

Of Immigration, Public Charges, Disability Discrimination, and, of All Things, *Hobby Lobby*

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ABSTRACT

This Essay seeks to demonstrate that federal disability discrimination law conflicts with and thus supervenes the Trump Administration’s new regulations changing the standards for excluding immigrants from the United States on the basis of their likelihood of becoming a public charge. The new regulations use an explicit disability-related discriminatory criterion that is not required by the statutory admission standards and will have an unjustified negative impact on immigrants who have disabling conditions. The Essay draws the comparison to Burwell v. Hobby Lobby, Inc., a 2014 case in which the Supreme Court invalidated a federal regulation on the ground that it conflicted not with its enabling legislation but with an unrelated federal statute, the Religious Freedom Restoration Act.

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INTRODUCTION

Immigrants applying for admission to the United States or adjustment of status to lawful permanent resident are subject to being found inadmissible on the ground that they are likely to become a public charge.¹ A recently adopted set of regulations from the Trump Administration drastically alters the way the Department of Homeland Security (DHS) determines whether individuals are excluded on that basis. The August 14, 2019 Final Rule redefines a public charge as anyone who receives any level of public cash assistance or specified in-kind assistance, including Medicaid and SNAP (the successor program to food stamps), public housing, or other benefits for twelve months of any thirty-six month period.² It establishes a new

1. 8 U.S.C. § 1182(a)(4) (2018). The statute requires consideration of an immigrant’s age; health; family status; assets, resources, and financial status; and education and skills. *Id.* § 1182(a)(4)(B)(i). Affidavits of support may also be considered and are required in some instances. *Id.* § 1182(a)(4)(B)(ii), (C)(ii), (D). Persons granted asylum or refugee status and some other categories of noncitizen entrants are not subject to the public charge provision or the new regulations described below; typically, those already in lawful permanent residence status are not subject to the exclusion, but they will be if they are returning to the United States after six months abroad. *Id.* § 1101(a)(13)(C) (listing permanent residents who are treated as entrants and subject to public charge exclusion). *But see infra* text accompanying notes 75–78. Under the new regulations, non-immigrants seeking extension of their status or adjustment to a different non-immigrant status may also be subject to a public charge test, but the test will simply be if the person has received one or more of listed public benefits in twelve months of any thirty-six months since obtaining the non-immigrant status. 8 C.F.R. § 248.1 (2019).

Since this Essay focuses on immigrants, application of the public charge rule to nonimmigrant entrants will not be considered further. The new rules will have direct effects on family members of people who are United States citizens or permanent residents, that is, parents, spouses, or children who are seeking entry as immigrants or adjustment of status to that of lawful permanent resident. It will also directly affect lawful permanent residents who travel abroad, and non-permanent resident immigrants who apply for entry or adjustment of status. It will have significant, if less direct, effects on many others. *See infra* text accompanying notes 62–84.

2. 8 C.F.R. § 212.21(a) (2019); *see id.* § 212.21(b) (defining public benefit). *See generally* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified

framework for determining on the totality of circumstances whether a person is likely to become a public charge. Among other things, it is now a heavily weighted negative factor to have a medical condition that is likely to require extensive treatment or interfere with the ability to provide for oneself, attend school, or work.³ Other heavily weighted negatives are being out of work and not in school,⁴ and receiving cash or in-kind public benefits for twelve of the past thirty-six months before application.⁵ Having a household income of less than 125% of the federal poverty guideline, having a large household, and being under eighteen or over sixty-one also weigh against the applicant in the decision.⁶ Before now, in-kind benefits such as Medicaid and SNAP did not count for the likely-public-charge determination, and cash support that was not the primary basis of a person's livelihood did not make a person a public charge.⁷ Moreover, sponsorship through an affidavit of support routinely defeated exclusion on the basis of likelihood of becoming a public charge.⁸

Under existing law, many immigrants, even those with documented status, are disqualified for regular Medicaid and federal cash and in-kind assistance programs.⁹ But exceptions exist,¹⁰ and at state option, a range of cash and in-kind public benefits may be available.¹¹ Immigrants who have received even

at 8 C.F.R. pts. 103, 212–214, 245, 248). Regulations contained in the Final Rule will be cited as if already codified; other citations to the Final Rule are to the preamble to the regulations in the Federal Register. DHS issued corrections to the Final Rule in October of 2019. Inadmissibility on Public Charge Grounds; Correction, 84 Fed. Reg. 52,357 (Oct. 2, 2019). Because the text versions available to readers may not incorporate the corrections, this Essay will indicate both the original and the corrected text where appropriate. The corrections renumber the footnotes to the document after note 82, so this Essay will give both the original and renumbered references to the footnotes.

3. 8 C.F.R. § 212.22(c)(1)(iii)(A). Sufficient private insurance or assets to pay for treatment will undo this provision. *Id.* § 212.22(c)(1)(iii)(B).

4. *Id.* § 212.22(c)(1)(i).

5. *Id.* § 212.22(c)(1)(ii).

6. *Id.* § 212.22(b)(1)–(4).

7. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689, 28692 (May 26, 1999).

8. See *infra* notes 50–51 and accompanying text.

9. See 8 U.S.C. § 1621(a)–(c) (2018) (making “nonqualified” entrants ineligible for public benefits with very limited exceptions). Persons considered “qualified” are lawful permanent residents and those granted asylum or refugee status, and those in a few other categories. *Id.* § 1641(b)–(c).

10. Qualified persons who have had that status for five years are eligible for federal means-tested benefits. *Id.* § 1613(a). A lawful permanent resident who has accumulated 40 calendar quarters of Social Security coverage (typically ten years of work) without receiving listed means-tested benefits, is eligible for means-tested benefits. *Id.* § 1612(a)(2)(B).

11. *Id.* § 1621(d). The preamble to the Final Rule cites the example of Washington State, where, according to a comment, lawfully present noncitizens who fail to meet federal eligibility qualifications in the PRWORA may receive “State Family Assistance; Food Assistance Program for Legal Immigrants; Aged, Blind, or Disabled Cash Assistance; Pregnant Women Assistance;

the lowest levels of assistance now risk being excluded from obtaining lawful permanent resident status, and may even face deportation.¹² Moreover, having a disability that could interfere with work, having a low income, being at the ends of the age spectrum, and being in a large family, are all common conditions for immigrants, but they are apt to disqualify immigrants from entry or lawful permanent residency under the new regulations. Immigrants with disabilities are especially likely to be in need of in-kind benefits or low levels of cash assistance in order to be self-sufficient members of American society. Given the reality of limited accommodation in the workplace,¹³ they are disproportionately likely to have low incomes or to be subject to temporary periods of unemployment as well.¹⁴ Almost by definition, they are likely to have conditions that could be described as medical and may interfere with school or work or require treatment.¹⁵

The Final Rule will harm immigrants by forcing them to give up benefits that they need and are legally entitled to receive. The harms will rebound through the general public due to untreated illness and strains on the public health system.¹⁶ The Final Rule will also harm immigrants by making them less likely to be able to enter the United States and adjust their immigration status to that of lawful permanent resident. This will be due to the medical condition, income, and other barriers that the Final Rule imposes.¹⁷ The harm to immigrants with disabilities will be especially severe in light of their already precarious position in American society.

Consolidated Emergency Assistance Program; Refugee Cash Assistance; Housing and Essential Needs Referral; Diversion Cash Assistance; and State Supplemental Payment.” Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,374 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212–214, 245, 248). DHS responded to a comment concerning the state benefits by saying that they would have been considered under the 1999 Field Guidance, but that response ignored the fact that if the benefits accounted for less than half of support, they would not render the recipient a public charge under the 1999 Field Guidance. Some of the benefits, of course, such as refugee assistance, are not covered by the Final Rule. For a more comprehensive description of current benefits eligibility rules for noncitizens, see Andrew Hammond, *The Immigration-Welfare Nexus in a New Era?*, 22 LEWIS & CLARK L. REV. 501, 514–18 (2018) (listing programs and collecting authorities).

12. See *infra* text accompanying notes 75–78.

13. Many sources detail the challenges faced by persons with disabilities in the workplace as currently constituted and the difficulties with using existing disability discrimination law to remedy the situation. See, e.g., Alex C. Geisinger & Michael Ashley Stein, *Expressive Law and the Americans with Disabilities Act*, 114 MICH. L. REV. 1061, 1073–75 (2016); Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 78 (2014); Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1152–60 (2010).

14. See *infra* text accompanying note 102.

15. See *infra* text accompanying notes 99–100.

16. See *infra* text accompanying notes 70–72.

17. See *infra* text accompanying notes 79–84.

The central point of this Essay is that the Final Rule discriminates against immigrants with disabilities in violation of Section 504 of the Rehabilitation Act of 1973.¹⁸ That law prohibits federal agencies from discriminating on the basis of disability in their programs and activities. The Final Rule deprives immigrants with disabilities of access to the valuable benefit of lawful entry to and permanent residency within the United States, both directly and due to the disparate impact the regulations cause. To follow the law, the government should provide the reasonable accommodation of restoring the interpretation of the public charge provision that applied from its origin in the 1880s all the way up to 2019.

Perhaps surprisingly, the case this conflict between rule and statute parallels is the recent Supreme Court decision, *Burwell v. Hobby Lobby Stores, Inc.*,¹⁹ which held that a regulation enacted under the authority of the Patient Protection and Affordable Care Act²⁰ conflicted with the protections conferred on religionists under the Religious Freedom Restoration Act.²¹ As with the conflict there, the force of a federal statute, Section 504, is greater than that of an administrative regulation, even though the two are in unrelated areas and the regulation might otherwise have been a valid interpretation of the law.

Much of the debate on immigration concerns treatment of those who enter the United States without legal authorization,²² or decisions as to whom asylum or refugee status should be extended.²³ The policies of the current

18. 29 U.S.C. § 794 (2018). The Americans with Disabilities Act, 42 U.S.C. §§ 12101–12113, 47 U.S.C. §§ 225, 611 (2018), embodies the same policies, but Section 504, rather than the ADA, applies to federal agency activities. *See infra* text accompanying notes 85–89.

19. 573 U.S. 682 (2014).

20. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat 119 (2010) (codified in scattered sections of 42 U.S.C.).

21. Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4).

22. *See, e.g.*, Jason A. Cade, *Enforcing Immigration Equity*, 84 *FORDHAM L. REV.* 661 (2015); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 *S. CAL. L. REV.* 181 (2017); Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 *AM. U. L. REV.* 1285 (2015).

23. *See, e.g.*, Michael J. Churgin, *The Asylum/Convention-Refugee Process in the United States and Canada*, in *HUMAN RIGHTS AND IMMIGRATION* 261 (Ruth Rubio-Marin ed., 2014); Elizabeth Keyes, *Unconventional Refugees*, 67 *AM. U. L. REV.* 89 (2017); Maureen A. Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 *ADMIN. L. REV.* 127 (2019). For illuminating discussions of asylum protection for individuals subject to persecution on account of disability, see Arlene S. Kanter, *The Right of People with Disabilities to Asylum and Protection from Deportation on the Grounds of Persecution or Torture Related to Their Disability*, *HUMAN RIGHTS BRIEF* (Apr. 20, 2018), https://www.researchgate.net/publication/327294523_The_Right_of_People_with_Disabilities_

presidential administration have ensured that those aspects of the debate stay in the headlines.²⁴ But recent presidential initiatives make clear that the administration wishes to change the scope of day-to-day, legally authorized immigration as well.²⁵ The change in the interpretation of public charge inadmissibility is part of that agenda and needs to be part of the immigration discussion. The Final Rule will have a devastating impact on families with members who are immigrants who are already in the United States, as it will on families who seek to have relatives not in the United States join them, as it will on immigrants and would-be immigrants themselves.

A number of scholarly sources addressing the Notice of Proposed Rulemaking (NPRM)²⁶ that preceded the Final Rule put forward reasons to conclude that the new regulations are irrational, violate the Administrative Procedure Act (APA), or are otherwise contrary to law, and several judicial decisions temporarily enjoined the enforcement of the Final Rule on the basis of those arguments, though the nationwide injunction that had been entered against the operation of the regulations has been stayed by the Supreme Court.²⁷ None of the decisions, and so far none of the law review articles

to Asylum and Protection from Deportation on the Grounds of Persecution or Torture Related to Their Disability [https://perma.cc/YAF3-YMG6], and Eric Rosenthal, *Investigations by Disability Rights International: Demonstrate a Worldwide Pattern of Abuse and Torture Which May Provide Grounds for Asylum and Protection from Deportation for People with Disabilities in the U.S.*, HUMAN RIGHTS BRIEF (Apr. 20, 2018), https://www.researchgate.net/publication/327294523_The_Right_of_People_with_Disabilities_to_Asylum_and_Protection_from_Deportation_on_the_Grounds_of_Persecution_or_Torture_Related_to_Their_Disability [https://perma.cc/K8NR-8FE6].

24. See, e.g., Jason Zengerle, *How America Got to 'Zero Tolerance' on Immigration: The Inside Story*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/magazine/immigration-department-of-homeland-security.html> [https://perma.cc/QLF8-JWEP].

25. See, e.g., Michael D. Shear & Ron Nixon, *Plan To Punish Immigrants for Using Welfare Could Boost G.O.P. Candidates*, N.Y. TIMES (Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/us/politics/legal-immigrants-welfare-republicans-trump.html> [https://perma.cc/4537-VSCV].

26. 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).

27. *Make the Road N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647 (S.D.N.Y. 2019), *stay denied sub nom.* *New York v. U.S. Dep't of Homeland Sec.*, Nos. 19-3591, 19-3595, 2020 WL 95815 (2d Cir. Jan. 8, 2020), *stay granted sub nom.* *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (Jan. 27, 2020); *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334 (S.D.N.Y. 2019), *stay denied sub nom.* *New York v. U.S. Dep't of Homeland Sec.*, Nos. 19-3591, 19-3595, 2020 WL 95815 (2d Cir. Jan. 8, 2020), *stay granted sub nom.* *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (Jan. 27, 2020); see *Casa De Md., Inc. v. Trump*, 414 F. Supp. 3d 760 (D. Md.), *appeal filed*, No. 19-2222 (4th Cir. Nov. 4, 2019), *stay denied*, 2019 WL 7565389 (D. Md. Nov. 14, 2019), *stay granted*, No. 19-2222 (4th Cir. Dec. 9, 2019); *Cook Cty., Ill. v. McAleenan*, 417 F. Supp. 3d 1008 (N.D. Ill.), *appeal filed*, No. 19-3169 (7th Cir. Oct. 31, 2019), *stay granted*

sub nom. *Wolf v. Cook Cty*, 140 S. Ct. 681 (Feb. 21, 2020); *City of S.F. v. U.S. Citizenship & Immigration Servs.*, 408 F. Supp. 3d 1057 (N.D. Cal.), *stay granted*, 944 F.3d 773 (9th Cir. 2019), *appeal dismissed sub nom.* *La Clinica de la Raza v. Trump*, No. 19-17483, 2020 WL 1170719 (9th Cir. Feb. 4, 2020); *Washington v. U.S. Dep’t of Homeland Sec.*, 408 F. Supp. 3d 1191 (E.D. Wash.), *stay granted*, 944 F.3d 773 (9th Cir. 2019), *appeal dismissed sub nom.* *La Clinica de La Raza v. Trump*, No. 19-17483, 2020 WL 1170719 (9th Cir. Feb. 4, 2020). The *Make the Road* and *New York* cases discuss the disability discrimination objection briefly as part of the APA discussion and rule that disability discrimination is a colorable argument worthy of further development. *See* 419 F. Supp. 3d at *9–10; 408 F. Supp. 3d at 350. The *Washington* case finds strongly persuasive the disability discrimination aspect of the reasoning that the Final Rule is contrary to law under the APA: “At this early stage in the litigation, the plain language of the Public Charge Rule casts doubt that DHS ultimately will be able to show that the Public Charge Rule is not contrary to the Rehabilitation Act.” 408 F. Supp. 3d 1191, 1219. The *City of San Francisco* case addresses the disability discrimination-APA objection to the Final Rule but rejects it. 408 F. Supp. 3d at 1103. *See generally infra* text accompanying notes 129–41 (discussing cases that consider the disability discrimination argument against the Final Rule). The APA arguments unrelated to the specific disability discrimination objection appear in a number of noteworthy articles. *See* Cori Alonso-Yoder, *Publicly Charged: A Critical Examination of Immigrant Public Benefit Restrictions*, 97 DENV. U. L. REV. 1, 5–6 (2020) (linking Trump Administration public charge initiative to attacks on birthright citizenship and Immigration and Nationality Act’s policy of promoting racial diversity); Polly J. Price, *Immigration Policy and Public Health*, 16 IND. HEALTH L. REV. 235, 245 (2019) (“If finalized in its current form, however, the rule is almost certain to be reversed by a court under the Administrative Procedure Act, a fate that has happened to numerous Trump administration initiatives for failing to follow the basic rules of administrative lawmaking.”); *see also* Medha D. Makhoul, *The Public Charge Rule as Public Health Policy*, 16 IND. HEALTH L. REV. 177, 198–208 (2019) (stressing negative impact of proposed public charge regulations on government’s asserted objective of self-sufficiency of immigrants to the United States); Wendy E. Parmet, *The Worst of Health: Law and Policy at the Intersection of Health & Immigration*, 16 IND. HEALTH L. REV. 211, 225–30 (2019) (cataloguing harmful effects of proposed regulations). If it were not enough that past practice was based on previous congressional understandings left unchanged by Congress over many years, the sheer irrationality of the new regulations should be enough to doom them. By DHS figures, 20.9 percent of the American population currently receives benefits of the kinds that qualify to make a person a public charge under the new regime. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,162 (table 11). The idea that Congress would deem fully one-fifth of the American population to be public charges seems preposterous. The Final Rule also has an obvious racial impact: “It could allow wealthier people, largely from whiter countries, to become Americans and limit or even block many poor people, largely from Mexico, Central America and Asia, from becoming naturalized citizens.” Amber Phillips, *Trump Just Did What He Couldn’t Get Republicans in Congress To Agree To*, WASH. POST, Aug. 13, 2019, <https://www.washingtonpost.com/politics/2019/08/13/trump-just-did-what-republicans-congress-wouldnt-agree/> [<https://perma.cc/2GV6-E57N>]; *see also* Kevin R. Johnson & Rose Cuison Villazor, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 591 (2019) (linking initiative to the Muslim ban and other policies and stating, “[t]he Trump administration’s recent proposal to expand the definition of ‘public charge’ will exacerbate the racial and national origins impact of the current law”).

explore in depth the conflict between the Rule and Section 504,²⁸ and no source to this point has developed the comparison to other federal regulations that fall because they clash with a supervening but unrelated statute passed by Congress. This Essay seeks to contribute to the debate by developing those arguments.

Part One describes the statutory provision regarding public charge and its interpretation up to now, then details the changes imposed by the Final Rule. Part Two goes into the likely effects the Final Rule will have in discouraging the use of public benefits and constricting lawful immigration due to the new interpretation of the likely-public-charge term. Part Three demonstrates that the new public charge regulations conflict with the ban on disability discrimination by federal agencies in Section 504 of the Rehabilitation Act. Part Four shows that the *Hobby Lobby* case provides a persuasive analogy of a regulation promulgated under one statute that falls because it contradicts an unrelated statute enacted by Congress.

28. However, several comments to the NPRM note the conflict with federal disability discrimination law and policy as ground for objection, developing the point with varying degrees of detail. *See, e.g.*, Access Living, Comment Letter on Proposed Changes to the Public Charge Rule (Dec. 4, 2018), 2–3, <https://www.regulations.gov/document?D=USCIS-2010-0012-28657> [<https://perma.cc/UC7E-D227>]; American Civil Liberties Union, Comment Letter on Proposed Rule: Inadmissibility on Public Charge Grounds (Dec. 10, 2018), 6–15, <https://www.regulations.gov/document?D=USCIS-2010-0012-49669> [<https://perma.cc/V7ZP-M9AH>]; Boundless Immigration, Inc., Comment Letter on Proposed Rule: Inadmissibility on Public Charge Grounds (Dec. 10, 2018), 64–65, <https://www.regulations.gov/document?D=USCIS-2010-0012-50974> [<https://perma.cc/9VS5-ANGW>]; Commonwealth of Virginia et al., Comment Letter on Proposed Rule: Inadmissibility on Public Charge Grounds (Dec. 10, 2018), 8–9, <https://www.regulations.gov/document?D=USCIS-2010-0012-17123> [<https://perma.cc/3JEL-EWAK>]; Consortium for Citizens with Disabilities, Comment Letter on Proposed Rule: Inadmissibility on Public Charge Grounds (Dec. 10, 2018), 5–6, <https://www.regulations.gov/document?D=USCIS-2010-0012-62933> [<https://perma.cc/ZMV6-4M9Z>]; DePaul Asylum and Immigration Law Clinic, Comment Letter on Proposed Rule: Inadmissibility on Public Charge Grounds (Dec. 10, 2018), 7, <https://www.regulations.gov/document?D=USCIS-2010-0012-52082> [<https://perma.cc/DGP9-ZXQF>]; Disability Rights Education and Defense Fund, Comment Letter on Proposed Rule: Inadmissibility on Public Charge Grounds (Dec. 10, 2018), 7–8, <https://www.regulations.gov/document?D=USCIS-2010-0012-54837> [<https://perma.cc/LM85-URWX>]; New York Legal Assistance Group, Comment Letter on Proposed Rule: Inadmissibility on Public Charge Grounds (Dec. 10, 2018), 19–20, <https://www.regulations.gov/document?D=USCIS-2010-0012-50103> [<https://perma.cc/S2N6-3V98>]; Mark C. Weber et al., Comment Letter on Proposed Rule: Inadmissibility on Public Charge Grounds (Dec. 10, 2018), 3, <https://www.regulations.gov/document?D=USCIS-2010-0012-62742> [<https://perma.cc/DEK3-JDLB>].

I. THE PUBLIC CHARGE EXCLUSION AND THE NEW RULE

The public charge clause has been a feature of federal immigration law since the 1880s. An 1882 act forbade the landing of a “lunatic,” “idiot,” or “any person unable to take care of himself or herself without becoming a public charge.”²⁹ Congress enacted this and similar exclusions during a time of fear about the decline of the American population stock; the same period saw the rise of Eugenics, a pseudo-science of optimal human breeding and the elimination of genetic inferiority.³⁰ It also saw the movement to sweep persons with disabilities out of the community and into state institutions.³¹ Not until 1990, the same year that Congress adopted the Americans with Disabilities Act, did Congress remove the many disability-specific exclusions from the immigration laws, specifically those barring persons with intellectual disability, mental illness, physical defects, and various other conditions.³² Congress never removed the provision relating to persons likely to become a public charge.³³

In 1999, citing longstanding interpretations of the public charge provision as well as dictionary definitions, the Immigration and Naturalization Service (INS)³⁴ issued proposed regulations whose explanation stated that being a

29. See Immigration Act, ch. 376, § 2, 22 Stat. 214 (1882).

30. JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925, at 149–57 (2d ed. 1963); Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in THE NEW DISABILITY HISTORY 33, 45–46 (Paul K. Longmore & Lauri Umansky eds. 2001).

31. Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 400–01 (1991) (“In virtually every state, in inexorable fashion, people with disabilities—especially children and youth—were declared by state lawmaking bodies to be ‘unfitted for companionship with other children,’ a ‘blight on mankind’ whose very presence in the community was ‘detrimental to normal’ children, and whose ‘mingling . . . with society’ was ‘a most baneful evil.’ Persons with severe disabilities were considered to be ‘anti-social beings,’ as well as a ‘defect . . . [which] wounds our citizenry a thousand times more than any plague.’”) (footnotes citing statutes and public reports omitted).

32. Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978 (1990). Exclusions continue to exist for persons with some communicable diseases and those with physical or mental disorders and behavior associated with the disorder that makes them dangerous. 8 U.S.C. § 1182(a)(1)(A) (2020). A bar on entry of persons with HIV was repealed effective 2010. Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293, § 305, 122 Stat. 2918.

33. For additional discussion of the history and application of the public charge exclusion, see Mark C. Weber, *Immigration and Disability in the United States and Canada*, 32 WINDSOR Y.B. ACCESS TO JUST. 19, 22–23, 25–26, 35 (2015); Mark C. Weber, *Opening the Golden Door: Disability and the Law of Immigration*, 8 J. GENDER, RACE & JUST. 153, 156–61, 166–68 (2004); see also Makhoul, *supra* note 27, at 179–89 (tracing public charge exclusion back from the Elizabethan Poor Law through the 1990s welfare reform).

34. Congress transferred the functions of the former INS to the Department of Homeland Security (DHS). Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

public charge “suggests a complete, or nearly complete, dependence on the Government rather than the mere receipt of some lesser level of financial support.”³⁵ Referring to the historical use of almshouses, which provided complete support to those without their own resources, INS declared that “[t]his primary dependence model of public assistance was the backdrop against which the ‘public charge’ concept in immigration law developed in the late 1800s.”³⁶ Thus non-institutionalized persons had to be dependent on public benefits for at least half their cash income to be considered public charges.³⁷ The INS ruled that receipt of Medicaid and SNAP were not to be counted in the likely-public-charge determination; other in-kind benefits, short of complete maintenance in an institution at public expense, were also not to be counted.³⁸

The 1999 proposed regulations were never officially adopted, but the INS exercised its authority to issue a Field Guidance embodying the same principles and definitions. In the Field Guidance, the INS stated that “[i]t 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.”³⁹ Instead, “the Service has determined that the best evidence of whether an alien is primarily dependent on the government for subsistence is either (i) the receipt of public cash assistance for income maintenance, or (ii) institutionalization for long-term care at government expense.”⁴⁰

The INS adopted this Guidance after consulting with the Department of Health and Human Services, the Social Security Administration, and the Department of Agriculture (which administers food assistance) concerning the impact of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), a statute that limited immigrants’ eligibility for many public benefit programs.⁴¹ INS sought to harmonize its policies with the PRWORA to ensure that eligible immigrants would continue to apply for and receive those benefits to which they were entitled.

35. Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,677 (proposed May 26, 1999) (to be codified at 8 C.F.R. pts. 212, 237).

36. *Id.*

37. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,163.

38. *Id.* at 51,163–64.

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

40. *Id.*

41. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. For a description of benefits that remain available and so will affect public charge determinations, see *supra* notes 9–11 and accompanying text.

The Field Guidance said that recent changes in the immigration law and adoption of the PRWORA

have sparked public confusion about the relationship between the receipt of federal, state, local public benefits and the meaning of “public charge” under the immigration laws. . . . [O]fficers should not place any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance with respect to determinations of admissibility or eligibility for adjustment on public charge grounds.⁴²

The August 2019 Final Rule from DHS departs mightily from historical practice as put into effect by the 1999 Field Guidance. The Rule defines a public charge as someone who receives one or more public benefit, including Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), any other state, local, or federal cash assistance,⁴³ SNAP, federal housing assistance,⁴⁴ or Medicaid (with limited exceptions for emergency services, school-based services, services provided to youths under twenty-one, and women during pregnancy and for sixty days afterward), for any twelve months, in the aggregate, within any thirty-six month period.⁴⁵ If two of these benefits are received in the same month, it counts as two months.⁴⁶

The Final Rule defines a person likely to become a public charge as an individual more likely than not at any time in the future to receive one or more of the public benefits listed above, based on the totality of circumstances.⁴⁷ The Final Rule drastically changes the totality of circumstances test for the public charge determination, as that test was embodied in historical practice and the 1999 Field Guidance. The Field Guidance provided that the determination is a “*prospective evaluation* Past receipt of cash income-maintenance benefits does not automatically make an alien inadmissible as likely to become a public charge, nor does past

42. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. at 28,689.

43. Bizarrely, the rule seems to apply to any amount of cash assistance, however small, as long as the duration wire is tripped. “DHS may find an alien inadmissible under the standard, even though the alien who exceeds the duration threshold may receive only hundreds of dollars, or less, in public benefits annually.” Final Rule, 84 Fed. Reg. at 41,360–61.

44. Section 8 Housing Choice Voucher and Project-Based Rental, and traditional public housing are included. 8 C.F.R. § 212.21(b)(3)–(4), (6) (2020).

45. *Id.* § 212.21(a), (b)(1)–(6).

46. *Id.* § 212.21(a).

47. *Id.* § 212.21(c).

institutionalization for long-term care at government expense.”⁴⁸ How long ago and for how long the benefits were received mattered. In-kind benefits and smaller cash amounts did not count at all: “Past receipt of non-cash benefits (other than institutionalization for long-term care) should not be taken into account under the totality of the circumstances test. Similarly, past receipt of special-purpose cash benefits not for income maintenance should be not taken into account.”⁴⁹ Moreover, an affidavit of support from a relative or other sponsor ordinarily would overcome inadmissibility on the basis of public charge.⁵⁰ The Final Rule deems an affidavit of support a factor in the totality of circumstances, but the accompanying materials disparage reliance on affidavits of support and so cast doubt on whether they will be effective under the new regime.⁵¹

The Final Rule’s totality of circumstances test contains extensive requirements assigning weight to various factors when determining the likelihood of becoming a public charge. The regulations place heavy negative weight on receipt of any benefit for twelve of the thirty-six months before the determination.⁵² Diagnosis with a medical condition that is likely to require

48. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,690 (May 26, 1999). Current receipt of lower amounts of cash benefits was not determinative as well. *Id.*

49. *Id.*

50. See Andrew F. Moore, *The Immigrant Paradox: Protecting Immigrants Through Better Mental Health Care* 81 ALB. L. REV. 77, 117 (2018) (“However, if being sponsored by a family member, the affidavit of support . . . can overcome this basis for denying admission.”); Maria Benevento, *New Rule Would Force Immigrants To Go Without Benefits or Risk Their Stay in US*, NATIONAL CATHOLIC REPORTER (Feb. 16, 2018), <https://www.ncronline.org/news/justice/new-rule-would-force-immigrants-go-without-benefits-or-risk-their-stay-us> [https://perma.cc/5HU4-K44Q] (“[T]he main factor considered for family-based immigrants since 1999 was the mandatory affidavit of support that a sponsor files demonstrating he or she can support the immigrant at 125% of the poverty level.”); Charles Wheeler, *Is It Safe for Immigrants To Receive Public Benefits?*, Catholic Legal Immigration Network (2016) (on file with author) (“While [likely-public-charge] is still a frequent basis for initial refusal, it has almost always been overcome through submission of additional documentation or a joint sponsor’s affidavit of support.”).

51. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,398–99 (“It is true that the practical focus of DHS in a public charge inadmissibility determination previously had been primarily on the sufficiency of an affidavit of support submitted on the alien’s behalf. . . . DHS considers it inconsistent with the statutory language to solely use the affidavit of support as a means to determine public charge inadmissibility.”).

52. 8 C.F.R. § 212.22(c)(1)(ii) (2020). With respect to benefits received, the determination is to be made based on the period after 60 days from the publication of the final rule. *Id.* But benefits that would have counted under the 1999 Field Guidance will count even if received before the effective date. “[A]n applicant’s receipt of cash assistance for income maintenance prior to the effective date of this rule will be treated as a negative factor in the totality of the circumstances.” Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,321; see 8 C.F.R. § 212.22(d).

extensive medical treatment or will interfere with the ability to provide for oneself, attend school, or work also carries heavy negative weight, unless private insurance or assets can cover the costs related to the condition.⁵³ So does not having private health insurance or equivalent personal resources to pay medical costs.⁵⁴ The rewriting of the totality-of-circumstances test assigns negative weight to factors that include household income of less than 125% of the federal poverty guideline (FPG)⁵⁵ (unless the household assets are at least five times the difference between the income and the FPG for the family size),⁵⁶ any receipt of cash or institutionalization benefits ever, even more than thirty-six months ago,⁵⁷ age below eighteen or over sixty-one,⁵⁸ limited English proficiency,⁵⁹ a low credit score,⁶⁰ and obtaining of some immigration benefit fee waivers.⁶¹

II. THE CONSEQUENCES OF THE FINAL RULE

The Final Rule will cause immigrants to disenroll from public benefits, and will also imperil immigrants' plans to enter the United States and to remain in the country or get on the road to citizenship as a lawful permanent resident.

Many people working with immigrant communities have emphasized that the Final Rule will cause immigrants to disenroll from or not apply for the public benefits to which they are legally entitled.⁶² Moreover, due to

53. 8 C.F.R. § 212.22(c)(1)(iii)(A).

54. *Id.* § 212.22(c)(1)(iii)(B).

55. The 2019 one-person household FPG is \$12,490. Office of the Assistant Sec'y for Planning & Evaluation, *2019 Poverty Guidelines*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://aspe.hhs.gov/2019-poverty-guidelines> [<https://perma.cc/X3ZF-LQ33>].

56. 8 C.F.R. § 212.22(b)(4). Active duty military personnel are treated somewhat more favorably. *See id.*

57. *Id.* § 212.22(d).

58. *Id.* § 212.22(b)(1).

59. *Id.* § 212.22(b)(5)(ii)(D).

60. *Id.* § 212.22(b)(4)(ii)(G).

61. *Id.* § 212.22(b)(4)(ii)(F).

62. *See infra* notes 65–66 and accompanying text. As noted above, although the welfare reform of the 1990s limited immigrants' eligibility for public benefits, a number of programs remain open to people who would be affected by the Final Rule. *See* 8 U.S.C. § 1621(d) (1998) (permitting states to extend public benefit eligibility to otherwise ineligible immigrants in statutes passed after Aug. 22, 1996); *see also id.* § 1641(b) (2008) (deeming lawful permanent residents "qualified" immigrants under § 1621's exclusion of "unqualified" immigrants from benefits). Lawful permanent residents' eligibility for means-tested benefits generally depends on length of time in status or accumulation of a full earnings record. *See supra* note 11 and accompanying text. Permanent residents may be denied entry on public charge grounds after extended absences from

imperfect information and the predictable exercise of caution on the part of immigrants and their families, it is likely that people not affected by the Final Rule will withdraw from public programs that they need in order to be self-sufficient. This is what many sources have described as a chilling effect.⁶³ Chilling effects from the 1996 welfare and immigration reform efforts caused widespread, unnecessary disenrollment from benefits by immigrants in the succeeding three years, which is what led the INS to issue the 1999 Field Guidance.⁶⁴

The impact on health and wellbeing from the 2019 Final Rule's intended operation and its chilling side-effects will be widespread and severe. The number of immigrants who will give up benefits to which they are legally entitled is huge, though the actual figures are disputed. According to a *New York Times* report, DHS officials admit that "[m]ore than 324,000 people in households with noncitizens are estimated to drop out or not enroll in public benefit programs" due to the new regulations.⁶⁵ But, according to the report, "Advocacy organizations say the number of people affected by the regulation is vastly larger, estimating that 26 million immigrants living in the United States legally will reconsider their use of government benefits because they fear how accepting assistance could affect their ability to remain in the United States."⁶⁶

the United States. Therefore, permanent residents who return to their countries of origin to care for relatives or meet other obligations that take longer than six months may be among those most likely to be denied admissibility to the United States because of the receipt of Medicaid, SNAP, or other benefits, while others immigrants might be especially vulnerable to the medical-condition exclusion, low-income screen, or other aspects of the Final Rule.

63. See, e.g., Immigrant Legal Res. Ctr., Comment Letter on NPRM, 2, https://www.ilrc.org/sites/default/files/resources/ilrc_pub_charge_comment-20181206.pdf [<https://perma.cc/S55M-FPYW>].

64. See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689 (May 26, 1999) ("[T]he Illegal Immigration Reform and Immigrant Responsibility Act of 1996 . . . and the recent welfare reform laws have sparked public confusion about the relationship between the receipt of federal, state, local public benefits and the meaning of 'public charge' under the immigration laws. Accordingly, the Service is taking two steps to ensure the accurate and uniform application of law and policy in this area."); see also Price, *supra* note 27, at 243–44 ("Concerned that fear of obtaining necessary medical care was jeopardizing the general public, HHS worked with the Immigration and Nationalization Service (INS) to address the situation.").

65. Michael D. Shear & Eileen Sullivan, *Trump Policy Favors Wealthier Immigrants for Green Cards*, N.Y. TIMES (Aug. 12, 2019), <https://www.nytimes.com/2019/08/12/us/politics/trump-immigration-policy.html> [<https://perma.cc/J5TH-SXBG>].

66. *Id.* The widespread effect includes parents withdrawing their U.S. citizen children from benefits they are entitled to and need for health, nutrition, and education. Leila Miller, *Trump Administration's 'Public Charge' Rule Has Chilling Effect on Benefits for Immigrants' Children*,

Diminished enrollment in medical assistance and nutrition programs causes worse health outcomes to the individuals who do not enroll and to the public at large.⁶⁷ The point may be obvious, but it deserves emphasis. As Professor Makhoul writes:

DHS ignored a critical insight that also has influenced the development of public charge policy. This is the understanding that public benefits play an important role in helping the working poor to become self-sufficient in the long term by addressing [social determinants of health], such as access to health care and adequate nutrition. The development of public charge policy has historically reflected a broad public policy strategy of improving health and nutrition in order to help working-poor families become self-sufficient.⁶⁸

Moreover, by penalizing the use of ordinary Medicaid, which provides primary care, and not penalizing emergency Medicaid, which covers much more expensive care, the Final Rule may well increase overall medical

L.A. TIMES (Sept. 3, 2019), <https://www.latimes.com/california/story/2019-09-02/trump-children-benefits-public-charge-rule> [<https://perma.cc/H4D9-TJVA>] (“[C]onvincing parents they don’t have to opt out of benefits for their children has felt like a monumental task at a time when family separations, the threat of raids and President Trump’s harsh rhetoric toward immigrants have created a deep sense of fear. . . . Experts say that people are likely to fall back on what feels like the safest option without fully being able to understand how the rule applies to them.”); see Elizabeth Hewitt, “*They Go to Work, Come Back, and Starve*”: Why Immigrant Families Are Avoiding Food Assistance: Even Though the “Public Charge” Rule Has Been Blocked, Fewer Immigrants Are Accessing SNAP and Other Programs, SALON (Oct. 20, 2019, 1:29 PM), https://www.salon.com/2019/10/20/they-go-to-work-come-back-and-starve-why-immigrant-families-are-avoiding-food-assistance_partner/ [<https://perma.cc/M3RP-J95V>] (“All over the country, organizations that enroll people in SNAP are noticing the impact.”). One observer declares: “[O]ver 19 million . . . children live with at least one immigrant parent, and nearly nine in ten of these children are citizens.” Am. Pub. Health Ass’n, Comment Letter on NPRM, 2 (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/3NQY-HG2T>]. Although Medicaid for children under twenty-one and CHIP were not included in the Final Rule, the chilling effect can be expected to extend to those programs. Samantha Artiga et al., *Estimated Impacts of the Final Public Charge Inadmissibility Rule on Immigrants and Medicaid Coverage*, HENRY J. KAISER FAM. FOUND. ISSUE BRIEF 1–2 (Sept. 2019), <http://files.kff.org/attachment/Issue-Brief-Estimated-Impacts-of-Final-Public-Charge-Inadmissibility-Rule-on-Immigrants-and-Medicaid-Coverage> [<https://perma.cc/NB28-LMUX>]. Moreover, to a recipient, it may be impossible to determine precisely which program is providing the benefits. This is a consequence of laudable efforts by public welfare agencies in recent years to provide seamless services to eligible recipients with a single application.

67. Artiga et al., *supra* note 66.

68. Makhoul, *supra* note 27, at 202.

expenditures.⁶⁹ Immigrants are generally healthier than the public at large, but denying them routine medical care magnifies harms to the general public and the public health system itself.⁷⁰ The American Public Health Association's comment on the NPRM declared:

The fear generated by this rule would put families in impossible situations where they are forced to choose between keeping their families together or enrolling in programs to keep their families healthy Driving people away from health and nutrition services could have drastic effects on the public's health. Parents may opt not to vaccinate their children, increasing the risk of disease outbreaks and jeopardizing herd immunity; communicable and sexually transmitted diseases may go undiagnosed leading to spread of disease, . . . in a time when . . . STD rates in the U.S. are at an all-time high⁷¹

Even DHS recognizes that an additional consequence to public health is "increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated."⁷²

The effects of the Final Rule go beyond those stemming from disenrollment in medical and nutritional benefits programs. Applicants for lawful permanent resident status currently in the United States will find themselves denied adjustment of status because of the revised medical condition, employment, and income standards in the new regulations.⁷³

69. Medha D. Makhoul, *Health Justice for Immigrants*, 4 U.PA. J.L. & PUB. AFF. 235, 269–70 (2019). Makhoul leaves the question open.

70. See Price, *supra* note 27, at 236 ("Lack of preventive healthcare can mean low resilience in the population as a whole. A community's overall resilience in the face of a contagious disease outbreak is only as strong as the weakest link."); see also Parmet, *supra* note 27, at 222. Parmet stresses fragmentation of the health system, exacerbation of negative social health determinants, and promotion of stigma and fear. She goes on to state, "The potential of anti-immigration policies to harm both the health care system and public health is especially evident in the Trump Administration's proposed public charge regulations." *Id.* at 225.

71. Am. Pub. Health Ass'n, *supra* note 66, at 2.

72. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51, 114, 51,270. See Price, *supra* note 27, at 246 (noting that lack of treatment for immigrants may spread diseases).

73. See Jeanne Batalova et al., *Millions Will Feel Chilling Effects of U.S. Public-Charge Rule That Is Also Likely to Reshape Legal Immigration*, MIGRATION POLICY INST. (Aug. 2019), <https://www.migrationpolicy.org/news/chilling-effects-us-public-charge-rule-commentary> [<https://perma.cc/74SS-KP4N>] ("Using Census data to review the characteristics of recent green-card holders, MPI [the Migration Policy Institute] found 43 percent were not employed or enrolled in school; 39 percent did not speak English well or at all; 33 percent had incomes below 125 percent of the poverty line; 25 percent lacked a high school diploma; and 12 percent had incomes below 125 percent of poverty and were either under 18 or over 61. Among recent green-card holders, 69 percent had at least one of these negative factors; 43 percent had at least two; and 17 percent had at least three Most applicants would fall into a gray area with some positive and some negative factors, underscoring how discretionary the process may be.").

Unsurprisingly, matters will be worse for immigrants with disabilities. Persons with disabilities in the United States disproportionately have lower incomes, and their disabilities are likely to be considered medical conditions that will weigh against them in the public charge determination.⁷⁴ Affidavits of support will no longer provide reliable protection against a public charge determination.

There also exists a real threat of deportation if an immigrant is deemed a public charge. Until now, deportation on the basis of public charge has been rare.⁷⁵ Nevertheless, it is legally permitted if an immigrant has become a public charge within five years of admission and the reason for public support stems from a condition the immigrant had preceding entry to the United States.⁷⁶ A leaked draft regulation from the Trump Administration would permit deportation even of lawful permanent residents and refugees who have used public benefits, including Medicaid and state welfare, within five years of admission.⁷⁷ Moreover, non-permanent residents whose visa status expires will be subject to removal unless they can adjust their status to lawful permanent resident or some other permitted category of entrant. The preamble to the Final Rule states: “Upon denial of an extension of stay or a change of status application, if the alien is removable, DHS can issue an NTA [Notice to Appear] and place the alien in removal proceedings.”⁷⁸

Apart from the impact on aspiring legal permanent residents, the Final Rules will have the predictable effect of preventing many otherwise qualified individuals from even entering the United States. The Department of State screens applicants for immigrant visas for likelihood to become a public charge, and the Department of State has modified its Foreign Affairs Manual

74. See *infra* text accompanying notes 101–03.

75. Aruna Sury et al., *Public Charge as a Ground of Deportability*, IMMIGRANT LEGAL RES. CTR. 5 (June 2019) (“As a practical matter the public charge ground of deportability is rarely, if ever, charged by DHS.”), https://www.ilrc.org/sites/default/files/resources/public_charge-deportability-june_2019_0.pdf [<https://perma.cc/KA6F-4Q2A>].

76. 8 U.S.C. § 1227(a)(5) (2008).

77. Yeganeh Torbati, *Exclusive: Trump Administration Proposal Would Make It Easier to Deport Immigrants Who Use Public Benefits*, REUTERS (May 3, 2019, 11:47 AM), <https://www.reuters.com/article/us-usa-immigration-benefits-exclusive/exclusive-trump-administration-proposal-would-make-it-easier-to-deport-immigrants-who-use-public-benefits-idUSKCN1S91UR> [<https://perma.cc/9Q53-AAKB>].

78. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,330. In addition, as to nonimmigrants the Final Rule “contains additional provisions that will render certain nonimmigrants ineligible for extension of stay or change of status if she or he received one or more public benefits for more than 12 months in the aggregate within any 36-month period since obtaining the status he or she wishes to extend or change.” *Id.* at 41,295.

to conform to the Final Rule with respect to public charge determinations.⁷⁹ As the Final Rule noted, “DHS is working with DOS to ensure that the Foreign Affairs Manual appropriately reflects the standards in this rule.”⁸⁰ Under the Final Rule, receipt of what the regulations consider public benefits in one’s country of origin do not count in the public charge determination (if it did, everyone in Western Europe, where free or heavily subsidized health care is the norm, would be excludable as public charges under the new regulations), but as State applies the Final Rule’s content under the revised Foreign Affairs Manual, the award of immigrant visas will certainly diminish. Researchers from the Kaiser Family Foundation note that “Nearly all (94%) noncitizens who originally entered the U.S. without LPR [Legal Permanent Resident] status have at least one characteristic that DHS could potentially weigh negatively in a public charge determination.”⁸¹ More than a third have incomes below 125% of FPG.⁸²

79. See 9 Foreign Affairs Manual 302.8-2 (prescribing rules for application of public charge exclusion) (Feb. 24, 2020), <https://fam.state.gov/FAM/09FAM/09FAM030208.html> [<https://perma.cc/DC5S-QJVG>]. Even before the most recent revisions, alterations in 2018 placed less weight on affidavits of support, and other written and unwritten policy changes led to a stricter application of the likely public charge exclusion. See *Mayor of Balt. v. Trump*, No. ELH-18-3636, 2019 WL 4598011, at *5 (D. Md. Sept. 20, 2019) (stating that as amended, Foreign Affairs Manual “now requires consular officers to consider a visa applicant’s receipt of non-cash benefits as part of the public charge determination. . . . [T]he FAM now includes the receipt of non-cash benefits by the visa applicant’s family members as a part of the totality-of-the-circumstances test. . . . [And an Affidavit of Support] is merely one factor among many that the consular officer should consider.”); see also Ariel Brown, *Consular Processing Practice Alert on Public Charge and Affidavit of Support Issues*, IMMIGRATION LEGAL RES. CTR. (July 2, 2018), https://www.ilrc.org/sites/default/files/resources/consul_process_pract_alert_pub_charge_affid-20180702.pdf [<https://perma.cc/3CDD-2ZYS>]; Michael D. Shear et al., *Trump’s Policy Could Alter the Face of the American Immigrant*, N.Y. TIMES (Aug. 15, 2019) <https://www.nytimes.com/2019/08/14/us/immigration-public-charge-welfare.html?login=email&auth=login-email> [<https://perma.cc/BJD6-C54M>] (“The way that means testing tends to favor immigrants from Europe and Canada already has become apparent over the past year as State Department consular officials began evaluating visas on the basis of whether applicants are likely to be heavy users of government benefits. Visa denials increased across the board . . . [with] steep increases in visa denials for countries like India, Pakistan, Bangladesh, Haiti and the Dominican Republic [and] Mexico. . . .”). The *Mayor of Baltimore* decision denied a motion to dismiss in a lawsuit challenging the revisions based on the Administrative Procedure Act, and the equal protection component of the Due Process Clause. 2019 WL 4598011, at *42.

80. Final Rule, 84 Fed. Reg. at 41,294 n.3 (stating, before the passage quoted in text, “This rule does not directly revise DOS standards or processes.”).

81. Artiga et al, *supra* note 66, at 1.

82. *Id.* The analysis uses data from the 2014 Survey of Income and Program Participation. *Id.* at 2. On October 4, 2019, President Trump issued a proclamation, effective November 3, 2019, forbidding entry to the United States as an immigrant of any person who will not be covered by health insurance within 30 days of entry unless the immigrant has “financial resources to pay for

For persons with disabilities trying to immigrate to the United States the change will be disastrous. The weight given to medical conditions and the new approach regarding affidavits of support will be harmful enough to applicants with disabilities. But in light of the lack of workplace and transportation accommodations for people with disabilities in other countries,⁸³ a rule embodying employment and income considerations drawn from the Final Rule will bar many immigrants with disabilities who if permitted to enter the United States could be quite capable of managing entirely on their own, or with the help of families and friends, or with only slight or occasional outside support. Instead, they will be unable to join family, improve their own well-being, and contribute to American society.

DHS acknowledges that the new regime will constrict entry to the United States by immigrants seeking to enter lawfully, and that it will diminish the opportunities of those here to become lawful permanent residents. “DHS is aware that this rule will likely result in more findings of public charge inadmissibility and may result in fewer overall admissions and approved adjustment of status applications to the United States.”⁸⁴

reasonably foreseeable medical costs.” Proclamation No. 9945, 84 Fed. Reg. 53,991, 53,992 (Oct. 9, 2019). This measure too will have the effect of drastically reducing legal immigration by people with lower incomes, a group that typically includes would-be immigrants seeking to join family members in the United States. See Nicole Narea, *A Federal Court Just Blocked Trump’s Attempt to Quietly Cut Legal Immigration by Up to 65%*, VOX (Nov. 27, 2019, 10:53 AM), <https://www.vox.com/2019/10/9/20903541/trump-proclamation-legal-immigration-health-insurance> [<https://perma.cc/J9VJ-UY7N>] (“[Under the proclamation] immigrants who do not have health insurance and cannot afford to pay medical care costs would not be able to move to the US permanently. . . . The proclamation could bar roughly 375,000 immigrants annually”). A court has enjoined implementation of the proclamation, and a stay of the injunction has been denied. *Doe v. Trump*, No. 3:19-cv-1743-SI, 2019 WL 6324560 (D. Or. Nov. 26, 2019), *stay denied*, 944 F.3d 1222 (9th Cir. 2019); see also *Doe No. 1 v. Trump*, 414 F.Supp.3d 1307 (D. Or. Nov. 2, 2019) (similar case brought by other plaintiffs). See generally Camilo Montoya-Galvez, *Groups Sue to Block Administration from Denying Visas to Immigrants Who Can’t Afford Health Care*, CBS NEWS (Oct. 30, 2019, 6:57 PM), <https://www.cbsnews.com/news/trump-ban-lawsuit-seeks-to-prevent-administration-from-denying-visas-to-immigrant-who-cant-afford-health-care/> [<https://perma.cc/ZNJ4-S3QA>] (describing suit).

83. See, e.g., Vera Chouinard, *Living on the Global Peripheries of Law: Disability Human Rights Law in Principle and in Practice in the Global South*, LAWS, Feb. 20, 2018, at 17–19. This reality is present even in developed countries. See, e.g., Jun Nakagawa & Peter Blanck, *Future of Disability Law in Japan: Employment and Accommodation*, 33 LOY. L.A. INT’L & COMP. L. REV. 173, 174 (2010); Matthew Smith, *The Duty to Accommodate Drug and Alcohol Addiction in the Workplace*, in *DISABILITY POLITICS IN A GLOBAL ECONOMY* 64, 69–71 (Ravi Malhotra ed., 2017).

84. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,401.

III. THE FINAL RULE'S CONFLICT WITH SECTION 504

Explaining the conflict between the anti-discrimination mandate of Section 504 and the Final Rule entails discussion of Section 504 and prominent cases that have relied on it to bar discriminatory federal agency conduct. That discussion leads logically to the conclusion that Section 504 forbids the government from applying the new rule, both because it directly discriminates on the basis of disability and because it has an unjustified disparate impact on individuals with disabilities. The defenses against charges of disability discrimination advanced by the government are ineffective in undermining that conclusion. Several judicial decisions in cases challenging the Final Rule lend additional support to the conclusion.

A. Section 504's Prohibition on Federal Government Disability Discrimination

Title V of the Rehabilitation Act of 1973 was the first broad-reaching federal disability discrimination law.⁸⁵ Section 504 of the Act bars disability discrimination in federally assisted activity, just as Title VI of the Civil Rights Act bars discrimination on the basis of race, color, and national origin in any program or activity receiving federal financial assistance.⁸⁶ Since so many state and local public programs in education, public works, employment and other areas received federal aid at the time of Section 504's passage, the law forbade disability discrimination in those public activities long before the Americans with Disabilities Act of 1990 extended the disability discrimination prohibition to all state and local government activities.⁸⁷

The Rehabilitation Act did not initially cover programs and agencies of the federal government itself except with regard to employment,⁸⁸ but in 1978, Congress amended Section 504 to forbid discrimination by reason of disability “under any program or activity conducted by any Executive agency

85. 29 U.S.C. §§ 791–794a (2018). An important predecessor was the Architectural Barriers Act of 1968, Pub. L. No. 90-480, 82 Stat. 718. It was not until 1990 that Congress passed the Americans with Disabilities Act, a truly comprehensive disability discrimination law covering private employment and commercial activity, state and local government programs, and employment, and telecommunications, all irrespective of federal funding of the activities. 42 U.S.C. §§ 12101–12213; 47 U.S.C. §§ 225, 601 (2018).

86. 42 U.S.C. § 2000d (2018).

87. See 42 U.S.C. §§ 12131–12165 (2018) (ADA Title II).

88. See Pub. L. No. 93-112, § 501, 87 Stat. 365 (1973) (requiring affirmative action and other steps with respect to employment of persons with disabilities in federal departments, agencies, and instrumentalities).

or by the United States Postal Service.”⁸⁹ Accordingly, Section 504 prohibits disability discrimination by the Department of Homeland Security and the State Department.

The courts have applied Section 504’s federal government disability discrimination provision to invalidate federal agency actions that have the effect of discriminating against persons with disabilities. In *American Council of the Blind v. Paulson*, the District of Columbia Circuit ruled that the existing practice of issuing paper money that lacks tactile or other features to make it readily accessible to people who are blind or have low vision violates Section 504.⁹⁰ The court affirmed a grant of summary judgment on liability and remanded for entry of injunctive relief, which the district court granted.⁹¹ The court of appeals reasoned that forcing people with visual impairments to rely on the honesty and kindness of sales clerks and others denied them meaningful access to currency. The Treasury Department had the obligation to show an undue burden, which it could not meet when the large majority of world currencies have different sizes for different denominations or features such as perforations, raised dots, and tactile strips to convey the information to those who cannot see.

In the context of immigration, a court applied Section 504 to the Department of Justice to require appointment of representatives for disabled individuals who are incompetent to represent themselves in detention or removal proceedings. *Franco-Gonzalez v. Holder* held that the government violated Section 504 by failing to provide a qualified representative to persons in removal proceedings who cannot present their defenses adequately by themselves due to severe mental illness or disability.⁹² The court entered a permanent injunction covering a class of individuals in custody for removal proceedings in the states of the Ninth Circuit.⁹³ A court also enforced Section 504 to reverse a government decision to dismiss a cadet from the Merchant

89. Pub. L. No. 95-602, § 119, 92 Stat. 2955 (1978).

90. 525 F.3d 1256, 1274 (D.C. Cir. 2008).

91. *Id.* at 1274, *on remand*, 581 F. Supp. 2d 1 (D.D.C. Oct. 3, 2008) (granting injunction). More than ten years of wrangling over the relief ensued. *See* Am. Council of the Blind v. Lew, No. 02-0864, 2017 WL 6271264 (D.D.C. Jan. 6, 2017) (denying plaintiffs’ motion to modify relief), *rev’d and remanded*, Am. Council of the Blind v. Mnuchin, 878 F.3d 360 (D.C. Cir. 2017), *stay denied*, No. 02-00864, 2019 WL 503450 (D.D.C. Jan. 9, 2019), *on remand*, 396 F. Supp. 3d 147 (D.D.C. 2019) (denying proposed modifications to injunction), *appeal filed*, No. 19-5284 (D.C. Cir. Oct. 25, 2019).

92. No. CV 10-02211 DMG, 2013 WL 3674492, at *5 (C.D. Cal. Apr. 23, 2013).

93. *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG, 2013 WL 8115423, at *1-2 (C.D. Cal. Apr. 23, 2013).

Marine Academy when he developed diabetes;⁹⁴ another court applied Section 504 to require more accessible Social Security notices to persons with sensory impairments.⁹⁵ As these cases suggest, Section 504 bans disparate impact discrimination by the federal government as well as intentional discrimination.⁹⁶

B. Section 504 Supervenes the New Public Charge Rule

The Final Rule conflicts with Section 504. In *American Council of the Blind v. Paulson*, the court noted that plaintiffs in an action under Section 504 need to show that “they were excluded from, denied the benefit of, or subject to discrimination under a program or activity . . . carried out by a federal executive agency.”⁹⁷ It then is up to the federal agency to assert as an affirmative defense that “accommodating the plaintiffs’ disabilities would constitute an undue burden.”⁹⁸ The new regulations deny with a vengeance the benefits of admission and adjustment of status to persons with disabilities. A return to the previous practices of the immigration authorities—those employed from the 1880s through the issuance of the 1999 Field Guidance and up to 2019—would be a reasonable accommodation to the disabilities of the immigrants subject to the likely-public-charge determination.

94. Lane v. Pena, 867 F. Supp. 1050, 1052, 1074–75 (D.D.C. 1994), *vacated in part and aff’d in part*, No. 95-5006, 1995 U.S. App. LEXIS 20039 (D.C. Cir. June 5, 1995), *aff’d*, 518 U.S. 187 (1996) (barring damages relief on the basis of sovereign immunity).

95. Am. Council of the Blind v. Astrue, No. C 05-04696, 2009 WL 3400686 (N.D. Cal. Oct. 20, 2009); *see also* Gray v. Golden Gate Nat’l Recreation Area, No. C 08-00722, 2013 WL 12386845 (N.D. Cal. Feb. 20, 2013) (denying defense motion for summary judgment in Section 504 case demanding physical accessibility accommodations in national park), *reconsideration denied*, 2013 WL 12386896 (N.D. Cal. Mar. 29, 2013).

96. *See* Helen L. v. DiDario, 46 F.3d 325, 335 (3d Cir. 1995) (“Because the ADA evolved from an attempt to remedy the effects of ‘benign neglect’ resulting from the ‘invisibility’ of the disabled, Congress could not have intended to limit the Act’s protections and prohibitions to circumstances involving deliberate discrimination. Such discrimination arises from ‘affirmative animus’ which was not the focus of the ADA or section 504.”). *See generally* Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, 1440–45 (2015) (discussing the federal prohibition on unintentional disability discrimination in Section 504 and the ADA).

97. 525 F.3d 1256, 1266 (D.C. Cir. 2008). DHS’s own regulations recognize the duty: “No qualified individual with a disability in the United States, shall, by reason of his or her disability, be excluded from the participation in, be denied benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Department.” 6 C.F.R. § 15.30(a) (2020); *see also id.* § 15.50(a) (“The Department shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with a disability.”).

98. 525 F.3d at 1266.

The fact of denial of a benefit and discrimination on the basis of disability needs little exposition. The regulation imposes heavy disadvantage for having a “medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien’s ability to provide and care for himself or herself, to attend school, or to work.”⁹⁹ That language overlaps in significant part with the definition of disability that applies to Section 504: “a physical or mental impairment that substantially limits one or more major life activities of such individual.”¹⁰⁰ In addition to explicit discrimination on the basis of disability, there are obvious disparate impacts from the new final rule.¹⁰¹ Individuals with disabilities are more likely than individuals without disabilities to have incomes below the poverty line,¹⁰² so they are disproportionately negatively affected by a rule that imposes disadvantage for having an income less than 125% of the FPG. Since means-tested benefits are just that, a disparate proportion of immigrants with disabilities will be eligible for means-tested public benefits, even though for immigrants the range of the benefits is restricted under the PRWORA and other laws. DHS effectively concedes the disparate negative impact of the Final Rule: “Although a study of the correlations between different disabilities and the array of positive and negative factors were not included in the text of the rule, DHS understands that those correlations may exist and may also be affected by the type and severity of the disability.”¹⁰³

The reality that people with disabilities often have lower incomes does not necessarily prevent them from being self-sufficient under a reasonable interpretation of the statutory public charge provision. More commonly, a person with a disability will be self-sufficient but at a lower level of consumption than if the individual were not disabled. Recent statistics show

99. 8 C.F.R. § 212.22(c)(1)(iii)(A) (2020).

100. 29 U.S.C. § 705(20) (incorporating by reference 42 U.S.C. § 12102).

101. Scholars have debated the scope of the disparate impact prohibition in Section 504. Compare Leslie Francis & Anita Silvers, *Reading Alexander v. Choate Rightly: Now is the Time*, LAWS, Oct. 8, 2017, at 6, with Mark C. Weber, *Meaningful Access and Disability Discrimination*, 39 CARDOZO L. REV. 649, 650–53 (2017). As the text above explains, however, the magnitude of the effect of the Final Rule on persons with disabilities is such that the Final Rule falls squarely within any interpretation of the disparate impact prohibition. Moreover, the explicit use of a disability-related category and the failure to provide reasonable accommodation make the situation one of disparate treatment as well. See *supra* text accompanying notes 99–100; see also Weber, *supra* note 96, at 1432–33 (describing Section 504’s ban on disparate treatment).

102. Currently, 29.6% of people with disabilities are in poverty versus 13.2% of people without disabilities. Inst. on Disability, Univ. of N.H., *Annual Report on People with Disabilities in America: 2018*, DISABILITY COMPENDIUM 9 (2018) https://disabilitycompendium.org/sites/default/files/user-uploads/Annual_Report_2018_Accessible_AdobeReaderFriendly.pdf [https://perma.cc/RJ7Z-5NGT] (reporting 2017 statistics derived from the Census Bureau American Community Survey).

103. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,410.

that the median earnings of people with disabilities ages eighteen to sixty-four who work full time amount to about eight-ninths of those without disabilities, \$40,353 versus \$45,449.¹⁰⁴ Thus, a condition that interferes with the ability to work does not make one likely to become a public charge even if, on the whole, it may reduce one's income.¹⁰⁵ Individuals with disabilities sometimes have initial difficulties finding work, but have a much easier time at remaining in the labor force.¹⁰⁶

Moreover, immigrants' incomes generally start low but rise quickly, particularly if the immigrant has a low educational attainment before arrival in the United States.¹⁰⁷ As one set of researchers noted, "The [new] public charge regulations would disrupt recent immigrants' ability to remain in the U.S. just when they are able to earn more," which "short circuits their ability to contribute to the national economy."¹⁰⁸ The study concludes: "As their incomes improve, immigrants become more self-sufficient and have less need for means-tested public benefits. The public charge rules could exclude immigrants before they can attain self-sufficiency."¹⁰⁹

C. Flaws in the Administration's Defenses Against the Claim of Disability Discrimination

In defending itself against the many comments submitted by individuals and groups charging that the new regulations discriminate against persons

104. Institute on Disability, *supra* note 102, at 7 (using 2017 statistics from the American Community Survey). These figures do not separate out immigrants from the rest of the population.

105. The 125% income standard seems particularly strange, since it was drawn from the income required to make an affidavit of support to be a sponsor of an immigrant. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg., at 41,414, n.630 (renumbered as n.629). That a person needs to have an income of 125% of poverty to support someone else does not mean that immigrants need to have an income of 125% of poverty to support themselves. *See generally* 8 U.S.C. 1183a(f)(1)(E) (establishing standard of 125% of FPG for sponsors).

106. Ben Casselman, *In a Tight Labor Market, Hiring Rules Loosen Up*, N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/05/business/economy/recruiting-labor-force.html> [<https://perma.cc/TTN2-FDYP>] ("Economic research has found that once people are drawn into the labor force, they tend to stay in it. That may be especially true for workers with disabilities or other barriers to employment . . .").

107. Leighton Ku & Drishti Pillai, *The Economic Mobility of Immigrants: Public Charge Rules Could Foreclose Future Opportunities*, GEO. WASH. U. MILKEN INST. PUB. HEALTH 1 (Nov. 15, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285546 [<https://perma.cc/C8WE-BCUE>] ("[I]mmigrants start out with lower incomes than those native-born, but gradually catch up. Moreover, immigrants with low education close the immigrant-native income gap even faster, catching up with similar US-born counterparts within six to seven years on average.").

108. *Id.* at 4.

109. *Id.*

with disabilities, DHS principally relies on the Immigration and Nationality Act's reference to "health" as a consideration in likely-public-charge determinations.¹¹⁰ But having a medical condition that may need treatment in the future or may interfere with ordinary activities is not the same thing as being unhealthy. Many individuals with disabilities are perfectly healthy, some, such as Paralympic athletes, extraordinarily so.¹¹¹ The disability discrimination laws stand against the stereotype that having a disability, even though it may require some level of medical intervention, is the same as being unhealthy.

The Supreme Court has ruled that actionable disability discrimination occurs when government acts on the basis of "unwarranted assumptions" about people with disabilities, including stereotypes that they are "incapable or unworthy of participating in community life."¹¹² That is precisely what DHS is doing. As Professor Parmet writes:

DHS is communicating the message that individuals with a disability are burdensome, public charges. This is a message that will undoubtedly rebound upon citizens with disabilities. It is also a message that is contrary to the one Congress sought to deliver in enacting the Rehabilitation Act of 1973 and the Americans with Disabilities Act.¹¹³

The 1999 Field Guidance recognized that a current or anticipated need for in-kind medical assistance does not make a person likely to become a public charge if the person can provide more than half of their income by their own means.

DHS's position in the NPRM that it is relying on the effects of the disability rather than on the fact of the disability itself¹¹⁴ falls into the fallacy identified and rejected in *School Board of Nassau County v. Arline*, which stated the simple truth that under Section 504 the existence of a disability cannot be separated from its effects.¹¹⁵ That Congress did not create an

110. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,405–12.

111. *See A.H. ex rel. Holzmueller v. Ill. High Sch. Ass'n*, 881 F.3d 587 (2018) (considering disability discrimination claim asserted by Paralympic athlete).

112. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999).

113. Parmet, *supra* note 27, at 228.

114. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,183–84.

115. 480 U.S. 273 (1987). The case involved a teacher with tuberculosis who was fired from her job; the Court held that Section 504 protected the teacher, stating: "Petitioners maintain . . . that the school board dismissed Arline not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed to the health of others. We do not agree with petitioners that, in defining a handicapped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant in a case such as this." *Id.* at 281–82.

explicit exception for persons with disabilities in the Immigration and Nationality Act¹¹⁶ does not give DHS license to ignore Section 504.

What of the affirmative defense of undue burden? It is hardly a burden for the administration to continue in force a policy that it has maintained for 140 years. DHS maintains that the purpose of the change is “to better enforce the public charge ground of inadmissibility and to ensure that aliens are self-sufficient when coming to the United States or seeking to adjust status.”¹¹⁷ Not penalizing the use of benefits that enable persons with disabilities to be self-sufficient would further those goals, not burden them. The Final Rule is even more harmful to persons who need small amounts of assistance to be self-sufficient than the Administration’s original proposal was. The October, 2018 NPRM said that receipt of a “monetizable” benefit greater than 15% of the FPG for a household of one would make a person a public charge.¹¹⁸ The Final Rule makes receipt of any level of benefits enough to do it.¹¹⁹

Public benefits, particularly if they consist of medical care or food assistance, frequently are what is needed to permit a person with a disability to achieve self-sufficiency.¹²⁰ Even DHS admits that in-kind benefits, most notably food assistance, medical care, and housing, promote long-term self-sufficiency. The NPRM stated: “DHS acknowledges the importance of increasing access to health care and helping people to become self-sufficient in certain contexts (such as with respect to other agencies’ administration of government assistance programs).”¹²¹ DHS added that “[t]he INA, however, does not dictate advancement of those goals in the context of public charge inadmissibility determinations.”¹²² This, of course, does not respond to the

116. See *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. at 41,383.

117. *Id.* at 41401. Apparently to deflect the argument that the Final Rule conflicts with the PRWORA and state public benefit policies, the Preamble says that the Final Rule does not change an immigrant’s eligibility for benefits. *Id.* at 41305. DHS never denies that the rule penalizes the exercise of that eligibility by denying immigration benefits to anyone who makes use of the benefits. In what may be a Freudian typo, the Preamble at one point says “With this rulemaking, DHS prevent individuals from receiving public benefits for which they are eligible.” *Id.* at 41461.

118. *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. at 51,289–90.

119. See *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. at 41,421 (“DHS has determined that it is reasonable to consider any application, approval, or certification for, or receipt of, public benefits as a negative factor in the totality of the circumstances, regardless of whether the benefits exceed the threshold for becoming a public charge.”). By contrast, the 1999 Field Guidance used a greater than one-half of a person’s support as the standard for cash benefits and excluded all in-kind benefits from consideration. See *id.*

120. See Makhlof, *supra* note 27, at 205 (“[A]ccess to subsidized health insurance such as Medicaid enables low-wage workers to obtain and retain employment.”) (collecting and discussing supporting authorities).

121. *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. at 51,158 n.258 (renumbered as n.257).

122. *Id.*

point that Section 504 dictates advancement of those goals. The language of the Americans with Disabilities Act is instructive: “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”¹²³

The importance of some level of public benefits to self-sufficiency, particularly the value of in-kind benefits or modest amounts of monetary aid, is buttressed by the 1999 Field Guidance, which stated that “confusion about the relationship between the receipt of public benefits and the concept of ‘public charge’ has deterred eligible aliens and their families, including U.S. citizen children, from seeking important health and nutrition benefits that they are legally entitled to receive. This reluctance to access benefits has an adverse impact not just on the potential recipients, but on public health and the general welfare.”¹²⁴ The INS expanded on the point:

According to HHS [the Department of Health and Human Services] and other benefit-granting agencies consulted by the Service, non-cash benefits generally provide supplementary support in the form of vouchers or direct services to support nutrition, health, and living condition needs. . . . These benefits are often provided to low-income working families to sustain and improve their ability to remain self-sufficient.¹²⁵

An analysis of Census Bureau data shows that “[m]ore than 60 percent of noncitizens in benefits-receiving families are employed. Public benefits-use levels for immigrants and the U.S. born alike are largely driven by use of SNAP and Medicaid/Children’s Health Insurance Program (CHIP)—programs often viewed as work supports.”¹²⁶

Unlike the accommodations ordered in some other Section 504 cases, a return to the policy of the 1999 Field Guidance would not increase costs to the governmental agency. In fact, DHS estimates that the undiscounted “quantified new direct costs” of the Final Rule over the first ten years would be \$352,026,980.¹²⁷ Although there will be a decrease in government expenditures as immigrants withdraw from the supports to which they are

123. 42 U.S.C. § 12101(a)(7).

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

125. Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,677–78 (proposed May 26, 1999) (to be codified at 8 C.F.R. pts. 212, 237).

126. Batalova et al., *supra* note 73. CHIP is not included as a public benefit under the Final Rule.

127. Final Rule, 84 Fed. Reg. at 41,485.

entitled, the Final Rule does not count that as a benefit from the change,¹²⁸ and it is hard to imagine that DHS could make the argument that it is a benefit when Congress and the state enactors of public assistance programs made their own calculations that provision of the benefits is a net positive when they permitted immigrants to receive the benefits. The amount of burden imposed on the government to preserve the status quo as to the public charge rule is not even in the same league as changing American currency or creating a system to provide lawyers and advocates for incompetent persons subject to immigration removal proceedings, modifications that courts found to be within the scope of reasonable accommodations that Section 504 requires.

D Litigation Challenging the Final Rule

As noted above, several courts have temporarily enjoined the Final Rule, though all of the injunctions have been stayed.¹²⁹ The opinions address the Section 504 argument as part of the broader Administrative Procedure Act challenge to the regulations, discussing disability discrimination as one of the reasons the Final Rule is “in excess of statutory jurisdiction, authority, or limitations”; is “not in accordance with law”; or is “arbitrary, capricious, [or] an abuse of discretion.”¹³⁰

Make the Road v. Cuccinelli, and *New York v. U.S. Department of Homeland Security*, both decided by the same judge, observe that “the Rule clearly considers disability as a negative factor in the public charge

128. See *id.* at 41,486 (“The primary benefit of the final rule would be to better ensure that aliens who are admitted to the United States, seek extension of stay or change of status, or apply for adjustment of status are not likely to receive public benefits and will be self-sufficient . . .”).

129. See *Casa De Md., Inc. v. Trump*, 414 F. Supp. 3d 760 (D. Md.), *appeal filed*, No. 19-2222 (4th Cir. Nov. 4, 2019), *stay denied*, 2019 WL 7565389 (D. Md. Nov. 14, 2019), *stay granted*, No. 19-2222 (4th Cir. Dec. 9, 2019); *Cook Cty., Ill. v. McAleenan*, 417 F. Supp. 3d 1008 (N.D. Ill.), *appeal filed*, No. 19-3169 (7th Cir. Oct. 31, 2019), *stay granted sub nom.* *Wolf v. Cook Cty.*, 140 S. Ct. 681 (Feb. 21, 2020); *City and Cty. of S.F. v. U.S. Citizenship & Immigration Servs.*, 408 F. Supp. 3d 1057 (N.D. Cal. 2019), *stay granted*, 944 F.3d 773 (9th Cir. 2019), *appeal dismissed sub nom.* *La Clinica de la Raza v. Trump*, No. 19-17483, 2020 WL 1170719 (9th Cir. Feb. 4, 2020); *Make the Road N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647 (S.D.N.Y. 2019), *stay denied sub nom.* *New York v. U.S. Dep’t of Homeland Sec.*, Nos. 19-3591, 19-3595, 2020 WL 95815 (2d Cir. Jan. 8, 2020), *stay granted sub nom.* *Dep’t of Homeland Sec. v. N.Y.*, 140 S. Ct. 599 (2020); *New York v. U.S. Dep’t of Homeland Sec.*, 408 F. Supp. 3d 334 (S.D.N.Y. 2019), *stay denied sub nom.* *New York v. U.S. Dep’t of Homeland Sec.*, Nos. 19-3591, 19-3595, 2020 WL 95815 (2d Cir. Jan. 8, 2020), *stay granted sub nom.* *Dep’t of Homeland Sec. v. N.Y.*, 140 S. Ct. 599 (2020); *Washington v. U.S. Dep’t of Homeland Sec.*, 408 F. Supp. 3d 1191 (E.D. Wash.), *stay granted*, 944 F.3d 773 (9th Cir. 2019), *appeal dismissed sub nom.* *La Clinica de La Raza v. Trump*, No. 19-17483, 2020 WL 1170719 (9th Cir. Feb. 4, 2020).

130. 5 U.S.C § 706(2)(A), (C) (2018).

assessment.”¹³¹ But, as the opinions note, “Defendants do not explain how disability alone is itself a negative factor indicative of being more likely to become a public charge. In fact, it is inconsistent with the reality that many individuals with disabilities live independent and productive lives.”¹³² Thus, the conflict between Section 504 and the Final Rule is “at least a colorable argument that the Rule as to be applied may violate the Rehabilitation Act,” and the case should proceed to permit further development of the facts.¹³³

An additional case, *Washington v. U.S. Department of Homeland Security*, reaches an even stronger conclusion, though by a slightly different route. In finding a likelihood of success on the merits of the claim that the Final Rule violates the APA as action not in accordance with law, specifically Section 504, the court states that “DHS acknowledges in the Public Charge Rule notice that the Public Charge Rule will have a ‘potentially outsized impact’ on individuals with disabilities.”¹³⁴ The court then rejects what it describes as DHS’s rationalization that the statute does not exempt people with disabilities from the public charge exclusion and includes health as a consideration. The court responds that the statute “does not state that disability is a factor that ‘may’ be considered.”¹³⁵ Moreover, while millions of people with disabilities in the United States qualify for Medicaid, Medicaid receipt is in fact positively associated with employment of individuals with disabilities, according to the evidence presented by the amici curiae. “Therefore, accessing Medicaid logically would assist immigrants, not hinder them, in becoming self-sufficient, which is DHS’s stated goal of the Public Charge Rule.”¹³⁶ The court declares that “[a]t this early stage in the litigation, the plain language of the Public Charge Rule casts doubt that DHS ultimately will be able to show that the Public Charge Rule is not contrary to the Rehabilitation Act.”¹³⁷

City of San Francisco v. U.S. Citizenship & Immigration Services addresses the disability discrimination objection to the Final Rule, but rejects it as a basis for ruling that the Final Rule is not in accordance with law under the APA, even while it finds other bases persuasive. With regard to Section

131. *Make the Road*, 2019 WL 5484638, at *10 (“Defendants acknowledge that disability is ‘one factor . . . that may be considered’ and that it is ‘relevant . . . to the extent that an alien’s particular disability tends to show that he is ‘more likely than not to become a public charge’ at any time.’” (citing Defs.’ Opp’n at 22 (quoting Final Rule, 84 Fed. Reg. at 41,368)); *New York*, 408 F. Supp. 3d at 350.

132. *Make the Road*, 2019 WL 5484638, at *10; *New York*, 408 F. Supp. 3d at 350.

133. *Make the Road*, 2019 WL 5484638, at *10; *New York*, 408 F. Supp. 3d at 350.

134. *Washington v. U.S. Dep’t Homeland Sec.*, 408 F. Supp. 3d at 1218.

135. *Id.* at 1219.

136. *Id.*

137. *Id.*

504, the court says there is no violation because the law forbids discrimination that is “solely” by reason of disability, and under the Final Rule other factors are to be considered in the public charge determination as well.¹³⁸ This reasoning does not respond to the fact that for a given individual, disability will be the deciding factor among the others that are taken into account. In fact, under the Final Rule medical conditions are to be a heavily weighted factor in the determination.¹³⁹ The opinion also relies on the “health” language in the Immigration and Nationality Act, but it does not respond to the point that while a disability may be a medically determinable condition, having a condition that may need medical treatment at some point or may interfere with ordinary activities under current levels of accommodation is not the same thing as being unhealthy.¹⁴⁰ It is stereotyped thinking to uncritically equate disability with bad health.¹⁴¹ The section of the opinion discussing Section 504 concludes with a quotation that “section 504 may not ‘revoke or repeal . . . a much more specific statute . . . absent express language by Congress.’”¹⁴² That statement may be correct, but relying on it misses the point that the Final Rule is a *regulation*, not a statute, and Section 504 is a *statute*, not a regulation. More on that below.

IV. THE *HOBBY LOBBY* ANALOGY

When a federal regulation conflicts with a congressional enactment, the regulation is invalid. This principle applies whether the conflict is with the regulation’s enabling legislation or an unrelated statute.¹⁴³ A prominent

138. *City and Cty. of S.F. v. U.S. Citizenship & Immigration Servs.*, 408 F. Supp. 3d 1057, 1103 (N.D. Cal. 2019). The stay order decision of the Ninth Circuit makes the same arguments, more briefly and in reverse order. *City of S.F. v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773, 800 (9th Cir. 2019).

139. 8 C.F.R. § 212.22(c)(1)(iii)(A) (2020).

140. *See supra* text accompanying note 111 (discussing the distinction between having a disability and being unhealthy).

141. *See supra* text accompanying note 112 (discussing disability stereotypes).

142. *City of S.F.*, 408 F. Supp. 3d at 1103 (quoting *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1353 (10th Cir. 1987)).

143. *See In re Nautilus Motor Tanker Co.*, 85 F.3d 105, 112 (3d Cir. 1996) (holding that Coast Guard regulation concerning admissibility of report was properly disregarded on account of conflict with the congressionally enacted Federal Rules of Evidence); *see also Wheeler v. Premiere Credit*, 80 F. Supp. 3d 1108, 1114 (S.D. Cal. 2015) (holding that Higher Education Act regulation cannot take precedence over provision of Fair Debt Collection Practices Act, questioning whether statute and regulation actually conflict); *In re Haffner*, 25 B.R. 882, 887–88 (Bankr. N.D. Ind. 1982) (holding that automatic stay provided by bankruptcy statute prevails over Commodity Credit Corp. regulation that might be read to conflict with it). In a sense, invalidation on the basis of a conflict with an unrelated statute occurs in any situation in which a court finds

recent example of the latter is *Burwell v. Hobby Lobby Stores, Inc.*,¹⁴⁴ in which the Supreme Court ruled that the regulation embodying the contraception mandate of the Patient Protection and Affordable Care Act (“ACA”)¹⁴⁵ was invalid because it conflicted with the Religious Freedom Restoration Act (“RFRA”).¹⁴⁶ The ACA requires employers’ group health insurance plans to provide “preventive care and screenings” for women without “any cost sharing requirements.”¹⁴⁷ Congress authorized the Department of Health and Human Services to decide what types of preventive care had to be covered, and in regulations promulgated under the ACA’s authority, HHS required employers to cover various contraceptive methods.¹⁴⁸ Religious organizations were exempt. For-profit, closely held corporate employers asserting religious beliefs against facilitating use of the covered contraceptives said that the regulations violated RFRA’s statutory requirement that the federal government not take any action that substantially burdens the exercise of religion unless it demonstrates that the action furthers a compelling governmental interest and is the least restrictive means of doing so. After ruling that RFRA protected closely held businesses of the type making the challenge, the Court ruled that HHS’s regulation fell before the statutory duty RFRA imposes.¹⁴⁹

The Court reasoned that because the ACA imposed a significant financial penalty on companies that failed to provide no-cost contraceptives in their group insurance plans, the regulations’ mandate substantially burdened the

that a regulation is unlawful under the Administrative Procedure Act, and so is invalid; the APA is not itself part of substantive enactments. But the point being made here is not that the regulations in the NPRM are arbitrary and capricious as an interpretation of the Immigration and Nationality Act, *see supra* text accompanying note 27, but that they violate Section 504 of the Rehabilitation Act. It is of course true that Congress has “broad power over naturalization and immigration,” which leads the courts to uphold congressional application of rules to noncitizens that would not be acceptable if applied to citizens. *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976). Here, however, Congress has spoken by enacting Section 504, so that enactment needs to be obeyed.

144. 573 U.S. 682 (2014).

145. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 42 U.S.C.).

146. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2018)).

147. 42 U.S.C. § 300gg-13(a)(4) (2018).

148. Congress explicitly delegated to the Health Resources and Services Administration of HHS the determination of which preventive care would be covered, *id.*, and the agency for its part consulted the Institute of Medicine before determining that the preventive care term of the statute would cover contraception. *See Hobby Lobby*, 573 U.S. at 697; *see generally* 45 C.F.R. § 147.130(a)(iv) (2019) (incorporating guidelines established by the Health Resources and Services Administration).

149. *Hobby Lobby*, 573 U.S. at 719. This, of course, was the most newsworthy issue in the case.

companies' owners' religious beliefs.¹⁵⁰ The Court assumed that the regulations furthered a compelling governmental interest in guaranteeing cost-free access to the relevant contraceptive methods, but ruled that the government did not achieve the interest by the least restrictive means.¹⁵¹ The Court commented that one option—having the government fund the services—could be compelled under RFRA, but ultimately said that HHS could extend the contraceptive-mandate exemption it had created for nonprofit organizations with religious objections to for-profit, closely held corporations that make the claim that compliance with the regulations' mandate violates their religious beliefs, and that would be a less restrictive option than maintaining the mandate.¹⁵²

Hobby Lobby is directly analogous to a Section 504 challenge to DHS's Final Rule. Section 504 bars government agency conduct that is explicit disability discrimination or has a disparate impact unless changing the conduct would impose an undue burden; RFRA bars government agency conduct that substantially burdens religious belief unless there is a compelling interest and the conduct is the least restrictive means of achieving it. The government conduct in both cases is that of the agency that Congress delegated the power to enforce the underlying statute, and the conduct is embodied in duly promulgated regulations. The challenge in both cases is made not to a federal statute, which might be viewed as equal in force to RFRA or Section 504, but instead to an agency regulation, which has to yield to a contrary even if unrelated congressional enactment.

In *Hobby Lobby*, the challengers to the contraceptive mandate did not contend that the government was intending to interfere with their religious exercise or acting on the basis of animus. In its defense of the new regulations, DHS has insisted that it did not intend to discriminate against or express animus against persons with disabilities.¹⁵³ In both cases, any lack of discriminatory intent or animus is irrelevant.¹⁵⁴

Although DHS never makes the connection between RFRA and Section 504, it concedes in the Final Rule that RFRA may require that the new

150. *Id.* at 726.

151. *Id.* at 728, 730.

152. *Id.* at 730–31.

153. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,184; Final Rule, 84 Fed. Reg. at 41,401 (“Regardless of whether this rule will impact the groups specified in [various] comments, DHS is not promulgating this rule for a discriminatory purpose.”).

154. A prominent authority on law and religion has drawn the comparison between the free-exercise burdens of religion-neutral laws on religionists and unintentional disability discrimination, such as thoughtlessly failing to install a ramp on a building. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1139 (1990).

regulations not be applied to religious workers. It states that “DHS believes that this regulation, and other provisions of the INA and implementing regulations, can be administered consistently with the RFRA,” but goes on to say that “DHS acknowledges that any individual or organization who identifies a substantial burden on his, her, or an organization’s exercise of religion such that the RFRA may require specific relief from any provision of this rule may assert such a claim.”¹⁵⁵ As with RFRA and the contraception mandate in *Hobby Lobby*, Section 504 prohibits the government agency from violating the rights it protects. In the face of that statutory obligation, the DHS regulatory initiative falls.

CONCLUSION

DHS’s Final Rule works hardship on families with members who are immigrants, on immigrants now in this country, and on those who aspire to immigrate to the United States. By its terms, the Final Rule targets immigrants with disabilities, embodies negative disability stereotypes, and has a profound negative impact on persons with disabilities. Section 504 prohibits federal agency actions that target those with disabilities, that apply negative stereotypes, and that have unjustified negative impacts. It requires reasonable accommodations. The Final Rule is simply a regulation. Section 504 of the Rehabilitation Act is a statute enacted by Congress. Like RFRA, Section 504 sweeps away a regulation that conflicts with its mandates.

155. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,431.