No. 19-2222

In the United States Court of Appeals for the Fourth Circuit

Casa De Maryland, Inc., ET AL.,
Plaintiffs-Appellees,

v.

Donald J. Trump, in his official capacity as President of the United States, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Maryland

AMICUS CURIAE BRIEF OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Signature: _____ Date: December 23, 2019

Counsel for: Immigration Reform Law Institute

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CORPORATE DISCLOSURE STATEMENT

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and legal permanent residents, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir. filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 99 (B.I.A. 2016); *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010); and *In re Q- T- -- M- T-*, 21 I. & N. Dec. 639 (B.I.A. 1996).

All of the parties in this case have communicated to *amicus curiae* in writing that they consent to the filing of this brief.

RULE 29(A)(4)(E) STATEMENT

No counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

The district court erroneously interpreted "public charge."

On August 14, 2019, the U.S. Department of Homeland Security ("DHS") published its rule on Inadmissibility on Public Charge Grounds ("Rule"), 84 Fed. Reg. 41292, to guide determinations of whether an alien applying to enter or remain in the United States is "likely at any time to become a public charge" under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(4). The Rule requires, *inter alia*, examination of an alien's use of certain public benefits.

When deciding plaintiffs' motion for a preliminary injunction against DHS's enforcement of the Rule, and weighing the likelihood of plaintiffs' success on the merits, the district court asked what Congress meant when it codified "public charge."

The answer is in the term's plain meaning. It is also in Congress's statutory language. But the district court looked elsewhere. First, it looked to two non-events to define the term "public charge": 1) Congress's inaction on statutory language in 1996 and 2013; and 2) the INS's inaction on rulemaking in 1999. Second, it looked to court cases from 1915 and 1929 that have long since been superseded by statute.

The plain meaning of "public charge" controls. Congress's actual statutory language is authority superior to Congress's debates over hypothetical statutory language. DHS's actual rulemaking is authority superior to DHS's proposed rulemaking. Past inaction toward defining "public charge," and cases that have

long since been legislated into irrelevance, are not evidence of the term's statutory meaning, but merely the absence of such evidence.

Because the district court erroneously construed "public charge," the district court's decision should be reversed and the preliminary injunction against DHS's enforcement of the Rule should be lifted.

ARGUMENT

I. THE RULE IS A PERMISSIBLE CONSTRUCTION OF "PUBLIC CHARGE."

A. The Rule is consistent with the plain meaning of "public charge."

The plain meaning of "public charge" controls the term's interpretation. "The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (internal quotation marks omitted). "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). The plain, ordinary, and natural—even tautological—meaning of "public charge" is "one who produces a money charge upon, or an expense to, the public for support and care." Appellants' Brief at 31 (quoting *Public Charge*, Black's Law Dictionary (3d ed. 1933); Black's Law Dictionary (4th ed. 1951)). This meaning is not "demonstrably at odds" with Congress's intentions. *Infra* Part I.B.

B. The Rule is consistent with statutory construction of "public charge."

If the district court found the self-evident meaning of "public charge" to be inadequate, then the district court should have read "public charge" as Congress construed it. Congress declared "a compelling government interest to enact new rules . . . to assure that aliens be self-reliant" in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA" or "Welfare Reform Act"). 8 U.S.C. § 1601(5). Self-reliance, like public charge, is self-explanatory. A person who uses need-based public benefits is not self-reliant or self-sufficient. By definition, he is relying upon public benefits—or else exploiting them gratuitously.

The district court acknowledged this compelling—and clarifying—government interest in its discussion of the Welfare Reform Act. The district court cited Congress's determinations that "self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes" and "that aliens within the Nation's borders not depend on public resources to meet their needs." JA237. The district court should also have cited the Welfare Reform Act's finding that "current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable" of solving the problem that "aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates." 8 U.S.C. § 1601. Not for nothing, the final Rule notice refers to self-sufficiency about 300 times. 84 Fed.

Reg. 41292. "Congress has directly spoken to the precise question at issue," and "the court . . . must give effect to the unambiguously expressed intent of Congress," just as DHS did when issuing the Rule. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

Yet rather than give effect to this unambiguously expressed intent of Congress, the district court instead gave effect to Congress's repeated *inaction*. The court said "Congress also has rejected multiple attempts to define 'public charge' in the way that DHS now does through administrative rulemaking," citing a failed amendment to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and a failed amendment to another bill that never even became law. JA264–JA265. But "'[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.'" Appellants' Brief at 33 (quoting *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169–70 (2001)). Failed legislative proposals are not evidence of statutory meaning; rather, they are the absence of such evidence.

Congress declared that aliens' "applying for and receiving public benefits" is a problem. The Rule is a permissible solution. The district court's contrary holding would abolish the congressional mandate, not implement it.

C. The plain, statutory meaning of "public charge" supersedes century-old cases.

The district court stated that "[w]e first look to the plain language of the statute" and "[c]ourts should also look to the context of the statue [*sic*] as a whole to derive legislative intent." JA257–JA258. If the district court had done as it said, then it would have found the Rule to be consistent with the context of the statute. Instead, the district court focused on the late 1800's and several long-since superseded court cases, discounting the authority of at least five subsequent generations of statutory context. *See, e.g.*, Appellants' Brief at 18–30.

Specifically, the district court interpreted the public-charge exclusion to apply only against "life-long" conditions mentioned during "the legislative debate in 1882," such as blindness or lunacy. JA259. Then it applied a case decided under the Immigration Act of 1907, *Gegiow v. Uhl*, in which "the Supreme Court considered the question of whether someone could be denied admission to the United States as a public charge based on the conditions of local labor markets." JA259 (citing *Gegiow*, 239 U.S. 3, 9–10 (1915)). Importantly, that was the *only* holding in *Gegiow*: "The single question on this record is 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." *Gegiow*, 239 U.S. at 9. *Gegiow* does not purport to define "public charge," let alone to do so against all subsequent authority.

In any case, under *Gegiow*, public charges "are to be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions." *Gegiow*, 239 U.S. at 10. Nothing in the Rule depends upon local conditions, and that an alien will impose an ongoing charge upon the public can indeed be a "permanent personal objection" to his admission. *Gegiow* itself rebuts the district court's insistence upon "life-long" disability: the district court cites *Gegiow*'s list of "permanent personal characteristics" to include alterable qualities such as whether a person is a professional beggar or prostitute. JA259. The common thread linking these characteristics is that each of them implies a likelihood the alien will incur a burden upon the public, not that the alien is incapacitated.

What's more, *Gegiow* was superseded by statute just two years after it was decided—and superseded again, repeatedly, over the next 100 years. The district court acknowledges this and even cites a case confirming it, yet still misses the point. Congress "amended the public charge provision in the Immigration Act of 1917" to "'associate [public charge] in the law'" with an economic purpose, "'and disassociate it from the provisions . . . which are of a sanitary nature.'" JA260 (quoting H.R. Doc. No. 64-886, at 4 (Mar. 11, 1916)). Consequently, in *U.S. ex rel. Iorio v. Day*, 24 F.2d 920 (2d Cir. 1929), the Second Circuit noted that the public-charge exclusion "is certainly now intended to cover cases like *Gegiow*." 24 F.2d

at 922. The district court, however, read this supersession merely to "clarif[y] that the term public charge covers people that would become 'destitute' due to the inability to work." JA260. But that never needed clarification: destitute people unable to work are, *ipso facto*, public charges. Rather, *Iorio* clarified that the public charge exclusion even applies when "the occasion leads to the conclusion that the alien will become destitute, *though generally capable of standing on his own feet*." 34 F.2d at 922 (emphasis added). In other words, even able-bodied, able-minded people can be excluded as public charges.

Additional legislation codified after *Iorio* further clarifies "public charge" in accordance with its plain, ordinary, natural meaning. That legislation also supersedes "executive branch immigration opinions" such as *Matter of Martinez-Lopez*, 10 I & N. Dec. 409 (AG 1964), which the district court cited for the proposition that public-charge exclusion requires "more than a showing of a possibility that the alien will require public support." JA262. After *Martinez*, Congress's subsequent public-charge legislation even "provided that the mere *possibility* that an alien might obtain unreimbursed, means-tested public benefits in the future was sufficient to render that alien inadmissible on public-charge grounds, regardless of the alien's other circumstances." Appellants' Brief at 18–19.

Because the district court erroneously relied upon superseded and inapposite cases to rationalize its interpretation of "public charge," the district court arrived at

an incorrect interpretation of the term. Instead, the plain, ordinary, and natural meaning of "public charge," and the term's statutory construction over centuries, *infra* Part I.D, shows that the Rule's interpretation of "public charge" is not "demonstrably at odds with the intentions of its drafters." *Ron Pair Enters.*, 489 U.S. at 242.

D. The Rule is consistent with the historical meaning of "public charge."

The public charge rule is a simple, commonsense principle that even predates the first federal immigration statutes. "Strong sentiments opposing the immigration of paupers developed in this country long before the advent of federal immigration controls." 5 Gordon et al., *Immigration Law and Procedure*, § 63.05[2] (Rel. 164 2018). America has excluded public-charge aliens since before the United States was founded, and has consistently applied this principle across a wide range of categories. "American colonists were especially reluctant to extend a welcome to impoverished foreigners[.] Many colonies protected themselves against public charges through such measures as mandatory reporting of ship passengers, immigrant screening and exclusion upon arrival of designated 'undesirables,' and requiring bonds for potential public charges." JAMES R. EDWARDS, JR., PUBLIC CHARGE DOCTRINE: A FUNDAMENTAL PRINCIPLE OF AMERICAN IMMIGRATION POLICY 2 (Center for Immigration Studies 2001) (citing E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY,

1798–1965 (Univ. of Penn. Press, 1981)), available at https://cis.org/sites/cis.org/files/articles/2001/back701.pdf. About two hundred years later, this became the main purpose of the very first federal statutory immigration exclusion. *See* Act of March 3, 1875, 18 Stat. 477 (Page Act) (excluding convicts and sex workers, thought likely to become dependent on the public coffers for support).

Exclusion and deportation statutes using the term "public charge" have been on the books for over 137 years, ever since the first comprehensive federal immigration law included a bar against the admission of "any person unable to take care of himself or herself without becoming a public charge." Immigration Act of 1882, 22 Stat. 214 (August 3, 1882). Congress continued to expand its exclusion of aliens who were public charges through the Progressive Era. *See, e.g.*, Act of March 3, 1891, 26 Stat. 1084 (excluding "paupers"); 1903 Amendments, 32 Stat. 1213 (excluding "professional beggars"); Act of February 5, 1917, 39 Stat. 874 (excluding "vagrants").

Acceptance of a bond promising, in consideration for an alien's admission, that he will not become a public charge was authorized in 1903, reflecting earlier administrative practice. Act of March 3, 1903, Sec. 26; 32 Stat. 1220. The essential elements of the current immigration bond provision, § 213 of the INA, have thus been in the law since 1907. *See* Act of February 20, 1907, § 26, 34 Stat. 907.

By 1990, the INA contained three separate exclusion grounds, which barred aliens who: (a) were "likely to become a public charge"; (b) were "paupers, professional beggars, [or] vagrants"; or (c) suffered from a disease or condition that affected their ability to earn a living. Former INA §§ 212(a)(7), (8), and (15). The Immigration Act of 1990 deleted the second and third grounds. § 601(a). By classifying economic undesirability, indigence, and disability under the remaining public charge ground, Congress intended to improve enforcement efficiency by eliminating obsolete terminology. Gordon, *supra* at § 63.05[4].

Public discontent over aliens' increasing use of public benefits and welfare programs culminated in passage of the Personal Responsibility and Work Opportunity Act of 1996 ("PRWORA" or "Welfare Reform Act"), P.L. 104-193. The Welfare Reform Act enacted definitive statements of national policy regarding non-citizen access to taxpayer-funded resources and benefits. There, Congress determined that "[a]liens generally should not depend on public resources to meet their needs," and that "the availability of public benefits should not constitute an incentive for immigration to the United States." 8 U.S.C. § 1601(2).

Congress's exclusion of aliens from public benefits programs is a "compelling government interest." "It is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. §

1601(5). Consistent with this unambiguous policy, the Welfare Reform Act defined "state or local public benefits" in very broad terms. 8 U.S.C. § 1621(c).

While the Act allowed both qualified and non-qualified aliens to receive certain benefits, such as emergency benefits (all aliens) and the Supplemental Nutrition Assistance Program (qualified alien children), Congress did *not* exempt receipt of such benefits from consideration for INA § 212(a)(4) public charge purposes. "This change in law is intended to insure that the affidavits of support are legally binding and sponsors—rather than taxpayers—are responsible for providing emergency financial assistance during the entire period between an alien's entry into the United States and the date upon which the alien becomes a U.S. citizen." Report of Comm. on Economic and Educational Opportunities, H.R. Rep. (Conference Report) No. 104-75, at 46 (Mar. 10, 1995).

Later, Congress also enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), P.L. 104-108 (Sept. 30, 1996). IIRIRA codified the five minimum factors that must be considered when making public charge determinations, 8 U.S.C. § 1182(a)(4)(B), and authorized consular and immigration officers to consider an enforceable affidavit of support as a sixth admissibility factor, making it a mandatory factor for most family based immigration. 8 U.S.C. § 1182(a)(4)(C); 8 U.S.C. § 1183a.

IIRIRA legislative history states that these amendments were designed to further expand the scope of the public charge ground for inadmissibility. H.R. Report (Conference Report) No. 104-828 at 240–41 (1996). This intent was behind Congress's mandate that *both* receipt of past benefits or dependence on public funds *and* the prospective likelihood that such dependence would occur should be considered. To comply with the Welfare Reform Act, the Department of State developed a Public Charge Lookout System ("PCLS") to identify and seek repayment of Medicaid benefits consumed during prior visits to the United States. It used this system to identify prior Medicaid and Aid to Families with Dependent Children payments to immigrant visa applicants for use in public charge determinations.

Significantly, the PCLS did not distinguish between cash support benefits such as Supplemental Security Income ("SSI") and Temporary Assistance for Needy Families ("TANF"), versus non-cash benefits such as Medicaid. Ten states were reported to have executed formal memoranda of understanding with consular posts regarding exchange of both cash and non-cash public benefits for public charge determination uses, at the encouragement of the State Department. Reported benefits typically included non-emergency Medicaid-covered benefits such as prenatal and childbirth expenses. *Affidavits of Support and Sponsorship*

Regulations: A Practitioners Guide, (CLINIC June 1999) (citing Department of State Cable No. 97-State-196108 (May 27, 1997)).

The PCLS was never restrained by the courts. It operated effectively until late 1997. But, under pressure from the "FIX 96" campaign by interest groups seeking to roll back IIRIRA enforcement, the Department of Health and Human Services ("HHS") and other agencies terminated cooperative reporting agreements with consular officers and INS inspection and adjudication personnel. *See* Department of State Cable No. 97-State-228462 (December 6, 1997); Letters from HHS to state Medicaid and TANF directors (December 17, 1997); Memorandum from Paul Virtue, INS Associate Commissioner for Programs (December 17, 1997).

* * *

In short, the Rule is a permissible construction of "public charge" according to the term's plain meaning, statutory construction, and history.

II. THE IMMIGRATION AND NATURALIZATION SERVICE'S FIELD GUIDANCE OF 1999 IS AN ARBITRARY INTERPRETATION OF "PUBLIC CHARGE."

Just as the district court erroneously imbued Congress's inaction with interpretive authority, it also erroneously vested the inaction of a rulemaking agency with such power. In 1999, the Immigration and Naturalization Service ("INS") proposed, but never finalized, a relaxed interpretation of the public charge rule. As part of that effort, INS published an accompanying administrative

documentation, the "field guidance." *Field Guidance on Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999). This 1999 notice of proposed rulemaking ("NPRM"), and its accompanying field guidance, never resulted in a final rule. And it was never subject to notice and comment under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553.

Nonetheless, the district court treated this non-rule as authority superior to DHS's actual Rule. "Although the 1999 Proposed Rule was never finalized, the 1999 Field Guidance has governed public charge admissibility determinations since that time," JA239, and the field guidance "affirms" the public charge rule's "history and case law." JA266. But whether the field guidance is a rule or a non-rule, the field guidance deviated from the plain and conventional meaning of the term "public charge." The 1999 proposed rulemaking and its accompanying field guidance advanced a novel meaning of public charge as "the likelihood of a foreign national becoming primarily dependent on the government for subsistence, as demonstrated by either: [a] receipt of public cash assistance for income maintenance; or [b] institutionalization for long-term care at government expense." 83 Fed. Reg. 51133 (quoting proposed 8 C.F.R. § 212.102 (1999)). Even a cursory comparison with the controlling statutory policies and provisions summarized above, *supra* Part I, shows that the 1999 proposal was arbitrary.

This proposed rule was suggested under two controversial theories. First, the INS claimed the new rule implemented a policy favoring access to non-cash entitlements, in particular health care. The INS policy justification in the 1999 NPRM asserted that the provision of public benefits other than Supplemental Security Income, general relief, and long-term institutionalization to aliens "serve[s] important public interests." 64 Fed. Reg. at 28676. Yet the INS's claim directly contradicts Congress's statutory policy that aliens should be excluded from eligibility for means-tested benefits, regardless of whether these benefits are "subsistence" or "supplementary" in nature. 8 U.S.C. § 1601 *et seq*.

The plain language of the Welfare Reform Act, and the IIRIRA requirement of an enforceable affidavit of support for § 213A alien applicants for admission or adjustment of status, presumptively disqualified immigrant aliens from access to all "means-tested public benefits" for a lengthy period. The Welfare Reform Act did not distinguish between cash versus non-cash, or subsistence versus supplemental benefits. "Federal benefits" denied to non-qualified aliens under the Act included both non-cash and earned benefits such as heath, disability, public housing, food assistance, unemployment benefits, and "any other similar benefit for which payments or assistance are provided . . . by an agency of the United States." 8 U.S.C. § 1611(c)(1). Other than "qualified aliens," noncitizens were made ineligible for any "means-tested benefit," including food stamps. Only

emergency medical care, public health assistance for communicable diseases, and short-term "soup kitchen"-type relief were expected. 8 U.S.C. § 1611(b)(1).

Under IIRIRA, the income and resources of aliens who require an affidavit of support as a condition of admissibility are deemed to include the income and resources of the sponsor whenever the alien applies or reapplies for any means-tested public benefits program, without regard to whether the benefit is provided in cash, kind, or services, 8 U.S.C. § 1631(a), (c), although certain exceptions apply for battered spouses and children, 8 U.S.C. § 1631(f).

The INS's second theory was that a lack of precedential statutes or cases allowed the INS to define "public charge" narrowly. So the INS selected a single one of many dictionary meanings for "charge." This created, administratively, a new substantive legal meaning for the term "public charge." 64 Fed. Reg. at 28677. For example, the field guidance interpreted its proposed rule to (1) ban consular officers and INS adjudicators from requiring or even suggesting that aliens, as a condition of reentry or adjustment of status to permanent legal resident, repay any benefits previously received, (2) disregard continued cash payments under the TANF program, on the theory that they are "supplemental assistance" and not "income-maintenance" cash payments, and (3) disregard the receipt of cash income maintenance benefits by a family member unless the payments are the "sole means of support" for that family. 64 Fed. Reg. 28689 (May 26, 1999).

This approach violated basic principles of statutory interpretation, which strongly favor the longstanding meaning of "public charge" over the INS's novel definition. Where a term not expressly defined in a federal statute has acquired an accepted meaning elsewhere in law, the term must be accorded that accepted meaning. *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990) ("But where a phrase in a statute appears to have become a term of art . . . any attempt to break down the term into its constituent words is not apt to illuminate its meaning."). This is particularly true where an ordinary or natural meaning exists independent of a statutory definition, as was the case in the 1999 proposed rulemaking. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("The term . . . is not defined in the Act. In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning."). And the argument that there is a "public interest" in obtaining welfare benefits was since rejected in relevant litigation over prenatal care for illegal alien women. *Lewis v. Thompson*, 252 F.3d 567, 579–582 (2d Cir. 2001) (finding "a clear congressional intent to deny federally-sponsored prenatal care to unqualified aliens").

Unlike the field guidance, the Rule is justified by the APA process that preceded it, and by unambiguous direction from Congress. This Court should reject the district court's suggestion that the field guidance is authoritative against the Rule.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the preliminary injunction against DHS's enforcement of the Rule should be vacated.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,079 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 23, 2019.

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