Michigan Law Review

Volume 119 | Issue 7

2021

Excluding 'Undesirable' Immigrants: Public Charge as Disability Discrimination

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https://doi.org/10.36644/mlr.119.7.excluding

COMMENT

EXCLUDING 'UNDESIRABLE' IMMIGRANTS: PUBLIC CHARGE AS DISABILITY DISCRIMINATION

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Public charge is a ground of inadmissibility based upon the likelihood that a noncitizen will become dependent on government benefits in the future. Once designated as a public charge, a noncitizen is ineligible to be admitted to the United States or to obtain lawful permanent residence. In August 2019, the Trump Administration published a regulation regarding this inadmissibility ground. Among its mandates, the rule expanded the definition of a public charge to include any noncitizen who receives one or more public benefits for more than twelve months in a thirty-six-month period. It also instructed immigration officers to weigh medical conditions that "interfere" with the noncitizen's ability to care for themselves in favor of finding the noncitizen to be a public charge. The rule prompted several legal challenges, including under section 504 of the Rehabilitation Act, the predecessor to the Americans with Disabilities Act. While these claims address the core legal arguments of disability discrimination, the scope of violations should be viewed more broadly. This Comment assesses the public charge rule from a disability rights perspective, exploring the intersection between disability and immigration law, and concludes that immigrants with disabilities no longer had access to federal programs to which they were entitled, and consequently, access to the United States itself.

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* J.D., May 2020, University of Michigan Law School. I am grateful to my mom, Rosario Sánchez Tonohuye, for all her support. I would also like to thank Professors Margaret Hannon and Danielle Kalil for their incredibly thoughtful feedback and, of course, the Notes team.

INTRODUCTION

Maria Isabel Bueso, a California resident, immigrated from Guatemala as a child in 2003 for treatment of her rare genetic disease, mucopolysaccharidosis type VI.[1] Doctors had invited her to participate in a clinical trial, and due in part to her participation, the Food and Drug Administration approved a medication that significantly improved the survival rates of individuals with the disease.[2] In August 2019, the United States Citizenship and Immigration Services (USCIS) terminated a program for immigrants like Bueso that granted them "deferred action" while they received lifesaving medical treatment.[3] The government told Bueso that she and her family had to leave within thirty-three days or face deportation to Guatemala.[4] Several members of Congress wrote a letter to Acting Secretary of Homeland Security Kevin McAleenan criticizing USCIS's decision to eliminate medical deferred action.[5] While Bueso has since been granted approval to remain in the United States for two more years,[6] her case highlights the perilous intersection between immigration and disability.

Bueso is one of countless immigrants with a disability.[7] Existing immigration law disparately affects immigrants with disabilities, particularly

1. Miriam Jordan & Caitlin Dickerson, *Sick Migrants Undergoing Lifesaving Care Can Now Be Deported*, N.Y. TIMES (Aug. 29, 2019), https://www.nytimes.com/2019/08/29/us/immigrant-medical-treatment-deferred-action.html [https://perma.cc/JHL4-89UA].

2. *Id.*

3. *Id.*

4. *Id.*

5. Camilo Montoya-Galvez, *More than 100 Lawmakers Denounce Decision To End Program for Sick Immigrants*, CBS NEWS (Aug. 30, 2019, 4:18 PM), https://www.cbsnews.com/news/medical-deferred-action-more-than-100-lawmakers-decry-decision-to-stop-health-program-for-sick-immigrants [https://perma.cc/CPZ3-PQ5T].

6. Farida Jhabvala Romero, *Concord Woman with Rare Disease Granted Reprieve from Deportation*, KQED (Dec. 10, 2019), https://www.kqed.org/news/11790433/concord-woman-with-rare-disease-granted-reprieve-from-deportation [https://perma.cc/CHQ4-6DZ2].

7. While there is no data on the number of immigrants with disabilities, 13.5 million Medicaid or CHIP enrollees are noncitizens or are in a household with a noncitizen. Samantha Artiga, Rachel Garfield & Anthony Damico, *Estimated Impacts of Final Public Charge Inadmissibility Rule on Immigrants and Medicaid Coverage*, KFF (Sept. 18, 2019), https://www.kff.org

through the inadmissibility ground known as "public charge." Prior to August 2019, a noncitizen was designated as a public charge if a consular officer or other immigration officer determined that the individual was likely to primarily rely on government support for subsistence.[8] As a public charge, this individual is ineligible for admission into the United States and legal permanent residence.[9] On August 14, 2019, however, the Department of Homeland Security (DHS) published the Inadmissibility on Public Charge Grounds Final Rule (the Final Rule), which further magnified the impact of this law on people with disabilities.[10] This rule concerned the designation of public charge status for individuals seeking adjustment of status, extension of stay, or change of status.[11] Under the Final Rule, the Trump Administration expanded the definition of a public charge to include noncitizens who receive one or more public benefits for more than twelve months within any thirty-six-month period.[12] This expanded definition raised the question of whether the Final Rule violated section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability, and if so, to what extent it affected immigrants with disabilities.

Disability issues within immigration law are not often addressed by legal scholarship.[13] Moreover, they have only been fleetingly addressed by the courts, even though some plaintiffs raised Rehabilitation Act claims in their challenges to the Final Rule.[14] With a focus on public charge as a ground of inadmissibility, this Comment seeks to highlight the breadth of the Final Rule's section 504 violations, presenting an analysis of the Final Rule through a disability rights lens. In doing so, it reads the rule as more than

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/report-section/estimated-impacts-of-final-public-charge-inadmissibility-rule-on-immigrants-and-medicaid-coverage-key-findings [https://perma.cc/RG4H-8HE6].

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

9. 8 U.S.C. § 1182(a)(4).

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

11. *Id.* Adjustment of status is the process through which a nonimmigrant visa holder applies for an immigrant visa. 8 U.S.C. § 1255. Through an extension of stay, a noncitizen may increase the duration of their stay in the United States. *See id.* § 1184. Change of status allows a noncitizen to change from one nonimmigrant visa to another. *Id.* § 1258.

12. *Public Charge*, U.S. CITIZENSHIP & IMMIGR. SERVS. (last updated Sept. 22, 2020), https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge [https://perma.cc/JR2C-4VEH].

13. Much of the scholarship in this area focuses on immigrants with mental disabilities. *See, e.g.*, Aliza B. Kaplan, *Disabled and Disserved: The Right to Counsel for Mentally Disabled Aliens in Removal Proceedings*, 26 GEO. IMMIGR. L.J. 523 (2012); Joren Lyons, Comment, *Mentally Disabled Citizenship Applicants and the Meaningful Oath Requirement for Naturalization*, 87 CALIF. L. REV. 1017 (1999). Regarding the Final Rule, Professor Mark C. Weber discusses its parallels with *Hobby Lobby* and explains that federal law supersedes federal regulation when the two conflict. Mark C. Weber, *Of Immigration, Public Charges, Disability Discrimination, and, of All Things*, Hobby Lobby, 52 ARIZ. ST. L.J. 245 (2020).

14. *E.g.*, Washington v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 1191 (E.D. Wash. 2019).

mere immigration regulation: in contravention of section 504 of the Rehabilitation Act, the Final Rule effectively denied individuals with disabilities access to public benefits and the liberty to be admitted or remain in the United States. Although the Biden Administration has since retreated from the Final Rule,[15] its implementation (and survival) signals the troubling perpetuity of disability discrimination in immigration law. Part I provides an overview of the public charge ground prior to the 2019 change, the development of the Final Rule from notice-and-comment to nationwide implementation to its demise, and the framework of section 504 of the Rehabilitation Act. Part II assesses the Final Rule from a disability rights standpoint by examining the access/content doctrine, eugenics, and the role of social welfare in the lives of those with disabilities. Part II also identifies public health as a policy concern that supports this Comment's conclusion that the Final Rule brazenly discriminated against immigrants with disabilities.

I. PUBLIC CHARGE AND DISABILITY DISCRIMINATION

In a radio interview, then Acting USCIS Director Ken Cuccinelli[16] revised the renowned words etched onto the Statue of Liberty from "Give me your tired, [give me] your poor"[17] to "[G]ive me your tired and your poor who can stand on their own two feet and who will not become a public charge."[18] From childhood, Americans are indoctrinated with a rosy view of immigration at Ellis Island,[19] but immigration regulation reflects a much more nuanced story.

Public charge doctrine, until recently, has not been the subject of public discourse regarding immigration law. This Part traces the historical evolution of the public charge ground of inadmissibility to its culmination in the Final Rule and outlines the Rehabilitation Act. Section I.A introduces the origins of the public charge ground and its amendments by the Supreme Court, Congress, and the Board of Immigration Appeals. Section I.B discusses the contours of the Final Rule and subsequent litigation. Section I.C describes section 504 of the Rehabilitation Act.

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15. Joint Stipulation to Dismiss, U.S. Dep't of Homeland Sec. v. New York, No. 20-449, 2021 WL 666376 (U.S. dismissed Mar. 9, 2021).

16. In March 2020, a federal court ruled that Cuccinelli's appointment as acting director of USCIS violated the Federal Vacancies Reform Act. L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1 (D.D.C. 2020).

17. Emma Lazarus, *The New Colossus*, POETRY FOUND., https://www.poetryfoundation.org/poems/46550/the-new-colossus [https://perma.cc/5HQ3-AJ83].

18. *Rule Would Penalize Immigrants to U.S. for Needing Benefits*, NPR (Aug. 13, 2019, 7:23 AM), https://www.npr.org/2019/08/13/750727515/rule-would-penalize-immigrants-to-u-s-for-needing-benefits [https://perma.cc/7SPD-BSJH].

19. *E.g.*, EVE BUNTING, DREAMING OF AMERICA: AN ELLIS ISLAND STORY (1999).

A. *History of Public Charge*

There are two categories of noncitizens: immigrants and nonimmigrants.[20] Immigrants, or legal permanent residents, may remain and work in the United States on a long-term basis.[21] Nonimmigrants have temporary visas to come as students, tourists, seasonal workers, and the like.[22] To come to the United States, a noncitizen must be eligible for a nonimmigrant or immigrant visa and be admissible.

According to the Immigration and Nationality Act (INA), "admission" is the lawful entry of a noncitizen into the United States "after inspection and authorization by an immigration officer."[23] The INA enumerates the exclusion grounds that render noncitizens ineligible for admission to the United States unless a waiver applies.[24] The provisions apply to noncitizens outside the United States seeking admission, noncitizens who entered without inspection,[25] and noncitizens within the borders who are applying for permanent residence.[26] Public charge is one of these grounds of inadmissibility.[27]

Over time, changes in immigration law have been prompted by an aversion to certain kinds of immigrants. Laws regarding public charge shifted from the overt exclusion of immigrants with disabilities to exclusion by proxy. Under the "proxy" scheme, the focus was reliance on government assistance, which indirectly envelops immigrants whose disabilities necessitate costly healthcare and other public benefits.[28] But even so, as long as the immigrant was not primarily dependent on government assistance, they were not deemed to be a public charge—until the Trump Administration began to implement its policies in 2018.

While public charge doctrine was initially nebulous, Congress and the courts further defined it over time. In the Immigration Act of 1882, Congress enacted "public charge" as an exclusion ground, prohibiting the admis-

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20. *Requirements for Immigrant and Nonimmigrant Visas*, U.S. CUSTOMS & BORDER PROT. (last updated Jan. 3, 2018), https://www.cbp.gov/travel/international-visitors/visa-waiver-program/requirements-immigrant-and-nonimmigrant-visas [https://perma.cc/WQY5-QHKZ].

21. There are three primary categories of immigrants: family-sponsored, employment-based, and diversity-based. 8 U.S.C. § 1151(a). Immigrants are also eligible to become U.S. citizens after three to five years; in contrast, nonimmigrants are ineligible for naturalization. *Id.* §§ 1427(a), 1430(a).

22. *Id.* § 1184 (providing a comprehensive list of nonimmigrant visa categories).

23. *Id.* § 1101(a)(13)(A).

24. *Id.* § 1182(a).

25. *Id.* § 1182(a)(6)(A) (providing that a noncitizen who has not been admitted is subject to the grounds of inadmissibility). Noncitizens who enter without inspection are subject to the grounds of exclusion, as they have not yet been admitted. *Id.* § 1225(a)(1).

26. *Id.* § 1255(a).

27. *Id.* § 1182(a)(4).

28. *See id.* § 1182(a).

sion of "any person unable to take care of himself or herself without becoming a public charge."[29] While the statute did not define "public charge," it explicitly excluded "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge" from admission.[30] This legislation was passed in response to *Henderson v. Mayor of New York*,[31] in which the Supreme Court held that state regulation of immigration through taxation of immigrants was unconstitutional,[32] leaving states without a direct source with which to fund the cost of immigrants. The 1882 Act also established an "immigrant fund" to provide "for the care of immigrants arriving in the United States," signaling that a noncitizen was not considered a public charge merely for receiving some public assistance.[33]

In 1907, Congress enacted an immigration statute that designated "paupers" and "professional beggars" as likely to become public charges.[34] The Supreme Court subsequently stated that a noncitizen is likely to become a public charge due to their "permanent" personal characteristics; the conditions of the city in which admission is sought do not affect the public charge determination.[35] In the wake of the enactment of sweeping social welfare legislation in the 1930s,[36] the Board of Immigration Affairs articulated a test to determine whether an individual is a public charge: (1) a noncitizen is charged for services rendered to them under law, thereby creating a cause of action in contract, (2) payment is demanded from the noncitizen, and (3) the noncitizen fails to pay for the charges.[37] The Board also stated that if the noncitizen accepts government services, that "does not in and of itself make the [noncitizen][38] a public charge."[39] In 1974, however, the Board narrowed

29. Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 214. But note that prior to this act, the government deported individuals for their poverty. *See* Ibrahim Hirsi, *Trump Administration's 'Public Charge' Provision Has Roots in Colonial US*, WORLD (Dec. 19, 2018, 2:00 PM), https://www.pri.org/stories/2018-12-19/trump-administration-s-public-charge-provision-has-roots-colonial-us [https://perma.cc/JU86-N7NS].

30. Hirsi, *supra* note 29. Congress later passed a statute excluding "[a]ll idiots, insane persons, paupers or persons likely to become a public charge." Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084.

31. 92 U.S. 259 (1876).

32. COMM. ON THE JUDICIARY, 100TH CONG., REP. ON GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT 7–8 (Comm. Print 1988).

33. Immigration Act of 1882, ch. 376, § 2 (noting that the Secretary of Treasury is tasked with "provid[ing] . . . support and relief of such immigrants therein landing as may fall into distress or need public aid").

34. Immigration Act of 1907, ch. 1134, § 2, 34 Stat. 898, 899.

35. Gegiow v. Uhl, 239 U.S. 3, 10 (1915) (finding that Russian noncitizens could not be deported as public charges solely because the city they intended to enter had high unemployment rates).

36. *See, e.g.*, Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935).

37. B—, 3 I. & N. Dec. 323, 326 (B.I.A. 1948) (holding that an institutionalized noncitizen had not become a public charge by being housed in a state hospital for no cost).

38. This Comment replaces the term "alien" with "noncitizen" when quoting U.S. immigration law to use language that affirms the dignity and humanity of such individuals.

the scope of its three-part test, holding that its application would be limited to the determination of whether a noncitizen had become a public charge *after* admission to the United States.[40]

Subsequent regulations focused on cash assistance as the identifier for public charges. The Immigration and Naturalization Service (INS)[41] promulgated a final rule in 1987 that classified individuals seeking adjustment of status as public charges if they had received public cash assistance.[42] The INS explained that cash assistance would not include food stamps, public housing, or other noncash benefits.[43] In response to the growth in the undocumented immigrant population in the 1990s, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to amend the INA.[44] The amendment added factors to assess whether an individual is classified as a public charge: age, health, family status, financial status, education, skills, and affidavits of support.[45] The amendment requires that those immigrating through certain visas, including family and employment-based petitions, provide an affidavit of support to avoid public charge status.[46] A noncitizen's sponsor must demonstrate that they can support the noncitizen at an annual income of at least 125 percent of the federal poverty level.[47] This affidavit is required even if the adjudicator would find that a noncitizen is unlikely to become a public charge.[48]

In 1999, to clarify the meaning of "public charge," the INS published a Field Guidance establishing that the public charge determination is a "totali-

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39. B—, 3 I. & N. Dec. at 324.

40. Harutunian, 14 I. & N. Dec. 583, 589 (B.I.A. 1974).

41. INS is the predecessor to three agencies: USCIS, Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP). U.S. CITIZENSHIP & IMMIGR. SERVS., OVERVIEW OF INS HISTORY 11 (2012), https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf [https://perma.cc/LJ6U-H6PH].

42. Adjustment of Status for Certain Aliens, 52 Fed. Reg. 16,205, 16,211 (May 1, 1987) (to be codified at 8 C.F.R. pt. 245a).

43. *Id.* at 16,209.

44. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, sec. 531, § 212(a), 110 Stat. 3009–546, –674 (codified as amended at 8 U.S.C. § 1182(a)). By expanding inadmissibility and removal grounds, IIRIRA disrupted family unity by removing members already in the U.S. and disincentivized the immigration of poor individuals. Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, 6 J. ON MIGRATION & HUM. SEC. 192, 198–99 (2018).

45. 8 U.S.C. § 1182(a)(4)(B).

46. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689 (Mar. 26, 1999). The affidavit of support is required for employment-based immigrants who intend to work for a relative or for a company in which a U.S. citizen or lawful permanent resident relative holds a 5 percent or more ownership interest. *Id.*

47. *Id.*; *see HHS Poverty Guidelines for 2021*, U.S. DEP'T HEALTH & HUM. SERVS. (last updated Jan. 15, 2021), https://aspe.hhs.gov/poverty-guidelines [https://perma.cc/CD97-TRL7].

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

ty of the circumstances test."[49] In this memorandum, the agency clarified that "'public charge' means [a noncitizen] . . . who is likely to become (for admission/adjustment purposes) '*primarily* dependent on the government for subsistence.'"[50] A decade later, in the Foreign Affairs Manual,[51] the State Department further defined public charge as signifying dependence on the U.S. government for either public cash assistance for income maintenance or long-term institutionalization.[52] Neither the use of noncash benefits nor the use of some public benefits triggered public charge status.[53]

B. *Final Public Charge Rule*

The Trump Administration had an unprecedented focus on public charge as a ground of inadmissibility. The Final Rule penalized noncitizens for having a disability, as disabilities greatly cut against noncitizens in the public charge determination. In 2019, approximately 21,000 individuals were deemed inadmissible on the basis of public charge, over 22 times the mere 932 individuals deemed inadmissible in 2015.[54] In January 2018, the State Department amended the Foreign Affairs Manual with regard to the public charge determination,[55] signaling the content of the regulation to come. The amendment allowed for noncash benefits to be considered as a factor in the totality of the circumstances test at the time of visa application.[56] The

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49. *Id.* at 28,690.

50. *Id.* at 28,689 (emphasis added).

51. The Foreign Affairs Manual provides guidelines for consular officials abroad. *See Foreign Affairs Manual*, U.S. DEP'T STATE, https://fam.state.gov [https://perma.cc/2K2Z-BAKE]. It can be amended without notice or comment. 5 U.S.C. § 553(a)(1).

52. U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL § 40.41 N2.a (2009), https://immigration.com/sites/default/files/86988_0.pdf [https://perma.cc/28CE-WMMH].

53. Prior to 2019, the following programs were excluded from the public charge designation: Supplemental Nutrition Assistance Program (formerly called Food Stamps); Medicaid; the Child Health Insurance Program; emergency medical services; the Women, Infants, & Children program; energy assistance; Head Start; and job training programs. *Id.*

54. BUREAU OF CONSULAR AFFS., *Table XX: Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act); Fiscal Year 2015*, U.S. DEP'T STATE, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2015AnnualReport/FY15AnnualReport-TableXX.pdf [https://perma.cc/7RRS-QLSW]; BUREAU OF CONSULAR AFFS., *Table XX: Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act); Fiscal Year 2019*, U.S. DEP'T STATE, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2019AnnualReport/FY19AnnualReport-TableXX.pdf [https://perma.cc/NME3-WFKF].

55. *See* U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL § 302.8-2(B)(1) (2018), https://fam.state.gov/FAM/09FAM/09FAM030208.html [https://web.archive.org/web/20180120232020/https://fam.state.gov/FAM/09FAM/09FAM030208.html].

56. *Id.* § 302.8-2(B)(1)(d). Under the amendment, "public benefits" in the public charge context included Supplemental Nutrition Assistance Program, Temporary Assistance for Needy Families Supplemental Security Income, Housing Choice Voucher Program, Section 8 Project-Based Rental Assistance, most forms of federally funded Medicaid, and subsidized public housing. 8 C.F.R. § 212.21(b) (2020).

amendment further instructed officers to consider an applicant's health: "[C]ertain health issues which might affect employment, increase likelihood of future medical expenses, or otherwise affect the applicant's ability to adequately provide for himself or herself or dependents should increase the burden on the applicant to provide evidence that they will not become a public charge."[57]

Citing self-reliance as a "core principle" in the United States when discussing immigration, the Trump Administration proffered a drastic expansion of the public charge definition.[58] In its original iteration, the rule designated a list of public benefits that would be considered in public charge inadmissibility determinations and proposed different thresholds depending on the public benefit.[59] On October 10, 2018, DHS commenced the rulemaking process by inviting comment on the proposed rule.[60] Commenters expressed concerns ranging from the "backdoor" exclusion of immigrants with HIV/AIDS[61] to the discrimination against communities of color that disproportionately experience chronic conditions like heart disease.[62] After receiving over 266,000 public comments, DHS published the Final Rule, entitled Inadmissibility on Public Charge Grounds, in the Federal Register in August 2019.[63]

The Final Rule was the most expansive iteration of the public charge rule since its inception in 1882. It allowed DHS to deny permanent residence, or green cards, from noncitizens who have used certain public benefits in the past. As these benefits included food stamps and Medicaid, the public charge redefinition excluded immigrants with disabilities who are food insecure or need Medicaid for home- and community-based services. Food insecurity is prominent in the United States, where over fifty million people experience

57. U.S. DEP'T OF STATE, *supra* note 55, § 302.8-2(B)(2)(b)(2).

58. *Press Briefing by USCIS Acting Director Ken Cuccinelli*, WHITE HOUSE (Aug. 12, 2019, 10:02 AM), https://trumpwhitehouse.archives.gov/briefings-statements/press-briefing-uscis-acting-director-ken-cuccinelli-081219 [https://perma.cc/SVG8-HBQV].

59. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,296 (Aug. 14, 2019) (to be codified at 8 C.F.R. pt. 103, 212–14, 245, 248). The rule originally proposed a threshold based on the Federal Poverty Guidelines for monetizable public benefits, such as cash benefits, and a duration threshold for receipt of non-monetizable benefits, like Medicare, more than twelve months in a thirty-six-month period. *Id.*

60. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018).

61. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,411.

62. *Id.* at 41,408. *See also* Garth Graham, *Disparities in Cardiovascular Disease Risk in the United States*, 11 CURRENT CARDIOLOGY REVS. 238, 240 (2015).

63. *Public Charge*, *supra* note 12.

uncertain access to food.[64] More than seventy million individuals were enrolled in Medicaid as of November 2020.[65]

As in its original iteration, the Final Rule applied to applicants for lawful permanent residence, applicants for immigrant and nonimmigrant visas, and nonimmigrants seeking to extend their stay in the same nonimmigrant visa category or change their status to that of a different nonimmigrant category.[66] Legal permanent residents who are absent from the United States for a continuous period exceeding 180 days are also subject to inadmissibility grounds and, consequently, were subject to the Final Rule.[67] The Final Rule did not change the public charge ground of deportability.[68] With respect to adjustment of status, the Final Rule required applicants subject to the public charge ground of inadmissibility to file a Declaration of Self-Sufficiency with their Form I-485 to prove that they were not likely to become a public charge.[69] Noncitizens seeking an extension of stay or change of status had to demonstrate that they had not received public benefits over the threshold since obtaining the status they wished to change.[70]

The Final Rule redefined a public charge to be a noncitizen "who receives one or more public benefit for more than 12 months in the aggregate within any 36-month period."[71] In this formulation, the receipt of two public benefits in one month qualified as two months of public benefits.[72] The Final Rule also redefined "public benefit" to include cash benefits for income maintenance, the Supplemental Nutrition Assistance Program, most forms

64. *Facts About Poverty and Hunger in America*, FEEDING AM., https://www.feedingamerica.org/hunger-in-america/facts [https://perma.cc/JWB4-YW2P].

65. CTRS. FOR MEDICARE & MEDICAID SERVS., OCTOBER AND NOVEMBER 2020 MEDICAID AND CHIP ENROLLMENT TRENDS SNAPSHOT 4 fig.1, https://www.medicaid.gov/medicaid/national-medicaid-chip-program-information/downloads/october-november-medicaid-chip-enrollment-trend-snapshot.pdf [https://perma.cc/QY5N-RUWY].

66. *Public Charge*, *supra* note 12.

67. 8 U.S.C. § 1101(a)(13)(C)(ii); Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,326.

68. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,295. This ground triggers deportation of noncitizens who have become a public charge within five years of their entry into the United States. 8 U.S.C. § 1227(a)(5).

69. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,295. The Declaration of Self-Sufficiency, or Form I-944, asks applicants to report their credit scores, health insurance, and history of receipt of public benefits. DECLARATION OF SELF-SUFFICIENCY, OMB NO. 1615-0142, U.S. CITIZENSHIP & IMMIGR. SERVS. 7–8 (2019), https://www.uscis.gov/sites/default/files/document/forms/i-944-pc.pdf [https://perma.cc/T6MR-93PM]. Following the Biden Administration's decision to not apply the Final Rule, USCIS ceased requiring submissions of Form I-944. *Inadmissibility on Public Charge Grounds Final Rule: Litigation*, U.S. CITIZENSHIP & IMMIGR. SERVS. (last updated Mar. 19, 2021), https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/inadmissibility-on-public-charge-grounds-final-rule-litigation [https://perma.cc/TL7R-BQYL].

70. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,295.

71. *Id.* at 41,297.

72. *Id.* at 41,295.

of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher Program, Section 8 Project-Based Rental Assistance, and certain other forms of subsidized housing.[73]

The Final Rule gave officers new guidelines regarding how to consider the factors in the noncitizen's case, discussing "heavily weighted" positive and negative factors.[74] Age, for instance, was a negative factor.[75] A noncitizen was more likely to be considered a public charge if they were under eighteen or over sixty-one.[76] Under the health factor, medical conditions were considered with regard to whether the noncitizen "[would] be able to care for himself or herself, to attend school, or to work . . . has sufficient household assets and resources, including but not limited to private health insurance, to cover any reasonably foreseeable medical costs."[77] A factor that heavily cut against noncitizens was receipt of public benefits.[78] These guidelines effectively prompted officers to equate "health" with "lack of disability." While some groups were statutorily exempted from the public charge inadmissibility ground, the exemptions primarily covered survivors of violence and persecution and special immigrant juveniles. [79]

Following the Final Rule's publication, several groups that provide services to immigrants and states challenged the Final Rule as an impermissible interpretation of the INA.[80] Some of these suits included claims alleging discrimination on the basis of disability in violation of section 504 of the Rehabilitation Act.[81] In late 2019, federal district court judges in several states issued temporary injunctions to block the Final Rule from taking effect nationwide.[82] The Ninth and Fourth Circuits subsequently held that the Final Rule qualified as a permissible interpretation of the statute,[83] staying the injunctions entered by district court judges.[84] Two nationwide injunctions is-

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 41,412.

78. *Id.* at 41,298–99.

79. *See* 8 U.S.C § 1182(a)(4)(E).

80. *See, e.g.*, Casa de Maryland, Inc. v. Trump, 414 F. Supp. 3d 760, 785 (D. Md. 2019) (finding that nonprofit plaintiff established an injury in fact on the basis of diversion of its resources), *rev'd*, 971 F.3d 220 (4th Cir. 2020); Washington v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 1191, 1220 (E.D. Wash. 2019) (holding that there were serious questions regarding whether DHS acted in an arbitrary and capricious manner in formulating the rule).

81. *E.g.*, *Washington*, 408 F. Supp. 3d at 1216.

82. *Id.*

83. City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs., 944 F.3d 773, 799 (9th Cir. 2019); Casa de Maryland, Inc. v. Trump, 971 F.3d 220, 230 (4th Cir. 2020).

84. *E.g.*, *Casa de Maryland*, No. 19-2222 (4th Cir. Dec. 9, 2019) (order staying preliminary injunction).

sued by the Southern District of New York remained in place,[85] and the Second Circuit declined to stay them pending appeal.[86] On January 27, 2020, the Supreme Court authorized the Trump Administration to enforce the Final Rule while challenges on the merits proceed.[87]

DHS implemented the rule nationwide on February 24, 2020.[88] In alignment with the Final Rule, the Office of Management and Budget approved Form DS-5540, or Public Charge Questionnaire, to be filed by applicants for admission.[89] New York and other state and local governments subsequently requested that the Supreme Court temporarily block the Final Rule during the COVID-19 pandemic, but their plea was denied in late April 2020.[90] The Final Rule continued to stop and start several times,[91] causing noncitizens confusion.[92] The Supreme Court agreed to review the Final Rule

85. Make the Rd. N.Y. v. Cuccinelli, No. 19 Civ. 7993, 2019 WL 6498283 (S.D.N.Y. Dec. 2, 2019) (denying motion to stay preliminary injunction); New York v. U.S. Dep't of Homeland Sec., No. 19 Civ. 7777, 2019 WL 6498250 (S.D.N.Y. Dec. 2, 2019) (same).

86. New York v. U.S. Dep't of Homeland Sec., No. 19-3591, 2020 WL 95815, at *1 (2d Cir. Jan. 8, 2020).

87. U.S. Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020). Additionally, a district court in Illinois enjoined the Final Rule only within Illinois, and the Seventh Circuit, without an opinion, declined to stay the injunction pending appeal. Cook Cnty. v. Wolf, No. 19-3169 (7th Cir. Dec. 23, 2019) (order denying motion to stay preliminary injunction). On February 21, 2020, in a 5–4 decision, the Supreme Court granted the application for stay pending disposition of the government's appeal in the Seventh Circuit, thereby permitting enforcement of the Final Rule in Illinois. Wolf v. Cook Cnty., 140 S. Ct. 681, 681 (2020). The Seventh Circuit later held that the preliminary injunction was properly granted. Cook Cnty. v. Wolf, 962 F.3d 208, 215 (2020). In a thorough dissent, then Judge Amy Barrett recognized that many noncitizens are forgoing public benefits because of the Final Rule but still concluded that it is a reasonable interpretation of the INA. *Id.* at 234–54 (Barrett, J., dissenting).

88. *DHS Implements Inadmissibility on Public Charge Grounds Final Rule*, DEP'T HOMELAND SEC. (Feb. 24, 2020), https://www.dhs.gov/news/2020/02/24/dhs-implements-inadmissibility-public-charge-grounds-final-rule [https://perma.cc/6TRQ-WBJ4].

89. Notice of OMB Emergency Approval of Information Collection: Public Charge Questionnaire, 85 Fed. Reg. 13,694, 13,695 (Mar. 9, 2020). Due to the policy change, however, the State Department is not currently requiring applicants to complete the DS-5540. *Update on Public Charge*, U.S. DEP'T STATE (Mar. 26, 2021), https://travel.state.gov/content/travel/en/News/visas-news/update-on-public-charge.html [https://perma.cc/88ZJ-EZW7].

90. U.S. Dep't of Homeland Sec. v. New York, 140 S. Ct. 2709 (2020). The Second Circuit later modified two nationwide injunctions of the Final Rule (one of which directly addressed the pandemic) to limit their scope to Connecticut, New York, and Vermont. New York v. U.S. Dep't of Homeland Sec., 969 F.3d 42, 50 (2d Cir. 2020). This resulted in a nonuniform application of immigration law where every state except those in the Second Circuit was subject to the new rule. A few months later, however, the Second Circuit stayed the injunction. New York v. Dep't of Homeland Sec., 974 F.3d 210, 212 (2d Cir. 2020).

91. For instance, an Illinois federal judge's nationwide vacatur of the Final Rule lasted only one day, as the Seventh Circuit subsequently allowed DHS to resume implementation during the appeal. Cook Cnty. v. Wolf, No. 19-cv-06334, 2020 WL 6393005 (N.D. Ill. Nov. 2, 2020), *appeal docketed*, No. 20-3150 (7th Cir. Nov. 3, 2020) (order staying the district court's judgment).

92. *E.g.*, SUSAN H. BABEY, JOELLE WOLSTEIN, RITI SHIMKHADA & NINEZ A. PONCE, UCLA CTR. FOR HEALTH POL'Y RSCH., ONE IN 4 LOW-INCOME IMMIGRANT ADULTS IN

a fourth time on February 22, 2021,[93] until the Biden Administration later informed the Court it would no longer defend the Final Rule.[94]

C. *Section 504 of the Rehabilitation Act*

In 1973, Congress enacted the Rehabilitation Act in response to findings that individuals with disabilities faced discrimination in numerous areas.[95] Indeed, in introducing a nondiscrimination bill, Rep. Charles Vanik described the treatment of people with disabilities as one of the "shameful oversights" of the United States.[96] With the Rehabilitation Act, Congress aimed to improve the ability of individuals with disabilities to live with greater independence and self-sufficiency, targeting the expansion of services, employment opportunities, and accessibility.[97]

Section 504 of the Rehabilitation Act has been referred to as an "accident of history" because of the Nixon Administration's resistance to its passage and to subsequent regulations.[98] After opposition stalled the effort to expand the protected grounds of the Civil Rights Act of 1964 to include disability,[99] section 504 borrowed language from the Civil Rights Act to ensure inclusion of government entities.[100] It prohibits the federal government from discrimination, such as the denial of benefits solely by reason of an individual's disability.[101] Government action includes "any program or activity receiving Federal financial assistance," such as programs at state prisons or public universities.[102] Programs and facilities conducted by any federal executive agency must be accessible to people with disabilities,[103] and the agency must provide reasonable accommodations if they are not.[104]

CALIFORNIA AVOIDED PUBLIC PROGRAMS, LIKELY WORSENING FOOD INSECURITY AND ACCESS TO HEALTH CARE (2021), https://healthpolicy.ucla.edu/publications/Documents/PDF/2021/publiccharge-policybrief-mar2021.pdf [https://perma.cc/QEM9-BA8Q].

93. *See* U.S. Dep't of Homeland Sec. v. New York, No. 20-449, 2021 WL 666376 (U.S. Feb. 22, 2021). President Biden also signed an executive order directing a review of the Final Rule. Exec. Order No. 14012, 86 Fed. Reg. 8277, 8278 (Feb. 5, 2021).

94. Joint Stipulation to Dismiss, *supra* note 15.

95. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 2, 87 Stat. 355, 357 (codified as amended at 29 U.S.C. § 701).

96. 117 CONG. REC. 45,974–75 (1971).

97. Rehabilitation Act § 2 (codified as amended at 29 U.S.C. § 701).

98. RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE 5 (2001). Nixon vetoed the bill twice. *Id.* at 121.

99. *Id.* at 132–33.

100. JOSEPH SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 64–70 (1993).

101. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified as amended 29 U.S.C. § 794).

102. 29 U.S.C. § 794(a).

103. *Id.*

104. 28 C.F.R. § 35.130(b)(7) (2020).

Section 504 reaches government action that discriminates through either purpose or effect.[105] Recipients of federal funding may not use criteria that have a discriminatory effect on the basis of disability or, through purpose or effect, substantially impair the "objectives of the recipient's program."[106] Discrimination also includes the failure to reasonably accommodate, such as not providing access to public assistance programs[107] or necessary auxiliary aids and services.[108] As demonstrated in Part II, the Final Rule clearly violates section 504 because it discriminates against immigrants with disabilities in both purpose and effect.

II. THE PUBLIC CHARGE RULE THROUGH A DISABILITY RIGHTS LENS

The Final Rule violated the Rehabilitation Act. Public charge determinations by DHS are programs or activities within the scope of section 504. Under the Final Rule, these determinations required an assessment of whether a medical condition interferes with the noncitizen's ability to care for themselves as part of the health factor.[109] The Final Rule also instructed immigration officers to weigh certain factors in favor of or against finding someone to be a public charge.[110] These criteria, through purpose or effect, discriminated on the basis of disability, substantially impairing the objectives of public benefit programs. The use of noncash public benefits, which immigrants with disabilities disparately use,[111] cut against noncitizens with disabilities.[112] DHS ultimately "[t]riple-[c]ount[ed]" the same circumstances against each noncitizen with a disability in violation of section 504: a noncitizen's medical condition and use of Medicaid cut against the noncitizen, *and* the noncitizen was deprived of the favorable factor of a lack of a medical condition.[113]

DHS conceded that the Final Rule would have an "outsized" impact on immigrants with disabilities because disability was considered as part of the

105. *See id.* § 41.51(b)(3)(ii). Referencing the "thoughtlessness and indifference" of discrimination against those with disabilities, the Supreme Court assumed, without deciding, that section 504 recognizes some claims of disparate impact discrimination. Alexander v. Choate, 469 U.S. 287, 295, 309 (1985).

106. 28 C.F.R. § 41.51(b)(3).

107. *See* Henrietta D. v. Bloomberg, 331 F.3d 261, 265 (2d Cir. 2003).

108. Argenyi v. Creighton Univ., 703 F.3d 441, 448 (8th Cir. 2013).

109. 8 C.F.R. § 212.22(b)(2) (2020); *see also* Weber, *supra* note 13, at 266–68.

110. 8 C.F.R. § 212.22(c).

111. *See* Rebecca Cokley & Hannah Leibson, *Trump's Public-Charge Rule Would Threaten Disabled Immigrants' Health and Safety*, CTR. AM. PROGRESS (Aug. 8, 2018, 7:00 AM), https://www.americanprogress.org/issues/disability/news/2018/08/08/454537/trumps-public-charge-rule-threaten-disabled-immigrants-health-safety [https://perma.cc/7VFZ-63VT].

112. *See* 8 C.F.R. § 212.22(b)(4)(E).

113. Brief for ACLU et al. as *Amici Curiae* in Support of Plaintiffs' Motion for Preliminary Injunction at 10–16, Washington v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 1191 (E.D. Wash. 2019) (No. 19-cv-05210) [hereinafter Brief for ACLU].

health factor in admissibility determinations.[114] A close examination of the Final Rule and disability rights doctrine is necessary to contextualize this "outsized" impact. This Part presents disability law theories as a framework through which to scrutinize the Final Rule, revealing a substantial overlap between immigration and disability law. Section II.A evaluates the Final Rule under the access/content distinction and finds that individuals with disabilities were denied access to the public benefits to which they were entitled. Section II.B discusses eugenics-based legislation as it relates to exclusionary immigration policies, concluding that the Final Rule codified modern-day eugenics. Section II.C reconciles the gap between the self-sufficiency objectives of the disability rights and immigrant communities and the role of social welfare. Finally, Section II.D assesses the public health consequences of the Final Rule.

A. *Considering the Access/Content Distinction*

In *Alexander v. Choate*, the Supreme Court applied a "meaningful access" standard to a Rehabilitation Act claim for the first time.[115] If a plaintiff has access to the same benefits received by nondisabled individuals, they are seen as being provided with meaningful access—sometimes even if the benefit disproportionately underserves people with disabilities.[116] In the public charge context, people with disabilities have a right to meaningful access to the following benefits: Supplemental Nutrition Assistance Program, Temporary Assistance for Needy Families Supplemental Security Income, Housing Choice Voucher Program, Section 8 Project-Based Rental Assistance, most forms of federally funded Medicaid, and subsidized public housing.[117] The Final Rule presented disability-related obstacles to the access of these public benefits. Even when considering the "access/content distinction," the Final Rule not only failed to provide people with the content of the public benefits; it also denied them access.

In disability discrimination cases, courts sometimes make an access/content distinction, a phenomenon named by Professor Samuel Bagenstos, reasoning that the ADA only mandates access to a benefit, even if the content of the benefit is not equal.[118] To evaluate access, courts look at the benefit: the more narrowly a court defines the benefit, the more likely a court is to find that the plaintiff had access to it.[119] In doing so, a court steers itself away from regulating the content of the benefit to the detriment of

114. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,368 (Aug. 14, 2019) (to be codified at 8 C.F.R. pt. 103, 212–14, 245, 248).

115. 469 U.S. 287, 301 (1985).

116. *See infra* notes 121–122 and accompanying text.

117. *See* 8 C.F.R. § 212.21(b).

118. SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 70–71 (2009).

119. Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 45 (2004).

plaintiffs with disabilities.[120] *Choate* illustrates the access/content distinction. In *Choate*, Medicaid recipients brought a class action for relief against Tennessee's reduction of the number of inpatient hospital days covered by state Medicaid from twenty to fourteen, alleging a violation of the Rehabilitation Act.[121] The plaintiffs argued that this reduction—and any reduction—disparately impacted individuals with disabilities, because their needs would not be met to the same degree as their nondisabled counterparts.[122]

The *Choate* majority drew a distinction between access to and the content of a benefit, narrowly defining meaningful access to mean "fourteen days of inpatient hospitalization"[123] as opposed to "healthcare that meets needs at a reasonable cost." Because the Medicaid recipients had "access" to inpatient hospitalization—even if at a reduced rate that disparately impacted their health needs—the Court found no cause of action and thus no need for a reasonable accommodation.[124] As noted by Professor Bagenstos, this distinction inhibits the effectiveness of disability rights legislation because it upholds a policy that inadequately serves the needs of people with disabilities.[125]

While some courts interpret meaningful access to require mere access to services already offered,[126] other courts exact higher standards by reframing the generality of the benefit to which meaningful access must be granted. In *Lovell v. Chandler*, the court held that Hawai'i's exclusion of certain people with disabilities from a healthcare program violated Title II of the ADA and section 504.[127] The court defined the benefit at a high level of generality as public healthcare services, rejecting the state's argument that it needed to offer only the programs it already offered, even if the programs disparately excluded people with disabilities.[128]

Under the Final Rule, then, were individuals with disabilities denied meaningful access to the enumerated public benefits? Regardless of the generality employed, the answer is unquestionably yes. Even under *Choate*'s

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120. *See id.* at 45–48.

121. Alexander v. Choate, 469 U.S. 287, 289–90 (1985) (upholding the fourteen-day annual limit on inpatient hospital stays imposed by Tennessee's Medicaid plan).

122. *Id.* at 290.

123. BAGENSTOS, *supra* note 118, at 47–48; *see id.* at 303.

124. *Choate*, 469 U.S. at 302 ("The reduction in inpatient coverage will leave both handicapped and nonhandicapped Medicaid users with identical and effective hospital services fully available for their use, with both classes of users subject to the same durational limitation.").

125. BAGENSTOS, *supra* note 118, at 71 (quoting Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 560 (7th Cir. 1999) (Posner, J.) ("A camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specifically designed for such persons.")).

126. *E.g.*, Doe v. Mut. of Omaha Ins. Co., 179 F.3d. 557, 563 (7th Cir. 1999) (upholding health insurance policies that capped AIDS coverage to $25,000–100,000 whereas other conditions were covered at $1,000,000).

127. 303 F.3d 1039, 1052 (9th Cir. 2002). Title II expands section 504's prohibition of discrimination to the services, programs, and activities of all federally funded programs regardless of whether they are public entities. *Id.*

128. *See Chandler*, 303 F.3d at 1053–54.

skeletal definition of access, the Final Rule denied immigrants with disabilities meaningful access to healthcare, energy assistance, nutrition security, and other benefits. There are not two levels of generality here. The benefit is the ability to apply for and receive public benefits while not inhibiting other rights, such as the right to become a U.S. citizen or simply stay in the United States on a legal permanent basis. Because the Final Rule forced immigrants with disabilities to put their immigration status at risk to receive public benefits, it denied them meaningful access to the benefits. While it may be argued that immigrants with disabilities were able to do this under the Final Rule, that was not the case. For example, if a noncitizen with a disability used Medicaid to cover treatment for their condition, they were likely to be designated a public charge and unable to become a legal permanent resident and naturalize.[129] This noncitizen ultimately had to choose between their health and their capacity to live in the United States at a heightened economic cost.[130] In effect, this was not a choice at all. Thus, a formulation of the benefit at a lower level of generality (ability to apply for and receive public benefits with the preservation of U.S. residency) and higher level of generality (ability to apply for and receive public benefits) would be a false bifurcation. The benefits cannot be separated from the repercussions.

The policy in *Choate* affected all people with disabilities who sought hospital care beyond fourteen days,[131] whereas the policy in *Chandler* excluded older and blind people from a state healthcare program.[132] Here, the Final Rule affected the noncitizen subsection of people with disabilities. Because the Final Rule effectively eliminated the only programs that permitted noncitizens with disabilities to live and work in the United States, the Final Rule is more akin to the policy at issue in *Chandler*. The Final Rule left a certain category of people with disabilities with no access to public benefits because it precluded the use of discrete programs like Low-Income Home Energy Assistance Program (LIHEAP) that meet the unique needs of immigrants with disabilities.[133] But for their disability, noncitizens with disabilities would have received public benefits without consequence, similar to the plaintiffs in *Chandler*.[134]

There can be no meaningful access where a regulation forces noncitizens to forego the public benefits that they and their families need to survive. Private insurance companies exclude coverage of services that people with disa-

129. *See* Cokley & Leibson, *supra* note 111.

130. *See infra* Section II.D.

131. 469 U.S. 287, 289 (1985).

132. 303 F.3d at 1045.

133. Cokley & Leibson, *supra* note 111. Seventy-two percent of households that receive LIHEAP have an individual with a serious medical condition. *Id.*

134. *Chandler*, 303 F.3d. at 1054 ("[Plaintiffs] qualified financially for the QUEST program but were excluded because they were disabled . . . .").

bilities often need[135] or impose caps on reimbursement for certain conditions,[136] resulting in a heightened need for access to Medicaid. Individuals who require electricity to support medical equipment need energy assistance that programs like the LIHEAP provide.[137] The Final Rule, however, disincentivized participation in public benefits, rendering moot the ability to even receive them. For some, it was much more than a disincentive—it was a life-or-death decision where an immigrant had to choose between remaining in the United States without essential public benefits or being forced to relocate to a country where they may not have access to adequate healthcare.[138] In tension with congressional intent to empower those with disabilities, the Final Rule blatantly violated section 504.

B. *Eugenics and Law*

Disability scholarship uses two models of disability: the medical model and the social model.[139] The latter, which is preferred by disability scholars, presents disability as not inherent to the individual.[140] This model focuses on the interaction between an individual and their environment and social structures.[141] Environments, as the product of social choices of others, are subject to modification.[142] For example, an individual who uses a wheelchair is hindered if there is no wheelchair ramp in a building—her disability is not inherent in her but is instead the consequence of the municipality's choice not to include a ramp. Disability itself is thus not the debilitating characteristic. In contrast, under the medical model, the focus is on the medical condition, framing disability as a negative impairment that is inextricable from the

135. *See* CTR. ON BUDGET & POL'Y PRIORITIES, MEDICAID WORKS FOR PEOPLE WITH DISABILITIES (2017), https://www.cbpp.org/sites/default/files/atoms/files/8-29-17health.pdf [https://perma.cc/3EVC-YUGH] ("Medicaid beneficiaries with disabilities are less likely to report unmet medical needs than people with other sources of coverage."); *see also, e.g.*, Templet v. Blue Cross/Blue Shield of La., No. Civ. A. 99-1400, 2000 WL 1568219, at *1 (E.D. La. Oct. 20, 2000) (barring coverage for urgent medical care for obesity).

136. *E.g.*, Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 563 (7th Cir. 1999).

137. Cokley & Leibson, *supra* note 111.

138. For example, experts predicted that up to 129,000 Massachusetts residents would avoid the health system in fear of the public charge designation. Steph Solis, *Up to 129,000 Immigrants in Massachusetts Could Shy Away from MassHealth over Fear of Public Charge Rule, Report Suggests*, MASSLIVE (Sept. 30, 2020), https://www.masslive.com/politics/2020/09/up-to-129000-immigrants-in-massachusetts-could-shy-away-from-masshealth-over-fear-of-public-charge-rule-report-suggests.html [https://perma.cc/VHN9-4QJQ].

139. Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 214 (2000); *see also* Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1256 (2007) (noting the limitations of the social model regarding policy implications).

140. Samaha, *supra* note 139, at 1257.

141. *Id.*

142. *See id.* at 1257–58.

individual.[143] Three practices arise from the medical model: eugenics, cures, and charity.[144] This Section focuses on the practice of eugenics as it intersects with exclusionary policies, particularly in immigration law.

In the past, U.S. laws have endorsed eugenics. Francis Galton, a European scientist who coined the term "eugenics" in 1883, defined it as the "science of improving stock, which . . . takes cognisance of all influences that tend in however remote a degree to give to the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable than they otherwise would have had."[145] In the early twentieth century, eugenics theory proliferated in the United States, popularizing the belief that the ills of society could be cured by eliminating the reproduction of those with undesirable social, moral, physical, and mental qualities.[146] The eugenics movement resulted in laws that criminalized marriage and sexual relations of those who were "epileptic, imbecile, or feebleminded" or in interracial relationships.[147]

Eugenicists applied the same underlying beliefs about "improving stock" to advocate for exclusionary immigration policies.[148] Specifically, they supported the enactment of the Federal Immigration Restriction Act of 1924, lauding its prevention of the "rising tide of defective germ-plasm" carried by immigrants.[149] This law imposed strict quotas in which only two percent of the number of people of each nationality present in the United States as of 1890 were permitted to immigrate.[150] Regarding this 1924 law, President Coolidge pronounced, "America must be kept American [because] biological

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143. *See* CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS 12 (1988).

144. *See* SHAPIRO, *supra* note 100, at 14–15, 271. In all three practices, the onus is not on society to become more accessible but instead is on the individual to not have a disability anymore. Medical cures are presented as the "solution" to disability where disability is a condition that must be eliminated through medicine. With charity, the notion is that if people donate money, the disability is more likely to be rid from society; this relies on viewing individuals with disabilities as dependent or pitiful.

145. FRANCIS GALTON, INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT 24–25 (London, Macmillan 1883).

146. Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 3–4 (1996).

147. MARK A. LARGENT, BREEDING CONTEMPT: THE HISTORY OF COERCED STERILIZATION IN THE UNITED STATES 64–65 (2008).

148. JUDITH DAAR, THE NEW EUGENICS: SELECTIVE BREEDING IN AN ERA OF REPRODUCTIVE TECHNOLOGIES 35 (2017).

149. *Id.* Daar also noted that "[e]very president from Theodore Roosevelt to Herbert Hoover was a member of a eugenics organization, publicly endorsed eugenic laws, or willingly signed eugenic legislation." *Id.* at 36.

150. Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153, 159 (repealed 1952). This facilitated the Americanization of a white race and rendered non-European immigrants "unalterably foreign and unassimilable to the nation." Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 70 (1999).

laws show . . . that Nordics deteriorate when mixed with other races."[151] The Supreme Court further legitimized eugenics when it upheld Virginia's sterilization law in *Buck v. Bell*, which mandated the sterilization of an institutionalized, "feeble-minded" eighteen-year-old girl.[152] Eugenics is rooted in the medical model of disability, as it treats disability as a biological impairment to the person that is so undesirable that the person's genes must be removed from society.

The Final Rule is modern-day eugenics. DHS rooted its justifications for the Final Rule in the medical model of disability, framing disability as a condition inherent to an individual that must be ferreted out of society. The cases to which the government cited in support of the Final Rule point to a eugenics-centered metric of eligibility to stay on a permanent basis or become part of the U.S. citizenry. In the preamble to the Final Rule, DHS explained its expansion of the definition of "public benefits" notwithstanding its effect on immigrants with disabilities, reasoning that health has historically been part of the public charge inquiry.[153] In support of this proposition, the government cited to *United States ex rel. Canfora v. Williams*, in which an Italian man, Vincenzo Canfora, developed gangrene in his foot that resulted in its eventual amputation.[154] After Canfora returned to the United States from Italy where he was visiting his mother, immigration authorities detained him on the grounds that he was likely to become a public charge.[155] The United States brought a writ of habeas corpus on his behalf challenging his detainment.[156] An immigration officer had received a letter indicating that Canfora had not paid for the surgery—nor had he been asked to.[157] Canfora also had relatives who were willing and able to maintain him financially.[158] Due to the immigration officer's finding that Canfora was likely to become a public charge on the basis of his being an amputee, the court dis-

151. DAAR, *supra* note 148, at 36 (alteration in original).

152. 274 U.S. 200, 205–07 (1927) (declaring that "[t]hree generations of imbeciles are enough"). Although many states have since repealed their sterilization laws, *Buck v. Bell* has never been overruled. In *Roe v. Wade*, 410 U.S. 113, 154 (1973), in fact, the Supreme Court cited the case. *See generally* ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2017); Jasmine E. Harris, *Why* Buck v. Bell *Still Matters*, BILL HEALTH (Oct. 14, 2020), https://blog.petrieflom.law.harvard.edu/2020/10/14/why-buck-v-bell-still-matters [https://perma.cc/LQG8-ZJ5S] ("*Buck*'s lasting power lies not in its doctrinal deployment, but in its *expressive value* and how it continues to shape public norms and legal interpretations about the humanity and dignity of Black, Latinx, indigenous, and disabled bodies and minds.").

153. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,368–69 (Aug. 14, 2019) (to be codified at 8 C.F.R. pt. 103, 212–14, 245, 248).

154. 186 F. 354, 355 (S.D.N.Y. 1911); *see* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,2922 at 41,368 n.407.

155. *Canfora*, 186 F. at 355.

156. *Id.*

157. *See id.* at 355–56.

158. *Id.* at 355.

missed the writ of habeas corpus.[159] DHS also cited to cases in which "dangerous" disease and poverty are referenced,[160] a nondisabled noncitizen is positively regarded for her lack of mental or physical disability,[161] and noncitizens are excluded for having a "rudimentary right hand" and for "stammer[ing] to such an extent that [they] can scarcely make [themselves] understood."[162] DHS's citations unequivocally evoke eugenics theory.

Statements by former President Donald Trump and former Acting Director Cuccinelli further demonstrate an underlying belief that individuals from other countries are genetically "less than" Americans—the same myth that underpinned the 1924 Immigration Act's restrictive quotas. In response to Democratic support for healthcare for undocumented immigrants, Trump tweeted, "How about taking care of American Citizens first!? That's the end of that race!"[163] He often refers to Latinx[164] immigrants as disease-bringers,[165] which stands in sharp contrast to his description of his family as

159. *Id.* at 356.

160. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,368 n.407 (Aug. 14, 2019) (to be codified at 8 C.F.R. pt. 103, 212–14, 245, 248); *Ex parte* Mitchell, 256 F. 229, 232 (N.D.N.Y. 1919) (describing "persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living" as a characteristic of a public charge).

161. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,368 n.407; *Ex parte* Sakaguchi, 277 F. 913, 916 (9th Cir. 1922) (emphasizing that "any" evidence of mental or physical disability would automatically qualify the appellant as a public charge).

162. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,368 n.407; United States *ex rel.* Barlin v. Rodgers, 191 F. 970, 974–75 (3d Cir. 1911) (noting that it was "clearly within the power of the board to take the finding of the physical defect into consideration with the examination . . . on the ground that the respondent was likely to become a public charge").

163. Donald J. Trump (@realDonaldTrump), TWITTER (June 27, 2019, 9:37 PM), https://twitter.com/realDonaldTrump/status/1144419410729242625 [https://perma.cc/UKF5-QXDL] ("All Democrats just raised their hands for giving millions of illegal aliens unlimited healthcare. How about taking care of American Citizens first!? That's the end of that race!").

164. This Comment uses "Latinx" when referring to people of Latin American heritage in an attempt to use gender-neutral language, as "Latino" and "Latina" are gendered. *See* John Paul Brammer, *Digging into the Messy History of "Latinx" Helped Me Embrace My Complex Identity*, MOTHER JONES (May–June 2019) https://www.motherjones.com/media/2019/06/digging-into-the-messy-history-of-latinx-helped-me-embrace-my-complex-identity [https://perma.cc/JL8W-HTG2]. It should be noted, however, that there is disagreement in the Latinx community over the use of this term for its linguistic imperialism and difficulty to pronounce in Spanish. Jose A. Del Real, *'Latinx' Hasn't Even Caught on Among Latinos. It Never Will.*, WASH. POST (Dec. 18, 2020, 10:31 AM) https://www.washingtonpost.com/outlook/latinx-latinos-unpopular-gender-term/2020/12/18/bf177c5c-3b41-11eb-9276-ae0ca72729be_story.html [https://perma.cc/X8G4-FWBT].

165. *E.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 11, 2018, 7:12 AM), https://twitter.com/realdonaldtrump/status/1072464107784323072 [https://perma.cc/7M6B-47L6] ("They want Open Borders for anyone to come in. This brings large scale crime and disease."). President Trump had also previously stated that "tremendous infectious disease is pouring across the border." Rupert Neate & Jo Tuckman, *Donald Trump: Mexican Migrants Bring 'Tremendous Infectious Disease' to US*, GUARDIAN (July 6, 2015, 6:29 PM), https://www.theguardian.com/us-news/2015/jul/06/donald-trump-mexican-immigrants-tremendous-infectious-disease [https://perma.cc/54TY-6CA9].

having "[g]ood, smart genes."[166] At a White House briefing, Cuccinelli stated that the immigration system "bring[s] people to join us as American citizens, as legal permanent residents first, who can stand on their own two feet, who will not be reliant on the welfare system."[167]

Moreover, the public charge exclusion of individuals with disabilities disparately affected other marginalized communities. Some commenters on the Notice of Proposed Rulemaking noted that "the rule sends the signal that individuals with HIV/AIDS and other chronic health conditions are 'undesirable.'"[168] Because some medical conditions disproportionately affect communities of color, the Final Rule also disfavored immigrants of color.[169] The Final Rule served as a gatekeeping mechanism to ensure that only nondisabled immigrants are admitted and remain in the United States.

C. *On Social Welfare and Disability*

With the explicit preference for noncitizens who can "stand on their own two feet" to the exclusion of noncitizens who are "unable" to care for themselves,[170] the Trump Administration painted a dichotomy between self-sufficiency and disability. Evidence suggests, however, that the use of benefits actually promotes self-sufficiency.[171] Moreover, the immigrant and disability communities value independence and employment. The Trump Administration's basis for the Final Rule was thus flawed.

The disability rights community values independence.[172] Since the Civil War, social welfare has been one of the central tenets of disability law in the United States.[173] Some disability rights advocates, however, rejected welfare as the legislative response to disability issues, preferring prohibition on discrimination and allowance of accommodations in its stead.[174] This is because social welfare as a response to disability relies on the paternalistic medical model.[175] In the 1970s, this rejection culminated in a legislative shift from welfare to civil rights, resulting in the Rehabilitation Act and, eventually, the

166. Ryan Teague Beckwith, *Donald Trump Loves to Talk About His 'Good Genes*,*'* TIME (Sept. 12, 2017, 11:39 AM), https://time.com/4936612/donald-trump-genes-genetics [https://perma.cc/K5A7-YJEDG] (quoting President Trump's reference to his granddaughter's "[g]ood, smart genes").

167. *Press Briefing by USCIS Acting Director Ken Cuccinelli*, *supra* note 58.

168. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,411 (Aug. 14, 2019) (to be codified at 8 C.F.R. pt. 103, 212–14, 245, 248).

169. *E.g.*, Graham, *supra* note 62.

170. *Press Briefing by USCIS Acting Director Ken Cuccinelli*, *supra* note 58.

171. *See infra* notes 192–195 and accompanying text.

172. *See, e.g.*, Florence D. DiGennaro Reed, Michael C. Strouse, Sarah R. Jenkins, Jamie Price, Amy J. Henley & Jason M. Hirst, *Barriers to Independent Living for Individuals with Disabilities and Seniors*, 7 BEHAV. ANALYSIS PRAC. 70, 71 (2014).

173. Bagenstos, *supra* note 119, at 10.

174. *Id.* at 11–12.

175. *See supra* note 144 and accompanying text.

Americans with Disabilities Act (ADA).[176] The Rehabilitation Act and ADA prohibited discrimination on the basis of disability in programs that receive federal funding and in employment, public accommodations, and public entities' programs, respectively.[177] The welfare state largely remains in place,[178] now alongside an antidiscrimination regime.[179] Disability rights advocates have recently refocused on the social welfare approach, recognizing the strengths of benefits like Medicaid.[180]

The immigrant community esteems hard work. Latinx immigrants self-identify as a working people[181] and tend to believe that hard work yields positive results.[182] The children of immigrants carry a "heavy burden of what they perceive[] as their parents' sacrifices" that creates a sense of obligation to succeed.[183] But public perceptions of immigrants' relationship with hard work can be distorted. Legislators, media, and lawyers perpetuate a "good immigrant" narrative, often in support of policies like Deferred Action for Child Arrivals. In this narrative, a noncitizen is deemed worthy of immigration relief for their stellar pursuit of higher education,[184] faultlessness in en-

176. *See* Bagenstos, *supra* note 119, at 10.

177. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 391–93 (codified as amended at 29 U.S.C. § 794); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §§ 102, 202, 302, 104 Stat. 327, 331–32, 337, 355 (codified as amended at 42 U.S.C. §§ 12112(a), 12132, 12182(a)).

178. Recently, there has been a troubling increase in work requirements imposed on seekers of public assistance. *See, e.g.*, COUNCIL OF ECON. ADVISERS, EXEC. OFF. OF THE PRESIDENT, EXPANDING WORK REQUIREMENTS IN NON-CASH WELFARE PROGRAMS (2018), https://www.whitehouse.gov/wp-content/uploads/2018/07/Expanding-Work-Requirements-in-Non-Cash-Welfare-Programs.pdf [https://perma.cc/UW4D-77MQ]. The rationale underlying work requirements, however, is a false belief that public benefits lead to a lack of self-sufficiency. HEATHER HAHN, URB. INST., WORK REQUIREMENTS IN SAFETY NET PROGRAMS (2018), https://www.urban.org/sites/default/files/publication/98086/work_requirements_in_safety_net_programs.pdf [https://perma.cc/BWX4-9KFC] ("Work requirements don't necessarily help people find jobs, and certainly not jobs that lift people out of poverty.").

179. Bagenstos, *supra* note 119, at 10. This antidiscrimination model has also been subject to criticism for its ineffectiveness against structural barriers, as it focuses on the conduct of specific actors. *Id.* at 23; *cf.* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1845–46 (2005).

180. *See* Bagenstos, *supra* note 119, at 55–57.

181. Ashley-Marie Vollmer Hanna & Debora Marie Ortega, Salir adelante *(Perseverance): Lessons from the Mexican Immigrant Experience*, 16 J. SOC. WORK 47, 54 (2016).

182. Paul Taylor, Mark Hugo Lopez, Jessica Martínez & Gabriel Velasco, *The American Experience*, PEW RSCH. CTR. (Apr. 4, 2012), https://www.pewresearch.org/hispanic/2012/04/04/iii-the-american-experience [https://perma.cc/RDF5-T8BY].

183. Cristina Araujo Brinkerhoff, C. Eduardo Siqueira, Rosalyn Negrón, Natalicia Tracy, Magalis Troncoso Lama & Linda Sprague Martinez, '*There You Enjoy Life, Here You Work*': *Brazilian and Dominican Immigrants' Views on Work and Health in the U.S.*, 16 INT'L J. ENV'T RSCH. & PUB. HEALTH, no. 20, 2019, at 1, 11, https://doi.org/10.3390/ijerph16204025.

184. *See* Nina Totenberg, *The Harvard Law Student and DREAMer Whose Fate Could Be Decided by Supreme Court*, NPR (Nov. 11, 2019, 5:50 AM), https://www.npr.org/2019/11/11/777397365/the-harvard-law-student-and-dreamer-whose-fate-could-be-decided-by-supreme-court [https://perma.cc/9HR2-UKZ6].

try into the country,[185] assimilation,[186] English proficiency,[187] and gainful employment without the need for welfare.[188] These "good" immigrants are valued over and at the expense of the "bad" ones—those who have criminal records or are public charges.[189] In 1996, for instance, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act, which limited immigrants' access to welfare, food stamps, and health insurance.[190] This legislation was driven by the belief that immigrants came to the United States for welfare, despite the community's high participation in the workforce.[191]

The Final Rule thus raised questions about the role of social welfare for communities that strive to be independent in the face of paternalizing or condemning paradigms. Both the disability rights and immigrant communities rejected the Final Rule as a health-and-wealth tax,[192] marking the importance of social welfare for their communities. Social welfare programs, although not faultless, are necessary for the independence of people with disabilities.[193] Medicaid enables people with disabilities to access employment through its coverage of home-based services and employment supports, without which they would not be in the workforce.[194] Immigrant rights activists, too, recognize the coexistence of welfare and employment,

185. *See, e.g.*, Editorial, *Dream Big. Legalize Those in DACA*, SUN SENTINEL (May 25, 2018, 7:00 AM), https://www.sun-sentinel.com/opinion/editorials/fl-op-editorial-legalize-daca-immigrants-20180524-story.html [https://perma.cc/34VN-A8PP] ("Their parents brought them here as children. They must have been younger than 16 when they arrived.").

186. *See* Joel Rose, *In 'The Good Immigrant,' New Americans Grapple with Their Polarized Country*, NPR (Feb. 27, 2019, 12:08 PM), https://www.npr.org/2019/02/27/698066947/in-the-good-immigrant-new-americans-grapple-with-their-polarized-country [https://perma.cc/QU3Q-Z68K].

187. *See id.*

188. *Press Briefing by USCIS Acting Director Ken Cuccinelli*, *supra* note 58. Cuccinelli recounted the story of his Italian grandfather's immigration to the United States, underscoring that his family "worked together to ensure that they could provide for their own needs, and they never expected the government to do it for them." *Id.*

189. *See generally* César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457 (2014).

190. Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of U.S.C.).

191. IMMIGRANTS AND WELFARE: THE IMPACT OF WELFARE REFORM ON AMERICA'S NEWCOMERS 1–2 (Michael E. Fix ed., 2009).

192. "Health and wealth" tax refers to the Final Rule's preference for nondisabled individuals who do not need public benefits.

193. *See, e.g.*, Manasi Deshpande, Tal Gross & Yalun Su, *Disability and Distress: The Effect of Disability Programs on Financial Outcomes* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25642, 2019), https://doi.org/10.3386/w25642 (finding that Social Security programs reduce financial distress and increase the likelihood of purchasing a home for people with disabilities); *see also* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 161 (2016) ("[H]er $754 monthly check was more reliable than any job she could get.").

194. Brief for ACLU, *supra* note 113, at *12–14.

finding that immigrants who benefit from social welfare positively contribute to the U.S. economy.[195]

D. *Public Health Implications*

Granting a preliminary injunction barring the enforcement of the Final Rule, a federal judge explained that the decision "reflect[ed] no view whatsoever of whether the Final Rule is consistent or inconsistent with the American Dream," maintaining that policy implications did not affect his considerations.[196] But to fully understand the Final Rule, it is essential to understand one of the several policy concerns it raised: public health implications.

The Final Rule threatened worse health outcomes and wider disease spread in the United States. By deterring immigrants from using publicly funded healthcare, including programs that cover services that private insurance does not cover, the Final Rule increased the likelihood that immigrants would suffer adverse health consequences. In turn, this affected U.S. public health as a whole, especially with regard to communicable diseases.

The necessity of public benefits is greatly magnified during a public health crisis.[197] Yet, in response to several comments on the proposed rule regarding communicable diseases, DHS stated that noncitizens who enrolled in Medicaid for the purpose of obtaining a vaccine would nonetheless be deemed public charges.[198] Months later, in January 2020, the United States confirmed its first case of COVID-19.[199] During the pandemic, USCIS published a message stating that seeking "treatment or preventative services [for COVID-19] will not negatively affect any [noncitizen] as part of a future Public Charge analysis."[200] But this message did not eliminate the Final Rule's chilling effect,[201] and despite high COVID treatment costs[202] and the

195. Annalisa Merelli, *Immigrants Who Rely on Public Benefits Are Actually Essential to the US Economy*, QUARTZ (Jan. 30, 2020), https://qz.com/1790918/immigrants-who-use-public-benefits-are-essential-to-us-economy [https://perma.cc/V2RL-VCLW].

196. Cook Cnty. v. McAleenan, 417 F. Supp. 3d 1008, 1031 (N.D. Ill. 2019).

197. *See* Michelle Hackman, *Rule Barring Immigrants from Social Programs Risks Worsening Coronavirus Spread*, WALL ST. J. (Mar. 25, 2020, 8:00 AM), https://www.wsj.com/articles/rule-barring-immigrants-from-social-programs-risks-worsening-coronavirus-spread-11585137602 [https://perma.cc/59W7-MM92].

198. *E.g.*, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,384–85 (Aug. 14, 2019) (to be codified at 8 C.F.R. pt. 103, 212–14, 245, 248).

199. Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Aug. 6, 2020), https://www.nytimes.com/article/coronavirus-timeline.html [https://perma.cc/2RUW-NMUB].

200. *Public Charge*, *supra* note 12.

201. Estimates showed that millions of immigrants would forego Medicaid to escape the public charge determination, and most of these are Latinx or Asian. Leighton Ku, *New Evidence Demonstrates that the Public Charge Rule Will Harm Immigrant Families and Others*, HEALTHAFFAIRS (Oct. 9, 2019), https://www.healthaffairs.org/do/10.1377/hblog20191008.70483/full [https://perma.cc/G9ZL-G75J]. Confusion over the scope of the public charge rule

fact that the Final Rule is no longer in place, immigrants still fear the grave consequences of seeking subsidized healthcare.[203] In particular, avoidance of public benefits likely remains high among Latinx noncitizens and those who do not speak English well.[204] Furthermore, treatment and testing are only small subsections of the public benefits that noncitizens may need in the midst of a pandemic-caused economic downturn, and notably, USCIS did not provide an exemption for the use of other benefits.[205]

CONCLUSION

The Final Rule may be defunct for now, but its resilience raises concerns of its eventual return. The Final Rule discriminated against immigrants with disabilities in violation of section 504 of the Rehabilitation Act with broad social and legal implications. The Final Rule further formalized the idea that disability is an undesired characteristic for U.S. citizens, simultaneously contravening the self-sufficiency values of the disability rights and immigrant communities. A noncitizen hoping to come to the United States or become a legal permanent resident could not apply for public benefits, lest they be disqualified as a public charge. Nondisabled immigrants, in contrast, faced no difficulty in their path to permanent residence on the basis of disability. In its exclusion of immigrants with disabilities, the Final Rule—not unlike the Federal Immigration Restriction Act of 1924—clamored for homogeneity in the U.S. populace.

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also turned noncitizens away from social welfare, even citizens who were not subject to the Final Rule. Weber, *supra* note 13, at 257–63 (describing the rule's incentives to disenroll from public benefits regardless of immigration status).

202. *See, e.g.*, Sarah Kliff, *Kept at the Hospital on Coronavirus Fears, Now Facing Large Medical Bills*, N.Y. TIMES (Feb. 29, 2020), https://www.nytimes.com/2020/02/29/upshot/coronavirus-surprise-medical-bills.html [https://perma.cc/6D5F-BMQS].

203. *See, e.g.*, Usha Lee McFarling, *Fearing Deportation, Many Immigrants at Higher Risk of Covid-19 Are Afraid to Seek Testing or Care*, STAT NEWS (Apr. 15, 2020), https://www.statnews.com/2020/04/15/fearing-deportation-many-immigrants-at-higher-risk-of-covid-19-are-afraid-to-seek-testing-or-care [https://perma.cc/L5GN-HDPM]; Joseph Shapiro, *Undocumented with COVID-19: Many Face a Long Recovery, Largely on Their Own*, NPR (Sept. 1, 2020, 6:01 AM), https://www.npr.org/2020/09/01/905822094/undocumented-with-covid-19-many-face-a-long-recovery-largely-on-their-own [https://perma.cc/5BAM-SVT2].

204. BABEY ET AL., *supra* note 92.

205. *See Public Charge*, *supra* note 12. Although USCIS permitted noncitizens to submit statements about pandemic-triggered reliance on public benefits, this was limited to noncitizens applying for adjustment of status and still does not provide an exemption. Instead, USCIS offered a totality of circumstances analysis and emphasized relevance and credibility. *Id.*