No. 19-35914

United States Court of Appeals for the Ninth Circuit

State of Washington, et al.,
Plaintiffs-Appellees,
v.
United States Department of Homeland Security, et al.,
Defendants-Appellants.

Appeal from the U.S. District Court
for the Eastern District of Washington,
No. 4:19-cv-05210-RMP
Hon. Rosanna Malouf Peterson, District Judge

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

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CORPORATE DISCLOSURE STATEMENT

The Immigration Reform Law Institute does not have a parent company and does not issue stock.

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INTEREST OF *AMICI CURIAE*[1]

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. 826 (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).

IRLI submits this *amicus curiae* brief to assist this Court in understanding how the United States District Court for the Eastern District of Washington erred by misinterpreting "public charge" and improperly issuing a preliminary injunction against the Department of Homeland Security's enforcement of the public charge rule.

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[1] The parties have consented to the filing of this *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

The district court erroneously interpreted "public charge."

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 whether DHS's Rule entails a permissible construction of the term "public charge."

The real answer is found in the term's plain meaning. It is also found in Congress's statutory language. But the district court looked elsewhere. It chose to consider 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. In both instances, the government declined to adopt or alter a definition of "public charge."

Congress's and DHS's declension is not authoritative. The term's plain meaning controls. Congress's actual statutory language is superior authority to

Congress's debates over hypothetical statutory language. And DHS's actual rulemaking is superior authority to DHS's proposed rulemaking. Past inaction toward defining "public charge" is not evidence of the term's meaning, but merely the absence of such evidence.

Because the district court endowed past inaction with undue legal authority—and ignored the plain meaning and statutory context of "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 district court erred by using congressional inaction to depart from plain meaning.

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). The plain—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 37 (quoting *Public Charge*, Black's Law Dictionary (3d ed. 1933); Black's Law Dictionary (4th ed. 1951)).

Here, instead of interpreting "public charge"—which Congress did not define in the governing statute, 8 U.S.C. § 1182(a)(4)(A)—according to its plain meaning, the district court purported to interpret the term according to Congress's intent later. The district court said that "Congress's intent is reflected by the fact that the Immigration Reform Act that was enacted into law did not contain the provisions that would have incorporated" the Rule. ER 39. The district court then noted that "[i]n 2013 Congress again considered and rejected a proposal to broaden the public charge inadmissibility ground." ER 41. But "'[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.'" Appellants' Brief at 29 (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.

The district court's deference to Congress's inaction was erroneous. Rather than sifting Congress's inaction for meaning, the district court should have read the term "public charge" according to its plain meaning, which is not "demonstrably at odds with the intentions of its drafters." *Ron Pair Enters.*, 489 U.S. at 242.

b. The Rule is consistent with statutory language construing "public charge."

If the district court found the plain meaning of "public charge" to be ambiguous, then it should have resolved that ambiguity by reference to Congress's

finding of "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," that "aliens . . . [should] not depend on public resources to meet their needs," and 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." ER 36–37. Not for nothing, DHS's Rule notice "uses the word 'self-sufficiency' 165 times and the word 'self-sufficient' 135 times." ER 52.

Self-sufficiency controls "public charge" just as well as the term's plain meaning does. Yet the district court said that it "remains an open question for a later determination" "[w]hether DHS can use the stated goal of promoting self-

sufficiency to justify this rulemaking." ER 52. But if Congress's overt directive does not justify this rulemaking, then what does? DHS only exists to effect Congress's legislation and the President's delegation. Such authority is the single strongest basis—indeed, the sole basis—for agency rulemaking.

Bizarrely, the district court implied that some additional, and technocratic, basis for rulemaking is needed beyond the democratic and Constitutional prerogatives vested in DHS, which Congress expressly tasked with determining whether an alien "is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The district court chided the "[t]he Federal Defendants" for failing to "explain[] how DHS as an agency has the expertise necessary to make a determination of what promotes self-sufficiency and what amounts to self-sufficiency." ER 45. Then the district court found that it itself had superior expertise, citing *amicus curiae* instead of the parties' evidence to proclaim that "accessing Medicaid *logically* would assist immigrants, not hinder them, in becoming self-sufficient." ER 47 (emphasis added). Of course, "[s]uch policy arguments are more properly addressed to legislators or administrators, not to judges." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 864 (1984).

In any event, logically, an alien accessing Medicaid is, *ipso facto*, not self-sufficient. He is a charge upon the public. Appellant's Brief at 40 ("[T]he average Medicaid recipient receives $7,426.59 in annual benefits."). By the district court's

"logic," a rule allowing aliens to receive public benefits is a permissible construction of "public charge" inadmissibility because public benefits help their recipients avoid being (or remaining) public charges. Such a rule would abolish the congressional mandate, not implement it.

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

If the district court wanted to search further than Congress's repeated insistence upon alien self-sufficiency in the Welfare Reform Act, it should have explored actual legislative precedent instead of citing failed legislative proposals. For centuries, the public charge rule's drafters expressly intended it to exclude aliens who burden the public for support and care. Congress did not abolish this history when it declined to adopt new legislation in 1996 and 2013.

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 Mar. 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") 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. "[T]he 1999 field guidance has applied to public charge determinations since it was issued twenty years ago" and "Congress has not expressly altered" it. ER 41. Again granting undue deference to Congress's inaction, the district court found meaning in the fact that "Congress rejected expansion of the benefits considered for public charge exclusion with full awareness of the 1999 field guidance in effect." ER 44. Yet not even the district court claimed that any congressional acquiescence in the field guidance, which was a non-regulation, gave it the force of law. Congress did not enact anything

pertaining to public charge admissibility in 2013. From congressional inaction on agency inaction the district court attempted to conjure up authority for its judgment. But zero plus zero still equals zero.

In any event, whether 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 gield 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. 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 lifted.

DATED: December 13, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(7)(B), the foregoing *amici curiae* brief is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 3,755 words, excluding those sections identified in Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on December 13, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Christopher J. Hajec
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