thereby leaving in place more than a century of judicial interpretation and refusing to allow an agency to use the receipt of such benefits as a basis to prevent admission to this country.[7]

Contemporaneous with the passage of the 1996 Act, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193, 110 Stat. 2105, which restricted most noncitizens from accessing many public support programs. Congress nonetheless also made clear that certain benefits would be (or would, after a time, become) available to lawful permanent residents

[7] *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983) (interpretation informed by the fact that Congress had a "prolonged and acute awareness" of an established agency interpretation of a statute, considered the precise issue, and rejected bills to overturn the prevailing interpretation); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (rejecting construction of statute that would implement substance of provision that Conference Committee rejected).

(as defined in the INA). *See, e.g.*, 8 U.S.C. §§ 1611(b), 1613(c), 1621(b).[8] Among the available benefits were public health assistance (such as medical immunizations) and programs that deliver in-kind services (such as soup kitchens, short-term shelter, and other temporary programs necessary for the protection of life or safety). *See id.* These statutes stand as powerful evidence that Congress intended lawfully present noncitizens to receive certain benefits. *Amici* respectfully submit that it strains credulity for DHS to suggest that Congress, having explicitly stated that noncitizens may receive these benefits, somehow also intended that those same noncitizens who accept the benefits will be subject to deportation as public charges.

C. 1999 INS Field Guidance

In 1999, the Immigration and Naturalization Service ("INS") published Field Guidance to assist immigration officers, immigrants, and the public in understanding public charge determinations. *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999) (the "1999 Field Guidance"). That guidance was deemed "necessary to help alleviate public confusion over the meaning of the term 'public charge' in immigration law and its relationship to the receipt of Federal, State, and local

[8] The new rule would deny admission to noncitizens based on the perceived likelihood of their accepting benefits at any time for the rest of their lives. *See* 84 Fed. Reg. at 41,501 (defining "likely at any time to become a public charge" to refer to "at any time in the future").

public benefits" and "to provide aliens with better guidance as to the types of public benefits that will and will not be considered in public charge determinations." *Id.* It "both summarizes longstanding law with respect to public charge and provides new guidance on public charge determinations in light of the recent changes in law," notably the 1996 Act and welfare reform laws. *Id.*

The notice that promulgated the 1999 Field Guidance stated that:

> 'public charge' means an alien who has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) '*primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense*.'

Id. (emphasis added). It further explained that "[i]nstitutionalization for short periods of rehabilitation does not constitute such primary dependence." *Id.* It also made clear that "officers should not place any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance with respect to determinations of admissibility or eligibility for adjustment on public charge grounds." *Id.*[9]

[9] Commentators have noted that the 1999 Field Guidance demonstrated the intent of INS and the Department of Health and Human Services to confirm that the immigration laws enacted in 1996 did not make immigrants ineligible for the Children's Health Insurance Program (CHIP), short-term Medicaid (but not nursing or other long-term care), housing subsidies, food stamps, and other non-cash assistance. *See* MOLONEY, *supra*; *see also* Park, *supra*, at 1172 (noting that the guidance "clarified public charge criterion to exclude non-cash benefits, such as Medicaid and special-purpose cash benefits that are not intended for income maintenance").

Summarizing statutory language, legal precedent and agency practice, the Field Guidance confirmed that a "totality of circumstances" test is required:

> The standard for adjudicating inadmissibility under section 212(a)(4) has been developed in several Service, BIA, and Attorney General decisions and has been codified in the Service regulations implementing the legalization provisions of the Immigration Reform and Control Act of 1986. These decisions and regulations, *and section 212(a)(4) itself*, create a "totality of the circumstances" test.
>
> * * *
>
> *The existence or absence of a particular factor should never be the sole criterion for determining if an alien is likely to become a public charge.* The determination of financial responsibility should be a prospective evaluation based on the alien's age, health, family status, assets, resources and financial status, education, and skills, among other factors.[10]

Id. at 28,690 (emphasis added) (footnotes omitted). The Field Guidance observed correctly that a compelling reason to limit the public charge definition to those receiving cash benefits is that

> certain federal, state, and local benefits are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient. Thus,

[10] The INS added that a noncitizen may be considered likely to become a public charge even if there is no legal obligation to reimburse the benefit-granting agency for the benefits or services received, in contrast to the standards for deportation, as to which the three-part *Matter of B-* test continued to apply. DHS proposes to continue using this test in the deportation context.

> participation in such non-cash programs is not evidence of poverty or dependence.

Id. at 28,692.

D. Rejection of 2013 Amendments

More recently, in 2013 the Senate rejected two proposed amendments relevant to the public charge issue. The first amendment, which sought to "expand[] the criteria for 'public charge,' such that applicants would have to show they were not likely to qualify even for non-cash employment supports such as Medicaid, the SNAP program, or [CHIP]," was rejected by voice vote. S. Rep. No. 113-40, at 42 (2013). The second amendment "would have expanded the definition of 'public charge' such that people who received non-cash health benefits could not become legal permanent residents" and "would also have denied entry to individuals whom [DHS] determines are likely to receive these types of benefits in the future." *Id*. at 63. By voice vote, this amendment also "was not agreed to . . . ." *Id.* While these rejected amendments do not have the force of law, they certainly evidence that the only body in Congress to consider the "public charge" criteria in the past few years rejected enactment of the type of rule DHS now seeks to impose.

CONCLUSION

As reflected by the statutes, legislative history, court decisions, and executive action surveyed above, the term "public charge," when used as grounds for exclusion or removal from the United States, has always been intended, interpreted, and understood to apply to persons likely to rely on the government for long-term subsistence. DHS's new rule, which allows a public charge label to be attached to noncitizens who are receiving (or may temporarily receive) in-kind benefits, is not only arbitrary and illogical, but also runs counter to how "public charge" has been understood for more than 130 years.

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CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limits established by Circuit Rule 29 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 6,485 words. *See* Fed. R. App. P. 32(g); Circuit Rule 29.

In addition, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document was prepared using Microsoft Word 2019 in Times New Roman, a proportionally spaced typeface, with the body of the brief in 14-point font and footnotes in 12-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2020, a true and correct copy of the foregoing brief was filed with the Clerk of the United States Court of Appeals for the Seventh Circuit using the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users, and service will therefore be accomplished by the appellate CM/ECF system.

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