IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CASA De Maryland, Inc., et al., Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, et al., Defendants.	Civil Action No. 8:19-cv-2715-

AMICUS CURIAE BRIEF OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

IDENTITY OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases in the interests of United States citizens and assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases. *See, e.g., Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013); *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015). IRLI is considered an expert in immigration law by the Board of Immigration Appeals. IRLI has prepared *amicus* briefs for the Board at the request of that body for more than twenty years. *See, e.g., 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).

ARGUMENT

On August 14, 2019, the U.S. Department of Homeland Security ("DHS") published *Inadmissibility on Public Charge Grounds* ("Rule"), 84 Fed. Reg. 41292. The Rule guides 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), by requiring, *inter alia*, examination of an alien's use of certain welfare programs.

Plaintiffs acknowledge that federal law denies admission into the United States for any noncitizen who is "likely at any time to become a public charge." Pls.' Corr. Mot. for a Prelim. Inj. And Supp. Mem., ECF No. 28 ("Mot.") at 1. But Plaintiff noncitizens allege injury from the Rule because they "will be forced to make countless day-to-day decisions under the specter of the Public Charge Rule, as they seek to preserve their ability to obtain LPR [lawful permanent

resident] status in the future," while Plaintiff "CASA as an organization will continue to be forced to redirect its limited resources to educate, counsel, and support its members as those members seek to minimize the risk of jeopardizing their immigration status." *Id.* at 3. Accordingly, Plaintiffs ask this Court to grant "a nationwide injunction of the Rule." *Id.*

Plaintiffs misapprehend the meaning and history of the public charge rule, greatly to the detriment of their likelihood of success on the merits. The Rule is in full harmony with the long history of exclusion on public charge grounds, and with unchallenged agency practice prior to the anomalous Field Guidance of 1999.

I. The Rule is consistent with the plain meaning and history of "public charge."

Plaintiffs narrate an incorrect history of the public charge rule, improperly narrowing both its meaning and also the circumstances in which it has applied over centuries. Mot. at 4–18. Conversely, Defendants' presentation of the public charge rule's meaning, and the current Rule's consistency with that meaning, is correct. Def. Mem. in Opp. to Pls.' Mot. for a Prelim. Inj., ECF No. 52 ("Opp.") at 1–5, 13–24.

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). Indeed, 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, such exclusion also 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," specifically, have been on the books for over 137 years, 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 of 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"), P.L. 104-193. PRWORA enacted definitive statements of national policy regarding non-citizen access to taxpayer-funded resources and benefits. Congress intended 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' 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 congressional policymaking, PRWORA defined "state or local public benefits" in very broad terms. 8 U.S.C. § 1621(c).

While PRWORA allowed both qualified and non-qualified aliens to receive certain benefits, for example emergency benefits (all aliens) and the Supplemental Nutrition Assistance Program ("SNAP") (qualified alien children), Congress did *not* exempt receipt of such benefits from consideration for INA § 212(a)(4) public charge purposes. *See* Report of Comm. on

Economic and Educational Opportunities, H.R. Rep. (Conference Report) No. 104-75, at 46 (Mar. 10, 1995) ("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*.") (emphasis added).

A year and a half later, Congress 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 USC § 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 USC § 1182(a)(4)(C); 8 USC § 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 PRWORA, 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).

II. The Immigration and Naturalization Service's Field Guidance of 1999 is not an authoritative interpretation of the public charge rule.

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). Yet the 1999 notice of proposed rulemaking ("NPRM") never resulted in a final rule. And the Field Guidance was never subject to notice and comment under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. Nevertheless, Plaintiffs urge this Court to vest that document with improper legal authority. Mot. at 5, 17–21. In this, Plaintiffs join other interest groups who

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.").

The 1999 proposed rulemaking and its accompanying Field Guidance advanced a novel meaning of public charge to mean "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)). But even a cursory comparison with the controlling statutory policies and provisions summarized above, *supra* Part II, 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 SSI, 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' 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 PRWORA, 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. PRWORA 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 benefit, 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 excepted. 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 any suggestion that the Field Guidance is authoritative against the Rule.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for preliminary injunction should be denied.

Dated: October 3, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2019, the foregoing was served by filing a copy using the Court's ECF filing system, which will send notice of the filing to all counsel of record.

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