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
No. 8:19-cv-02715-PWG
Hon. Paul W. Grimm

BRIEF OF UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

Robert M. Loeb
Thomas M. Bondy
Peter E. Davis*
Emily Green
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

Douglas N. Letter
General Counsel
Todd B. Tatelman
Principal Deputy General Counsel
Megan Barbero
Josephine Morse
Adam A. Grogg
William E. Havemann
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, DC 20515
(202) 225-9700

Counsel for Amicus Curiae

[*Additional Counsel Listed on Inside Cover*]

Rene Kathawala
Jessica Edmundson
Allison Epperson
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

M. Todd Scott
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

* Admitted only in California and practicing law in the District of Columbia pending admission to the D.C. Bar under supervision of Orrick attorneys admitted in the District of Columbia.

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INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae, the United States House of Representatives,[2] respectfully submits this brief because of its interest in ensuring that immigrants to our Nation are accorded the rights to which the immigration laws entitle them. The Constitution empowers the Legislative Branch to "establish a uniform Rule of Naturalization." Art. I, sec. 8. The formulation of "[p]olicies pertaining to the entry of [noncitizens] and their right to remain here … is entrusted exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954).

For more than 100 years, courts and the Executive Branch have understood the "public charge" provision of our Nation's immigration laws to apply to individuals who are likely to become primarily dependent upon public assistance for a significant period. Congress preserved that long-established meaning when it reenacted the public-charge provision without material change in 1996. Congress has an important

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(e), the House certifies that no counsel for a party authored the brief in whole or in part, and no person or entity other than the House and its counsel made a monetary contribution intended to fund the preparation or submission of the brief. All parties consented to the filing of this brief.

[2] The Bipartisan Legal Advisory Group (BLAG) of the United States House of Representatives has authorized the filing of an *amicus* brief in this matter. The BLAG comprises the Honorable Nancy Pelosi, Speaker of the House, the Honorable Steny H. Hoyer, Majority Leader, the Honorable James E. Clyburn, Majority Whip, the Honorable Kevin McCarthy, Republican Leader, and the Honorable Steve Scalise, Republican Whip, and "speaks for, and articulates the institutional position of, the House in all litigation matters." Rules of the U.S. House of Representatives (116th Cong.), Rule II.8(b), https://perma.cc/M25F-496H. The Republican Leader and Republican Whip dissented.

interest in preserving its ability to reenact a statutory term, against the backdrop of that term's settled meaning, without the risk that an administration dissatisfied with Congress's policy judgment will later seek to give the term a meaning that Congress has already rejected.

INTRODUCTION AND SUMMARY

Since 1882, Congress has directed that non-U.S. citizens likely to become "public charges" may not settle in the United States. During that time, the courts and the Executive Branch have consistently construed this provision as limited to persons likely to become primarily dependent on the government for a significant period. Congress affirmed this long-established understanding of the term when it reenacted the public-charge provision without material change in 1996. The current version of the provision once more denies admission and adjustment of status to permanent residency to persons "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). At the same time, in a closely related provision, Congress considered and rejected an effort to broaden the definition of "public charge" to include noncitizens who receive small amounts of widely available government benefits.

The Trump Administration now seeks to broaden—dramatically—the scope of the "public charge" provision. On August 14, 2019, the Department of Homeland Security (DHS) issued a rule redefining "public charge" to refer to persons likely at any time to receive certain government benefits—including in-kind benefits like food stamps, Medicaid, and federal housing assistance—for more than 12 months in the aggregate within any three-year period. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,295 (Public Charge Rule). Because the class of noncitizens who may obtain these benefits at some point in their lifetimes is potentially vast, the new DHS rule—which applies to noncitizens seeking to enter the United States or

become lawful permanent residents—would overhaul the Nation's immigration system, seizing on a previously narrow exclusion to substantially limit the class of individuals who may settle here.

DHS may not substitute its own policy judgment for Congress's in this way. When Congress reenacted the public-charge provision without material change in 1996, it legislated against the backdrop of a settled century-old understanding of "public charge" as limited to noncitizens who primarily depend on the government over the long term. Courts must presume that Congress intended to ratify that long-established meaning when it reenacted the provision without changing it. *See Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 633-34 (2019).

The district court correctly held that DHS's new rule deviates from the longstanding understanding of "public charge" in fundamental respects. For the first time ever, DHS seeks to consider in its public-charge determination not just a noncitizen's receipt of cash benefits for income maintenance, but also the receipt of in-kind benefits like food stamps, Medicaid, and affordable housing—even though acceptance of such benefits does not make a noncitizen primarily dependent upon the government. For the first time ever, a noncitizen deemed likely at any point in the future to collect no more than 50 cents of government assistance a day for just over one year—for a total of less than $200 in benefits—would be considered a "public charge." And for the first time ever, immigration officers are directed to consider a noncitizen's lack of English proficiency as evidence that he or she is likely to become

a "public charge." These changes cannot be reconciled with Congress's intent when it reenacted the provision in 1996—particularly given that Congress in 1996 *rejected* efforts to broaden a related provision to encompass noncitizens likely to obtain these government benefits.

The district court's injunction should separately be upheld because the new DHS rule would be impossible to apply rationally or fairly. The rule would require immigration officers to make predictive judgments about whether noncitizens are likely far in the future to collect *de minimis* amounts of public benefits for even short periods. This inquiry would provide officers with essentially unchecked authority to exclude prospective immigrants, and it would substantially increase the danger of arbitrary and discriminatory enforcement. It would also leave noncitizens in the dark about how they could possibly satisfy this standard, and it would deter them from seeking benefits to which Congress entitled them. DHS's new rule would replace the century-old understanding of "public charge" with a harmful regime that cannot be intelligibly applied.

ARGUMENT

I. DHS'S NEW UNDERSTANDING OF "PUBLIC CHARGE" DEPARTS FROM THAT TERM'S LONGSTANDING AND SETTLED MEANING.

A. The Term "Public Charge" Has Always Referred To A Person Primarily Dependent On The Government For A Significant Period.

The term "public charge" has always referred to persons likely to become primarily dependent on the government over the long term. In the more than 100 years since the public-charge provision was enacted, both the courts and the Executive Branch have understood the term consistent with that long-established understanding.

1. Congress first used the phrase "public charge" in the Immigration Act of 1882, the Nation's original immigration law. The 1882 Act provided that "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge … shall not be permitted to land [in the United States]." Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214.

The text of the 1882 statute establishes that "public charge" referred to persons primarily dependent on the government. When the provision was enacted, Webster's Dictionary defined a "charge" as a "person or thing committed to another's custody, care or management." Webster's American Dictionary of the English Language (1st ed. 1828); *accord* Webster's New International Dictionary (1st ed. 1890). A "*public* charge," therefore, at the time was understood to refer to someone committed to the

custody or care of the government. By definition, one who is committed to government custody or management relies on the public for support—*i.e.*, he or she is primarily dependent on the government.

Other features of the 1882 Act confirm that "public charge" requires a showing of primary dependency and that the dependency must be more than temporary. A different provision of the 1882 Act created an "immigrant fund" to be "used … for the care of immigrants arriving in the United States, for the relief of such as are in distress," and commanded the Treasury Secretary to "provide for the support and relief of such immigrants therein landing as may fall into distress or need public aid." §§ 1-2, 22 Stat. at 214. In establishing a fund for their support, the statute necessarily contemplated that the United States would admit distressed immigrants needing public aid. The public-charge provision therefore could not have excluded immigrants simply because they might collect some government benefits.

Historical context reinforces this understanding. Congress modeled the original public-charge restriction on state laws directed at "exceptionally impoverished and destitute persons." Hidetaka Hirota, *Expelling the Poor* 33, 68 (2016); *see, e.g.*, Act of May 5, 1847, ch. 195, § 3, 1847 N.Y. Laws 451. Courts explained that the provisions required proof that individuals would be "unable to maintain themselves … by reason of some permanent disability." *City of Boston v. Capen*, 61 Mass. 116, 122 (1851). Courts also required proof that the person would "become a *heavy* and *long continued* charge to the [public]." *Id.* (emphases added). And courts recognized that

the "mere fact that a person may occasionally obtain assistance from the county does not necessarily make such person … a public charge." *Twp. of Cicero v. Falconberry*, 42 N.E. 42, 44 (Ind. App. 1895).

Thus, in *Gegiow v. Uhl*, 239 U.S. 3 (1915), the Supreme Court held as a matter of law that the public-charge provision did not apply in a case involving immigrants who had little money, did not speak English, and would be unable to find employment in their chosen destination city. *Id.* at 8-10. To be a "public charge," the Court concluded, a person must be "excluded on the ground of permanent personal objections." *Id.* at 10. That the immigrants would not find a job in their destination did not make them "public charges." *Id.*

2. In 1917, Congress amended the public-charge provision, moving its location within the statute, but courts and the Executive Branch continued to recognize that the amended provision applied only to persons likely to become primarily dependent on the government for significant periods. *See* Immigration Act of February 5, 1917, ch. 29, § 3, 39 Stat. 874, 876.

In *Ex parte Hosaye Sakaguchi*, 277 F. 913 (9th Cir. 1922), the court explained that the 1917 Amendment "does not change the meaning that should be given [public charge]." *Id.* at 916. The Ninth Circuit thus ruled that "the words 'likely to become a public charge' … exclude only those persons who are likely to become occupants of almshouses for want of means with which to support themselves in the future." *Ng Fung Ho v. White*, 266 F. 765, 769 (9th Cir. 1920). Other courts also continued to read

"public charge" to refer to "a condition of dependence on the public for support." *Coykendall v. Skrmetta*, 22 F.2d 120, 121 (5th Cir. 1927); *accord United States ex rel. Mantler v. Comm'r of Immigration*, 3 F.2d 234, 235-36 (2d Cir. 1924) (refusing to deem noncitizen "public charge" based on "conjecture or speculation"). The Executive Branch applied the provision similarly. *See Matter of T-*, 3 I. & N. Dec. 641, 644 (BIA 1949) (noncitizens in good health and "capable of earning [] livelihood" not likely to become "public charges").

3. In 1952, Congress enacted the Immigration and Nationality Act (INA), which overhauled the Nation's immigration laws, but retained the "public charge" provision. Pub. L. No. 82-414, ch. 2, § 211, 66 Stat. 163, 183. The INA continued to make inadmissible noncitizens who are "likely to become public charges," and further clarified that this judgment was to be made "in the opinion of" the relevant immigration official. *Id.* As before, the provision was understood to apply only to noncitizens considered likely to become primarily dependent on the government over the long term.

In 1964, the Attorney General issued a precedential decision holding that the public-charge provision "requires more than a showing of a possibility that the [noncitizen] will require public support." *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (A.G. 1964). The Attorney General explained that "[s]ome 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." *Id.* And the Attorney General concluded that "[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." *Id.* at 421-22.

Later opinions by the Board of Immigration Appeals (BIA) reaffirmed the settled understanding that the public-charge determination principally turns on a noncitizen's "physical and mental condition, as it affects ability to earn a living," rather than on the prospect that the noncitizen may temporarily receive small amounts of government aid. *Matter of Harutunian*, 14 I. & N. Dec. 583, 588 (BIA 1974). Hence, a noncitizen could not be excluded on public-charge grounds given that she "has now joined the work force, that she is young, and that she has no physical or mental defects which might affect her earning capacity." *Matter of A-*, 19 I. & N. Dec. 867, 870 (BIA 1988). By contrast, a noncitizen "who is incapable of earning a livelihood, who does not have sufficient funds in the United States for his support, and has no person in the United States willing and able to assure that he will not need public support" would be "excludable as likely to become a public charge." *Matter of Harutunian*, 14 I. & N. Dec. at 589-90.

Summarizing the state of the law in 1999, the Immigration and Naturalization Service (INS) understood "public charge" to refer to a noncitizen who has become "primarily dependent on the Government for subsistence, as demonstrated by either

the receipt of public cash assistance for income maintenance or institutionalization for long-term care at Government expense." Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,677 (proposed May 26. 1999) (INS Field Guidance). INS reasoned that the plain meaning of the term "public charge" "suggests a complete, or nearly complete, dependence on the Government rather than the mere receipt of some lesser level of financial support." *Id.* And INS explained that this understanding of "public charge" "is consistent with" a century of public-charge precedents. *Id.*

B. Congress Legislated Against The Backdrop Of The Long-Settled Meaning Of "Public Charge" When It Reenacted The Provision.

When Congress reenacted the public-charge provision without material change in 1996, Congress intended to retain the established judicial and administrative understanding of that statutory term.

1. Congress passed the latest public-charge provision as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). *See* Pub. L. No. 104-208, 110 Stat. 3009. IIRIRA made substantial reforms to the Nation's immigration scheme, but it retained the public-charge provision materially unchanged. Like its predecessor, IIRIRA provided that a noncitizen is inadmissible if, "in the opinion of" the relevant immigration official, the noncitizen "is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A).

Congress in considering IIRIRA rejected a proposal to amend the public-charge provision addressing deportation to include noncitizens who temporarily receive supplemental public benefits. A prior version of the bill would have defined "public charge" to permit deportation if a noncitizen "received Federal public benefits for an aggregate of 12 months over a period of 7 years." 142 Cong. Rec. S11872, S11882 (daily ed. Sept. 30, 1996) (statement of Sen. Kyl). But this provision was removed under threat of veto. *Id.* at S11881-82.

In 2013, Congress again rejected an attempt to expand the public-charge provision beyond its long-established meaning to encompass receipt of supplemental public benefits. Then-Senator Jeff Sessions introduced an amendment that would have "expand[ed] the criteria for 'public charge,'" requiring noncitizens "to show they were not likely to qualify even for non-cash employment supports such as Medicaid, the SNAP program, or the Children's Health Insurance Program (CHIP)." S. Rep. No. 113-40, at 42 (2013). This proposal would have meant that "people who received non-cash health benefits could not become legal permanent residents," and that individuals who are "likely to receive these types of benefits in the future" would be "denied entry." *Id.* at 63. The amendment was rejected by voice vote. *Id.*

2. Where, as here, "a word or phrase has been … given a uniform interpretation by inferior courts or the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012).

Congress must be able to rely on the settled meaning of a statutory term without the risk that an Executive Branch dissatisfied with Congress's policy choices will later attempt to redefine the term to mean something entirely different.

The Supreme Court has repeatedly held that when Congress reenacts a statutory phrase that has received a settled judicial interpretation, Congress is presumed to have ratified that interpretation. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009). Faced with settled precedent regarding the meaning of a statutory phrase, the Court recently emphasized that it "presume[s] that when Congress reenacted the same language in the [new statute], it adopted the earlier judicial construction of that phrase." *Helsinn*, 139 S. Ct. at 633-34. And the Court has explained that Congress's decision to amend a statute "while still adhering to the operative language" in a provision "is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals" interpreting that provision. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015).

A similar presumption applies when Congress reenacts a statutory phrase that has received an authoritative interpretation by the relevant Executive Branch agency. Agency "regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Helvering v. Winmill*, 305 U.S. 79, 83 (1938). Precedential decisions issued by the BIA and Attorney General

provide authoritative administrative interpretations of the immigration laws. *See* 8 C.F.R. 1003.1(g)(1).

These presumptions apply with particular force where Congress has rejected efforts to modify the term at issue. "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." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). In one case, for example, the Supreme Court was tasked with interpreting a statutory term after Congress had considered and rejected a proposal to add a clause that would have modified the term. *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). The Court explained that Congress's "action strongly militates against a judgment that Congress intended a result that it expressly declined to enact"—particularly because "the courts in nearly four decades of litigation have interpreted the statute in a manner" that would be inconsistent with that result. *Id.*

These principles leave no doubt that Congress preserved the long-established meaning of "public charge" when it reenacted that term without change in IIRIRA. In drafting, debating, and enacting IIRIRA, Congress legislated against the backdrop of a uniform body of law holding that the provision "requires more than a showing of a possibility that the [noncitizen] will require public support" and that "[a] healthy person in the prime of life cannot ordinarily be considered likely to become a public charge." *Matter of Martinez-Lopez*, 10 I. & N. Dec. at 421. And Congress considered

and rejected a proposal to expand the public-charge provision governing deportation to cover a noncitizen's temporary receipt of benefits—compelling evidence that it did not intend to achieve that result.

3. Congress's decision to retain the longstanding meaning of "public charge" is confirmed by several other amendments Congress made to the public benefits laws and to the INA in 1996. One month before it passed IIRIRA, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104–193, 110 Stat. 2105 (1996) (PRWORA), which overhauled key aspects of the Nation's federal benefits programs. PRWORA provided that lawful permanent residents could collect public benefits like food stamps and Medicaid after they had lived in the United States for five years. *Id.*, § 403, 110 Stat. at 2265 (codified at 8 U.S.C. § 1613). In addition, the Act made affidavits of support submitted by an immigration sponsor, in support of a noncitizen's application for lawful permanent residency, legally enforceable. *Id.*, § 423, 110 Stat. at 2271 (codified at 8 U.S.C. § 1183a). Then, in IIRIRA, Congress amended the INA to require most immigrants to obtain affidavits of support from sponsors. Pub. L. No. 104-208, § 531(a), 110 Stat. at 3009-674 (codified at 8 U.S.C. § 1182(a)(4)(C)-(D)).

These changes underscore Congress's codification of the long-settled meaning of "public charge." Congress expressly authorized immigrants to collect federal benefits and required sponsors to reimburse the government for receipt of these benefits under some circumstances. Congress therefore contemplated that

immigrants, at least after the five-year initial period, would collect federal benefits. It addressed its concerns about immigrant self-sufficiency not by excluding all immigrants who might collect benefits, but instead by enacting a detailed scheme that limited their eligibility for a defined period and required reimbursement upon the government's request.

C. DHS's New Rule Impermissibly Departs From The Long-Settled Understanding Of "Public Charge."

1. DHS's new rule transforms the public-charge provision. DHS now defines "public charge" for purposes of admissibility to mean a person who, according to the relevant immigration official, is likely to collect more than 12 months of certain public benefits in the aggregate during a 36-month period. Public Charge Rule at 41,295. Under the new rule, qualifying benefits for the first time include in-kind assistance like food stamps (now known as the Supplemental Nutrition Assistance Program, or SNAP), Medicaid, and federal housing assistance. *Id.* Multiple benefits received in a single month count as multiple months of benefits. *Id.* And immigration officials for the first time must consider English proficiency in making the public-charge determination. *Id.* at 41,503-04.

It is difficult to overstate the significance of this transformation. Less than two percent of noncitizens receive the cash benefits that could trigger a public-charge determination under the meaning of that term that has governed for a century. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,193 (proposed

Oct. 10, 2018). But the new DHS rule requires immigration officers to predict whether at any time in the future a noncitizen is likely to collect *de minimis* amounts of public benefits that are widely used. The new rule could therefore increase the number of noncitizens deemed inadmissible on public-charge grounds by orders of magnitude. "[*A*]*bout half of all U.S.-born citizens*" at some point participate in the benefits programs considered in DHS's new rule.[3] Thus, under the new rule, a noncitizen would be admissible only if she was deemed "'more likely than not' to resemble, over her entire lifetime, the more affluent half of the U.S.-born population." Answering Br. 25 (quoting Public Charge Rule at 41,501).

The DHS rule would overhaul the Nation's immigration system, seizing on a previously narrow exclusion to impose a new and dramatic limit on the class of individuals seeking to enter the United States or become lawful permanent residents. That is not a decision Congress authorized DHS to make. To the contrary, Congress twice considered and rejected an expanded definition of "public charge" similar to the definition that DHS now seeks to enact administratively. The Executive Branch cannot accomplish by regulation what the Legislative Branch rejected by legislation. "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems

[3] Danilo Trisi, *Administration's Public Charge Rules Would Close the Door to U.S. to Immigrants Without Substantial Means*, Ctr. Budget & Policy Priorities (Nov. 11, 2019), https://tinyurl.com/ur8d7xy.

and preferences." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). "Until it exercises that power, the people may rely on the original meaning of the written law." *Id.*

2. The DHS rule departs from the long-established understanding of the term "public charge" in at least four respects.

In-Kind Benefits. Congress reenacted the public-charge provision against the backdrop of an understanding that the public-charge determination could be triggered only by a likelihood of receiving benefits associated with primary dependence on the government, like cash assistance or long-term institutionalization. The new DHS rule departs from this understanding, making noncitizens inadmissible on public-charge grounds if they are likely to receive minimal in-kind benefits.

Individuals who receive these benefits often do not depend on them for subsistence. The in-kind benefits in DHS's rule—SNAP, Medicaid, and housing assistance—reflect Congress's policy judgment that individuals should have access to nutritious food, medical care, and affordable housing. *See* 7 U.S.C. § 2011; 42 U.S.C. § 1396-1; 42 U.S.C. § 1437(a)(1). The programs are not exclusively available to the poor. SNAP benefits are generally available to individuals with incomes up to 130% of the federal poverty line. *See* 7 C.F.R. § 273.9(a)(1). Many states have expanded Medicaid to persons with incomes up to 138% of the poverty line. *See* 42 U.S.C. § 1396a(a)(10)(i), (*l*). And affordable housing assistance is in many geographical areas available to persons who earn incomes that place them substantially above the poverty

line. 42 U.S.C. § 1437f(o)(4); *id.* § 1437a(b)(2)(B) (families eligible if they earn 50% of area median income or less). Individuals who receive these benefits would not be destitute without them, but may accept them anyway because Congress has made a policy choice to provide them free of cost.

Primary Dependence. As explained above, prior to the DHS rule, the term "public charge" had always been understood to "suggest[] a complete, or nearly complete, dependence on the Government rather than the mere receipt of some lesser level of financial support." INS Field Guidance at 28,677. But the DHS rule treats as "public charges" individuals likely to receive any amount of benefits, no matter how small, including individuals who are fully employed and living above the poverty line.

Individuals who obtain small amounts of in-kind benefits do not primarily depend on those benefits. Consider a recipient of SNAP benefits. As its name suggests, SNAP *supplements* an individual's ability to obtain nutritious food. *See* 7 U.S.C. § 2011. In 2018, the average SNAP recipient received just $1.39 per meal—or $127 per month.[4] Some individuals at the higher end of income eligibility for SNAP could receive as little as 20 cents per day—about $6 per month. *See City & Cty. of San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1099 (N.D. Cal. 2019). Most SNAP recipients who can work do so, and many are subject to work requirements as a

[4] *Policy Basics: The Supplemental Nutrition Assistance Program*, Ctr. Budget & Policy Priorities (June 25, 2019), https://tinyurl.com/yx7dh4v5 (CBPP SNAP Basics).

condition of receiving benefits. *See* CBPP SNAP Basics. Such an individual is not a "public charge" under any reasonable understanding of the term.

Long-Term Dependence. Prior to the DHS rule, the term "public charge" required a showing that the noncitizen would depend on the government for a significant period. The BIA recognized that there "may be circumstances beyond the control of the [noncitizen] which temporarily prevent [a noncitizen] from joining the work force"—such as if the noncitizen is "unable to find a job"—and that this temporary inability to find work would not necessarily make the noncitizen a "public charge." *Matter of A-*, 19 I. & N. Dec. 870. But the new DHS rule would deem noncitizens "public charges" if they receive benefits for only a few months.

The DHS rule covers any noncitizen likely to receive more than 12 months of benefits in any three-year period, and it counts a noncitizen's receipt of multiple benefits in one month as multiple months of benefits. Thus, an individual would be excluded under the public-charge provision if she were deemed likely to receive SNAP, Medicaid, and housing assistance for more than four months spread over any three-year period for the rest of her life. Construing such a short-term receipt of benefits to trigger a public-charge finding departs from the long-settled meaning of "public charge" that Congress intended to reenact.

English Proficiency. The DHS rule for the first time provides that a noncitizen's lack of English proficiency will be weighed negatively as part of the "public charge" analysis. Public Charge Rule at 41,503-04.

No historical precedent exists for considering English proficiency in this way. To the contrary, courts have routinely rejected claims that an individual's lack of English proficiency makes him or her likely to become a "public charge." In *Gegiow*, for example, the Court dismissed arguments that Russian immigrants who lacked knowledge of English were likely to become "public charges." 239 U.S. at 8. In *Matter of Martinez-Lopez*, the Attorney General noted that the fact that the noncitizen "spoke no English" was "no handicap." 10 I. & N. Dec. at 411. Congress has refused to enact legislative proposals imposing a language barrier to obtaining permanent residency. *See, e.g.*, Raise Act, S. 1720, 115th Cong. § 5(c) (2017). By contrast, Congress has required immigrants who settle in the United States to gain English proficiency before they become citizens. *See* 8 U.S.C. § 1423.

Millions of immigrants have come to the United States with little or no knowledge of English.[5] Even though immigrants often arrive with imperfect English, many quickly learn the language. One study estimates that "[a]bout 91 percent of immigrants in the United States between 1980 and 2010 reportedly spoke English."[6]

[5] Jeanne Batalova & Jie Zong, *Language Diversity and English Proficiency in the United States*, Migration Policy Inst. (Nov. 11, 2016), https://tinyurl.com/vue225q.

[6] Michelangelo Landgrave, *Immigrants Learn English*, CATO Inst. Immigration Research & Policy Br. No. 14 (Sept. 17, 2019), https://tinyurl.com/scxwtoh.

Temporary language barriers notwithstanding, "immigrants are less likely to consume welfare benefits" than "native-born Americans."[7]

The predictive nature of the "public charge" inquiry makes consideration of English proficiency particularly problematic. A noncitizen's English proficiency at the time of admission has not been shown to bear any relationship to whether the noncitizen is likely to seek public benefits far into the future. There is a serious risk that consideration of English proficiency would invite immigration officials to deem noncitizens "public charges" based on characteristics that are irrelevant at best, or discriminatory at worst.

D. DHS's Arguments For Deviating From The Long-Settled Meaning Of "Public Charge" Lack Merit.

1. DHS principally argues that, even though Congress retained the "public charge" language in 1996, it impliedly overruled the long-established meaning of "public charge" through separate amendments to the INA and to the federal benefits laws. Br. 18-19. To the contrary, in enacting these provisions, Congress elected to make no material change to the public-charge provision and instead chose to promote immigrant self-sufficiency by restricting noncitizen access to public benefits and by requiring reimbursement by noncitizens' sponsors upon request. Congress's decision to make most lawful permanent residents eligible for benefits after five years cannot

[7] Alex Nowrasteh & Robert Orr, *Immigration and the Welfare State*, CATO Inst. Immigration Research & Policy Br. No. 6 (May 10, 2018) https://tinyurl.com/ya9ygkt6.

be reconciled with DHS's view that any noncitizen likely to receive benefits at any time must be excluded as a "public charge."

DHS supports its argument by citing a provision requiring a noncitizen's sponsor to reimburse the government for any benefits he or she may receive, including Medicaid and SNAP. Br. 19. But DHS's argument is inconsistent with its own understanding of "public charge." DHS defines "public charge" to mean a person "who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period," Public Charge Rule at 41,295—*not* one who receives one or more *unreimbursed* public benefits during that time period. DHS's definition does not account for whether a benefit would be reimbursed, and it would therefore exclude people that Congress expected would be admitted: noncitizens who collect public benefits subject to reimbursement upon request.

DHS's argument also ignores that Congress did not require all prospective permanent residents to obtain sponsors, yet it expressly permitted *all* lawful permanent residents to obtain benefits after living in the United States for five years. *See* 8 U.S.C. § 1613. DHS's argument is inapposite as to noncitizens who are not required to obtain a sponsor but whom Congress nevertheless authorized to obtain benefits five years after becoming lawful permanent residents.

DHS's reliance on Executive Branch decisions involving deportation on "public charge" grounds is similarly misplaced. Br. 20 (citing *Matter of B-*, 3 I. & N.

Dec. 323, 325 (BIA 1948)). Those decisions reflect a "narrow[]" understanding of "public charge," *Matter of Harutunian*, 14 I. & N. Dec. at 589, in which a person who collects public benefits is not a "public charge" if he or she has family or friends "financially able to pay all proper charges." *Matter of B-*, 3 I. & N. Dec. at 325. DHS's new understanding of "public charge," however, would redefine that term to include noncitizens who receive any benefits, even if they are able to later reimburse the government with the help of friends or family.

In any event, DHS's arguments about these separate statutory provisions fail to overcome the presumption that Congress "adopted the earlier [] construction" of "public charge" when it reenacted the provision without material change. *Helsinn*, 139 S. Ct. at 633-34. Where, as here, statutory amendments would be "a fairly oblique way of attempting to overturn [a] settled body of law," they do not rebut the presumption that Congress intended to retain the prior understanding. *Id.* (citation omitted).

2. DHS falls back on the assertion (Br. 24-26) that Congress intended to leave the Executive Branch broad discretion to interpret the meaning of "public charge." While DHS may possess discretion to interpret the statute, it does not have discretion to rewrite the statute contrary to its long-established meaning ratified by Congress. Even where there may be "some uncertainty" about a provision's meaning, the Executive Branch cannot "expand *Chevron* deference to cover virtually any interpretation." *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 525 (2009). The

language adopted by Congress sets the "outer limits" on a provision's meaning. *Id.* The Executive Branch must adhere to those limits, and the courts must police those limits applying the traditional tools of statutory interpretation.

DHS maintains (Br. 26) that the scope of the term "public charge" has varied to some degree over the last century, and that this variation supports its discretion to wholly redefine the term. This argument, however, ignores that Congress legislated against the backdrop of a century of precedent in which neither Congress, nor the courts, nor the Executive Branch deemed a noncitizen's likelihood of receiving minimal in-kind benefits sufficient to render the noncitizen a "public charge." Even assuming the understanding of the term "public charge" fluctuated somewhat over the course of the twentieth century, such minor variations cannot support an inference that Congress allowed DHS's radical departure here.

II. DHS'S NEW "PUBLIC CHARGE" RULE IS IRRATIONAL.

DHS's new rule would be impossible to apply in practice and would lead to a host of practical problems that Congress did not intend when it tasked immigration officials with excluding noncitizens likely to become "public charges."

The public-charge provision does not ask whether the noncitizen is *currently* a "public charge." Instead, it asks whether a person is "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The DHS rule, in turn, requires immigration officers to make a prediction about whether a noncitizen "is more likely than not at any time in the future to receive one or more designated public benefits

for more than 12 months in the aggregate within any 36-month period." Public Charge Rule at 41,295.

This prediction requires immigration officials to look far into the future. With minor exceptions, Medicaid, SNAP, and federal affordable housing assistance are unavailable to noncitizens until they have lived here for five years. *See* 8 U.S.C. § 1613. Most persons subject to the "public charge" restriction are thus ineligible for these benefits when they apply for lawful permanent residency, and many will remain ineligible for an additional five years after an immigration official's public-charge determination is made. As a result, the rule requires immigration officials to predict not whether an immigrant has already collected or is likely imminently to collect benefits, but whether she is likely to collect them at any point from five years in the future on.

This is an impossible prediction to make accurately. Many noncitizens subject to DHS's new definition of "public charge" will be employed full-time and situated above the poverty line when the immigration official is called upon to make the prediction. Others will ordinarily be employed, except that they may have suffered a medical emergency or job loss that requires them to collect benefits temporarily. Some might at some point collect merely *de minimis* benefits, hardly adding up to $100 in a particular year. Some will qualify for benefits, but will have relatives who could support them if they chose to forgo those benefits. The DHS rule requires

immigration officials to predict whether all these noncitizens will be likely to accept public benefits—beginning five years after their admission until they die.

An immigration official could not hope to make that determination in a rational and consistent manner. *See Judulang v. Holder*, 565 U.S. 42, 56 (2011) (invalidating an agency interpretation as likely to yield a rational outcome "as a coin flip"). It would be impossible for an immigration official to make a reasoned decision about whether an applicant, far in the future, is likely to encounter an unpredictable yet temporary hardship, or is likely to choose at some point to accept small amounts of benefits to supplement her steady income.

This indeterminacy has had cascading effects throughout the immigration system. The DHS rule has left prospective immigrants and their immigration counselors in the dark about how to comply. Public Charge Rule at 41,315 (inquiry "inherently subjective"). Some may choose not to apply for permanent residency. Others may altogether forgo benefits to which they are entitled on the belief that their forbearance will improve their prospects for satisfying the public-charge provision. Studies have indicated that millions of people may forgo benefits because of this rule, a substantial share of whom would do so unnecessarily because the rule does not apply to them and thus would not cover their decision to receive such benefits.[8]

[8] *See, e.g.*, Samantha Artiga et al., *Estimated Impacts of Final Public Charge Inadmissibility Rule on Immigrants and Medicaid Coverage*, Kaiser Family Found. (Sept. 18, 2019), https://tinyurl.com/vty88wy.

CONCLUSION

For the foregoing reasons, the Court should affirm the injunction entered by the district court.

Respectfully submitted,

/s/ Megan Barbero

Douglas N. Letter
General Counsel
Todd B. Tatelman
Principal Deputy General Counsel
Megan Barbero
Josephine Morse
Adam A. Grogg
William E. Havemann
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, DC 20515
(202) 225-9700

Robert M. Loeb
Thomas M. Bondy
Peter E. Davis
Emily Green
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

Rene Kathawala
Jessica Edmundson
Allison Epperson
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

M. Todd Scott
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

Counsel for Amicus Curiae

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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)(i) because this brief contains 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES

/s/ Megan Barbero
Megan Barbero
Counsel for Amicus Curiae

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 Fourth Circuit by using the appellate CM/ECF system on January 21, 2020.

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OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES

/s/ Megan Barbero
Megan Barbero
Counsel for Amicus Curiae