IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Cook County, Illinois et al. Plaintiffs, v. Kevin K. McAleenan et al. Defendants.	No. 1:19-cv-06334 Judge Feinerman

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, CENTER FOR PUBLIC REPRESENTATION, ET AL. IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Date: October 2, 2019

LATHAM & WATKINS LLP

/s/ Marc N. Zubick
Marc N. Zubick (Bar. No. 6308239)
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611
Telephone: +1.312.876.7700
Email: marc.zubick@lw.com

Sarah M. Ray (*pro hac vice* pending)
Kyle A. Virgien (*pro hac vice* pending)
Diana A. Aguilar (*pro hac vice* pending)
Charles F. Sprague (*pro hac vice* pending)
505 Montgomery Street, Suite 2000
San Francisco, California 94111-6538
Telephone: +1.415.391.0600
Email: sarah.ray@lw.com
Email: kyle.virgien@lw.com
Email: diana.aguilar@lw.com
Email: charles.sprague@lw.com

Attorneys for Proposed Amici Curiae American Civil Liberties Union, Center for Public Representation, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici curiae are nineteen nonprofit organizations that represent, advocate for, and support the disability community. Collectively, *amici* operate in all fifty States and six Territories and represent tens of thousands of people with disabilities and their family members across the country. Among other services, the *amici* provide public education, litigate, and conduct research for people with disabilities and their families. All *amici* are dedicated to the liberty, equality, and integration of individuals with disabilities. Individual statements of interest from each *amici* organization appear in the appendix to this brief.

The United States is a nation shaped by immigration and founded on ideals of equality—however imperfectly realized. Contrary to these values, for more than a century, immigrants with disabilities were legally excluded from this country based on the flawed notion that individuals with disabilities were "undesirables." But over time, public attitudes changed as reflected in various congressional acts, including the enactment of the Rehabilitation Act of 1973 and the revision of immigration laws to eliminate disability-specific exclusions. The Department of Homeland Security's Final Rule on Public Charge Ground of Inadmissibility (the "Final Rule"), whether unintentionally or deliberately,[1] seeks to reinstate those exclusionary provisions.

[1] The current administration has openly displayed hostility towards immigrants with disabilities. President Donald J. Trump tweeted that Central American asylum seekers waiting in Tijuana, Mexico will bring "large scale crime and disease" to the United States. Chantal Da Silva, *Donald Trump Says Migrants Bring 'Large Scale Crime and Disease to America'*, NEWSWEEK (Dec. 11, 2018), https://www.newsweek.com/donald-trump-says-migrants-bring-large-scale-crime-and-disease-america-1253268 (emphasis added). President Trump also falsely said that Haitians "all have AIDS." Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html. The Trump Administration has indicated a desire to stop granting "deferred action" to people undergoing medical treatment, often with disastrous consequences. *See* Miriam Jordan, *Faced With*

In the early twentieth century, the "principal object" of immigration law was "the exclusion from this country of the morally, mentally and physically deficient[.]"[2] Citing the "public charge" requirement as authority, Ellis Island immigration inspectors would pick people out of line who appeared to be "disabled" or "diseased," and deny them entry into the United States.[3] While this treatment was often rationalized at the time as a matter of simple economics, contemporaneous documents reveal that these policies were rooted in eugenic considerations and the flawed notion that people with disabilities are somehow "deficient."[4]

By the 1960s, spurred by the civil rights movement, the nation's perception of individuals with disabilities had begun to change. And Congress responded. In 1973, on a bipartisan basis, Congress passed the Rehabilitation Act, which prohibits disability discrimination by the Federal government. Section 504 of the Rehabilitation Act ("Section 504") was modeled, in part, after Title VI of the Civil Rights Act of 1964, and declared: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or

---

Criticism, Trump Administration Reverse Abrupt End to Humanitarian Relief, N.Y. TIMES (Sept. 2, 2019), https://www.nytimes.com/2019/09/02/us/trump-immigration-deferred-action.html.

[2] Douglas C. Baynton, *Defectives in the Land: Disability and American Immigration Policy, 1882-1924*, 24 J. AM. ETHNIC HIST. 31, 34 (2005).

[3] *See, e.g.*, Mark C Weber, *Opening the Golden Door: Disability and the Law of Immigration*, 81, J. GENDER, RACE & JUST. 153, 156 (2004) ("Inspectors looked for any of a long list of diseases and abnormalities, including arthritis, asthma, deafness, the loss of an eye or a limb, deformities, poor vision, underdevelopment, and dementia.").

[4] *See* Baynton, *supra*, at 34-35 ("In a letter to the Comm'r General, the Ellis Island Commissioner wrote that the Bureau had 'no more important work to perform than to pick out all the mentally defective immigrants, for these are not only likely to join the criminal classes and become public charges, but by leaving feebleminded descendants they start vicious strains which leads to misery and loss in the future generation and influence unfavorably the character and lives of hundreds of persons.'").

activity receiving Federal financial assistance." Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973)[5]; *see also* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, 78 Stat. 241, 252-53 (1964). This language made clear that access for people with disabilities is a matter of *equal opportunity*, not a welfare benefit or act of charity.[6]

In the half-century since, Congress has repeatedly reaffirmed this commitment to ensuring equal opportunity for individuals with disabilities. In 1990, Congress enacted the Americans with Disabilities Act ("ADA"), which declares that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(7). That same year, Congress amended the Immigration Code to end the discriminatory exclusion of people with certain disabilities. *See* Immigration Act of 1990, Pub. L. No. 101-649 § 603(a)(15), 104 Stat. 4978, 5083-84 (1990) (the "Immigration Act") (deleting language excluding, *inter alia*, "[a]liens who are mentally retarded" or who are "afflicted with . . . a mental defect"). These changes marked an end to explicitly discriminatory prohibitions on individuals with disabilities in the Immigration Code, exclusions that for more than one hundred years were listed alongside the statutory public charge prohibition.[7] Despite this clear congressional intent, the Final Rule unlawfully reverts to

[5] The Rehabilitation Act Amendments of 1992 updated the term "handicap" to individual with a "disability." *See* Pub. L. No. 102–569 (HR 5482), 106 Stat 4344 (Oct. 29, 1992).

[6] *See generally* Nat'l Council on Disability, *Equal of Opportunity: The Making of the Americans with Disabilities Act* (Jul. 26, 1997), https://files.eric.ed.gov/fulltext/ED512697.pdf.

[7] Congress's support for the integration of people with disabilities has not wavered. Most recently, in 2008, Congress removed HIV and AIDS from the list of infectious diseases that would prevent an individual from immigrating to or visiting the United States. *See* Tom Lantos and Henry J. Hyde U.S Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293, 122 Stat. 2918; 42 C.F.R. § 34.2(b).

the categorical exclusions against people with disabilities that prevailed over a century ago.[8]

The Final Rule discriminates against disabled immigrants and their families with devastating effects. The confusion surrounding the Final Rule poses a serious threat of harm to the disability community, both citizens and noncitizens alike. The Department of Homeland Security ("DHS") acknowledges these discriminatory results and makes no attempt to defend them as necessary policy or consistent with its non-discrimination obligations under Section 504. Rather, DHS contends that federal law actually *requires* it to exclude immigrants with disabilities in discriminatory fashion. As explained below, this is both legally and factually incorrect. The *amici curiae* respectfully urge the court to grant Plaintiffs' motion.

FACTUAL AND LEGAL BACKGROUND

A. Immigrants' Access to Public Benefits

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") to comprehensively reform the American welfare system. PRWORA generally limited immigrants' access to public benefits. Pub. L. No. 104-193, 110 Stat. 2105 (1996). However, recognizing the importance of certain programs, Congress

[8] DHS has made it clear that this is exactly what it seeks to do. In its publication of the Final Rule, DHS included the following footnote as support for its assertion that it can rely on an immigrant's disability in making the public charge determination: "*Ex parte Mitchell*, 256 F. 229 (N.D.N.Y. 1919) (referencing disease and disability as relevant to the public charge determination); *Ex parte Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922) (taking into consideration that the alien was an able-bodied woman, among other factors, and finding that there wasn't evidence that she was likely to become a public charge); *Barlin v. Rodgers*, 191 F. 970, 974-977 (3d Cir. 1911) (sustaining the exclusion of three impoverished immigrants, the first because he had a 'rudimentary' right hand affecting his ability to earn a living, the second because of poor appearance and 'stammering' such that made the alien scarcely able to make himself understood, and the third because he was very small for his age); *United States ex rel. Canfora v. Williams*, 186 F. 354 (S.D.N.Y. 1911) (ruling that an amputated leg was sufficient to justify the exclusion of a sixty year old man even though the man had adult children who were able and willing to support him.)." *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292, 41,368 n.407 (Aug. 14, 2019) (to be codified at 8 CFR Parts 103, 212, 213, 214, 245 and 248).

specified that *all* immigrants regardless of legal status would be eligible for emergency Medicaid, crisis counseling, and mental health and substance use disorder treatment. As detailed below, these benefits are of particular importance to immigrants with disabilities.

PRWORA's changes to benefits eligibility generated considerable public confusion about the extent of the "public charge" rule, which resulted in a sharp decline in the usage of non-cash public benefits. The Immigration and Naturalization Service ("INS") (now, DHS) responded by issuing Field Guidance clarifying the meaning of a "public charge" "in order to reduce the negative public health consequences generated by the existing confusion and to provide aliens with better guidance as to the types of public benefits that will and will not be considered in public charge determinations." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999) ("1999 Field Guidance"). In this Field Guidance, INS interpreted "public charge" to mean an applicant who is "*primarily dependent on the government for subsistence*, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." *Id.* (emphasis added). Immigrants who received non-cash benefits were not considered a public charge under this rule. *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114, 51,163-64 (Oct. 10, 2018).

B. The Final Public Charge Rule

On August 14, 2019, DHS published the Final Rule, which modifies the prevailing test[9] by assigning mandatory ratings (heavily weighted positive, positive, negative, or heavily weighted

[9] The applicable statute states that in making a public charge determination "the consular officer or the Attorney General shall at a minimum consider the alien's—(I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." 8 U.S.C. § 1182(a)(4)(B).

negative) to the statutory factors to be considered: the applicant's "age," "health," "family status," "assets, resources, and financial status," and "education and skills." 84 Fed. Reg. at 41,369. The Final Rule states that, when considering an individual's health, DHS will treat as a negative factor having "a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide and care for himself or herself, to attend school, or to work upon admission or adjustment of status." 8 C.F.R. § 212.22(b)(2). Accordingly, all or almost all immigrants with disabilities would be assigned a negative health factor. *Cf.* 29 U.S.C. § 705(9)(B) (defining "disability," for purposes of Section 504 of the Rehabilitation Act, as having "the meaning given" the term in the ADA's definition of disability); 42 U.S.C. § 12102(1)(A) (defining a disability, under the ADA, as "a physical or mental impairment that substantially limits one or more major life activities of such individual").

That same medical condition is considered a heavily weighted negative factor if the applicant lacks private insurance. 8 C.F.R. § 212.22(c)(1)(iii). The receipt or authorization to receive benefits, including Medicaid, for 12 months within 36 months of filing an application (for a visa, admission, adjustment of status, extension of stay, or change of status) is also deemed a heavily weighted negative factor, 8 C.F.R. §§ 212.22(c)(1)(ii).

The lack of a "medical condition" described above is one of a few factors that will be given a positive value under the Final Rule. 8 C.F.R. § 212.22(b)(2). The only heavily weighted positive factors are (1) income, assets, resources, and support that are at least 250% of the Federal Poverty Level and (2) enrollment in a private insurance plan, but only if the applicant does not use tax credits to offset health care premium costs under the Affordable Care Act. 8 C.F.R. § 212.22(c)(2).

Under the Final Rule, DHS officials may find in favor of admissibility *only if* the positive factors outweigh the negative factors. 84 Fed. Reg. at 41,397-98. If an immigrant is assigned a

heavily weighted negative factor, she will be considered a public charge unless she has two or more countervailing positive factors or one heavily weighted positive factor. *Id.*

C. Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act prohibits federal executive agencies from discriminating against individuals with disabilities in any program or activity.[10] Section 504 reaches government action that, either through purpose or effect, discriminates against individuals with disabilities. *See* 28 C.F.R. § 41.51(b)(3) ("A recipient [of federal funds] may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) That have *the effect* of subjecting qualified handicapped persons to discrimination on the basis of handicap; (ii) That have the *purpose or effect* of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons . . . .") (emphasis added).

In *Alexander v. Choate*, the Supreme Court made clear that Congress intended Section 504 to forbid all forms of disability discrimination, including invidious animus and benign neglect. *See* 469 U.S. 287, 294–97 (1985) ("Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect. . . . [M]uch of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."); *Eskenazi-McGibney v. Connetquot Cent. Sch. Dist.*, 84 F. Supp. 3d 221, 231 (E.D.N.Y. 2015) ("The ADA and Rehabilitation Act

[10] *See* 29 U.S.C. § 794; 6 C.F.R. § 15.1; DHS Directive No. 065-01 (Aug. 25, 2013); DHS Instruction No: 065-01-001 (Mar. 7, 2015); DHS Guide 065-01-001-01 ("Guide"), at 23-24 (Jun. 6, 2016); Mem. for Maurice C. Inman, Jr., General Counsel, Immigration and Naturalization Service, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Section 504 of the Rehabilitation Act of 1973 (Feb. 2, 1983).

were designed to protect disabled persons from discrimination, both intentional and unintentional, in the provision of public services.").

Section 504 applies to all DHS activities and programs, including public charge determinations, which means DHS cannot utilize discriminatory "criteria or methods" in making public charge determinations. *See* 6 C.F.R. §§ 15.30(b), 15.49. The "criteria or methods" are discriminatory if they "[s]ubject qualified individuals with a disability to discrimination on the basis of disability" or "[d]efeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with a disability." 6 C.F.R. § 15.30(b)(4).[11]

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE FINAL RULE VIOLATES SECTION 504 OF THE REHABILITATION ACT.

DHS admits that the Final Rule will have an "outsized" impact on people with disabilities, but claims that "it is not the intent, nor is it the effect of this rule to find a person a public charge solely based on his or her disability." 84 Fed. Reg. at 41,368. DHS is wrong: the Final Rule's "health" and "resources" "criteria," in combination, make anyone with a significant disability virtually certain to be excluded in a public charge determination. Therefore, the "purpose or effect" of the Final Rule is to selectively exclude immigrants with disabilities from admission into the United States or adjustment of status in violation of Section 504 of the Rehabilitation Act.

[11] The government violates Section 504 when it "excludes [individuals] from a program based on an eligibility criterion that impermissibly screens out [individuals] with disabilities." *C.D. v. New York City Dep't of Educ.*, No. 05 Civ. 7945 (SHS), 2009 WL 400382, at *13 (S.D.N.Y. Feb. 11, 2009); *see also Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *4 (C.D. Cal. Apr. 23, 2013) (finding that the government violates Section 504, even in cases of non-intentional discrimination, if individuals with disabilities "are unable to meaningfully access the benefit offered . . . because of their disability.") (*citing Alexander*, 469 U.S. at 299).

A. Under the Final Rules' "Health" Criterion, Individuals with Disabilities Are Automatically Penalized.

Under the Final Rule, DHS automatically assigns a negative weight to any applicant having "a medical condition that is likely to require extensive medical treatment or institutionalization *or that will interfere with the alien's ability to provide and care for himself or herself, to attend school, or to work upon admission or adjustment of status*." 8 C.F.R. § 212.22(b)(2) (emphasis added). In effect, this criterion converts the "health" inquiry into a "disability" inquiry. Although "disability" is not fully synonymous with "medical condition," people with disabilities experience functional limitations that often have underlying medical diagnoses. When these medical diagnoses are inadequately treated or accommodated, they can result in an individual's inability to provide self-care, attend school, or work. Thus under this broadly defined criterion, almost every person with a "disability" will be assigned an automatic negative weight under the Final Rule. *Cf.* 29 U.S.C. § 705(9)(B) (defining "disability" under Section 504 to mean "a physical or mental impairment that substantially limits one or more life activities of the individual"); *Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667, 672 (7th Cir. 2012) ("Disability includes the limitation of one or more major life activities[.]"). There is absolutely nothing in the legislative history that suggests that this was Congress's intent when it designated "health" as one of the factor to be considered in a public charge determination. In fact, it would have been contrary to congressional action at the time given that Congress had just passed the ADA.

Not only will this criterion assign a negative weight to almost every person with a disability; it will count as a heavily weighted negative factor for all of these people with disabilities who lack private insurance. As explained below, *see infra* at § I.B., many people with disabilities cannot receive the services they require from private insurance and thus would be subject to this heavily weighted negative factor. Further, under the Final Rule the *lack* of a medical condition is

one of the few positive factors recognized by DHS. *See* 8 C.F.R. § 212.22(b)(2). Thus, all other factors being equal, individuals with a disabilities will be severely disadvantaged by automatically being assigned one or more negative factors, and automatically be disqualified from one of the few positive factors DHS will consider in making a public charge determination. This sharply different treatment of individuals who are similarly situated "but for their disability" amounts to discrimination under Section 504. *See Lovell v. Chandler*, 303 F.3d 1039, 1053 (9th Cir. 2002) (finding a Section 504 violation where "but for their disability," the plaintiffs would have received Medicaid under the state's QUEST program); *see also Doe v. Pfrommer*, 148 F.3d 73, 83 (2d Cir. 1998) ("[T]he central purpose of . . . [Section 504] is to assure that disabled individuals receive 'evenhanded treatment' in relation to the able-bodied.").

B. The Final Rule Also Penalizes Individuals with Disabilities for Using Medicaid—the Only Provider of Necessary Services that Promote Self-Sufficiency.

An applicant's use of, or even approval for, Medicaid for more than 12 months in any 36 month period counts as a heavily weighted negative factor under the Final Rule. *See* 8 C.F.R. §§ 212.22(c)(1)(ii), 212.21(b)(5). The benefits Medicaid provides are *essential* for millions of people with disabilities, and a third of Medicaid's adult recipients under the age of 65 are people with disabilities.[12] Studies show that Medicaid is positively associated with employment and the integration of individuals with disabilities,[13] in part because Medicaid covers employment

[12] *See Medicaid Works for People with Disabilities*, C. ON BUDGET AND POL'Y PRIORITIES, https://www.cbpp.org/research/health/medicaid-works-for-people-with-disabilities (last visited Sept. 9, 2019).

[13] *See e.g.* Jean P. Hall, *et al.*, *Effect of Medicaid Expansion on Workforce Participation for People With Disabilities*, 107 AM. J. OF PUB. HEALTH 262 (Feb. 2017), https://ajph.aphapublications.org/doi/10.2105/AJPH.2016.303543; Larisa Antonisse, *et al.*, Kaiser Family Foundation, *The Effects of Medicaid Expansion under the ACA: Updated Findings from a Literature Review* 11 (Sept. 2017), http://files.kff.org/attachment/Issue-Brief-The-Effects-of-Medicaid-Expansion-Under-the-ACA-Updated-Findings-from-a-Literature-

supports[14] that enable people with disabilities to work.[15] Congress has specified that Medicaid services are designed to help individuals with disabilities "attain or retain [the] capability for independence or self-care." 42 U.S.C. § 1396-1.

One reason Medicaid services are essential to the disability community is the lack of coverage by private insurance of services people with disabilities typically need.[16] Medicaid is the *only* insurer that generally covers many home- and community-based services, including personal care services, specialized therapies and treatment, habilitative and rehabilitative services, and durable medical equipment.[17] Even highly educated professionals, business owners, and other well-off individuals with disabilities who use private insurance *also* retain Medicaid coverage

---

Review (collecting 202 studies of Medicaid expansion under the ACA, and concluding that many studies show a significant positive correlation between Medicaid expansion and employment rates and none show a negative correlation).

[14] Supported employment is a Medicaid-funded service to assist people with disabilities in obtaining and maintaining employment in the general workforce, including job placement, job training, job coaching, transportation, and personal care services at work.

[15] *See Employment & HCBS*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/ltss/employment/employment-and-hcbs/index.html (last visited Sept. 9, 2019) ("Habilitation services are flexible in nature, and can be specifically designed to fund services and supports that assist an individual to obtain or maintain employment.").

[16] *See Medicaid Works for People with Disabilities*, C. ON BUDGET AND POL'Y PRIORITIES, https://www.cbpp.org/research/health/medicaid-works-for-people-with-disabilities (last visited Sept. 9, 2019).

[17] *See* Mary Beth Musumeci, *et al.*, Kaiser Family Foundation, *Medicaid Home and Community –Based Services Enrollment and Spending* (Apr. 04, 2019) https://www.kff.org/medicaid/issue-brief/medicaid-home-and-community-based-services-enrollment-and-spending/ (last visited Sept. 9, 2019) ("Medicaid fills a gap by covering HCBS that are often otherwise unavailable and/or unaffordable through other payers or out-of-pocket[.]"). Home and community based services are services that help people with disabilities live, work and participate in their communities. *See Home & Community-Based Services*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/hcbs/authorities/1915-c/index.html (last visited Sept. 5, 2019).

because no other insurer provides the services that they need.[18] In recognition of the coverage limitations in private insurance for individuals with disabilities, Congress authorized the Medicaid Buy-In program. This program allows people to use Medicaid even when their incomes are above the standard limits for regular Medicaid eligibility by paying a premium—which thereby permits them *to remain in the workforce*.[19]

Despite congressional recognition of the importance of Medicaid to people with disabilities, and contrary to evidence showing that Medicaid services *help* individuals with disabilities avoid becoming public charges, the Final Rule treats using Medicaid as a heavily weighted negative factor. 84 Fed. Reg. at 41,298-99. An immigrant assigned a heavily weighted negative factor will be considered a public charge unless she or he has two or more countervailing positive factors or one heavily weighted positive factor. *Id.* But as explained above, immigrants with disabilities are automatically precluded by definition from a positive health factor; thus, an

---

[18] *See, e.g.*, Andraéa LaVant, *Congress: Medicaid Allows Me to Have a Job and Live Independently*, AMERICAN CIVIL LIBERTIES UNION (Mar. 22, 2017, 1:45 PM), https://www.aclu.org/blog/disability-rights/congress-medicaid-allows-me-have-job-and-live-independently ("Almost immediately after starting at my new job, I learned that commercial/private insurance does not cover the services I need to live independently. I would still need to rely on the services supplied through Medicaid just to ensure that I could go to work and maintain the independence that I had worked so hard to attain."); Asim Dietrich, *Medicaid Cuts are a Matter of Life or Death for People with Disabilities*, ARIZ. CAP. TIMES (Jul. 13, 2017), https://azcapitoltimes.com/news/2017/07/13/medicaid-cuts-are-a-matter-of-life-or-death-for-people-with-disabilities/ ("Even with such a severe disability, I live a full life. I am an attorney who works on behalf of others with disabilities, I am a board member at a local disability advocacy organization called Ability 360, and I have an active social life. The only reason I am able to have such a full life is Medicaid."); Alice Wong, *My Medicaid, My Life*, NEW YORK TIMES (May 3, 2017), https://www.nytimes.com/2017/05/03/opinion/my-medicaid-my-life.html ("I am unapologetically disabled and a fully engaged member of society. None of that would be possible without Medicaid.").

[19] *See e.g.*, *Medicaid "Buy In" Q&A*, HHS ADMIN. FOR COMMUNITY LIVING & DOL OFFICE OF DISABILITY AND EMPLOYMENT POLICY, https://www.dol.gov/odep/topics/MedicaidBuyInQAF.pdf (last updated Jul. 2019).

immigrant's use of public benefits designed to increase self-sufficiency will almost invariably result in a public charge finding.

C. The Final Rule Triple-Counts the Same Factual Circumstances Against an Individual with Disabilities.

As noted, under the Final Rule, an immigrant's medical condition and his or her use of Medicaid can both be deemed a heavily weighted negative factor. 8 C.F.R. § 212.22(c)(1). And the lack of the same medical condition is a positive factor. *See* 8 C.F.R. § 212.22(b)(2). Also, as discussed above, many individuals with disabilities rely on Medicaid in part because it provides services not available through private insurance that allow these individuals to work. The Final Rule combines these criteria to in effect triply punish individuals with disabilities: first for having the medical condition that impedes their ability to work, second for using Medicaid's services that they need to work and otherwise be productive members of their communities, and third by disqualifying them from a potential positive factor.

Consider an immigrant who uses Medicaid because she needs rehabilitative services. This individual will have a medical condition that interferes with her ability to work, and, if she lacks private insurance, it will count as a heavily weighted negative factor. Her use of (or approval for) Medicaid services for more than 12 months in the past 36 months would then constitute *another* heavily weighted negative factor. And regardless of how healthy she is otherwise, she cannot qualify for the "health" positive factor. Therefore, the Final Rule would invariably deem this individual a public charge by triple-counting her disability.

This example starkly demonstrates the falsity of DHS's argument that "[u]nder the totality of the circumstances framework, the disability itself would not be the sole basis for an inadmissibility finding." Section 504 is violated where an individual is denied a benefit on the basis of his or her disability, even if other factors are considered. *See Lovell*, 303 F.3d at 1053

(finding a Section 504 violation where other factors in a "restrictive income and assets test," because "those disabled persons were denied QUEST coverage by the State solely because of their disabilities").

II. THE FINAL RULE WILL CAUSE IRREPARABLE HARM TO BOTH CITIZENS AND NON-CITIZENS WITH DISABILITIES.

DHS concedes the Final Rule's designation of Medicaid as a public benefit will have a "potentially outsized impact . . . on individuals with disabilities," 84 Fed. Reg. at 41,368, but fails to appreciate the magnitude of the harm. As explained in the preceding section, the Final Rule will cause irreparable harm to immigrants with disabilities who will either be denied admission or an adjustment of status.[20] Conversely, in order to avoid a public charge determination, immigrants with disabilities will be forced to forego necessary medical services.[21] For example, imagine an immigrant who had been in the United States long enough to be eligible for a Medicaid buy-in program that he uses to get personal care services (which are unavailable through private health insurance), enabling him to work. He would have to drop out of the Medicaid Buy-In program (and thereby lose the personal care services and possibly his employment as a result) in order to

[20] Mandatory exclusion from the United States can be a death sentence for some immigrants with disabilities. For example, Maria Isabel Bueso, an immigrant diagnosed with a rare life-threatening condition was denied extension of Deferred Action Status. Isabel has lived in the United States for 16 years as a legal resident. The United States Citizenship and Immigration Services (USCIS) has ordered her removal to Guatemala, where the lifesaving medical treatment she receives is not available. *See e.g. Congressman DeSaulnier Announces Private Bill to Protect Maria Isabel Bueso from Deportation*, CONGRESSMAN MARK DESAULNIER: CALIFORNIA'S 11TH CONG. DIST. (Sept. 3, 2019), https://desaulnier.house.gov/media-center/press-releases/congressman-desaulnier-announces-private-bill-protect-maria-isabel-bueso.

[21] *Cf.* Avital Fischer, Sumeet Banker, and Claire Abraham, *Pediatricians Speak Out: A 'Public Charge Rule' is Dangerous for Children*, THE HILL (Sept. 1, 2019, 5:00 PM), https://thehill.com/opinion/healthcare/459565-pediatricians-speak-out-a-public-charge-rule-is-dangerous-for-children ("[O]ne in seven immigrant adults reported that they or a family member did not participate in benefit programs to which they were entitled, for fear of jeopardizing their ability to secure legal permanent residence status.").

minimize the risk being considered a public charge (which would prohibit him from becoming a legal permanent resident).

Confusion surrounding the Final Rule will cause immigrants to forego public benefits to which they are entitled and which would not result in a "negative" factor, out of fear that accessing those benefits would adversely impact their immigration status. But the harm caused by the Final Rule is not limited to non-citizen immigrants. Confusion surrounding the Final Rule is also likely to cause immigrant parents to refuse government benefits for their citizen children even though the usage of those benefits would not be counted against the parents. DHS admits that the programs named in the Final Rule will experience a 2.5% disenrollment rate and that hundreds of thousands of people eligible for benefits will unenroll because other members of their households are foreign-born noncitizens. 84 Fed. Reg. at 41,463, 66-69. Disability organizations have fielded countless calls, emails, and letters from people who are confused and concerned as to whether they should disenroll from benefits.[22] A researcher quoted by the *Los Angeles Times* recently warned: "'We're already seeing chilling effects. . . . There are families that are stopping benefits for their U.S. citizen children. There are green card holders and naturalized citizens that stopped benefits even though they won't be affected.'"[23] And a recently published study in the Journal of the American Medical Association Pediatrics found that between "0.8 and 1.9 million children with

[22] As just one example, Disability Rights California "has received calls from families who are afraid to apply for [In-Home Supportive Services] for their children, even though their children are eligible and receipt of IHSS could prevent their costly out-of-home placement." *Disability Rights California Comments in Response to Proposed Rulemaking on Inadmissibility on Public Charge Grounds* (Dec. 10, 2018), https://www.disabilityrightsca.org/post/proposed-changes-to-federal-rules-for-public-charge-an-immigration-policy-that-hurts-people.

[23] Leila Miller, *Trump administration's 'public charge' rule has chilling effect on benefits for immigrants' children*, LOS ANGELES TIMES (Sept. 3, 2019), https://www.latimes.com/california/story/2019-09-02/trump-children-benefits-public-charge-rule.

medical needs could be disenrolled" from health and nutrition benefits as a result of the version of the rule proposed by DHS in October, 2018.[24]

CONCLUSION

The Final Rule seeks to turn back the clock to a shameful era of eugenic immigration policies by establishing a set of criteria ensuring that immigrants with disabilities will be considered "public charges." This rule will irreparably harm the community of individuals with disabilities both by denying disabled immigrants admission or adjustment of status and by discouraging citizens and noncitizens from accessing the benefits that allow them to study, work, and participate fully in society. The *amici curiae* therefore respectfully urge the Court to heed the overwhelming opposition among the disability community to the Final Rule and grant Plaintiffs' request for relief.

[24] Leah Zallman, Karen Finnegan, David Himmelstein, *et al.*, *Implications of Changing Public Charge Immigration Rules for Children Who Need Medical Care*, J. AMER. MED. ASSOC. PEDIATRICS (Sept. 1, 2019).

Dated: October 2, 2019

Respectfully submitted

LATHAM & WATKINS LLP

/s/ Marc N. Zubick
Marc N. Zubick (Bar. No. 6308239)
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611
Telephone: +1.312.876.7606
Email: marc.zubick@lw.com

Sarah M. Ray (*pro hac vice* pending)
Kyle A. Virgien (*pro hac vice* pending)
Diana A. Aguilar (*pro hac vice* pending)
Charles F. Sprague (*pro hac vice* pending)
505 Montgomery Street, Suite 2000
San Francisco, California 94111-6538
Telephone: +1.415.391.0600
Email: sarah.ray@lw.com
Email: kyle.virgien@lw.com
Email: diana.aguilar@lw.com
Email: charles.sprague@lw.com

Attorneys for Proposed Amici Curiae American Civil Liberties Union, Center for Public Representation, et al.

Appendix: Statements of *Amici Curiae* Groups

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. With more than three million members, activists, and supporters, the ACLU fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction. The ACLU's Disability Rights Program envisions a society in which discrimination against people with disabilities no longer exists, and in which people understand that disability is a normal part of life. This means a country in which people with disabilities are valued, integrated members of the community, and where people with disabilities have jobs, homes, education, healthcare, and families.

The **Center for Public Representation** ("CPR") is a national, nonprofit legal advocacy organization that has been assisting people with disabilities for more forty years. CPR uses legal strategies, systemic reform initiatives, and policy advocacy to enforce civil rights, expand opportunities for inclusion and full community participation, and empower people with disabilities to exercise choice in all aspects of their lives. CPR has litigated systemic cases on behalf of people with disabilities in more than twenty states and has authored amici briefs to the United States Supreme Court and many courts of appeals. CPR is both a national and statewide legal backup center that provides assistance and support to the federally-funded protection and advocacy agencies in each state and to attorneys who represent people with disabilities in Massachusetts. CPR has helped lead the effort to educate and engage the disability community about the "public charge" rule at issue in this case.

The **American Association of People with Disabilities** ("AAPD") works to increase the political and economic power of people with disabilities. A national cross-disability organization, AAPD advocates for full recognition of the rights of over 61 million Americans with disabilities.

The **Association of University Centers on Disabilities** ("AUCD") is a nonprofit membership association of 130 university centers and programs in each of the fifty States and six Territories. AUCD members conduct research, create innovative programs, prepare individuals to serve and support people with disabilities and their families, and disseminate information about best practices in disability programming.

The **Autistic Self Advocacy Network** ("ASAN") is a national, private, nonprofit organization, run by and for autistic individuals. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals and others with disabilities to participate fully in community life and enjoy the same rights as others without disabilities.

The **Civil Rights Education and Enforcement Center** ("CREEC") is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law. CREEC's members include both people with disabilities and people who want to immigrate or have immigrated to this country. CREEC's efforts to defend human and civil include ensuring that such individuals do not encounter discrimination based on disability.

The **Coelho Center for Disability Law, Policy and Innovation** ("The Coelho Center") was founded in 2018 by the Honorable Tony Coelho, primary author of the Americans with Disabilities Act. Housed at Loyola Law School in Los Angeles, The Coelho Center collaborates with the disability community to cultivate leadership and advocate innovative approaches to advance the lives of people with disabilities. The Coelho Center brings together thought leaders, advocates, and policy makers to craft agendas that center disabled voices.

Disability Rights Advocates ("DRA") is a non-profit, public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, and housing. DRA's clients, staff and board of directors include people with various types of disabilities. With offices in New York City and Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities nationwide.

Disability Rights Education and Defense Fund ("DREDF") is a national cross-disability law and policy center that protects and advances the civil and human rights of people with disabilities through legal advocacy, training, education, and development of legislation and public policy. We are committed to increasing accessible and equally effective healthcare for people with disabilities and eliminating persistent health disparities that affect the length and quality of their lives. DREDF's work is based on the knowledge that people with disabilities of varying racial and ethnic backgrounds, ages, genders, and sexual orientations are fully capable of achieving self-sufficiency and contributing to their communities with access to needed services and supports and the reasonable accommodations and modifications enshrined in U.S. law.

Founded in 1985, **Equip for Equality** is an independent, not-for-profit organization that administers the federally mandated protection and advocacy system in Illinois. Its mission is to advance the human and civil rights of children and adults with physical and mental disabilities in Illinois. It is the only statewide, cross-disability, comprehensive advocacy organization providing self-advocacy assistance, legal representation, and disability rights education while also engaging in public policy and legislative advocacy and conducting abuse investigations and other oversight activities. Equip for Equality serves as a catalyst for social change, breaking down barriers that prevent people with disabilities from fully participating in all aspects of community living.

The **Judge David L. Bazelon Center for Mental Health Law** is a national nonprofit advocacy organization that provides legal assistance to individuals with mental disabilities. The Center was founded in 1972 as the Mental Health Law Project. Through litigation, policy advocacy, and public education, the Center advances the rights of individuals with mental disabilities to participate equally in all aspects of society, including health care, housing, employment, education, community living, parental and family rights, and other areas. The Center worked with others to develop comments of the Consortium for Citizens with Disabilities concerning the "public charge" rule at issue in this case, and has litigated cases, filed amicus briefs, and engaged in other advocacy on a number of issues concerning the rights of immigrants with disabilities.

Little Lobbyists is a family-led organization that seeks to protect and expand the rights of children with complex medical needs and disabilities through advocacy, education, and outreach. We advocate for our children to have access to the health care, education, and community inclusion they need to survive and thrive.

Mental Health America ("MHA"), formerly the National Mental Health Association, is a national membership organization composed of individuals with lived experience of mental illnesses and their family members and advocates. The nation's oldest and leading community-based nonprofit mental health organization, MHA has more than 200 affiliates dedicated to improving the mental health of all Americans, especially the 54 million people who have severe mental disorders. Through advocacy, education, research, and service, MHA helps to ensure that people with mental illnesses are accorded respect, dignity, and the opportunity to achieve their full potential. MHA is against policies that discriminate against people with mental health conditions.

The **National Association of Councils on Developmental Disabilities** ("NACDD") is the national nonprofit membership association for the Councils on Developmental Disabilities located in every State and Territory. The Councils are authorized under federal law to engage in advocacy, capacity-building, and systems-change activities that ensure that individuals with developmental disabilities and their families have access to needed community services, individualized supports, and other assistance that promotes self-determination, independence, productivity, and integration and inclusion in community life.

The **National Council on Independent Living** ("NCIL") is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of centers for independent living, state independent living councils, people with disabilities and other disability rights organizations. NCIL advances independent living and the rights of people with disabilities. NCIL envisions a world in which people with disabilities are valued equally and participate fully.

The **National Disability Rights Network** ("NDRN") is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance

Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Piute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

The **National Federation of the Blind** ("NFB") is the nation's oldest and largest organization of blind persons. The NFB has affiliates in all fifty states, Washington, DC, and Puerto Rico. The NFB and its affiliates are widely recognized by the public, Congress, executive agencies of state and federal governments, and the courts as a collective and representative voice on behalf of blind Americans and their families. The organization promotes the general welfare of the blind by assisting the blind in their efforts to integrate themselves into society on terms of equality and by removing barriers that result in the denial of opportunity to blind persons in virtually every sphere of life, including education, employment, family and community life, transportation, and recreation.

The Arc of the United States ("The Arc"), founded in 1950, is the nation's largest community-based organization of and for people with intellectual and developmental disabilities ("I/DD"). The Arc promotes and protects the human and civil rights of people with I/DD and actively supports their full inclusion and participation in the community throughout their lifetimes.

The Arc has a vital interest in ensuring that all individuals with I/DD receive the appropriate protections and supports to which they are entitled by law.

Founded in 1946 by paralyzed veterans, **United Spinal Association** is a national membership organization of 56,000 persons with spinal cord injuries or disorders, the vast majority of whom use wheelchairs. United Spinal Association has represented the interests of the wheelchair-using community in litigation for decades. United Spinal Association was a key negotiator with members of Congress regarding the provisions of the Americans with Disabilities Act and the Fair Housing Amendments Act. Addressing the needs and rights of people with disabilities, especially those with mobility impairments, has always been part of United Spinal Association's mission.

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2019, a true and correct copy of the foregoing document was electronically filed via the Court's CM/ECF system, which will send a copy of this filing via electronic mail to all attorneys of record.

/s/ Marc N. Zubick
Marc N. Zubick (Bar. No. 6308239)
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611
Telephone: +1.312.876.7700
Email: marc.zubick@lw.com

Attorney for Proposed Amici Curiae American Civil Liberties Union, Center for Public Representation, et al