

INADMISSIBLE AS A PUBLIC CHARGE: ADJUDICATING THE TRUMP ADMINISTRATION’S WAR ON LEGAL IMMIGRATION*

I. INTRODUCTION

Isabel Martínez emigrated to the United States “the right way.”¹ While she has yet to be naturalized as an American citizen, Isabel has been in the United States since she was two years old, when her family moved from Michoacán, Mexico.² She lives legally in California on a temporary work visa, but she ultimately hopes to apply for lawful permanent residency (LPR) status.³ Her ten-year-old daughter, a U.S. citizen, was recently diagnosed with Lupus, a condition for which Isabel relies on state-sponsored health insurance to treat.⁴ A new rule, promulgated by the Trump administration’s Department of Homeland Security (DHS), is sparking fear and confusion for families like Isabel’s who worry that their use of public benefits may jeopardize their chances of securing LPR status.⁵

“Public charge law” refers to a provision in immigration law that deems inadmissible any noncitizen who, in the opinion of the relevant government actor, is “likely at any time to become a public charge” (i.e., primarily dependent on government programs).⁶ This determination applies to those seeking a visa for legal, temporary entry to the United States and noncitizens already in the United States applying for adjustment of status to LPR.⁷ Though LPC law—meaning “likely to become a public charge”—has a long history in the United States, the legal doctrine behind it has remained “remarkably constant” through more than a century of case law, statutes, and regulations.⁸

* Kaylin Hawkins, J.D. Candidate, Temple University Beasley School of Law, 2021. The author would like to thank the *Temple Law Review*, Volume 93 staff for their consistent hard work and careful review of this Comment.

1. See Monica Campbell & Indra Ekmanis, *Supreme Court’s ‘Public Charge’ Decision Sows Confusion Among Immigrants Using Public Benefits*, WORLD (Jan. 29, 2020, 5:00 PM), <http://www.pri.org/stories/2020-01-29/supreme-courts-public-charge-decision-sows-confusion-among-immigrants-using> [https://perma.cc/XK9T-2EA6]; see also Ruben Pantoja, *The Right Way, the Wrong Way, and the American Way: Nativist Policy in California, 1900–2000* (2015) (unpublished M.A. thesis, University of California, Irvine) (implying that the legal path individuals take in immigrating to the United States is “the right way”).

2. Campbell & Ekmanis, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. 5 CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, *IMMIGRATION LAW AND PROCEDURE* § 63.05 (2020).

7. *Id.* A third public charge provision provides grounds for deportation, but this provision is rarely used and is not the subject of this Comment. See 6 *id.* at § 71.07 (“[O]nly thirty-one people were deported on this ground from 1971 to 1980. The immigration agency did not even report statistics on the number of people deported as public charges after 1980.” (footnote omitted)).

8. Torrie Hester, Hidetaka Hirota, Mary E. Mendoza, Deirdre Moloney, Mae Nagi, Lucy Salyer & Elliot Young, *Historians’ Comment on DHS Proposed Rule “Inadmissibility on Public Charge Grounds”* 8 (Oct. 5,

President Trump's DHS disrupted that legal history when it finalized a regulation titled "Inadmissibility on Public Charge Grounds."⁹ In an exertion of unilateral executive authority lacking any support from Congress, the DHS expanded the type of benefits considered in a public charge determination,¹⁰ lowered the public charge standard from primary dependence on welfare to use of welfare for supplemental support,¹¹ and undermined the totality-of-the-circumstances nature of the codified public charge test.¹² Fortunately, Isabel Martínez's fears about her daughter's California-sponsored health care are unwarranted under the rule, which applies only to federal programs and will not consider a child's use of public benefits in the parent's public charge determination.¹³ But the rule does make uncertain Isabel's path to legal permanent residency, and the panic that the rule provoked in Isabel's community is just one of many injuries it is likely to inflict on immigrant communities throughout the United States.¹⁴

This Comment begins with an overview of the history of LPC law, including its intermittent use as a tool of government-sanctioned discrimination,¹⁵ while emphasizing the legal continuity of the principles underlying LPC law and the Trump administration's use of unilateral force to change them.¹⁶ This Comment then proceeds to an analysis of the impact the rule is likely to have on immigrants, local and state governments, care providers, and a number of other entities.¹⁷ Finally, this Comment concludes with a discussion of the ongoing litigation over the rule and makes an argument for how presiding federal judges should proceed in light of recent case law.¹⁸

This Comment argues that the Administrative Procedure Act (APA)¹⁹ gives federal judges clear authority to "set aside agency action . . . [that is] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁰ The public charge rule puts the Trump administration's actions well within the meaning of "arbitrary and capricious" under the APA by overturning decades of precedent without congressional approval, enacting a policy that flouts its own stated purpose, and cloaking a

2018), <http://www.ilcm.org/wp-content/uploads/2018/10/Historians-comment-FR-2018-21106.pdf> [https://perma.cc/2LLT-CY5L].

9. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (codified at scattered parts of 8 C.F.R.).

10. See *infra* note 139 and accompanying text.

11. See *infra* notes 138–139 and accompanying text.

12. See *infra* notes 145–147 and accompanying text.

13. See *infra* notes 125–126 and accompanying text for a list of the affected programs and for authorities reviewing the effect of family-member use of public benefits on an individual's public charge determination, respectively.

14. See Campbell and Ekmanis, *supra* note 1.

15. See *infra* Part II.A.

16. See *infra* Parts II.B and II.C.

17. See *infra* Part III.A. This Comment's predominant focus will be the "adjustment of status" side of LPC determinations. It frequently mentions but does not emphasize the public charge rule as it pertains to determining the admissibility of new migrants before entry, though many of the rule's critics argue that it is in this respect that the rule could levy its most detrimental impacts in terms of economic output by excluding potential members of both the skilled and unskilled workforces. See Campbell and Ekmanis, *supra* note 1.

18. See *infra* Part III.B.

19. 5 U.S.C. §§ 551–59, 701–06 (2018).

20. 5 U.S.C. § 706(2)(A).

discriminatory policy in pretextual reasoning. As such, this Comment argues that federal judges should respond accordingly: exercise the power given to them by the APA and vacate the public charge policy.

II. OVERVIEW

Public charge policy is not an innovation of modern law. The policy dates as far back as the colonial era and has endured the many iterations of American immigration law. Part II.A examines this history, with an emphasis on how public charge law has time and again been used to discriminate against newcomers based on their income, race, ethnicity, and gender. Part II.B examines the evolution of modern public charge law and its intersection with welfare policy, starting with the federal government's first attempt at comprehensive immigration reform and ending with the immigration and welfare reforms of the 1990s. Part II.C analyzes the new public charge rule in effect as of February 2020, highlighting its most dramatic departures from traditional public charge law.

A. *Early Public Charge Law: Stereotyping the Drunkards, the Shiftless, and the Lazy*

Public charge policy in the Americas has a history older than the U.S. government itself.²¹ Colonial “poor laws” allowed local governments to remove and exclude outsiders whose use of almshouses (the primary source of colonial public aid offering shelter, food, and clothing) rendered them “public charges,” a term that describes those who unduly expend public resources.²² Modeled on even older codes like the Elizabethan Poor Law of 1601²³ and the Poor Relief Act of 1662,²⁴ colonial poor laws established many of the founding principles that guide public charge policy today.²⁵ These early laws often turned newcomers away unless the shipmasters they arrived with were willing to offer a bond for their passengers.²⁶ Many of these laws also made bona fide residency a prerequisite for receiving aid by codifying the number of years an individual must live in one town before he can access public benefits there.²⁷

The rationale behind poor laws was that resources for public welfare were limited; governing bodies were expected to distribute those resources only to those who were

21. See Medha D. Makhoul, *The Public Charge Rule as Public Health Policy*, 16 IND. HEALTH L. REV. 177, 179–80 (2019).

22. Hester et al., *supra* note 8, at 2.

23. 43 Eliz. c.2 (Eng.).

24. 14 Car. 2. c.12 (Eng.).

25. See *Shapiro v. Thompson*, 394 U.S. 618, 628 n.7 (1969) (describing the five-year waiting period, its purpose, and its origins in the Elizabethan Poor Law and Law of Settlement and Removal); Makhoul, *supra* note 21, at 179.

26. Makhoul, *supra* note 21, at 181 n.27 (citing THE HONORABLE GEN. COURT OF MASS., ACTS AND RESOLVES PASSED BY THE GENERAL COURT OF MASSACHUSETTS, AN ACT RELATING TO ALIEN PASSENGERS 339 (Dutton & Wentworth 1850)).

27. John E. Hansan, *Poor Relief in Early America*, VCU LIBRS.: SOC. WELFARE HIST. PROJECT (2011), <https://socialwelfare.library.vcu.edu/programs/poor-relief-early-amer/> [https://perma.cc/4GLT-MFCY]. See *infra* note 100 and accompanying text for a description of the modern five-year ban on noncitizen receipt of public benefits.

considered deserving.²⁸ To serve that end, the early poor laws created a distinction between recipients who were “worthy” and those who were “unworthy” of aid.²⁹ Only unworthy recipients—those considered to be “drunkards, shiftless, lazy”³⁰—would be subject to public charge determinations.³¹ The worthy—those who were “orphans, widows, handicapped, frail[,] elderly”³²—were free to use public benefits without fear of being deemed a public charge and facing the consequences thereof.³³ These categories reflected the already evolving American notions of self-sufficiency and individual responsibility.³⁴ As a practical effect, colonial poor laws and the sentiments behind them laid the foundation for two centuries of U.S. immigration policy that have aimed to defend the state budget against the poor and the unworthy.³⁵

Colonial poor laws generally applied equally to newcomers and residents alike, but as state governments formed, they refashioned the colonial codes as components of the first wave of American legislation to target immigrants specifically.³⁶ New York and Massachusetts led the effort to bring public charge policy into the nineteenth century.³⁷ These states were the most acutely affected by the mass migration to the United States in the early and mid-1800s, much of which can be attributed to the already impoverished Irish fleeing famine.³⁸ Not only did the population influx put new levels of strain on public resources, but the tendency for these low-income immigrants to need aid upon arrival intensified an increasingly popular bias that associated immigrants with dependency on welfare.³⁹ The two states responded to anti-immigrant sentiment and a perceived fiscal threat by codifying their ability to deport or deny entry to any “lunatic, idiot, deaf and dumb, blind or infirm persons . . . who . . . [were] likely to become permanently a public charge.”⁴⁰

By the late 1800s, immigration policy had moved almost entirely into the hands of the federal government.⁴¹ In 1882, Congress borrowed public charge language from New

28. See Makhoul, *supra* note 21, at 180.

29. Hansan, *supra* note 27.

30. *Id.*

31. *Id.*

32. *Id.*

33. See *id.*

34. See *id.*

35. See Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 9 & n.47 (2009) (characterizing the debate over immigration policy as one charged by racial and socioeconomic hostilities); Anna O. Law, *Lunatics, Idiots, Paupers, and Negro Seamen—Immigration Federalism and the Early American State*, 28 STUD. AM. POL. DEV. 107, 115 (2014) (tracing notions of “undeserving” categories of immigrants back to early public charge policy).

36. Hester et al., *supra* note 8, at 2.

37. Law, *supra* note 35, at 116.

38. Hester et al., *supra* note 8, at 2.

39. Law, *supra* note 35, at 116 (“[F]rom 1845 to 1860, between one-half and two-thirds of Boston’s paupers were immigrants, while in New York in 1860, ‘no fewer than 86 percent of those on relief were foreign born.’” (footnote omitted)).

40. Hester et al., *supra* note 8, at 2 (second omission in original) (quoting N.Y. (STATE) COMM’RS OF EMIGRATION, ANNUAL REPORTS OF THE COMMISSIONERS OF EMIGRATION OF THE STATE OF NEW YORK: FROM THE ORGANIZATION OF COMMISSION, MAY 5, 1847, TO 1860, at 433 app. at 12 (1861)).

41. Law, *supra* note 35, at 127.

York and Massachusetts to draft the “first comprehensive federal immigration law” and deny entry to “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.”⁴² In 1891, Congress expanded the rule to deny admission to any immigrant deemed “*likely* to become a public charge.”⁴³ The law only allowed deportation for an immigrant who became a public charge within one year of arrival, recalling the colonial idea that newcomers should be able to receive aid without fear of deportation after they have established true residency in the United States.⁴⁴ It should be noted that even in the early stages of federal immigration law, Congress limited public charge determinations to immigrants who became primarily or permanently dependent on public aid; the law deliberately left immigrants free to access aid during times of temporary financial distress.⁴⁵

Throughout the twentieth century, two trends emerged alongside the development of federal immigration law that inform an analysis of modern public charge policy: (1) the expansion of social welfare programs, and (2) increasing anti-immigrant sentiment, particularly its correlation with similarly hostile attitudes about ethnicity and race.⁴⁶ Early federal immigration policy, unrestricted by yet-to-exist constitutional protections against racial classifications, often explicitly considered race as a basis for excluding migrants and erecting barriers to citizenship.⁴⁷ The Chinese Exclusion Act of 1882⁴⁸ categorically excluded Chinese laborers from entry to the United States.⁴⁹ President Roosevelt’s “Gentlemen’s Agreement” in the early 1900s severely restricted Japanese migration to the United States.⁵⁰ Native Americans were long barred from U.S. citizenship, even after the Fourteenth Amendment had purportedly guaranteed citizenship by birth.⁵¹

Anti-immigrant policies were not limited to explicit national origin quotas and categorical racial bans on entry. While not facially discriminatory, LPC law has been repeatedly used as a more covert means to anti-immigrant, racist ends.⁵² In the 1910s,

42. Makhoul, *supra* note 21, at 181 (quoting Act of Aug. 3, 1882, ch. 376 § 2, 22 Stat. 214, 214 (1882)).

43. *Id.* at 181–82 (emphasis added) (quoting Immigration Act of 1891, Pub. L. No. 51–551, 26 Stat. 1084 (1891)).

44. *Id.* at 182. By 1917, Congress had extended the period new arrivals must endure before they could receive aid without consequence from one year to five years. *Id.*

45. Hester et al., *supra* note 8, at 1.

46. *Id.* at 5–6; Johnson, *supra* note 35, at 15–16 (identifying racism as a motivating factor behind most immigration policies, historical and modern).

47. DEIRDRE M. MOLONEY, NATIONAL INSECURITIES: IMMIGRANTS AND U.S. DEPORTATION POLICY SINCE 1882, at 134 (2012).

48. Ch. 126, 22 Stat. 58 (1882) (repealed 1943).

49. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58; *see also* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889) (upholding the Chinese Exclusion Act as a proper use of Congress’s power to shape immigration policy).

50. *See* Michael Patrick Cullinane, *The ‘Gentlemen’s’ Agreement – Exclusion by Class*, 32 IMMIGRANTS & MINORITIES 139, 140–41 (2014).

51. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 56–57 (2002) (citing *Elk v. Wilkins*, 112 U.S. 94 (1884)).

52. *See, e.g.,* Johnson, *supra* note 35, at 15–17 (“As we have seen, such features of the Immigration & Nationality Act as the public-charge exclusion, for example, preclude many prospective immigrants of color from the developing world from lawfully immigrating to the United States.” (footnote omitted)).

law enforcement used anti-Semitic stereotypes to deport disproportionate numbers of Jewish immigrants, finding that their “peddler” nature made them “economically unfit” under LPC law.⁵³ Prejudices against South Asian migrants led to thousands of LPC determinations based on the group’s reputation for being lazy and unfit for employment.⁵⁴ In the 1930s, local agencies wielded LPC law with unprecedented, targeted force against Mexican migrant workers.⁵⁵ Mexican migrants constituted 46.3% of all deportations ordered throughout the decade.⁵⁶

Women were also disproportionately turned away on LPC grounds, particularly unmarried women and women traveling without their husbands or fathers.⁵⁷ Traditional gender roles suggested these migrants were the most likely candidates for economic dependency.⁵⁸ This attitude also tied LPC law to sexual morality—the idea being that single women would resort to soliciting sex for financial support and “by that defect of character [were] rendered likely to become a public charge.”⁵⁹ Though gender disparity is not especially relevant to conversations about modern public charge policy, its history in LPC law demonstrates how closely the American public associated immigrants with immoral or otherwise unsuitable behavior.⁶⁰ Together, these troubling trends demonstrate a long history of the U.S. government weaponizing LPC law in battles over racial identities, religion, gender roles, and sexual morality in the name of fiscal responsibility.⁶¹

B. *Modern Public Charge Law*

Public charge law has remained exceptionally consistent since its colonial inception, even as the laws surrounding it underwent massive transformations in the twentieth century. Part II.B.1 explores the simultaneous development of two federal statutory schemes: the national welfare system and a comprehensive framework governing immigration and citizenship. Part II.B.2 discusses how these developments fed public animosity toward both immigrants and welfare recipients, ultimately compelling Congress to restrict noncitizen access to public benefits. Part II.B.3 describes this legislation’s implications for public charge law and how it shaped LPC law into the form it takes today.

53. MOLONEY, *supra* note 47, at 82–83.

54. *See* Hester et al., *supra* note 8, at 3.

55. *See* MOLONEY, *supra* note 47, at 92.

56. *Id.*

57. *Id.* at 84.

58. *See id.*

59. *Id.* at 28.

60. *See id.* at 80; *see also* Hester et al., *supra* note 8, at 4 (“This use of LPC reflected an older view that social transgressions were caused by inborn character defects (e.g. ‘weak morals’), which by definition preexisted entry.”).

61. MOLONEY, *supra* note 47, at 80.

1. The Nexus Between the Modernized Immigration System and the Social Safety Net

While anti-immigrant sentiment intensified throughout the twentieth century, the U.S. welfare system was growing well beyond its humble roots in the colonial poorhouses.⁶² The New Deal provoked the first of several waves of expansion to hit federal welfare programs in the 1900s.⁶³ The Social Security Act of 1935,⁶⁴ a product of the New Deal and a particularly important innovation in American welfare policy, established public retirement benefits and need-based income support for certain qualifying groups.⁶⁵ Federal welfare programs enjoyed a second era of expansion in the 1960s.⁶⁶ During this time, Medicare and Medicaid established national health insurance programs,⁶⁷ the Food Stamp Act of 1964⁶⁸ created a program to subsidize the nutrition of low-income families,⁶⁹ and a series of additional statutes created programs to supplement incomes and deliver services to low-income youth and parents.⁷⁰ A collective hostile attitude toward immigrants and a century of expansions in the social safety net sent immigration and welfare policy on a crash course that did not fully culminate until the 1990s.⁷¹

As welfare policy evolved throughout the twentieth century, immigration and LPC law did the same.⁷² Early twentieth-century LPC law concerned the interpretation of the aforementioned 1891 Immigration Act, which provided for public charge determinations as grounds for deportation within one year of entry and grounds for denying entry at the time of arrival.⁷³ Early courts charged with interpreting the statutory LPC language rallied around a familiar consensus that it encompassed only primary and permanent

62. See Makhlof, *supra* note 21, at 182–83.

63. The New Deal was the Roosevelt administration’s response to the Great Depression of the 1930s. During this time, the government established “powerful new welfare-state institutions” including social insurance, cash and work relief programs, and federal labor regulations. CHARLES NOBLE, *WELFARE AS WE KNEW IT: A POLITICAL HISTORY OF THE AMERICAN WELFARE STATE* 54 (1997).

64. Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

65. Social Security Act of 1935, 49 Stat. 620; see also NOBLE, *supra* note 63, at 56.

66. See NOBLE, *supra* note 63, at 79.

67. See 42 U.S.C. § 1395 (2018) (governing Medicare, a public health insurance program providing coverage to the “aged and disabled”); *id.* § 1396 (governing Medicaid, a public health insurance program providing coverage to “needy populations”); NOBLE, *supra* note 63, at 88–89, 93 (detailing the political histories that led to the passage of Medicare and Medicaid, respectively, in the 1960s).

68. Pub. L. No. 88-525, 78 Stat. 703 (1964) (codified at 7 U.S.C. §§ 2011–36 (2018)).

69. Food Stamp Act of 1964, 78 Stat. 703; NOBLE, *supra* note 63, at 93. This Comment will refer to the federal nutritional aid program under its modern name, the Supplemental Nutrition Assistance Program (SNAP). See Andrew Hammond, *The Immigration-Welfare Nexus in a New Era?*, 22 LEWIS & CLARK L. REV. 501, 505–06 (2018) (providing an overview of the history and administration of SNAP).

70. Makhlof, *supra* note 21, at 183. Programs of this type included subsidies for child care services for those receiving Aid to Families with Dependent Children (AFDC); Head Start, a vocational training program designed to increase the employability of young adults; and a number of other programs designed to help low-income working families. See *id.* at 183 n.43.

71. See Lisa Levinthal, *Welfare Reform and Limits on the Rights of Legal Residents*, 10 GEO. IMMIGR. L.J. 467, 470–74 (1996). See *infra* Part II.B.2. for a discussion of the immigration and welfare reforms of the 1990s.

72. Hester et al., *supra* note 8, at 5–6.

73. See Immigration Act of 1891, Pub. L. No. 51-551, § 11, 26 Stat. 1084, 1086 (1891).

dependence on public aid.⁷⁴ This left public programs dedicated to education, housing, food, and health care out of the LPC calculus; it was generally understood that these programs fostered societal integration and personal development, not economic dependency.⁷⁵ As a result, only programs offering cash benefits and long-term institutionalization were included in LPC determinations.⁷⁶ The distinction between dependency on public aid and public aid as a temporary supplement was a well-established tenet of LPC law throughout the federal courts and executive agencies.⁷⁷

Long after the federal courts had settled the definition of LPC as a matter of common law, Congress enacted the Immigration and Nationality Act of 1952 (INA)⁷⁸ that modernized federal immigration policy and established much of the statutory framework that exists today.⁷⁹ The 1952 reforms implemented several innovations in immigration law that implicate LPC policy, including the creation of “nonimmigrant” visa categories and the ability of nonimmigrant visa holders to adjust to LPR status.⁸⁰ Nonimmigrant visas indicate that the noncitizen’s presence will be temporary.⁸¹

Today, common nonimmigrant visa categories include those issued for work, tourism, and education.⁸² All other visas—including green cards, which indicate an immigrant has already qualified for LPR status—are immigrant visas.⁸³ Before 1952, all noncitizens had to seek a visa from a consulate abroad before entry.⁸⁴ If a noncitizen entered with a temporary visa and later decided to seek LPR status, she was required to leave the United States and then apply for an immigrant visa before reentering.⁸⁵ To

74. Complaint for Declaratory and Injunctive Relief at 17–19, *Washington v. U.S. Dep’t of Homeland Sec.*, 408 F. Supp. 3d 1191 (E.D. Wash. Aug. 14, 2019) (No. 4:19-cv-05210) [hereinafter E.D. Wash. Complaint for Declaratory and Injunctive Relief] (asserting that low income and poor labor conditions alone were not enough to render immigrants likely to become public charges because the LPC statute sought to exclude immigrants only on “the ground of *permanent* personal objections accompanying them” (quoting *Gegiow v. Uhl*, 239 U.S. 3, 10 (1915))); *see also* *Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d. Cir. 1917) (“We are convinced that Congress meant the act to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future.”).

75. Makhlof, *supra* note 21, at 182; Hester et al., *supra* note 8, at 4.

76. Makhlof, *supra* note 21, at 184–85.

77. E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 19. Official government publications, like this Department of Justice field guidance notice, confirm this tradition:

It has never been Service policy that any receipt of services or benefits paid for in whole or in part from public funds renders an alien a public charge, or indicates that the alien is likely to become a public charge. The nature of the public program must be considered. For instance, attending public schools, taking advantage of school lunch or other supplemental nutrition programs, or receiving emergency medical care would not make an alien inadmissible as a public charge, despite the use of public funds.

Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,692 (May 26, 1999) (first emphasis added).

78. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2018)).

79. E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 19–20; 1 GORDON ET AL., *supra* note 6, at § 2.03(1).

80. Hester et al., *supra* note 8, at 5.

81. 1 GORDON ET AL., *supra* note 6, at § 2.03(2)(c).

82. *Id.*

83. *Id.* § 1.03(2)(c)(ii)(B).

84. 3 *id.* § 31.03(1).

85. Hester et al., *supra* note 8, at 5.

streamline this process, the 1952 INA added the “adjustment of status” mechanism, allowing those with temporary nonimmigrant visas to apply for LPR status without having to leave the United States.⁸⁶

The creation of the adjustment of status process was a meaningful innovation in immigration law. Today, the preferred method of securing LPR status is adjustment from a nonimmigrant visa.⁸⁷ All noncitizens must again prove admissibility upon arrival at a port of entry after they have secured a visa—immigrant or nonimmigrant—from a consulate abroad.⁸⁸ Somewhat confusingly, nonimmigrants who live in the United States and apply for adjustment of status must also be deemed “admissible,” despite the fact that they have already been “admitted” to the United States.⁸⁹ Given the popularity of the adjustment of status route, many noncitizens are subjected to at least two public charge evaluations on their way to LPR status: once at entry and again upon application for adjustment of status.⁹⁰

2. Congress Responds to the Fiscal Threat of Immigration

Against the backdrop of the INA’s modernized immigration system and the expanded social safety net, immigrant status increasingly became a determinant of eligibility for public benefits.⁹¹ The latter half of the twentieth century provoked a shift in public opinion of federal welfare programs.⁹² Many American politicians attached a stigma to the poor and their receipt of federal benefits, arguing that welfare encouraged dependency, laziness, and criminal behavior.⁹³ This trend coincided with a similar, renewed downward turn in public opinion of immigration—specifically, undocumented immigration—which spiked significantly in the 1960s and 1970s.⁹⁴

The two stigmas clashed with economic and racial anxieties to produce a narrative that unauthorized immigrants were coming to the United States in droves to bankrupt the public assistance rolls.⁹⁵ While there was no evidence that unauthorized immigrants were to blame for the increase in welfare recipients, and federal statutes had not yet placed immigration status-based restrictions on welfare eligibility, state agencies charged with administering federal welfare programs began barring immigrants from receiving public

86. 4 GORDON ET AL., *supra* note 6, § 51.01(1)(a); *see also* Immigration and Nationality Act of 1952, § 245, 8 U.S.C. § 1255 (2018) (governing adjustment of status).

87. 1 GORDON ET AL., *supra* note 6, § 1.03(4)(b).

88. *See* 8 U.S. CITIZENSHIP AND IMMIGR. SERVS., USCIS POLICY MANUAL, pt. G, ch.3, <http://www.uscis.gov/policy-manual/volume-8-part-g-chapter-3> [<https://perma.cc/J8RW-ZM8E>] (current as of Oct. 15, 2020).

89. 7 *id.* at pt. A, ch. 2 (stating that all applicants for adjustment of status must be deemed admissible to the United States).

90. Immigration and Nationality Act of 1952, § 212, 8 U.S.C. § 1182 (“Any alien who . . . in the opinion of the [Secretary of DHS] at the time of *application for admission or adjustment of status*, is likely at any time to become a public charge is inadmissible.” (emphasis added)).

91. *See* Levinthal, *supra* note 71, at 468.

92. *Id.* at 467–68 (detailing the twin shifts in public opinion regarding federal welfare programs and growing immigrant populations).

93. *Id.*

94. *See* Cybelle Fox, *Unauthorized Welfare: The Origins of Immigrant Status Restrictions in American Social Policy*, 102 J. AM. HIST. 1051, 1052–54, 1059 (2016).

95. *Id.* at 1054, 1062.

benefits.⁹⁶ Despite the tendency of these state laws to fall to equal protection challenges in the courts, the public hostilities behind the laws continued to fester.⁹⁷

Eventually, Congress took its own action against the perceived fiscal threat of immigration by imposing status-based restrictions on specific federal programs.⁹⁸ The Immigration Reform and Control Act of 1986 (IRCA)⁹⁹ implemented, among other restrictions, a five-year ban that delayed newly legalized immigrants' ability to receive public benefits.¹⁰⁰ In 1996, Congress followed the IRCA with comprehensive welfare reform to construct the immigration-welfare nexus as it exists today.¹⁰¹ The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)¹⁰² established two categories of immigrants—qualified and nonqualified aliens—as a determinant of eligibility for public benefits.¹⁰³

Under the PRWORA, the term “qualified aliens” includes categories of noncitizens like lawfully permanent residents, refugees, and asylees.¹⁰⁴ Qualified aliens are generally barred from most federal public benefits for five years after securing qualified status, at which time they may start collecting.¹⁰⁵ All other noncitizens are “not . . . qualified alien[s]” under the PRWORA (most significantly, temporary visitors and undocumented immigrants) and are barred from almost all federal benefit programs.¹⁰⁶ The law does allow certain program-based exceptions for both categories of immigrants, including emergency Medicaid, K-12 public education, Head Start, health programs dedicated to immunizations and treatment of communicable diseases, and the Special Supplemental

96. *Id.* at 1053–54 (providing a history of state legislation aimed at excluding undocumented immigrants from the welfare rolls).

97. *See id.* at 1051–52 (noting the inability of unauthorized immigrants to receive certain welfare benefits despite a successful equal protection challenge on a similar matter); *see, e.g., Plyler v. Doe*, 457 U.S. 202, 202 (1982) (holding that a Texas law that denied public education to undocumented immigrant children violated the Fourteenth Amendment's Equal Protection Clause); *Graham v. Richardson*, 403 U.S. 365, 382–83 (1971) (determining that state restrictions on welfare benefits for those who were lawfully admitted residents, but not citizens, violated the Fourteenth Amendment and was preempted by the plenary power doctrine); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 774, 777–78 (C.D. Cal. 1995), *reconsidered in part*, 997 F. Supp. 1244 (C.D. Cal. 1997) (overturning certain sections of California's Proposition 187, a law that barred undocumented immigrants from receiving public benefits, because the sections both violated the Fourteenth Amendment and were preempted by the federal government's plenary power over immigration law).

98. *See Hester et al.*, *supra* note 8, at 6; *see also Fox*, *supra* note 94, at 1059.

99. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at scattered sections of 8 U.S.C.).

100. 8 U.S.C. § 1255a(h) (2018).

101. Hammond, *supra* note 69, at 502.

102. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.).

103. Makhoul, *supra* note 21, at 187 (citing Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)).

104. *Id.* (citing PRWORA § 431(b), 110 Stat. at 2274 (codified at 8 U.S.C. § 1641(b) (2018))).

105. 8 U.S.C. § 1613(a) (2018). Most refugees and asylees are exempt from the five-year ban. Makhoul, *supra* note 21, at 187 n.74.

106. 8 U.S.C. § 1611(a). Specifically, the statute precludes nonqualified aliens from “[f]ederal public benefit[s],” which are defined in the statute as “any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit.” *Id.* § 1611(a), (c)(1)(B).

Nutrition Program for Women, Infants, and Children (WIC).¹⁰⁷ These narrow exceptions demonstrate a minimal but consistent commitment to health and well-being, even in a statute aimed at reducing federal welfare spending and eliminating welfare as a perceived incentive for migration to the United States.¹⁰⁸

3. Public Charge Law as it Exists Today

Predictably, these reforms implicated the public charge doctrine. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996¹⁰⁹ amended the INA to establish the law's two public charge provisions as they exist today.¹¹⁰ The first public charge provision governs admissibility decisions made both at entry and for purposes of adjusting status.¹¹¹ Both of these LPC determinations are governed by DHS rules and are implemented by the U.S. Citizenship and Immigration Services.¹¹² Though not the focus of this Comment, the second modern public charge provision in the INA establishes public charge as a grounds for deportability.¹¹³ The Department of Justice is charged with the execution of the deportation provision, rounding out a multitude of federal agencies involved in LPC determinations.¹¹⁴

In amending the INA's public charge provision, Congress codified a "totality of the circumstances" test to guide the LPC determination.¹¹⁵ This approach had long been used by the Board of Immigration Appeals to review individual LPC determinations.¹¹⁶ Under the amended law, the reviewing officer must "at a minimum consider the [applicant's]—age; health; family status; assets, resources, and financial status; and education and skills."¹¹⁷ By codifying a number of situational factors for immigration officials to consider, Congress sanctioned what had previously been an informal but ubiquitous principle of LPC law: no one factor is dispositive.¹¹⁸ Enrollment in a welfare program constitutes just one piece of the "financial status" factor,¹¹⁹ so an immigrant's receipt of public benefits alone should not render them an LPC under statutory law.

107. 8 U.S.C. §§ 1611(b), 1613(c); Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,128, tbl.3 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212–14, 245, 248) (listing programs that are exceptions from the definition of federal public benefit under PRWORA).

108. See Makhoul, *supra* note 21, at 189 ("It is broadly understood that such immigrants often come into the country with few resources, and that providing immediate access to public benefits to them without any risk of negative immigration consequences is good policy for promoting their long-term self-sufficiency.").

109. Pub. L. No. 104-208, 110 Stat. 3009, 3009–546 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.).

110. See E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 26–27.

111. 8 U.S.C. § 1182(a)(4)(A) (2018).

112. 1 GORDON ET AL., *supra* note 6, § 3.02(1).

113. 8 U.S.C. § 1227(a)(5).

114. *Id.* § 1103(a)–(g) (conferring specific powers relating to immigration policy to the Secretary of Homeland Security, the Attorney General, and the Secretary of State).

115. E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 26.

116. See, e.g., Perez, 15 I. & N. Dec. 136, 137 (B.I.A. 1974) ("The determination of whether an alien is likely to become a public charge under [the INA] is a prediction based upon the totality of the alien's circumstances at the time he or she applie[d] for an immigrant visa or admission to the United States.").

117. 8 U.S.C. § 1182(a)(4)(B)(i).

118. See Hester et al., *supra* note 8, at 5.

119. Makhoul, *supra* note 21, at 185.

New public charge statutes required new statutory and regulatory interpretations. In 1999, the agency that has since become the DHS issued a field guidance document to define what it means to be a public charge and to settle some other interpretation issues under new federal law.¹²⁰ The field guidance defines an LPC as someone 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.”¹²¹ The agency promulgated this definition based on the long-held tradition that public charge law serves to discourage only *primary dependence*; short-term support intended to supplement or rehabilitate has never been grounds for an LPC determination.¹²²

For this reason, only programs that provide long-term institutionalization and cash benefits have ever been considered in such determinations, a fact left unchanged by the 1990s reform.¹²³ The field guidance also reaffirmed that if an immigrant has received benefits that are considered in LPC determinations, receipt of those benefits alone generally will not render that immigrant inadmissible.¹²⁴ The field guidance explicitly lists a number of noncash benefits that are not to be included in a public charge determination, including Medicaid (for noninstitutionalized treatment), Children’s Health Insurance Program (CHIP), Food Stamps, WIC, Head Start, and public housing benefits.¹²⁵ The principles set forth in the field guidance have guided the relevant agencies in making LPC determinations since their promulgation.¹²⁶ These foundational principles—primary dependence versus supplemental support, limitation to programs offering cash benefits and long-term institutionalization, and the importance of a holistic evaluation—have been universally applied throughout the executive agencies charged with executing LPC law.¹²⁷

120. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (proposed May 26, 1999).

121. *Id.* at 28,689.

122. *See id.* at 28,692.

123. *See id.* at 28,689, 28,692.

124. *Id.* at 28,692 (listing Social Security, Temporary Assistance for Needy Families cash assistance, state and local cash assistance programs, and institutionalized Medicaid health care as programs that will be included in LPC determinations, but noting that past use of these programs will not lead to a “*per se* determination” that the immigrant is inadmissible or deportable as a public charge).

125. *Id.* at 28,693.

126. Jenny Regier, *Proposed Public Charge Regulations in Immigration Law: Subtle Changes and Significant Effects*, 97 DENV. L. REV. F. 87, 88 (2019). Consistent government reliance on the field guidance is evidenced as recently as 2009, when the Department of Justice issued a fact sheet that affirmed the principles of primary dependence over supplemental support, consideration of exclusively cash benefits, and the emphasis on the totality of an immigrant’s circumstances. *See* U.S. DEP’T OF JUSTICE, PUBLIC CHARGE FACT SHEET (2009), 2009 WL 3453730.

127. *See* Hester et al., *supra* note 8, at 8 (noting that definitions of public charge have remained “remarkably constant” under decades of otherwise evolving statutes, common law, and administrative regulations).

C. *Public Charge in the Trump Administration*

In October of 2018, the DHS published a notice of proposed rulemaking called *Inadmissibility on Public Charge Grounds*,¹²⁸ which was finalized after a comment period on August 14, 2019.¹²⁹ The DHS stated two purposes for promulgating a new public charge rule: (1) to promote the self-sufficiency of immigrants in the United States¹³⁰ and (2) to improve upon the 1999 field guidance and clarify how to appropriately weigh the statutory LPC factors.¹³¹ The rule applies not only to applications for admission to the United States and adjustments of status to that of a lawful permanent resident, but also to requests for extensions of stay and change of status for certain *nonimmigrant* individuals.¹³² There is no statutory basis for the application of LPC law to change the status of nonimmigrants; the DHS exerted unprecedented authority with the promulgation of this rule.¹³³ The rule does allow for certain exemptions, and it does not consider use of public benefits by an undocumented individual's child.¹³⁴ However, the rule's broad scope means that some categories of noncitizens who *legally* access public benefits will later be punished for such use via a public charge determination.¹³⁵ This will affect both applicants for LPR status and those who have already been granted LPR status and are seeking to reenter the United States after more than six months away.¹³⁶

In addition to the expansion in the scope of LPC law, the rule changes the very definition of what it means to be a public charge.¹³⁷ The rule defines public charge as anyone receiving "one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)."¹³⁸ In a departure from a centuries-old tradition, the rule goes on to include both cash and noncash benefits in its definition of a public benefit. Not only does the DHS identify the traditional cash assistance programs as targets of consideration, but it also takes the unprecedented step of including SNAP food stamps, certain Medicaid benefits, Section 8 rental assistance, and public housing in the LPC calculus.¹³⁹

128. *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212–14, 245, 248).

129. *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (codified at 8 C.F.R. pts. 103, 212–14, 245, 248).

130. *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. at 51,122.

131. *Id.* at 51,123 ("[N]either the proposed rule nor Interim Field Guidance sufficiently described the mandatory factors or explained how to weigh these factors in the public charge inadmissibility determination.").

132. 8 C.F.R. § 212.22(b)(6) (2020); Regier, *supra* note 126, at 89.

133. E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 56–57 (citing *Inadmissibility on Public Grounds*, 84 Fed. Reg. at 41,507–08).

134. Regier, *supra* note 126, at 89; *see also* *Inadmissibility on Public Grounds*, 84 Fed. Reg. at 41,309 (excluding public benefit use by any of an individual's household members, including an individual's minor child, from the individual's public charge determination).

135. Regier, *supra* note 126, at 90.

136. *Id.*

137. *Id.* at 91.

138. 8 C.F.R. § 212.21(a) (2020).

139. *Id.* § 212.21(b).

Recall that a determination that a noncitizen has used public benefits in the past should not necessarily render her inadmissible or ineligible for LPR status.¹⁴⁰ Per the INA's *statutory* mandate, whether the individual is, at any time, likely to become a public charge is to be determined according to the totality of the circumstances test.¹⁴¹ Use of public benefits is just one element of the "financial status" factor of that test, which in turn is just one of five factors available for consideration.¹⁴²

As an executive agency, the DHS is limited in its ability to make policy.¹⁴³ The DHS's statutory mandate empowers the agency strictly to enforce congressional law, not undermine it.¹⁴⁴ Nevertheless, the DHS manages to revamp a codified multifactor test by assigning "automatic positive or negative valence[s] to certain characteristics related to each statutory factor."¹⁴⁵ The rule designates use of public benefits—still just one subfactor of the financial assets element—as a "heavily weighted negative factor."¹⁴⁶ Though the DHS cannot officially change the codified, comprehensive nature of LPC determinations, the heavy weight and limited number of other negatively weighed characteristics are likely to render the use of public benefits essentially dispositive.¹⁴⁷

In sum, the public charge rule uses unilateral executive authority to alter LPC law in a number of ways. The rule (1) expands the scope of the determination's reach in terms of applicants to which it applies, (2) assigns automatic weight to statutory factors that should be balanced with discretion, and (3) adds never before considered benefit programs in a way that abandons the policy's steadfast commitment to forgiving the use of noncash supplementary benefits.

III. DISCUSSION

The Trump Administration's rule effectuated drastic changes in public charge policy, drawing intense criticism from public health officials, immigrant advocacy groups, and lawmakers.¹⁴⁸ Part III.A discusses just some of the predicted consequences of the new public charge regulation, focusing predominately on those that prompted a number of stakeholders to take their grievances to court. Part III.B turns to an argument about how federal judges should respond to that litigation, beginning in Part III.B.1 with a summary of the litigants' strategy and the grounds for relief that they have submitted to the courts. Part III.B.2 provides the judicial context for the public charge litigation by discussing other, recent instances of states resisting attempts by the executive branch to unilaterally reform immigration law. Finally, Part III.B.3 concludes with an argument

140. See *supra* notes 118–119 and accompanying text.

141. See 8 U.S.C. § 1182(a)(4) (2018).

142. Makhoul, *supra* note 21, at 185.

143. See 8 U.S.C. § 1103(a) (granting the DHS Secretary the power to *administer and enforce* laws relating to immigration and naturalization of noncitizens).

144. *Id.*

145. Regier, *supra* note 126, at 90.

146. 8 C.F.R. § 212.22(c)(1)(ii) (2020).

147. Regier, *supra* note 126, at 90.

148. See *infra* notes 199–201 and accompanying text for a list of stakeholders opposed to the Trump administration's policy.

about how the presiding federal judges should settle the pending disputes over the public charge rule.

A. Anticipated Effects of President Trump's Public Charge Rule

Given the recency of the rule change, the magnitude of the *direct* legal impact (i.e., an increase in noncitizens who are deemed inadmissible or ineligible for LPR status on public charge grounds) is yet to be seen.¹⁴⁹ Some early assessments are foreboding. One estimation shows that ninety-four percent of all noncitizens who entered the country without LPR status have at least one characteristic that the DHS would weigh negatively in a public charge determination under the new rule, and forty-two percent have at least one characteristic that the DHS would *heavily* weigh as a negative factor.¹⁵⁰ Many of these noncitizens will face a higher barrier to LPR status in the wake of the rule.¹⁵¹ The specific number of those affected is likely to be sizable, given the fact that in 2017, 380,000 of the 550,000 noncitizens who adjusted to LPR did so through a pathway that likely required a public charge determination.¹⁵²

If history is to be of any guidance, data on this point from 1996 (the last time immigration reform resulted in a more restrictive LPC policy) indicate that the legal implications for individuals and their status could be extensive. Immediately following the PRWORA's enactment in 1996, public charge became the leading basis for denying admissibility and adjustment to LPR status—a title it retained for the next ten years.¹⁵³ From 1994 to 2008, LPC determinations constituted fifty-three percent of all 790,685 exclusions.¹⁵⁴ By 2008, LPC had fallen to a small minority of inadmissibility determinations, but the spike in the doctrine's use after the 1996 reform suggests that even marginal adjustments to the policy can have real impacts on immigrants seeking to enter or change status for some time after the rule's implementation.¹⁵⁵

The rule, with its expanded definition of public charge, addition of never-before-considered benefits, and calculus favoring inadmissibility, has the potential to repeat the history of the 1990s. The threat is particularly real for low-income immigrants trying to enter the United States legally or adjust to LPR status,¹⁵⁶ given that another of the rule's heavily weighted negative factors is claiming an income of more than 125% below the federal poverty line.¹⁵⁷ Many critics have focused on the rule's disproportionate impact on the less wealthy, accusing the Trump administration of

149. SAMANTHA ARTIGA, RACHEL GARFIELD & ANTHONY DAMICO, KAISER FAM. FOUND., ESTIMATED IMPACTS OF THE PROPOSED PUBLIC CHARGE RULE ON IMMIGRANTS AND MEDICAID 3 (Oct. 2018), <http://www.cmhnetwork.org/wp-content/uploads/2018/10/Issue-Brief-Estimated-Impacts-of-the-Proposed-Public-Charge-Rule-on-Immigrants-and-Medicaid.pdf> [https://perma.cc/2YLJ-375F].

150. *Id.* at 4–5.

151. *Id.* at 1.

152. *Id.* at 2–3.

153. RUTH ELLEN WASEM, CONG. RESEARCH SERV., R41104, IMMIGRATION VISA ISSUANCES AND GROUNDS FOR EXCLUSION: POLICY AND TRENDS 19 (2010).

154. *Id.* at 19–20.

155. *See id.*

156. Hester et al., *supra* note 8, at 8.

157. 8 C.F.R. § 212.22(b)(4)(A) (2020).

imposing a “wealth test for admission” to the United States.¹⁵⁸ Other critics go on to cite potential racial impacts, noting that the rule’s emphasis on financial status is likely to disproportionately affect the admission and LPR applications of nonwhite immigrants.¹⁵⁹

In defense of the rule, some scholars argue that its legal implications are actually likely to be fairly limited.¹⁶⁰ This line of reasoning considers the addition of noncash benefits and the negative weight assigned to LPC factors to be insignificant.¹⁶¹ It also emphasizes the exceptions allowed under the rule that exempt many categories of immigrants from LPC determinations, including refugees, asylees, and those with special immigrant juvenile status.¹⁶² Moreover, it is not clear the DHS has the practical capabilities to enforce the rule to its full potential.¹⁶³ Enforcement would require a massive personnel effort and the cooperation of state governments as the custodians of most information on public benefit recipients.¹⁶⁴

Regardless of whether the rule’s direct impacts will match those brought on by the 1996 LPC reform, the rule will levy its most devastating impact in the form of the “chilling effect.”¹⁶⁵ The term “chilling effect” describes the trend of immigrant disenrollment from public benefit programs out of confusion over new eligibility rules or fear of jeopardizing their chances of achieving LPR status.¹⁶⁶ Though the rule actually applies to narrow groups of immigrants, this fear and confusion leads even those who fall outside of the rule’s scope to disenroll from benefit programs, including those that are not at all considered in LPC determinations.¹⁶⁷ Thus, the rule’s indirect effect is likely to outweigh its legal reach.¹⁶⁸

Again, the aftermath of the 1996 LPC reform is informative and foreshadows an impending chill in the welfare recipient rolls.¹⁶⁹ Following the 1996 reform, benefit

158. See, e.g., Chantal Da Silva, *Alexandria Ocasio-Cortez Condemns Trump’s ‘Wealth Test’ for Immigrants: ‘The American Dream Isn’t a Private Club with a Cover Charge’*, NEWSWEEK (Jan. 28, 2020, 5:06 AM), <http://www.newsweek.com/alexandria-ocasio-cortez-condemns-trumps-wealth-test-immigrants-american-dream-isnt-1484319> [https://perma.cc/L8DD-ZDDT].

159. Andrew Chung, *U.S. Supreme Court Lets Hardline Trump Immigration Policy Take Effect*, REUTERS (Jan. 27, 2020, 1:34 PM), <http://www.reuters.com/article/us-usa-court-immigration/u-s-supreme-court-lets-hardline-trump-immigration-policy-take-effect-idUSKBN1ZQ24N> [https://perma.cc/UU8X-HNBJ].

160. Raymond G. Lahoud, *New Immigration Rule’s Approach to Public Aid Is Not New*, LAW360 (Aug. 26, 2019, 5:37 PM), <http://www.law360.com/articles/1192562/new-immigration-rule-s-approach-to-public-aid-is-not-new> [https://perma.cc/J6FU-QGYZ] (“[I]t is unlikely that there will be any significant increase in public charge determinations, given that the factors that the final rule further outlines have long been an integral part of federal immigration law.”).

161. See *id.*

162. Hammond, *supra* note 69, at 527.

163. See *id.* at 528.

164. *Id.*

165. Allison Orris, Alice Lam & Elizabeth Dervan, *How DHS’ Public Charge Rule Will Affect Immigrant Benefits*, LAW360 (Sept. 3, 2019, 3:20 PM), <http://www.law360.com/articles/1193999/how-dhs-public-charge-rule-will-affect-immigrant-benefits> [https://perma.cc/N55A-UPUZ].

166. *Id.*

167. *Id.* (“Thus, in addition to discouraging the use of Medicaid, SNAP or housing assistance, chilling effects may lead immigrants to disenroll from or forgo federal, state and local programs that fall outside public charge’s reach, such as CHIP [Children’s Health Insurance Program].”).

168. See Regier, *supra* note 126, at 93.

169. *Id.*

programs reported declines in immigrant enrollment ranging from twenty to sixty percent.¹⁷⁰ The chilling effect of the 1990s has already shown signs of a repeat appearance in the wake of the new DHS rule. Since the DHS gave notice of the proposed rule, agencies in eighteen states have reported declines in enrollment of up to twenty percent for WIC, a program that is not even implicated by the new rule.¹⁷¹ Estimates of the anticipated disenrollment from other programs like CHIP and Medicaid range from 2.1 to 4.9 million individuals.¹⁷²

The impact of a chilling effect would be devastating for the noncitizen populations in terms of public health, poverty, and food security.¹⁷³ Numerous people are at risk, given the fact that naturalized citizens and noncitizens comprise fourteen percent of the 82.6 million people receiving the public benefits considered under the new rule.¹⁷⁴ The rule's critics have cited a myriad of adverse effects to noncitizen well-being, including increased poverty, decreased food and housing security, reduced educational attainment, increased mother and infant mortality rates, increased rates of obesity and malnutrition, decreased vaccination rates, and increased prevalence of communicable diseases.¹⁷⁵ These adverse public health effects are so likely that the DHS explicitly acknowledged many of them as side effects of the rule's implementation and the ensuing chilling effect.¹⁷⁶

In addition to the well-being of noncitizens, the public charge rule threatens harm on a macro level by shifting burdens to the states, municipalities, and "safety net providers" (hospitals and health centers), which deal most intimately with public health problems.¹⁷⁷ Disenrollment from preventative health care programs—coupled with the other adverse health effects discussed above—will increase noncitizen use of emergency Medicaid services,¹⁷⁸ which remain available to all residents regardless of citizenship status and are not factored into LPC determinations.¹⁷⁹ The cost burden of uncompensated emergency care, which is exceptionally expensive, will fall on state-run

170. *Id.* (citing JEANNE BATALOVA, MICHAEL FIX & MARK GREENBERG, MIGRATION POLICY INST., CHILLING EFFECTS: THE EXPECTED PUBLIC CHARGE RULE AND ITS IMPACT ON LEGAL IMMIGRANT FAMILIES' PUBLIC BENEFIT USE 23 (2018)).

171. *Id.* (citing Helena Bottemiller Evich, *Immigrants, Fearing Trump Crackdown, Drop Out of Nutrition Programs*, POLITICO (Sept. 3, 2018, 8:17 AM), <http://www.politico.com/story/2018/09/03/immigrants-nutrition-food-trump-crackdown-806292> [https://perma.cc/BZB8-KFVV]).

172. ARTIGA ET AL., *supra* note 149, at 1.

173. Regier, *supra* note 126, at 93.

174. *Id.* at 92.

175. Makhoul, *supra* note 21, at 203–04; *see also* Evich, *supra* note 171 (discussing critics' concerns about the impact of the rule on WIC enrollment).

176. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,270 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. §§ 103, 212–14, 245, 248) (conceding that the rule would likely trigger a chill in public benefit enrollment and listing a number of probable secondary effects to public health and general well-being).

177. Orris et al., *supra* note 165.

178. *See* Makhoul, *supra* note 21, at 191–92 (explaining that Medicaid coverage for cheaper, preventative health care leads to fewer long-term hospitalizations and emergency room visits).

179. 8 U.S.C. § 1611(b) (2018) (prohibiting nonqualified aliens from receiving public benefits but providing for a few exceptions, including emergency Medicaid health services); *id.* § 1613(c) (prohibiting qualified aliens from receiving public benefits during the first five years of residency but allowing, as an exception, use of emergency Medicaid health services at any time).

Medicaid programs and private health care providers.¹⁸⁰ In turn, this is likely to impact the risk pool of marketplace coverage in a way that drives up health care costs for coverage consumers across the board.¹⁸¹

While state budgets will feel the effects of the rule most acutely in terms of health care costs, critics estimate that the rule will provoke a number of other adverse fiscal impacts for state and local governments.¹⁸² For example, noncitizen disenrollment from programs that enhance spending power and capacity to work could be detrimental to economic output and state tax revenues.¹⁸³ As it is, state and local governments collect significant tax revenue from their noncitizen residents.¹⁸⁴ This revenue is likely to decrease as a result of disenrollment from programs that allowed noncitizens to earn and spend paychecks.¹⁸⁵ As a concrete example, the State of Washington estimates that the regulation will force a reduction in its overall economic output in an amount somewhere between \$41.8 million and \$97.5 million dollars.¹⁸⁶ Obviously, such numbers will vary by state, with the most intense concentration on states with higher proportions of noncitizen populations.¹⁸⁷

In light of all the things the public charge rule is likely to *do*, what is perhaps most striking are the things the public charge rule is likely to *not* do. Specifically, it seems almost certain that the regulation will not serve its purported purpose,¹⁸⁸ which is to increase the “self-sufficien[cy]” of the noncitizen population.¹⁸⁹ Enacting a rule that is likely to decrease enrollment in public benefit programs is a puzzling way for the DHS to serve this goal, given extensive evidence that receiving noncash public benefits actually promotes stability and economic mobility.¹⁹⁰ Subsidized health care programs such as Medicaid have proven to be particularly effective in promoting financial stability, as access to preventative and early-treatment care facilitates employment retention for low-wage workers.¹⁹¹ Housing benefits also help low-income populations sustain

180. E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 90.

181. Orris et al., *supra* note 165.

182. *Id.*

183. E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 149–50.

184. *Id.* (“Between 2011 and 2013, tax revenues received from immigrants were \$130 billion higher than public money spent on that same population. On average, an immigrant in the United States pays \$900 more per individual in tax revenue than she collects in public expenditures.” (footnote omitted)).

185. *Id.* at 150.

186. *Id.* at 149.

187. See Orris et al., *supra* note 165.

188. See George C. Benjamin, Comment Letter on Proposed Rule on Inadmissibility on Public Charge Grounds (Dec. 10, 2018), https://www.apha.org/-/media/files/pdf/advocacy/testimonyandcomments/181210_apha_public_charge_comments.ashx?la=en&hash=56A1A126FC49D31E1766368617B2284942A01B70 [<https://perma.cc/H3VU-Q88H>].

189. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,116 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. §§ 103, 212–14, 245, 248).

190. Benjamin, *supra* note 188 (“Limiting access to public benefits programs does not promote self-sufficiency, but instead restricts access to resources that encourage positive health behaviors and contribute to economic mobility.”).

191. *Id.*; see also Allan Dizioli & Roberto Pinheiro, *Health Insurance as a Productive Factor*, 40 LAB. ECON. 1, 1–2 (2016) (finding that workers with health insurance miss approximately 76.54% fewer work days than those who are uninsured).

employment,¹⁹² and the nutritional assistance promised by programs like SNAP have demonstrated powerful antipoverty capabilities.¹⁹³ Public charge policy has long acknowledged this connection between noncash benefits and true self-sufficiency, evidenced by the doctrine's well-established distinctions between noncash and cash benefits and between dependency and supplementary support from welfare programs.¹⁹⁴ The Trump administration's departure from enduring public charge principles, coupled with the harm it threatens to individuals and municipalities, set the stage for the legal battle over LPC policy.

B. *The Public Charge Litigation*

This Part provides an overview of how the public charge litigation has proceeded thus far. It begins, in Part III.B.1 with a summary of the claims for relief that states and their allies have pleaded, most of them being grounded in the Administrative Procedure Act (APA).¹⁹⁵ Part III.B.2 acknowledges that the public charge litigation is simply the most recent iteration of a familiar pattern: the executive branch announces a change in immigration policy and state attorneys general push back by bringing APA claims before the federal courts. This Part briefly discusses these disputes, highlighting trends in their outcomes and identifying similarities to the litigation at hand.¹⁹⁶ Finally, Part III.B.3 argues that based on the questionable authority and insincerity behind the rule, the APA's mandate and relevant case law, and congressional inaction, federal judges should side with the states in their fight against the public charge rule.¹⁹⁷

1. *The APA as a Means to Relief: Reviewing the Claims*

The foregoing, extensive list of dangers posed by the public charge rule has forced the Trump administration to defend its regulation against several challenges in federal court.¹⁹⁸ To date, attorneys general from twenty-one states and the District of Columbia have joined lawsuits pending against the DHS.¹⁹⁹ The states are joined in these suits by several advocacy groups representing the immigrant communities, whose health and well-being stand to suffer under the rule.²⁰⁰ A number of other organizations have also joined the suits in defense of their own interests, including fiscal policy groups and

192. Benjamin, *supra* note 188.

193. LAURA WHEATON & VICTORIA TRAN, URBAN INST., *THE ANTIPOVERTY EFFECTS OF THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM* 9 (2018).

194. See Regier, *supra* note 126, at 91–92; Benjamin, *supra* note 188.

195. See *infra* Part III.B.1.

196. See *infra* Part III.B.2.

197. See *infra* Part III.B.3.

198. See, e.g., Geneva Sands, *13 States Sue Over Legal Immigration 'Public Charge' Rule*, CNN (Aug. 15, 2019, 1:11 PM), <http://www.cnn.com/2019/08/15/politics/13-states-sue-public-charge-immigration/index.html> [https://perma.cc/UAZ4-XHEP].

199. See Laurel Wamsley, Pam Fessler & Richard Gonzales, *Federal Judges in 3 States Block Trump's 'Public Charge' Rule for Green Cards*, NPR (Oct. 11, 2019, 9:27 PM), <http://www.npr.org/2019/10/11/769376154/n-y-judge-blocks-trump-administrations-public-charge-rule> [https://perma.cc/B9KH-UCUA].

200. *Id.*

private tech firms concerned about their skilled labor force.²⁰¹ While the challenges are numerous and varied, most of the claims are grounded in the APA.²⁰²

The APA entitles parties who are “suffering legal wrong because of agency action[] or adversely affected or aggrieved by agency action” to judicial review of the offending action.²⁰³ The remedies available to plaintiffs in an APA action include injunctive relief, which the plaintiffs have requested in an effort to prevent the rule from taking effect.²⁰⁴ Under the APA, a reviewing court may “hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²⁰⁵ Based on this provision, the plaintiffs’ complaints focus predominately on the twin claims that the DHS’s public charge rule is (1) contrary to existing law, and (2) arbitrary, capricious, and an abuse of discretion.²⁰⁶

To support the first argument that the rule should be set aside for its contradiction of existing law, the plaintiffs cite a number of statutes they believe to be undermined by the DHS rule.²⁰⁷ The plaintiffs argue that the rule violates the INA’s codification (via the Illegal Immigration Reform and Immigrant Responsibility Act) of the totality of the circumstances test for LPC determinations by weighing use of public benefits so heavily in the determination that it is essentially dispositive.²⁰⁸ The rule’s alleged violation of the PRWORA comes in the form of a “bait and switch”: the regulation punishes lawful immigrants for use of public benefits where Congress has explicitly provided that those benefits be made available to them after five years of residency.²⁰⁹ The rule’s inclusion of SNAP benefits in LPC determinations directly flouts SNAP’s enabling statute, which prohibits the consideration of those benefits “[as] income or resources for any purpose under any Federal, State, or local laws.”²¹⁰ Finally, the rule runs contrary to the

201. Shirin Ghaffary, *Twitter, Microsoft, and Other Companies Call for an End to Trump’s Rule To Keep out Low-Income Immigrants*, VOX: RECODE (Jan. 16, 2020, 8:50 PM), <http://www.vox.com/2020/1/16/21069827/twitter-microsoft-linkedin-public-charge-trump-immigration-tech-companies> [<https://perma.cc/9SCK-WWV5>] (explaining that tech companies have an interest in protecting legal migration as a source of both skilled and unskilled labor).

202. See, e.g., Complaint for Declaratory and Injunctive Relief at 55–58, *California v. U.S. Dep’t of Homeland Sec.*, No. 3:19-cv-04975 (N.D. Cal. Aug. 16, 2019) [hereinafter N.D. Cal. Complaint for Declaratory and Injunctive Relief]; E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 153–61; Complaint for Declaratory and Injunctive Relief at 65–69, *Mayor of Balt. v. Trump*, 429 F. Supp. 3d 128 (D. Md. 2019) (No. 1:18-cv-03636-ELH) [hereinafter D. Md. Complaint for Declaratory and Injunctive Relief]. The APA governs the powers, required procedures, and judicial review of administrative agencies such as, in the case at hand, the DHS. See 5 U.S.C. §§ 551–59, 701–06 (2018).

203. *Id.* § 702.

204. See *id.*; N.D. Cal. Complaint for Declaratory and Injunctive Relief, *supra* note 202, at 60.

205. 5 U.S.C. § 706(2).

206. N.D. Cal. Complaint for Declaratory and Injunctive Relief, *supra* note 202, at 55–58; E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 3–4.

207. See, e.g., N.D. Cal. Complaint for Declaratory and Injunctive Relief, *supra* note 202, at 55–56; E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 154–56 (citing, *inter alia*, the statute governing SNAP, the INA, the Illegal Immigration Reform and Immigrant Responsibility Act, and the PRWORA as statutes contradicted by the rule).

208. N.D. Cal. Complaint for Declaratory and Injunctive Relief, *supra* note 202, at 56.

209. E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 3–4.

210. *Id.* at 156 (alteration in original) (quoting 7 U.S.C. § 2017(b) (2018)).

Rehabilitation Act of 1973,²¹¹ which prohibits discrimination by any federal program against an individual based on a disability.²¹²

The challenge based on the arbitrary, capricious, and abuse of discretion nature of the rule is grounded less in the rule's contradiction of statutes and more in the Agency's reversal of its own policy based on centuries-old principles.²¹³ Those departures have already been discussed, but they include the redefinition of public charge as anyone receiving one or more public benefits, the shift from public charge as a determination of *dependency* on public benefits to mere *support* from those programs, the unprecedented addition of noncash benefits to the determination, the creation of the factor-weighting framework, and the arbitrary selection of the time frame for public benefit use that triggers its weight as a heavily weighted negative factor.²¹⁴ When an agency reverses its own policy this way, the agency must have a reasoned and full explanation for doing so; the explanation is especially important when the agency reverses its stance after decades of public reliance on the previous policy.²¹⁵

The plaintiffs argue that the DHS has not offered the requisite explanations for its sudden departure from a long-held policy.²¹⁶ The only explanation the DHS offered for the change in policy is its purported dedication to the "self-sufficiency" of the immigrant population.²¹⁷ By the DHS's own admission, the rule's anticipated effects are actually contradictory to the end of self-sufficiency.²¹⁸ This, the plaintiffs argue, suggests that the stated justification for the change in policy is a disingenuous one.²¹⁹ The agency's

211. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended 29 U.S.C. §§ 701–7961 (2018)).

212. Petitioners argue that imposing negative immigration consequences on an individual who used public health services because of a disability equates to discrimination of the individual on the basis of that disability. E.D. Wash. Complaint for Declaratory & Injunctive Relief, *supra* note 74, at 155 (citing 29 U.S.C. § 794(a)).

213. *See id.* at 13–14, 157–61.

214. *Id.* at 158–60. *See also supra* Parts II.A and II.B for a discussion of the history of LPC law and its commitment to excluding supplementary care and maintaining a true totality of the circumstances analysis in making LPC determinations.

215. E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 158. The Supreme Court has adopted an ad hoc approach in reviewing arbitrary and capricious claims. The analysis considers a number of factors, including whether an agency has

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see also* *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (“When an agency changes its existing position, it ‘need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.’ . . . In explaining its changed position, an agency must also be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’” (citations omitted)).

216. N.D. Cal. Complaint for Declaratory and Injunctive Relief, *supra* note 202, at 58.

217. The DHS explains that the new LPC policy will further this goal by forcing noncitizens to depend on their own capabilities and family resources rather than on federal welfare. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,116 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. §§ 103, 212–14, 245, 248).

218. *See supra* notes 189–194 and accompanying text for an explanation of how the anticipated effects of the rule run counter to the DHS's stated purpose for promulgating the rule.

219. E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 4.

reliance on this explanation in light of all the evidence to contradict it provides the grounds for the plaintiffs' claim that the rule is arbitrary, capricious, and an abuse of discretion.²²⁰

In furtherance of this argument, the plaintiffs point to what they believe to be the genuine motivation for the change in policy: the furtherance of the Trump administration's anti-immigrant agenda.²²¹ The claim is not as radical as it may sound. Both as a candidate and a sitting president, Donald Trump and his team have made immigration a centerpiece of the national political discourse.²²² Even the White House website states that "[President Trump] supports ending chain migration, eliminating the Visa Lottery, and moving the country to a merit-based entry system."²²³ The White House has also circulated falsities about immigrant use of welfare programs, asserting that immigrant families use welfare at higher rates than native-born families in an apparent attempt to fan the fires of existing public hostilities against immigration and public welfare.²²⁴ Further, the Trump administration's preoccupation with immigration does not extend to all migrants evenly.²²⁵ Statements from White House officials and the President reveal that the administration's anti-immigration policy has a decided slant against nationals of countries that are not predominately white.²²⁶ Citing the Trump administration's open hostility for non-European immigrants²²⁷ and the rule's disparate

220. *Id.*

221. *See id.* at 160, 162.

222. As early as January 2017, a draft executive order was leaked that suggested LPC law was just one of four separate areas of immigration law that the new administration was already planning on making more restrictive. *See* Matthew Yglesias & Dara Lind, *Read Leaked Drafts of 4 White House Executive Orders on Muslim Ban, End to DREAMer Program, and More*, VOX (Jan. 25, 2017, 5:43 PM), <http://www.vox.com/policy-and-politics/2017/1/25/14390106/leaked-drafts-trump-immigrants-executive-order> [<https://perma.cc/Y76N-46QK>].

223. *Immigration*, WHITE HOUSE, <http://www.whitehouse.gov/issues/immigration/> [<https://perma.cc/E2XD-3Z6A>] (last visited Nov. 1, 2020).

224. *Compare President Donald J. Trump Backs RAISE Act*, WHITE HOUSE (Aug. 2, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/> [<https://perma.cc/M2MQ-393K>] ("More than 50 percent of all immigrant households receive welfare benefits, compared to only 30 percent of native households in the United States that receive welfare benefits."), *with* ALEX NOWRASTEH & ROBERT ORR, CATO INST., IMMIGRATION AND THE WELFARE STATE 7 (2018) (stating that immigrants use, on average, twenty-seven percent fewer benefits than native-born Americans with similar incomes and ages).

225. *See* Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy To Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), <http://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html?module=inline> [<https://perma.cc/7EW4-2FZB>].

226. President Trump, in reference to Haitian migrants, is reported to have said they "all have AIDS" and responded to a report that forty thousand Nigerians had received visas by saying they would never "go back to their huts." *Id.* In the same briefing about Haitian and African migrants, President Trump expressed that he would rather accept migrants from "countries such as Norway" and not from "shithole countries." Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, WASH. POST (Jan. 12, 2018, 7:52 AM), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html [<https://perma.cc/2EVG-56Z5>].

227. *See* E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 55 (statement of acting director of U.S. Citizenship and Immigration Services Ken Cuccinelli) ("[The] sonnet inscribed on the Statue of Liberty 'was referring back to people coming from Europe where they had class-based societies' not to people coming to the United States from outside Europe.").

impact on low-income noncitizens from Central and South American countries,²²⁸ the plaintiffs argue that the self-sufficiency explanation is a pretextual one to disguise a more invidious motivation.²²⁹ History lends support to the view that public charge policy is a weapon primed for racial animus, given the tradition of public charge determinations as a method of targeting racial minorities.²³⁰

In all districts where complaints were filed against the DHS for its promulgation of the rule, the presiding judges sided with the states.²³¹ Federal judges in three states issued preliminary injunctions to block the rule days before it was scheduled to take effect on October 15, 2019.²³² Though the injunctions varied in scope, two district judges ordered nationwide injunctions that temporarily precluded the DHS from implementing the rule anywhere in the United States.²³³ A flurry of appeals by the government left behind discord among circuit judges and a complicated patchwork of judicial orders.²³⁴ The U.S. Court of Appeals for the Ninth Circuit stayed the injunction,²³⁵ though those orders had no practical effect in light of the U.S. Court of Appeals for the Second Circuit's decision to deny the government's motion and leave the injunction in place.²³⁶ This left only one injunction untouched by appellate review, an injunction from the U.S. District Court for the Northern District of Illinois that precluded enforcement only in the State of Illinois.²³⁷

The disorder caused by the conflicting orders prompted the Supreme Court to grant review of the nationwide injunction just three weeks after the Second Circuit refused to lift it.²³⁸ In a 5–4 decision along party lines, the Supreme Court lifted the national injunction against the order, leaving the rule to take effect pending resolution of the

228. *Id.* at 73; *see also* N.D. Cal. Complaint for Declaratory and Injunctive Relief, *supra* note 202, at 6; D. Md. Complaint for Declaratory and Injunctive Relief, *supra* note 202, at 69.

229. E.D. Wash. Complaint for Declaratory and Injunctive Relief, *supra* note 74, at 160.

230. *See supra* notes 46–56 and accompanying text for examples of historical instances of animus based on race or nationality as a motivation for strengthening public charge law.

231. *See* *CASA de Md., Inc. v. Trump*, 414 F. Supp. 3d 760, 788 (D. Md. 2019), *rev'd* 971 F.3d 220 (4th Cir. 2020); *Cook Cty. v. McAleenan*, 417 F. Supp. 3d 1008, 1014 (N.D. Ill. 2019), *aff'd on other grounds sub nom.* *Cook Cty. v. Wolf*, 962 F.3d 208 (7th Cir. 2020); *City of S.F. v. U.S. Citizenship & Immigr. Servs.*, 408 F. Supp. 3d 1057, 1073 (N.D. Cal. 2019), *appeal dismissed sub nom. per unopposed appellant motion*, *La Clinica de La Raza, Inc. v. Trump*, No. 19-17483, 2020 WL 1170719 (9th Cir. Feb. 4, 2020); *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 340 (S.D.N.Y. 2019), *aff'd as modified by* 969 F.3d 42 (2d Cir. 2020); *Washington v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 1191, 1199 (E.D. Wash. 2019), *appeal dismissed sub nom. per unopposed appellant motion*, *La Clinica de La Raza*, 2020 WL 1170719.

232. *Wamsley et al.*, *supra* note 199.

233. *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d at 351–53; *CASA de Md.*, 414 F. Supp. 3d at 786–87.

234. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599 (2020) (Mem.) (Gorsuch, J., concurring) (discussing how a “hodge-podge of jurisdictions” passed separate orders that were later stayed by federal circuit courts).

235. *City of S.F. v. U.S. Citizenship & Immigr. Servs.*, 944 F.3d 773, 807 (9th Cir. 2019), *appeal dismissed sub nom. per unopposed appellant motion*, *La Clinica de La Raza*, 2020 WL 1170719 (9th Cir. Feb. 4, 2020).

236. *New York v. U.S. Dep't of Homeland Sec.*, No. 19-3591, 2020 WL 95815, at *1 (2d Cir. Jan. 8, 2020), *aff'd as modified by* 969 F.3d 42 (2d Cir. 2020).

237. *Cook Cty. v. McAleenan*, 417 F. Supp. 3d 1008, 1014 (N.D. Ill. 2019).

238. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. at 599 (Mem.) (Gorsuch, J., concurring).

litigation.²³⁹ Notably, the Court did not speak to the merits of the public charge litigation at all; the order accompanied a mere four-page concurring opinion that expressed only procedural objections to the injunctions.²⁴⁰ Writing in concurrence, Justice Gorsuch identified several problems with the rising use of nationwide injunctions by district judges.²⁴¹ Justice Gorsuch seemed to be most troubled by the way national injunctions manage to flout a foundational principle of judicial remedies: remedies are meant only to “redress the injuries sustained by a particular plaintiff in a particular lawsuit.”²⁴² Notwithstanding its broader implications for the fate of nationwide injunctions generally, the Supreme Court’s order allows the DHS to effectuate its regulation while the public charge litigation proceeds.²⁴³

2. The Context: States vs. Feds in Immigration Policy

Before proceeding to an analysis of where the public charge litigation stands in the aftermath of the Supreme Court’s order, it is crucial to note the judicial environment with regard to immigration law. The public charge litigation is not an anomaly; it joins a growing list of legal battles led by state attorneys general who are challenging the Trump administration and its efforts to unilaterally change immigration policy.²⁴⁴ The Supreme Court has long-acknowledged broad judicial deference in immigration policy, where Congress and the executive branch have “broad, undoubted power over the subject of immigration and the status of aliens.”²⁴⁵ That power stems from the Constitution itself, which vests the authority to “establish a[] uniform Rule of Naturalization” and shape foreign policy with the federal government.²⁴⁶ However, the results of recent cases on the issue are inconsistent, suggesting that the courts are uncertain about their own role in refereeing disputes over executive attempts to change immigration policy without congressional endorsement.

In *City of San Francisco v. Trump*,²⁴⁷ the Ninth Circuit found that without congressional authorization, the executive branch could not withhold federal funds from “sanctuary” cities that protect immigrant populations by refusing to share immigration

239. *Id.* Initially, the Court left one statewide injunction in place in Illinois. Within weeks, the Court stayed this injunction as well in a separate order, allowing the DHS to implement the rule nationwide. *See Wolf v. Cook Cty.*, 140 S. Ct. 681, 681 (2020) (Mem.).

240. *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. at 600 (Mem.) (Gorsuch, J., concurring).

241. *Id.*

242. *See id.* (identifying the “same basic flaw” common of all nationwide injunctions as their ability to dictate how the defendant must act toward those who are not parties to the action at issue). Justice Gorsuch also cited a number of practical costs associated with nationwide preliminary injunctions: encouragement of forum shopping; judicial obstruction of efficient policy making; and the concern that granting interim, emergency relief precludes a thorough evaluation of the merits. *Id.* at 600–01.

243. *See id.*

244. *See* Stuart Anderson, *All the President’s Immigration Lawsuits*, FORBES (Nov. 5, 2019, 12:15 AM), <http://www.forbes.com/sites/stuartanderson/2019/11/05/all-the-presidents-immigration-lawsuits/#314991097d8e> [https://perma.cc/2F3W-3QTL].

245. *Arizona v. United States*, 567 U.S. 387, 394–95 (2012) (first citing *Toll v. Moreno*, 458 U.S. 1, 10 (1982); then citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)); *see also* *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

246. U.S. CONST. art. I, § 8, cl. 4; *see also Arizona v. United States*, 567 U.S. at 394–95.

247. 897 F.3d 1225 (9th Cir. 2018).

status information with federal law enforcement.²⁴⁸ The Supreme Court, however, upheld President Trump's travel ban, which barred entry of nationals from six predominantly Muslim countries via executive order, finding that such action fell within the INA's scope of delegated presidential authority.²⁴⁹

Though the Trump administration and its executive immigration actions have been met with particular resistance in the courts, it is not the only modern administration to be thwarted. In *Texas v. United States*,²⁵⁰ the U.S. Court of Appeals for the Fifth Circuit denied the Obama administration the authority to implement the Deferred Action for Parents of Americans and Lawful Permanent Residents Program, which would have overridden immigration statutes and granted deportation exemptions to millions of otherwise unlawfully present immigrants.²⁵¹ Even under the "special deference" owed to the Secretary of DHS, the court found that attempting to change the legal status of millions with one sweeping executive act was "an untenable position in light of the INA's intricate system of immigration classifications."²⁵²

Most relevant to the public charge litigation is *Department of Commerce v. New York (The Census Case)*,²⁵³ decided just last year.²⁵⁴ The Supreme Court sided with the petitioners in their claim that the Secretary of Commerce's decision to include a citizenship question in the 2020 census was an abuse of discretion under the APA because the stated reasons for the policy change rested on a pretextual basis.²⁵⁵ While acknowledging the deference the Court owes the executive in making immigration policy, the Court invoked an exception available upon a showing of bad faith or improper behavior by the decisionmakers.²⁵⁶ Under this exception, the Court may conduct an inquiry that goes beyond the record in an attempt to uncover the decisionmakers' "mental processes."²⁵⁷ That "extra-record" inquiry involved the Court's scrutiny of the Trump administration's seeming preoccupation with depressing noncitizen census response rates and led Chief Justice Roberts to conclude that the given justification for the new policy—improving enforcement of the Voting Rights Act of 1965²⁵⁸—was contrived.²⁵⁹ In the Chief Justice's words,

We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But

248. The court decided this case on constitutional grounds, finding that the executive's decision to withhold funds that had already been appropriated by Congress constituted a violation of the separation of powers doctrine and the anticommandeering principle. *City of S.F. v. Trump*, 897 F.3d at 1242–43.

249. *Trump v. Hawaii*, 138 S. Ct. 2392, 2417–23 (2018).

250. 809 F.3d 134 (5th Cir. 2015), *aff'd mem. by an equally divided court*, 136 S. Ct. 2271 (2016).

251. *Texas v. United States*, 809 F.3d at 146.

252. *Id.* at 184.

253. 139 S. Ct. 2551 (2019).

254. *The Census Case*, 139 S. Ct. 2551.

255. *Id.* at 2575–76.

256. *Id.* at 2573–74.

257. *Id.*

258. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. §§ 10101–02, 10301–14, 10501–08, 10701–02 (2018)).

259. *The Census Case*, 139 S. Ct. at 2575.

having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are “not required to exhibit a naiveté from which ordinary citizens are free.”²⁶⁰

The Court invoked similar reasoning in June 2020 when it rebuked the Trump administration’s attempt to rescind the Deferred Action for Childhood Arrivals (DACA) program via executive action.²⁶¹ The Court sided with the administration in finding that petitioners had not proved intentional racial discrimination, despite a disproportionate impact on Latino children.²⁶² Instead, the Court vacated the DACA rescission on APA grounds, finding the administration had acted arbitrarily and capriciously by offering post hoc justifications for the policy change,²⁶³ failing to acknowledge billion-dollar losses in economic output and tax revenue as a result of the rescission, and refusing to consider alternative policies in light of the millions of families who had long relied on DACA’s continuation.²⁶⁴

These decisions reflect the courts’ attempts to navigate an increasingly delicate governmental power balance in immigration law; in the absence of congressional action to intervene, the judiciary has been forced to react to blatant overreaches of executive power in an area of law that has traditionally afforded the executive branch robust deference. Such is the case for federal judges adjudicating the public charge litigation. After choosing the side of judicial deference and lifting the injunction against the public charge rule, Judge Jay Bybee of the Ninth Circuit acknowledged this state of affairs.²⁶⁵ In his concurring opinion, Judge Bybee wrote: “We have seen case after case come through our courts, serious and earnest efforts, even as they are controversial, to address the nation’s immigration challenges. Yet we have seen little engagement and no actual legislation from Congress.”²⁶⁶

3. The Court’s Role in the Public Charge Litigation

In theory, Judge Bybee’s proposed solution to repeated executive overreaches in immigration policy seems ideal. Legislation from Congress would let executive agencies enforce the nation’s immigration laws with authority and legitimacy, while giving the courts a clear law to apply in adjudicating claims of executive overreach.²⁶⁷ In practice, however, Congress is far too paralyzed by partisanship to tackle an issue as controversial

260. *Id.* (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)).

261. *See* *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020).

262. *Id.* at 1915–16.

263. *See id.* at 1909.

264. *See id.* at 1914.

265. *See* *City of S.F. v. U.S. Citizenship & Immigr. Servs.*, 944 F.3d 773, 809 (9th Cir. 2019) (Bybee, J., concurring), *appeal dismissed sub nom. per unopposed appellant motion*, *La Clinica de La Raza, Inc. v. Trump*, No 19-17483, 2020 WL 1170719 (9th Cir. Feb. 4, 2020).

266. *Id.*

267. *See* Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 780 (2019).

as immigration law.²⁶⁸ Some scholars attribute the very cause of administrative activity in immigration policy to congressional gridlock.²⁶⁹ As such, the debate over the public charge rule, as with any debate over immigration policy in recent history, is unlikely to be settled by congressional intervention in the near future.

It is unclear whether the Supreme Court's order to let the rule proceed on procedural grounds is any indication of what it will decide if and when it reaches the merits of the case. What is at least obvious from the order is that Justice Gorsuch and the majority do not consider federal judges to be entirely powerless in settling disputes over executive-made immigration policy void of congressional input.²⁷⁰ The Court signaled as much with its decision to leave the statewide injunction in Illinois in place and by its indication that it can review the merits of the case should either party to the litigation seek a writ of certiorari.²⁷¹ The Court's concern that federal judges are too often granting relief at a scope that outsizes the reach of their own jurisdiction is of separate issue. A literal reading of Justice Gorsuch's opinion suggests that federal judges may still use the power to enjoin agency action as given to them by the APA so long as they do so after a full evaluation of the merits and limit their relief to the parties before them.²⁷²

Instead of affording blind deference to agency action, federal judges should exercise their own power to stymie executive overreaches in immigration policy within the existing bounds of the APA's standards of review. The public charge litigation—bolstered by the recent precedent set by federal circuit judges and by the Supreme Court in *The Census Case*—presents a prime opportunity to do so. According to Chief Justice Roberts, even extraordinary standards of deference and review give way under “unusual circumstances” that warrant a court's reversal of an executive action in immigration law.²⁷³

The circumstances surrounding the public charge litigation surely reach that threshold. Analogous to the facts of *The Census Case*, the DHS's stated reasons for the public charge policy exhibit a disconnect from—and on some points a direct contradiction to—the evidence put forth and acknowledged by the agency.²⁷⁴ The agency's stated purpose in reforming the public charge rules was to increase the self-sufficiency of the noncitizen population.²⁷⁵ Yet the agency acknowledges several probable effects of the rule that are sure to depress—not promote—self-sufficiency,

268. See Bianca Figueroa-Santana, Note, *Divided We Stand: Constitutionalizing Executive Immigration Reform Through Subfederal Regulation*, 115 COLUM. L. REV. 2219, 2219–20 (2015) (discussing alternative solutions to reforming immigration law in the face of congressional inaction on the issue).

269. See *id.* at 2223 & n.18.

270. See *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Mem.) (Gorsuch, J., concurring).

271. *Id.* at 599.

272. See *id.* at 599–600.

273. *Dep't of Commerce v. New York (The Census Case)*, 139 S. Ct. 2551, 2576 (2019).

274. In *The Census Case*, the Court found this disconnect in both (1) the lack of evidence that the proposed action would actually serve the stated goal of better enforcing the Voting Rights Act, and (2) strong evidence that the proposed action would serve the unstated, improper goal of depressing census response rates among the noncitizen population. *Id.* at 2070–71, 2575.

275. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,122 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. §§ 103, 212–14, 245, 248).

including decreases in job retention, health and nutrition, and educational attainment.²⁷⁶ The rule's likely failure to serve its goal, coupled with adverse effects to both noncitizen well-being and small government fiscal policy, support the conclusion that the DHS rule is the type of bad policy that reaches the level of arbitrary and capricious.

To add one "unusual circumstance[]" to another, the Trump administration promulgated the public charge policy pursuant to a pattern of racially driven personal comments by the decisionmakers and a series of policies that seem to effectuate those sentiments.²⁷⁷ The Trump administration's apparent racial animus and preoccupation with immigration policy are only made more sinister in this context by the American tradition of wielding public charge policy against racial and ethnic minorities.²⁷⁸ These circumstances suggest that the stated reason for the rule was a mere pretext to disguise the actual motivation: to capitalize on traditional public attitudes about welfare programs and immigration in order to punish noncitizen communities for political gain.²⁷⁹ This is the exact kind of contrived "distraction" that Chief Justice Roberts considered as grounds for an order to vacate the administration's attempt to include a citizenship question on the 2020 census.²⁸⁰ If the Court can find that the Trump administration sought to depress noncitizen census response rates under the guise of enforcing the Voting Rights Act,²⁸¹ certainly it can find that the Trump administration sought to disproportionately deny admission to and jeopardize the LPR statuses of nonwhite immigrants under the guise of immigrant self-sufficiency.

Beyond the unusual circumstances and policy reasons for vacating the DHS rule, the public charge litigation offers ample legal authority for the courts to rebuke the Trump administration's attempt to change LPC law. Executive agencies simply cannot usurp Congress' power to make laws concerning immigration and naturalization.²⁸² Through the INA, Congress codified a totality of the circumstances test that the DHS rule undermines with its compulsory assignment of values to certain characteristics.²⁸³ If allowed to take effect, the DHS rule will reverse decades of case law, statutory schemes, and regulations that value public health, true self-sufficiency, and supplementary aid to legal noncitizens without threatening immigration consequences.²⁸⁴ Put plainly, the rule

276. See *supra* notes 190–194 and accompanying text for a discussion of the public charge rule's anticipated adverse effects on public health and general self-sufficiency.

277. See *supra* notes 221–230 and accompanying text for an elaboration on evidence of the Trump administration's apparent animus against the racial minority groups who would be most acutely affected by the public charge rule.

278. See *supra* notes 46–56 and accompanying text for a discussion of the role of racism in anti-immigrant policy in the United States.

279. See *supra* Parts II.A and II.B for the historical connection between anti-immigrant sentiment, prejudices against welfare recipients, and fiscal anxieties about federal expenditures.

280. See *Dep't of Commerce v. New York (The Census Case)*, 139 S. Ct. 2551, 2576 (2019).

281. See *id.* at 2594 (Breyer, J., concurring in part).

282. Marouf, *supra* note 267, at 720–21 (explaining that Congress's power to make immigration law is well established by the separation of powers doctrine, the enumerated powers in Article I, and the necessary and proper clause).

283. See *supra* notes 145–147 and accompanying text.

284. Hester et al., *supra* note 8, at 8–9.

is contrary to a number of laws in a way that empowers a judge to vacate agency action under the APA.²⁸⁵

Such an executive overreach is well within the scope of judicial review, even in a policy area like immigration where the executive is afforded particularly deferential treatment.²⁸⁶ The APA explicitly gives federal courts the power to vacate executive action where it is arbitrary and capricious or otherwise contrary to law.²⁸⁷ The petitioner-states have more than satisfied their burden in proving that the DHS acted arbitrarily and against existing law when it promulgated the public charge rule. Judge Bybee of the Ninth Circuit, and other commentators who side with the DHS in the name of judicial deference, are wrong in their stance that the federal courts are powerless in blocking executive overreaches in immigration policy.²⁸⁸ If it were true that only Congress could intervene when an administrative agency breaches the limits of its authority, Congress would not have codified the right to judicial review in the APA for cases of unlawful or unauthorized executive action.²⁸⁹

Congress's abdication of its own duty to resolve policy debates as complex and divisive as those surrounding immigration is no excuse for a federal judge's abdication of her own duty to serve as a check on executive power. Where an executive action undermines well-established statutory schemes and case law in order to implement a policy that threatens public health and public budgets, federal courts can and should exercise their power to review and vacate the agency's ruling. Such is the case for the DHS's public charge rule. Federal courts should respond with action already sanctioned by Chief Justice Roberts and the Supreme Court: vacate and remand the DHS's public charge rule, forcing the agency to offer "genuine justifications" for such an extreme reversal in immigration policy that can be appropriately scrutinized by the public who stands to be harmed by it.²⁹⁰

IV. CONCLUSION

The Trump administration's public charge rule is an immigration policy that will have detrimental, rippling effects for government budgets, public health, and economic output—many of which the administration has acknowledged. In light of the administration's robust anti-immigration agenda outside of the public charge policy and its apparent disdain for nonwhite, low-income immigrants in particular, it certainly seems that a plausible motive for the rule's enactment was to target and punish communities

285. See, e.g., 5 U.S.C. § 706 (2018) (providing the grounds for court injunctions against administrative actions).

286. Marouf, *supra* note 267, at 780 ("Giving deference to executive immigration actions . . . without looking deeper to see if there is any objective evidence of a crisis or if it is rooted in racial or religious animus, risks eroding our most deeply held constitutional values. Courts also should not be so blinded by deference that they fail to intervene when the President's actions conflict with statutes enacted by Congress.").

287. See 5 U.S.C. § 706.

288. See *supra* notes 265–266 and accompanying text for a summation of Judge Bybee's comments.

289. See 5 U.S.C. § 706.

290. *Dep't of Commerce v. New York (The Census Case)*, 139 S. Ct. 2551, 2575–76 (2019) (explaining that the purpose of the "reasoned explanation" requirement in administrative law is to allow for meaningful review by courts and scrutiny by the public, a purpose which would be defeated if the agencies were allowed to offer pretextual reasoning).

they have already politicized. At the very least, the rule simply does not serve its stated purpose to ensure the self-sufficiency of the immigrant population.

As the public charge litigation proceeds through the federal courts, presiding judges should not abdicate their responsibilities by deciding it is a job better suited for Congress or citing traditional deference to the executive in shaping immigration policy. That deference does not extend to blatant overreaches by executive agencies attempting to undo years of precedent with an administrative regulation. Instead, federal judges should remember that they are bound by the precedent set by Chief Justice Roberts in *The Census Case*: when there is a “disconnect between the decision made and the explanation given,”²⁹¹ an agency has acted in a way that is arbitrary, capricious, and an abuse of discretion. The public charge rule patently meets this standard, with the additional feature of contradicting established law. Federal judges should treat it as such, and use the power vested in them by the APA to vacate the public charge rule.

291. *Id.* at 2575.