19-3595-cv

In the United States Court of Appeals for the Second Circuit

MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, ASIAN AMERICAN FEDERATION, CATHOLIC CHARITIES COMMUNITY SERVICES (ARCHDIOCESE OF NEW YORK), CATHOLIC LEGAL IMMIGRATION NETWORK, INC.,

Plaintiffs-Appellees,

v.

KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security, UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF TORRIE HESTER, HIDETAKA HIROTA, ALAN KRAUT, JULIAN LIM, MADDALENA MARINARI, MARY E. MENDOZA, DEIRDRE MOLONEY, MAE NGAI, EMILY POPE-OBEDA, LUCY SALYER, AND ELLIOTT YOUNG AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICI CURIAE*[1]

Amici are scholars in the field of immigration history and have devoted significant attention to studying that topic and related subjects. By virtue of their expertise in immigration history, they are familiar with how the term "public charge" has been used over time. As *amici* well know, the definition of public charge as a basis for exclusion or removal from this country has remained constant over time, referring to those who have received cash benefits from the government for subsistence or have experienced long-term institutionalization. Contrary to the new rule promulgated by the Department of Homeland Security, the receipt, or likely receipt, of means-tested, non-cash benefits has never been, standing alone, sufficient to make an individual a "public charge" subject to exclusion or removal.

INTRODUCTION

Public charge laws have a long history in the United States, and throughout that history, the definition of public charge as a basis for exclusion or removal from this country has remained constant: those deemed excludable or removable on "public charge" grounds must have received cash benefits from the government for subsistence, or they must have experienced long-term institutionalization. The receipt of means-tested, non-cash benefits has never been, standing alone, sufficient to make

[1] No person or entity other than *amici* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

an individual a "public charge" subject to exclusion or removal. Indeed, far from excluding individuals from this country based on their receipt of non-cash benefits, both the States and the federal government have long put in place social support structures designed to help immigrants in need.

In August 2019, the Department of Homeland Security (DHS) promulgated a rule that is at odds with that history and would change the longstanding definition of the term "public charge," redefining the term so that an individual may be deemed inadmissible or denied adjustment of status based solely on the acceptance of non-cash benefits. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019). Under this rule, an individual is a public charge if she "receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period." *Id.* at 41,297. The term "public benefits" includes not only cash benefits, but also non-cash benefits received through the Supplemental Nutrition Assistance Program (SNAP), Section 8 Housing Assistance, Section 8 Project-Based Rental Assistance, Medicaid (with some exceptions), and certain other forms of subsidized housing. *Id.* at 41,295.

Expanding the public charge grounds for inadmissibility and denial of adjustment of status is at odds with over 100 years of consistent U.S. immigration policy. Under colonial, state, and early federal immigration laws, exclusion or deportation based on the likelihood of becoming a public charge applied only to people housed

at public charitable institutions or who received cash benefits from the government. Indeed, this remained the case as public benefits expanded during the 1930s and again during the 1960s and 1970s.

Congress included the term "public charge" in the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(4), against the backdrop of this well-established understanding of that term's meaning. Because the meaning of that term has been fixed for over a century, DHS does not have the discretion to substantially redefine it now, and its attempt to do so is "not in accordance with law" and therefore violates the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). The new rule should not be allowed to stand.

ARGUMENT

I. THE RECEIPT, OR LIKELY RECEIPT, OF MEANS-TESTED, NON-CASH BENEFITS HAS NEVER BEEN, STANDING ALONE, SUFFICIENT TO MAKE AN INDIVIDUAL A "PUBLIC CHARGE" SUBJECT TO EXCLUSION OR REMOVAL.

A. Colonial and Early America

Public charge laws have their roots in "poor laws" that were enacted in the colonies to regulate the movement of people—both those born in the colonies and immigrants—and to provide for their care if they required support during hard times. Rather than uniformly mandating that poor immigrants be removed or excluded from the colonies, these "poor laws" routinely provided financial and other support for poor immigrants.

As historians Cornelia Dayton and Sharon Salinger have documented, the system of "warning"—sending a notice that placed outsiders, whether from other countries or simply other towns, on notice that they were not official members of the town community, Cornelia H. Dayton & Sharon V. Salinger, *Robert Love's Warnings: Searching for Strangers in Colonial Boston* 4-5 (2014)—developed in New England during the sixteenth and seventeenth centuries, in part as a means of "alleviating poverty and organizing municipal government more effectively." *Id.* at 4.[2] The warning system enabled and encouraged migration, which was recognized as central to the wellbeing and growth of colonial communities in New England. Employers and landlords could hire and lodge workers, with confidence that an early, albeit very rudimentary, social welfare system existed to serve the needs of people who fell ill or dependent. *Id.* at 4-5.

Importantly, "[b]y itself, warning barred no one from staying in town, finding employment, buying a house, or marrying." *Id.* at 4. For example, in the Massachusetts colony, Boston's "warning ledger" contained the names of thousands of

[2] While some early accounts of the "warning" system portrayed it as a means of excluding the poor, these accounts "missed" a "crucial aspect": "warning was the hinge in a distinctive, two-tiered welfare system in which the province's taxpayers paid for the relief of needy strangers." Dayton & Salinger, *supra*, at 4; *see id.* ("The link with the province poor account refutes older characterizations of warning as a manifestation of New Englanders' stinginess and aversion to outsiders."). While authorities occasionally decided to physically remove individuals, such occasions were "rare." *Id.*

migrants who moved to the town. *Id.* at 5. The names on the ledger included the "sons and daughters of the propertied middling sort" new to the town. *Id.* "If in the future," one of these migrants "needed shelter or medical assistance in Boston's almshouse, the overseers of the poor searched for their names in the warning ledgers and then admitted them on what was called the province poor account. The province treasurer covered their expenses." *Id.* at 4. In short, the process of warning did not serve as a "stigma or threat," *id.* at 5, and was not a "gesture meant to exclude," *id.* at 4; rather, the system of warning "facilitated the province's policy of making available a larger pool of welfare funds for Britons and non-Britons, native born and stranger," *id.*

B. Early to Mid-Nineteenth Century

As the Industrial Revolution intensified and transportation systems developed after the 1820s, the U.S. economy required more workers, and immigration increased as a result. Kunal M. Parker, *State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 19 L. & Hist. Rev. 583, 605 (2001); Dirk Hoerder, *European Migrations, in The Oxford Handbook of American Immigration and Ethnicity* 38-41 (Ronald H. Bayor ed., 2016). According to scholar Kunal Parker, this immigration flow "fundamentally changed the scale and nature of poverty. In comparison with the eighteenth century, greater numbers of individuals were driven to seek public assistance because of the ebbs and flows of

the volatile early industrial economy." Parker, *supra*, at 605. Yet increased poverty did not lead to more exclusion on "public charge" grounds. Instead, as historian Hidetaka Hirota has observed, by the 1820s, "pauper removal practically became a dead letter in statute books or was abolished entirely in most states." Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy* 45 (2017).

For example, the Commonwealth of Massachusetts, one of the major recipients of this migration flow, continued to admit immigrants, and rather than exclude those who required public assistance, it provided a bureaucratic support system for them. As Parker has explained, Massachusetts "did not attempt to prevent incoming immigrants from entering its territory." Parker, *supra*, at 591. Rather, "it charged them a fee as aliens seeking to enter its territory in order to create a fund to defray the cost of supporting state paupers." *Id.* (emphasis omitted). While the details of those fees changed over time, the reason they were assessed remained unchanged: "alien passengers were taxed not to defray poor relief costs that the Commonwealth might incur in the future on their behalf but to defray current poor relief costs incurred on behalf of resident state paupers (a category that included immigrants, native-born children of immigrants, and American citizens from other states)." *Id.* at 610. The bonds and fees that States charged immigrants, therefore, subsidized and

paid for much of the public support services provided to both U.S. citizens and foreign-born immigrants.

It was not until the mid-nineteenth century, when the immigration of roughly 1.5 million Irish men and women to the United States prompted an outburst of anti-Irish nativism, Kevin Kenny, *The American Irish: A History* 89-90 (2000); *see* Hirota, *supra*, at 116 (opponents of the Irish called those who entered public almshouses "leeches upon our taxpayers" (citing Bos. Daily Bee, Dec. 19, 1855)), that anyone moved to exclude immigrants on public charge grounds, and even then, the movement was largely limited to New York and Massachusetts, both major destinations of Irish immigration. Hirota, *supra*, at 84-85. The Board of Commissioners of Emigration of the State of New York, established in 1847, was authorized to prohibit the landing of "'any lunatic, idiot, deaf and dumb, blind or infirm persons, not members of emigrating families, *and* who . . . are likely to become permanently a public charge,'" unless the shipmaster provided a bond for each such passenger. *Id.* at 66 (emphasis added) (citation omitted). In 1850, relying on a provision that stated that "[t]he inmates of a state almshouse, state lunatic hospital, or the hospital at Rainsford Island [an immigrant hospital], may be transferred from one institution to another, or sent to any state or place where they belong," Massachusetts began deporting foreign-born "paupers" to their countries of origin. Of Alien Passengers and State Paupers, ch. 71, § 7, *in The General Statutes of the Commonwealth of*

Massachusetts 397 (1860); *see* Hirota, *supra*, at 75. Designation as a "pauper" or "public charge" under these statutes required evidence of institutionalization or disability without family ties or any prospect of a financial turnaround. The receipt of non-cash assistance alone was insufficient to make one a "pauper" or "public charge." *Id.* at 79-82.[3]

And notably, even as Massachusetts and New York officials sometimes failed to neutrally apply these early "public charge" laws and instead used them as a pretext to justify targeting Irish immigrants, those jurisdictions—like all others—continued to admit poor immigrants, provide them with public support, and incorporate the bond immigrants paid on arrival to help support the state public charge bureaucracy. *Id*. For example, New York's Board of Commissioners of Emigration was responsible for using the capitation tax that shipmasters were required to pay for their passengers to provide for "the maintenance and support" of foreigners already resident in the United States who became "a charge upon any city, town or county, of this state," and its members viewed immigration in positive terms and expected that immigrants, regardless of their circumstances or means when they arrived in the State, would acquire the ability to become self-supporting after arrival. An Act

[3] As was true of many of the laws that followed, the text of the Massachusetts and New York pauper and public charge provisions was often disregarded in practice by those administering them, whose anti-Irish bias prompted them to exclude and deport immigrants who did not meet the legal criteria for exclusion or deportation. *See infra* at 14-15.

Concerning Passengers in Vessels Coming to the City of New-York, ch. 195, § 4 (May 5, 1847), *in* 1 *General Statutes of the State of New-York* 469 (1852). In the words of Commissioner Friedrich Kapp, the United States "owe[d] its wonderful development mainly to the conflux of the poor and outcast of Europe within it." Matthew J. Lindsay, *Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law*, 17 Yale J.L. & Human. 181, 195 (2005) (alteration in original) (citation omitted).

In short, from the nation's founding through much of the nineteenth century, no State chose to exclude all needy immigrants—and States certainly did not exclude such immigrants simply because they received non-cash benefits. To the contrary, social support systems were developed to help immigrants in need. Indeed, even the relatively stringent immigration laws passed by Massachusetts and New York to limit immigration from Ireland did not exclude all poor immigrants as "paupers" or "public charges"—rather, they excluded and removed only those who were likely to become permanently dependent on the State.

C. Late Nineteenth and Early Twentieth Centuries

In 1882, Congress passed the first general Immigration Act that contained a public charge provision. Modeled on the Massachusetts and New York laws, the act prohibited the landing of "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." Act of Aug. 3, 1882,

ch. 376, § 2, 22 Stat. 214, 214. The next major general immigration legislation, the Immigration Act of 1891, expanded the inadmissible classes to include "persons likely to become a public charge." Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084.

These laws were not designed to significantly limit immigration into the country. To the contrary, two significant restrictions narrowed the meaning of "public charge," as used in these federal statutes. First, the public charge designation was to be made based on "causes existing prior to [a person's] landing" in the United States. *Id.* § 11, 26 Stat. at 1086. Second, and relatedly, by 1891, Congress imposed a time limit on how long after entry a person could be deported on the basis that he or she had become a public charge—initially one year after arrival and later five years. Torrie Hester, *Deportation: The Origins of U.S. Policy* 145 (2017); *see also* Act of Mar. 3, 1891, ch. 551, § 11, 26 Stat. at 1086; Act of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214; Act of Feb. 20, 1907, ch. 1134, § 20, 34 Stat. 898, 904-05; Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 874, 889.[4]

[4] Under these laws, excludable and deportable categories included persons likely to become a public charge, persons suffering from a contagious disease, felons, persons convicted of other crimes or misdemeanors, polygamists, and anarchists, as well as "imbeciles, feeble-minded persons, persons with physical and moral defects which may affect their ability to earn a living, persons afflicted with tuberculosis, children unaccompanied by their parents, and women coming to the U.S. for immoral purposes [prostitution]." Deirdre Moloney, *National Insecurities: Immigrants and U.S. Deportation Policy Since 1882*, app. A. 242-46 (2012).

The U.S. Bureau of Immigration made clear in 1897 that these federal statutes were not passed to exclude or make removable immigrants who simply received non-cash public benefits, as it clarified that the public charge provisions of these early federal laws primarily applied to permanent "inmates of almshouses or charitable hospitals." U.S. Bureau of Immigration, Annual Report of the Commissioner-General of Immigration to the Secretary of the Treasury 4 (1897). Indeed, deportation on public charge grounds during this period principally took the form of removal from such institutions. As historian Torrie Hester has documented, "[t]he Bureau of Immigration set up procedures for carrying out deportations," and "one of their first steps, taken in 1898, . . . [was to] sen[d] out a survey to the managers of charitable, penal, and reformatory institutions to determine just how many immigrants were public charges." Hester, *supra*, at 146.

Not surprisingly, given the narrow application of the term, only a small fraction of the poor immigrants who arrived in the early twentieth century were deemed public charges. During that time, over twenty-four million people immigrated to the United States, mostly as low-waged, low-skilled laborers, but none were excluded or deported as public charges purely because they were destitute or used social services. During the 1910s, an average of one million people a year entered the United States. But in 1916, for example, the Bureau of Immigration excluded 10,263 people—just one percent of all arrivals—on the ground that they

were likely to become public charges. And that year the government deported only 1,431 immigrants as public charges. U.S. Dep't of Labor: Bureau of Immigration, Annual Report of the Commissioner General of Immigration to the Secretary of Labor 28 (1916).[5]

And significantly, in addition to admitting the vast majority of poor immigrants, the federal government also created a social support system to provide them with assistance. Under the federal Immigration Act of 1882, ship masters were required to pay the U.S. Treasury Department a fifty-cent capitation tax for the landing of every foreign passenger. This money went into the "Immigration Fund," which was spent "for the care of immigrants arriving in the United States" and "for the relief of such as are in distress," a recognition by the federal government of the benefits of providing public relief to destitute immigrants. Act of Aug. 3, 1882, ch. 376, § 1, 22 Stat. at 214.

Like the federal government, States and localities continued to provide public support for immigrants during this period as well, and immigrants often received support from a growing list of social services. Those services "consisted of in-kind benefits such as food, clothing, shoes, coal, rent vouchers, burial services, medical

[5] While the total number of individuals classified as "public charges" was small, even that small number was inflated by the fact that immigration officials sometimes used "public charge" as a proxy for social undesirability. *See* Moloney, *supra*, at 32-33; *see also infra* at 14-15.

care, or cash for poor individuals who lived in their own homes." Cybelle Fox, *Three Worlds of Relief: Race, Immigration, and the American Welfare State from the Progressive Era to the New Deal* 54 (2012). They also included Mothers' Pensions, which were cash grants to allow "destitute single mothers—usually widows—to stay home and care for their children." *Id.* After Illinois passed the first Mother's Pension law in 1911, twenty states passed Mother's Pension laws within the next two years, and by 1926, more than forty states had them. *Id.* at 54.

D. Mid-Twentieth Century to the Present

By the time of the Great Depression, the federal government and state and local governments offered a growing number of social services, such as English classes and public health programs, and many immigrants who lost their jobs turned to public relief for support. Significantly, the Immigration and Naturalization Service (INS) did not consider immigrants who were "victims of the general economic depression" removable simply because they took advantage of these services. Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 72 (2004) (citation and internal quotation marks omitted).

In 1948, the Board of Immigration Appeals (BIA) reaffirmed that, under federal law, an individual could be deported as a public charge only in narrow circumstances—specifically, when he or she owed the government money and failed to pay that debt when pressed. *See Matter of B—*, 3 I. & N. Dec. 323 (BIA 1948). In other

words, the BIA concluded that for a person to be considered a public charge, (1) "[t]he State or other governing body must, by appropriate law, impose a charge for the services rendered to the alien," (2) "[t]he authorities must make demand for payment of the charges upon those persons made liable under State law," and (3) "there must be a failure to pay for the charges." *Id.* at 326. The BIA emphasized that mere "acceptance by an alien of services provided by" the government "does not in and of itself make the alien a public charge" for deportation purposes under federal immigration law. *Id.* at 324.

To be sure, individual immigration officials and State Department officers in some cases construed the public charge laws more or less favorably depending on subjective judgments about immigrants' desirability as citizens, based on their race, gender, nationality, sexual orientation, disability, or other characteristics. For example, relying on stereotypes about female dependency, immigration officials disproportionately labeled single and pregnant women as "likely to become a public charge," even if they were self-supporting, possessed occupational skills, or presented affidavits of support from family members in the United States. Moloney, *supra*, at 35, 79; Eithne Luibhéid, *Entry Denied: Controlling Sexuality at the Border* 9-10 (2002); *see also* Moloney, *supra*, at 30-50. The public charge rule was also used as a pretext to exclude ethnic, religious, and racial groups, *see, e.g.*, Moloney, *supra*, at 82-92; Hester, *supra*, at 152-53, and to either deport or deny entry to

immigrants who were known or presumed to be lesbian, gay, bisexual, or transgender, often based on their appearance or attire, for reasons unrelated to the use of public support, Margot Canady, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* 19-54 (2009). But these individual determinations did not alter the well-established understanding that "public charge" provisions were adopted to exclude only those who received, or were likely to receive, cash benefits for subsistence or those who required long-term institutionalization.

Indeed, even as both immigration and the availability of public benefits massively expanded in the 1960s, Congress did not exclude lawful immigrants and refugees from accessing such benefits or label those who did so public charges. Significantly, legislation authorizing most of the major federal benefit programs enacted since the 1960s, such as Medicaid, Supplemental Security Income (SSI), food stamps, and Head Start, generally did not distinguish between citizens and non-citizens, basing eligibility instead on income. Cong. Research Serv., R43220, *Public Charge Grounds of Inadmissibility and Deportability: Legal Overview* 5-7 (2017); Hannah Matthews, Center for Law & Social Policy, *Immigrant Eligibility for Federal Child Care and Early Education Programs* 2 (2017). And although the federal government barred undocumented immigrants from accessing most federal welfare programs in the 1970s, Cybelle Fox, *Unauthorized Welfare: The Origins of Immigrant Status Restrictions in American Social Policy*, J. Am. Hist. 1051, 1052 (2016),

it did not make receipt of those benefits a basis for exclusion or deportation. In other words, during this period, the definition of "public charge" for purposes of exclusion or deportation remained consistent with the historical requirement of primary dependency on the government either for cash benefits or for long-term institutionalization.

From the mid-twentieth century onward, Congress repeatedly revised the relevant federal immigration laws, and federal agencies issued regulations implementing them, but the meaning of the term "public charge" remained constant in its inapplicability to those who received only non-cash benefits. In the Immigration and Nationality Act of 1952, for instance, Congress continued to include a "public charge" clause and clarified that the decision to deem someone a public charge was committed to a consular officer or the Attorney General, but it did not purport to alter that term's meaning. *See* Act of June 27, 1952, Pub. L. 444, § 212(a)(15), 66 Stat. 163, 183. And in 1987, the INS issued a final rule recognizing that a person was a "public charge" if she "received public cash assistance," Adjustment of Status for Certain Aliens, 52 Fed. Reg. 16,205, 16,211 (May 1, 1987), which the INS expressly clarified did *not* include the value of "assistance in kind, such as food stamps, public housing, *or other non-cash benefits*," including Medicare and Medicaid, *id.* at 16,209 (emphasis added).

Finally, in 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which contained the "public charge" language that now appears in the INA. Omnibus Consolidated Appropriations Act, Pub. L. 104-208, § 531, 110 Stat. 3009, 3009-674 (1996). In response, the INS (now DHS) issued the 1999 Field Guidance, reaffirming the longstanding definition of the term "public charge." *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (Mar. 26, 1949). The 1999 Field Guidance expressly defined a "public charge" as "an alien who has become . . . 'primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance purposes or (ii) institutionalization for long-term care at government expense.'" *Id.* This definition was entirely consistent with the term's well-established historical definition, and it remained the governing definition of the term "public charge" until DHS issued its new rule in 2019.

* * *

In sum, "public charge" laws have deep roots in our country's history, but they have never been the basis for excluding or removing immigrants based solely on their receipt of non-cash benefits. To the contrary, both the federal government and state and local governments have long made public benefits available to

immigrants. DHS's new rule is at odds with this long history and is thus unlawful, as the next Section discusses.

II. DHS'S NEW RULE REDEFINING "PUBLIC CHARGE" VIOLATES THE APA.

Congress incorporated this longstanding construction of the term "public charge" into the INA when it included that term in the statute, 8 U.S.C. § 1182(a)(4), and DHS's new rule substantially redefining that term is therefore "not in accordance with law," in violation of the APA, 5 U.S.C. § 706(2)(A).

The INA, like its many precursors, provides that "[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A). "In determining whether an alien is inadmissible," the statute continues, "the consular officer or the Attorney General shall at a minimum consider the alien's—(I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." *Id.* § 1182(a)(4)(B)(i). The INA further provides that "[i]n addition to th[ose] factors . . . , the consular officer or the Attorney General may also consider any affidavit of support . . . for purposes of exclusion under this paragraph." *Id.* § 1182(a)(4)(B)(ii).

The meaning of the term "public charge" in the INA is inextricably linked to the well-established historical definition of that term. This Court must assume "that

Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *accord EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 751 (9th Cir. 2003) (en banc); *see In re Nw. Airlines Corp.*, 483 F.3d 160, 169 (2d Cir. 2007) ("We also assume that Congress passed each subsequent law with full knowledge of the existing legal landscape."). By using the same term—"public charge"—as had long been used in the law to refer only to someone who receives cash benefits from the government for subsistence or who has experienced long-term institutionalization, Congress necessarily incorporated that definition into the INA. Indeed, Congress gave no indication that it intended to alter the term's meaning in any way; to the contrary, Congress's use of the well-established phrase "public charge" reflects the legislature's plan to incorporate the term's traditional definition into the statute.

The new administrative rule, which redefines and significantly expands that term to encompass those who receive only means-tested, non-cash benefits—a group that has categorically been excluded from the meaning of "public charge"—is therefore "not in accordance with law," in violation of the APA, 5 U.S.C. § 706(2)(A). *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2567 (2019) ("The Administrative Procedure Act embodies a 'basic presumption of judicial review,' and instructs reviewing courts to set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" (quoting *Abbott Labs.*

v. Gardner, 387 U.S. 136, 140 (1967), and 5 U.S.C. § 706(2)(A))). Moreover, the meaning of the term "public charge" in the INA is far from ambiguous, as that term has maintained a constant definition—again, one that does not include those who receive only non-cash benefits—for over a century. DHS therefore does not have the discretion to infuse the term with a new, broader meaning that contravenes its historical and traditional definition. *See City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (recognizing that courts and agencies alike "must give effect to the unambiguously expressed intent of Congress" (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984))). Accordingly, DHS's new rule violates the APA and should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 4,789 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief of *amici curiae* complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 31st day of January, 2020.

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Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2020, the foregoing document was filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit, using the appellate CM/ECF system.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 31st day of January, 2020.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra
Counsel for Amici Curiae