No. 19-3169

In the United States Court of Appeals for the Seventh Circuit

Cook County, Illinois, et al.,
Plaintiffs-Appellees,

v.

United States Department of Homeland Security, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Illinois, No. 19-cv-06334 (Judge Gary Feinerman)

AMICUS CURIAE BRIEF OF THE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPELLANTS

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3169

Short Caption: Cook County, Illinois et al v. Wolf et al

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The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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Attorney's Signature: /s/ Mark S. Venezia Date: December 16, 2019

Attorney's Printed Name: Mark S. Venezia

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes x
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Attorney's Signature: /s/ Lew J. Olowski Date: December 16, 2019

Attorney's Printed Name: Lew J. Olowski

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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. 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).

The parties have consented to the filing of this *amicus curiae* brief. 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. It misconstrued a 1915 Supreme Court case that, even if so misconstrued, has been superceded by statute. Consequently, the district court's reading of "public charge" is incorrect and its decision to impose a preliminary injunction against the Rule's enforcement should be reversed.

ARGUMENT

I. The Rule is a permissible construction of "public charge."

a. The district court erred by ignoring 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). 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)).

But, rather than interpreting "public charge" according to its plain meaning, the district court reached backward to interpret the term under *Gegiow v. Uhl*, 239 U.S. 3 (1915). The district court stated that "the Supreme Court told us just over a century ago what 'public charge' meant in the relevant era, and thus what it means today." SA18. For the district court, "*Gegiow* holds that 'public charge' encompasses only persons who. . . would be substantially, if not entirely, dependent on government assistance on a long-term basis." SA18–19.

But all the Supreme Court held about the meaning of "public charge" in *Gegiow* was that 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 (supporting the holding that immigration commissioners lacked the power to consider labor conditions in the city of immigrants' immediate

destination as a basis for their exclusion as public charges). Nothing in the Rule refers to local conditions, and the district court articulated no reason why aliens' likely continuing character as recipients of valuable public benefits such as Medicaid cannot count as a "permanent personal objection" to their admission under the public charge exclusion. Congress has always sought immigrants with personal traits making for self-reliance, not those making for public dependence.

In any event, 1915 is *not* the relevant era, and the public charge rule today is best understood in the context of at least five relevant statutes Congress passed in the century since *Gegiow* was decided. During that time, Congress codified "public charge" to accord with the term's plain meaning and with DHS's Rule. *Infra*, part b; Appellants' brief at 13–14, 23–41.

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

Congress emphasizes the plain meaning of the public charge rule in current statutory language that the district court erroneously discounted. For example, Congress codified the public charge rule in context 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.

Congress further explained 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." 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. *Indiana v. EPA*, 796 F.3d 803, 811 (7th Cir. 2015) (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

The district court discounted Congress's unambiguously expressed intent as a mere "policy goal." SA17. "Finding the meaning of a statute is more like calculating a vector (with direction and length) than it is like identifying which way the underlying 'values' or 'purposes' point (which has direction alone)."

SA17 (quoting *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992)). Here, however, reading the statute is simpler than calculating vectors. Congress explained itself with specificity and even identified the "compelling government interest" behind the public charge rule. The way it identified that interest shows that the plain meaning of "public charge," far from being "demonstrably at odds with" Congress's intent, exactly expressed that intent. *Ron Pair Enters.*, 489 U.S. at 242.

c. 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 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."

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. So the district court correctly treated the field guidance as irrelevant. "That definition and instruction never made their way into a regulation." SA2.

Nevertheless, appellees may urge this Court to vest that document with improper legal authority. Many interest groups misrepresent the field guidance as an authoritative construction of federal immigration law. *E.g.*, National Immigration Law Center, *Trump Administration's "Public Charge" Attack on Immigrant Families* (April 2018), *available at* https://protectingimmigrantfamilies.org/resources/ ("Adoption of the draft

proposed regulations would mark an unprecedented departure from the current, longstanding interpretation of the public charge rules."). For that reason, the otherwise irrelevant field guidance merits discussion to explain its arbitrariness.

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. 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 Congress's unambiguously expressed intent. This Court should reject any 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.

DATED: December 17, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Circuit Rule 29 because it contains 3,376 words. This brief also complies with the typeface and type-style requirements of Circuit Rule 32(b) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Mark S. Venezia
Mark S. Venezia

CERTIFICATE OF SERVICE

I certify that on December 17, 2019, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I further certify that I will cause 15 paper copies of this brief to be received by the Clerk within seven days of the Notice of Docket Activity generated upon acceptance of the brief, in compliance with 7th Circuit Rule 31 (b) and ECF Procedure (h)(2).

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/s/ Mark S. Venezia
Mark S. Venezia