19-3591-cv

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK, 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 SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, CENTER FOR PUBLIC REPRESENTATION, ET AL. IN OPPOSITION TO DEFENDANTS' MOTION FOR A STAY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the *amici curiae* state that they do not have parent corporations, and no publicly held corporation owns 10% or more of any of their stocks.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

Page(s)

REGULATIONS

Page(s)

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

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 *amicus* organization appear in the addendum to this brief.

INTRODUCTION

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."[2]

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and Local Rule 29.1(b), *amici curiae* state that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than *amici curiae* or their members or counsel contributed money intended to finance the preparation or submission of this brief.

[2] In the early twentieth century, the "principal object" of immigration law was "the exclusion from this country of the morally, mentally and physically deficient[.]" Douglas C. Baynton, Defectives in the Land: Disability and American Immigration Policy, 1882-1924, 24 J. AM. ETHNIC HIST. 31, 34 (2005).

But over time, spurred by the disability rights movement, public attitudes regarding disabilities evolved and Congress responded by changing the law. In 1973, Congress passed the bi-partisan 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 activity receiving Federal financial assistance." Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973)[3]; *see also* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, 78 Stat. 241, 252-53 (1964). 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

[3] 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).

Immigration Code to end the discriminatory exclusion of people with certain mental disabilities.[4]

The Department of Homeland Security's Final Rule on Public Charge Ground of Inadmissibility (the "Final Rule"), whether unintentionally or deliberately,[5] seeks to reinstate those exclusionary provisions in violation of the Rehabilitation Act. The Final Rule itself would have devastating effects on disabled immigrants and their

[4] *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"). The terms "mental retardation" and "mentally retarded" were once commonly used but are now considered outdated and offensive. In 2010, Congress passed Rosa's Law to change such terminology in federal law to "intellectual disability." Pub. L. No. 111–256, 124 Stat 2643 (Oct. 5, 2010). Most advocates, government agencies, and disability organizations use the term "intellectual disability."

[5] 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 attempted to stop granting "deferred action" to people undergoing medical treatment; after public outcry and pressure from Congress, the policy was reversed. *See* Camilo Montoya-Galvez, *Administration Reinstates Protections From Deportation for Sick Immigrants After Massive Uproar*, CBS NEWS (Sept. 20, 2019) https://www.cbsnews.com/news/medical-deferred-action-trump-administration-reinstates-deportation-relief-for-sick-immigrants-after-uproar/.

families, and confusion surrounding the Final Rule would cause yet further harm. As the district court correctly recognized, implementing the Final Rule "would have an immediate and significant impact . . . on law-abiding residents who have come to this county to seek a better life." Op.[6] at 19. The *amici curiae*—major organizations from all corners of the disability community—join together to voice the disability community's alarm over the Final Rule and to lend their expertise on the issues relating to Section 504 of the Rehabilitation Act. The *amici curiae* respectfully urge the court to deny DHS's motion to stay the district court's carefully considered preliminary injunction.

FACTUAL AND LEGAL BACKGROUND

A. Receipt of Public Benefits Historically Not Synonymous with Public Charge

Two decades ago, the Immigration and Naturalization Service ("INS") (now, DHS) issued Field Guidance clarifying the meaning of a "public charge" "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) ("Field Guidance"). In this Field Guidance, INS interpreted "public charge" to mean an applicant who is "*primarily dependent on the government for subsistence*, as

[6] "Op." refers to the district court's memorandum decision and order granting Plaintiffs' requested preliminary injunction. ECF No. 110.

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). As the district court properly noted, this Field Guidance both "summarized longstanding law" grounded in sound principles of statutory construction and "provided new guidance on public charge determinations" in light of welfare reform that Congress had recently enacted. Op. at 3 (citing 64 Fed. Reg. at 28,689).

B. The Final Public Charge Rule

On August 14, 2019, DHS published the Final Rule, which modifies the prevailing test[7] by assigning mandatory ratings (heavily weighted positive, positive, negative, or heavily weighted 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

[7] 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).

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). DHS all but concedes this new "health" test refers to having a disability.[8] *See* Mot.[9] at 20 ("The Rule does not deny any alien admission into the United States, or adjustment of status, 'solely by reason of' disability. An alien's medical condition is one factor, not the sole factor, that an adjudicator will consider in evaluating the totality of an alien's circumstances."). The applicant's "medical condition" (disability) is considered a heavily weighted negative factor if the applicant lacks private insurance. 8 C.F.R. § 212.22(c)(1)(iii). The receipt of 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). This calculation essentially assigns an additional negative weight to an immigrant's disability, because as discussed below, *see infra* at § I.B,

[8] And the relevant statutory provisions make clear that this language covers all or almost all immigrants with disabilities. *See* 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").

[9] "Mot." refers to DHS's motion to stay the district court's preliminary injunction. ECF No. 38.

individuals with disabilities must rely on Medicaid for disability-related services not covered by private insurance. Moreover, the lack of a "medical condition" is one of just a few positive factors available under the Final Rule. 8 C.F.R. § 212.22(b)(2). Under the Final Rule, DHS officials may find in favor of admissibility *only if* the positive factors outweigh the negative factors, with extra weight assigned to the heavily negative factors. 84 Fed. Reg. at 41,397-98.

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

[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).

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."). As this Court has stated, "Exclusion or discrimination [under Section 504] may take the form of disparate treatment [or] disparate impact[.]" *B.C. v. Mount Vernon Sch. Dist.* 837 F.3d 152, 158 (2d Cir. 2016).

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]

D. The District Court's Order

After voluminous briefing from the parties and *amici curiae*, as well as oral argument, the district court granted a nationwide preliminary injunction "postponing the effective date of the Rule" until a final ruling on the merits. Op. at 24. The district court held that Plaintiffs were likely to succeed on the merits, including because of their Rehabilitation Act claim. Op. at 5-18. After considering the record, the district court also concluded that Plaintiffs had amply demonstrated that the Final Rule would cause irreparable harm and that it was in fact "impossible to argue" otherwise. Op. at 19-20.

ARGUMENT

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

DHS argues that the Final Rule does not discriminate against individuals with disabilities because "[a]n Alien's medical condition is one factor, not the sole factor,

[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).

that an adjudicator will consider in evaluating the totality of an alien's circumstances." Mot. at 20. 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.

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). As the district court held, the Final Rule "clearly considers disability as a negative factor in the public charge assessment." Op. at 18.

DHS's "health" criterion would automatically assign a negative weight to almost every person with a disability. This status would count as a heavily weighted negative factor for these individuals 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 assigned this heavily weighted

negative factor. Further, under the Final Rule, the *lack* of a disability is one of the few positive factors recognized by DHS. *See* 8 C.F.R. § 212.22(b)(2). Thus, all else being equal, the Final Rule severely disadvantages individuals with disabilities by automatically assigning them a "negative factor" or "heavily weighted negative factor" *and* automatically disqualifying them from one of the few available positive factors. This disparate 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.").

DHS's argument that it is "required" to consider an immigrant's disability because Congress specified "health" as a factor DHS "shall consider" in evaluating whether the alien is likely to become a public charge is unavailing. Mot. at 20. There is nothing in the legislative history or elsewhere that indicates that Congress, in specifying that an immigrant's overall "health" should be considered, meant that DHS should exclusively consider an immigrant's disability. In fact, DHS's unsupported interpretation would have been contrary to congressional action at the time given that Congress had just passed the ADA.

As the district court recognized, this aspect of the Final Rule is discriminatory because individuals with disabilities are not categorically unhealthy, dependent, or likely to become a public charge. *See* Op. at 18 ("Defendants do not explain how disability alone is itself a negative factor indicative of being more likely to become a public charge. In fact, it is inconsistent with the reality that many individuals with disabilities live independent productive lives.").

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). Counting Medicaid use as a heavily weighted negative factor discriminates against individuals with disabilities because Medicaid services are *essential* for millions of people with disabilities.[12]

Individuals with disabilities frequently must rely on Medicaid because private insurance simply does not cover certain services that people with disabilities

[12] For this reason, a third of Medicaid's adult recipients under the age of 65 are people with disabilities. *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 Nov. 22, 2019).

typically need.[13] 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.[14] Even highly educated professionals, business owners, and other fully employed individuals with disabilities who use private insurance *also* retain Medicaid coverage because no other insurer provides the services that they need.[15]

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[13] *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 Nov. 22, 2019).

[14] *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 Nov. 22, 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 Nov. 22, 2019).

[15] *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

Medicaid use is positively associated with employment and the integration of individuals with disabilities,[16] in part because Medicaid covers employment supports[17] that enable people with disabilities to work.[18] Congress in fact specified that Medicaid services are meant to help individuals with disabilities "attain or retain

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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.").

[16] *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-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).

[17] 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.

[18] *See Employment & HCBS*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/ltss/employment/employment-and-hcbs/index.html (last visited Nov. 22, 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.").

[the] capability for independence or self-care." 42 U.S.C. § 1396-1. The Final Rule inexplicably penalizes using these services as a heavily weighted negative factor.

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

As noted, under the Final Rule, an immigrant's disability without private insurance and the use of Medicaid are both deemed heavily weighted negative factors, 8 C.F.R. § 212.22(c)(1), while the lack of a disability is a positive factor, *see* 8 C.F.R. § 212.22(b)(2). And, 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 *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 disabled 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 hollowness of DHS's argument that "[a]n alien's medical condition is one factor, not the sole factor, that an adjudicator will consider in evaluating the totality of an alien's circumstances." Mot. at 20. But regardless, the Final Rule violates Section 504 because individuals would be denied benefits on the basis of their disabilities, 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" were considered 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 previously admitted that 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 now contends that "plaintiffs' alleged injuries are speculative," Mot. at 21. DHS was correct the first time.

Allowing the Final Rule to take effect during this appeal would have particularly dire consequences for immigrants with disabilities, who would invariably either be denied admission or an adjustment of status under the Final Rule.[19] Conversely, some immigrants with disabilities might attempt to avoid a

[19] Mandatory exclusion from the United States can be a death sentence for some immigrants with disabilities. For example, Maria Isabel Bueso, an immigrant

public charge determination by foregoing necessary medical services.[20] For example, imagine an immigrant who has been in the United States long enough to be eligible for the Medicaid Buy-In program[21] that he uses to get personal care services, which are unavailable through private health insurance but are necessary to enable him to work. He would either have to drop out of the Medicaid Buy-In program (and thereby lose the personal care services and possibly his employment) or risk being deemed a public charge (which would prohibit him from becoming a

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diagnosed with a rare life-threatening condition was initially 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.

[20] *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.").

[21] 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*. *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).

legal permanent resident).

In addition, granting DHS's requested stay would cause significant public confusion about the Final Rule and 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. The stay would also harm citizens: many immigrant parents would likely refuse government benefits for their citizen children with disabilities even though the usage of those benefits would not be counted against the parents. DHS admitted during rulemaking that the programs named in the Final Rule will experience disenrollment 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. Already, 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

[22] For 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.

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 study in the Journal of the American Medical Association Pediatrics found that between "0.8 and 1.9 million children with 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]

The district court correctly described these foreseeable consequences of implementing the Final Rule:

> Overnight, the Rule will expose individuals to economic insecurity, health instability, denial of their path to citizenship, and potential deportation—none of which is the result of any conduct by those such injuries will affect. It is a rule that will punish individuals for their recipient of benefits provided by our government, and discourages them from lawfully receiving available assistance intended to aid them in becoming contributing members of our society.

Op. at 19-20. Because it is "impossible to argue that there is no irreparable harm for these individuals, Plaintiffs, and the public at large[,]" Op. at 20, DHS utterly fails

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[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.

[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).

to address this imminent, severe harm, instead casting it off as "speculative," Mot. at 21.

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 severely and immediately 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 deny Defendants' motion for a stay.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Local Rules 29.1(c) and 32.1(a)(4)(A), the foregoing brief contains 4,837 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the Word Count feature of Microsoft Word. This brief has been prepared in 14-point Times New Roman font.

s/ *Sarah M. Ray*
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Addendum: 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 than 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 amicus briefs in cases in 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.

As the federally authorized Protection & Advocacy System for people with disabilities in New York, **Disability Rights New York** ("DRNY") has an interest in pursuing legal remedies for individuals with disabilities who face discrimination. DRNY provides free legal services to advance and protect the rights of people with disabilities throughout New York State, including impact litigation to achieve systemic reform. DRNY provides these services to over 4,000 individuals per year under federally-funded mandates established by Congress to protect and advocate for the rights, safety, and autonomy of people with disabilities. DRNY's work in the area disability discrimination includes successful systemic litigation.

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 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 **New York Civil Liberties Union** ("NYCLU"), an affiliate of the American Civil Liberties Union (ACLU), is a not-for-profit, non-partisan organization with eight offices throughout New York State and approximately 190,000 members statewide. The NYCLU's mission is to defend and promote civil liberties and civil rights. The NYCLU works to ensure that the core values and principles of liberty, equality and integration are more fully and consistently realized in the lives of all New Yorkers. In pursuit of these principles we fight for the dignity of all people, with particular attention to the pervasive and persistent harms of disability discrimination. The NYCLU initiated the landmark *Willowbrook* class-action litigation on behalf of people with intellectual disabilities, a class action that was in the vanguard of the civil rights movement for people with disabilities. The NYCLU engages in public law social reform litigation and legislative and policy advocacy for New Yorkers with disabilities and their families.

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.