EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MAYOR AND CITY COUNCIL OF BALTIMORE, *Plaintiff,* v. DONALD J. TRUMP, in his official capacity as President of the United States of America, *et al*., *Defendants.*	Case No. 1:18-cv-3636-ELH

BRIEF OF *AMICI CURIAE* IMMIGRATION LAW PROFESSORS AND SCHOLARS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici are professors and scholars of immigration law who have testified, lectured, researched, written, and advocated at length regarding our nation's immigration laws, including the historical context in which those laws were enacted. This brief reflects *amici*'s long-standing interest in and knowledge regarding the use of "public charge" determinations to exclude or remove noncitizens. A list of *amici* appears in the Appendix to this brief.

SUMMARY OF ARGUMENT

The INA requires that all noncitizens who seek to be lawfully admitted into the United States prove they are not inadmissible. 8 U.S.C. §§ 1225(a), 1361. A noncitizen may be deemed inadmissible on a number of grounds, including that he/she is "likely at any time to become a public charge." *Id*. § 1182(a)(4)(A). In the 130 years since "public charge" first appeared in the federal immigration laws as a ground for inadmissibility, all three branches of the government have consistently viewed this term as *not* including immigrants willing and able to work, and, thus, who are unlikely to depend primarily on the government. Moreover, an immigrant's receipt of non-cash benefits has *never* been a factor relevant to a public charge finding.

This brief offers a survey of the original statute, relevant amendments, judicial construction, and agency interpretations of the term "public charge" since 1882.[1] This survey

[1] The public charge provision has been the subject of considerable commentary, *see, e.g.*, HOUSE JUDICIARY COMM., 100TH CONG., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT: HISTORICAL BACKGROUND AND ANALYSIS 119-25 (Comm. Print 1988), with many scholars criticizing misuse of the provision to discriminate against disadvantaged individuals, *see, e.g.*, DEIRDRE M. MOLONEY, NATIONAL INSECURITIES: IMMIGRANTS AND U.S. DEPORTATION POLICY SINCE 1882 (2012); Lisa Sun-Hee Park, *Perpetuation of Poverty through Public Charge*, 78 DEN. U. L. REV. 1161, 1172 (2001); Rebecca Kidder, *Administrative Discretion Gone Awry: The Reintroduction of the Public Charge Exclusion for HIV-Positive Refugees and Asylees*, 106 YALE L.J. 389, 422 (1996) (noting that an executive agency lacks authority unilaterally to extend the scope of the public charge exclusion). Much of that commentary emphasizes what the Interim Final Rule at issue here appears to ignore—the substantial contributions made by immigrants throughout this country's history.

demonstrates that Congress has always intended the term "public charge" to mean a noncitizen who will depend primarily on the government for subsistence. It also highlights the numerous occasions on which Congress and the Executive Branch declined to adopt a more expansive definition of "public charge" that included receipt of non-cash benefits. The statutory history and case law also reflect that the public charge determination is to be made based on the totality of relevant circumstances, with no one circumstance determinative other than long-term institutionalization or the receipt of cash benefits for income maintenance.

The Department of State has departed from the long-standing and well-accepted meaning of "public charge" in its January 2018 revision to its Foreign Affairs Manual and a more recent Interim Final Rule ("IFR") that govern how consular officers determine whether an individual is a likely public charge ineligible for a visa under the Immigration and Nationality Act ("INA"). The revised Foreign Affairs Manual allows consular officers to consider past or possible future receipt of non-cash benefits as part of the "totality of the applicant's circumstances" relevant to admissibility. FAM AR 1166. The IFR goes even further: it "redefines the term 'public charge' to mean an alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period," with "receipt of two benefits in one month count[ing] as two months' worth of benefits." Visas: Ineligibility Based on Public Charge Grounds, 84 Fed. Reg. 54,996, 55,110 (Oct. 11, 2019). "[P]ublic benefit" is now defined as "[a]ny Federal, State, local or tribal cash assistance for income maintenance," including the

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See, e.g., Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARVARD CIV. RIGHTS-CIV. LIBS. L. REV. 159, 161 (1998) ("[I]mmigrants contribute significantly to our nation's economy and culture, making the denial of services a marker of exploitation rather than a necessary policy choice.").

Supplemental Nutrition Assistance Program ("SNAP"), most forms of Medicaid, and public housing and rental assistance. *Id*. at 54,998-99.

By directing consular officers to consider temporary receipt of non-cash benefits when making public charge determinations (and, in some instances, to treat the receipt as a "heavily weighted negative factor," *id.* at 55,004-05), the State Department ignores how "public charge" has long been understood and implemented by all three branches of the federal government, and, in particular, Congress.[2] *Amici* respectfully submit that the State Department's construction of "public charge" is arbitrary, capricious, and contrary to existing law.

ARGUMENT

I. COURTS HAVE LONG RECOGNIZED THAT THE WILLINGNESS AND ABILITY TO WORK ARE CENTRAL TO THE PUBLIC CHARGE DETERMINATION

Nineteenth-century dictionaries defined "charge" as "[t]he person or thing committed to another[']s custody, care or management; a trust." *E.g.*, *Charge*, WEBSTER'S DICTIONARY (1828 online ed.), https://perma.cc/T3CB-5HUT; *Charge*, WEBSTER'S DICTIONARY (1886 online ed.). Accordingly, a "public charge" has always been envisioned as a person entrusted to the public for custody, care or management, *i.e.*, a person primarily dependent on the public or government for subsistence. Congress employed the term "public charge" against this backdrop.

A. 1882 Immigration Act

The first immigration statute to include the term "public charge" as a ground for exclusion was An Act to Regulate Immigration, ch. 376, 22 Stat. 214 (1882) (the "1882 Act").

[2] *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (citation omitted); *I.N.S. v. St. Cyr*, 533 U.S. 289, 313 n.35 (2001) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)) (Congress' use of "terms of art" indicates acceptance of "widely accepted definitions").

This law allowed for exclusion if the immigrant was "found, upon examination by the reviewing commission, board, or officers," to be a "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." *Id.* § 2. With respect to immigrants allowed entry, however, the 1882 Act provided for "the support and relief of such immigrants . . . as may fall into distress or need public aid," and imposed on each admitted noncitizen a 50-cent tax for the creation of an "immigrant fund" to be used, at least in part, "for the care of immigrants arriving in the United States [and] for the relief of such as are in distress." *Id.* § 1.

Thus, the 1882 Act expressly contemplated that some admitted immigrants were likely to receive government assistance; yet that fact did not allow them to be labeled public charges. *See Edye v. Robertson*, 112 U.S. 580, 590-91 (1884) ("That the purpose of [the 1882 Act and similar state laws] is humane, is highly beneficial to the poor and helpless immigrant, and is essential to the protection of the people in whose midst they are deposited by the steam-ships, is beyond dispute"). Consistent with the notion that the need for some temporary relief did not render an immigrant a public charge, it was noted during legislative debate that the public charge provision was intended to prevent foreign nations from "'send[ing] to this country blind, crippled, lunatic, and other infirm paupers, who ultimately become *life-long dependents on our public charities*.'" 13 Cong. Rec. 5066, 5108-10 (1882) (statement of Rep. Van Voorhis) (emphasis added).

B. Immigration Act of 1891

Congress amended the law in 1891 to include the forward-looking phrase "persons likely to become a public charge," and to add the term "paupers" to the list of excluded categories. *See* An Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens Under Contract or Agreement to Perform Labor, ch. 551, § 1, 26 Stat. 1084 (1891). It also provided that "any alien who becomes a public charge within one year after his arrival in the United States from causes existing prior to his landing therein shall be deemed to have come in

violation of law and shall be returned . . . ." *Id.* § 11. This gave rise to a two-step test: (i) whether, at the time of entry, the noncitizen is likely to become a public charge, and (ii) whether, after some time, the noncitizen has, in fact, become a public charge due to causes that existed before he/she arrived. This general scheme remains in place today.

An early case interpreting the 1891 amendment overturned a public charge determination involving a 40-year-old man, with experience as a cabinet-maker and no family, who was willing and able to work, and who had not been an "inmate of an almshouse" or been convicted of a crime. *See In re Feinknopf*, 47 F. 447, 447-48 (E.D.N.Y. 1891). This case not only recognized that a decisionmaker must consider the totality of circumstances in making a public charge determination, but also reinforces that the term "public charge" does not automatically include persons who may need temporary assistance until employed. Similarly, in *United States v. Lipkis*, 56 F. 427, 428 (S.D.N.Y. 1893), the court confirmed that an able-bodied man, capable of working and "likely to procure remunerative work in his trade," is not likely to become a public charge, absent some other negative factor. By contrast, the man's wife was found to have become a public charge after she "was sent to the public insane asylum" and "was there attended to for a considerable period at the expense of the municipality." *Id.*

Additional rulings from the 1890s further demonstrate that temporary relief did not make one a public charge; indeed, temporary aid was seen as a means of *preventing* one from becoming a public charge. *See, e.g.*, *Yeatman v. King*, 51 N.W. 721, 723 (N.D. 1892) (noting the "obligation" to keep those "destitute of means and credit from becoming a public charge by affording them temporary relief"); *Cicero Twp. v. Falconberry*, 42 N.E. 42, 44 (Ind. App. 1895) ("The mere fact that a person may occasionally obtain assistance from the county does not necessarily make such person a pauper or a public charge.").

C. 1903 and 1907 Immigration Acts

After inserting a semi-colon between "paupers" and "persons likely to become a public charge" in 1903, *see* An Act to Regulate the Immigration of Aliens Into the United States, ch. 1012, § 2, 32 Stat. 1213 (1903), Congress revised the statute in 1907 to exclude "persons not comprehended within any of the foregoing excluded classes who are . . . mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living." An Act to Regulate the Immigration of Aliens Into the United States, ch. 1134, § 2, 34 Stat. 898 (1907). Neither amendment affected prior interpretation, although the latter reinforced the view that the key inquiry is the immigrant's "ability . . . to earn a living."

D. *Gegiow v. Uhl*

After the act was again amended in 1910 (with no relevant changes), *see* An Act to Amend an Act entitled An Act to Regulate the Immigration of Aliens Into the United States, ch. 128, § 2, 36 Stat. 263 (1910), the Supreme Court addressed the public charge provision in *Gegiow v. Uhl*, 239 U.S. 3 (1915). The question presented was "whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked." *Id.* at 9-10. The immigrants at issue had been detained for deportation based on a finding that they were "bound for Portland, Oregon, where the reports of industrial conditions show that it would be impossible . . . to obtain employment." *Id.* at 8. The Supreme Court rejected the public charge finding, explaining that "[t]he statute deals with admission to the United States, not to Portland." *Id.* at 10. It reasoned that, because the public charge ground for exclusion was "mentioned between paupers and professional beggars," the term should be construed as similar to those categories. *Id.* The Court then held that those likely to become public charges "are to be excluded on the ground of *permanent personal objections accompanying them* irrespective of local conditions." *Id.* (emphasis added). *Gegiow* thus

teaches that "public charge" does not encompass persons who have a temporary concern, such as a brief inability to support themselves. *See also Howe v. United States*, 247 F. 292, 294 (2d Cir. 1917) ("Congress meant the act to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future.").

E. Immigration Act of 1917 and Subsequent Interpretations

Congress again amended the statute in 1917, this time moving the "public charge" reference to the end of the list of circumstances that can support exclusion. *See* An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29, § 3, 39 Stat. 874 (1917). The legislative history indicates that the purpose of the change was to overcome an inference (from *Gegiow*) that the former placement of "public charge" between "paupers" and "professional beggars" meant that these terms were of the same general nature. *See* S. Rep. No. 352, at 5 (1916). This indicates that the public charge category was not to be limited to personal characteristics or current economic status of the immigrant, but should be based on the totality of circumstances affecting whether the immigrant would be able to subsist on his/her own. Later references in the Congressional Record reinforce this conclusion. *See* 70 Cong. Rec. 3560, 3620 (1929) (stating that the phrase "persons likely to become a public charge" was shifted "in order to indicate the intention of Congress that aliens shall be excluded upon said ground for economic as well as other reasons and with a view to overcoming the decision of the Supreme Court in *Gegiow v. Uhl*, 239 U. S. 3"); *see also* 80 Cong. Rec. 5829, 5872 (1936) (same).

Courts analyzing the 1917 amendment observed that, regardless of the position within the statutory list of "persons likely to become a public charge," this term can only be viewed rationally as "one who is to be supported at public expense by reason of poverty" or other factors. *See, e.g.*, *Ex parte Mitchell*, 256 F. 229, 230-31 (N.D.N.Y. 1919) (finding that a 42-

year-old nurse in good health was not a public charge because she was "able to earn her own living" and adding that mere speculation about the possibility of illness, a house fire, or bad investments does not make one likely to become a public charge); *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922) (rejecting a public charge finding as to "an able-bodied" 25-year old woman "with a fair education, with no mental or physical disability, with some knowledge of English, skilled as a seamstress and a manufacturer of artificial flowers, with a disposition to work and support herself, and having . . . well-to-do [relatives], domiciled in this country, who stand ready to receive and assist her"). As the Second Circuit confirmed in another case, "it is hard to say that a healthy adult immigrant, with no previous history of pauperism, and nothing to interfere with his chances in life but lack of savings, is likely to become a public charge within the meaning of the statute." *U.S. ex rel. De Sousa v. Day*, 22 F.2d 472, 473-74 (2d Cir. 1927).

The common principle in these post-1917 rulings is that "[a] person likely to become a public charge is one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty," with the ultimate finding depending on the relevant facts presented. *See, e.g.*, *Wallis v. U.S. ex rel. Mannara*, 273 F. 509, 511 (2d Cir. 1921) (citing *Ex parte Mitchell*, 256 F. 229 (N.D.N.Y. 1919)*; cf. U.S. ex rel Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929) (holding that a public charge finding is appropriate "where the occasion leads to the conclusion that the alien will become destitute, though generally capable of standing on his own feet"). Post-1917 opinions also recognize that the transfer of the phrase "public charge" did not alter the "settled" rule that "there must be some evidence to support" a public charge finding. *U.S. ex rel. Duner v. Curran*, 10 F.2d 38, 41 (2d Cir. 1925) (holding that the record did not support a finding that children were likely to become public charges); *see also U.S. ex rel. Berman v. Curran*, 13 F.2d 96, 98 (3d Cir. 1926) (same).

F. Board of Immigration Appeals' Test for Deportability (1948)

In 1948, the Board of Immigration Appeals ("BIA") made clear that the acceptance of non-cash benefits, for which repayment was not owed, did not make an individual a public charge. In an order approved by the Acting Attorney General, the BIA observed:

> *The acceptance by an alien of services provided by a State or by a subdivision of a State to its residents, services for which no specific charge is made, does not in and of itself make the alien a public charge within the meaning of the 1917 act.* To illustrate, an alien who participates, without cost to him, in an adult education program sponsored by the State does not become a public charge. Similiarly [sic] with respect to an alien child who attends public school, or alien child who takes advantage of the free-lunch program offered by schools. We could go on *ad infinitum* setting forth the countless municipal and State services which are provided to all residents, alien and citizen alike, without specific charge of the municipality or the State, and which are paid out of the general tax fund. The fact that the State or the municipality pays for the services accepted by the alien is not, then, by itself, the test of whether the alien has become a public charge . . . .

Matter of B-, 3 I. & N. Dec. 323, 324-25 (A.G. 1948) (emphasis added). Federal district courts had previously reached similar conclusions. *See, e.g.*, *Ex parte Orzechowska*, 23 F. Supp. 428, 429 (D. Or. 1938); *Ex parte Kichmiriantz*, 283 F. 697, 698 (N.D. Cal. 1922).

Numerous other BIA decisions affirmed that immigrants should not be deemed likely to become public charges upon admission if willing and able to work. *See, e.g.*, *In re T-*, 3 I. & N. Dec. 641, 644 (BIA 1949) (a woman "quite capable of earning her own livelihood" and a boy with "considerable training in the tailoring industry" are not likely to become public charges); *In re C-*, 3 I. & N. Dec. 96, 97 (BIA 1947) ("no likelihood" that an immigrant "in good health and is able and willing to go to work" will become a public charge); *In re H-*, 1 I. & N. Dec. 459, 459 (BIA 1943) (overturning public charge finding where appellant was "steadily employed" and "in good health"); *In re R-*, 1 I. & N. Dec. 209, 210 (BIA 1942) (reversing finding that immigrant was likely to become a public charge because he had only $78 at time of arrival, where "[n]othing in the record indicates that he was not able to work"); *In re V-*, 1 I. & N. Dec. 293,

295-96 (BIA 1942) (finding that an immigrant who "can obtain employment and owns his own home" is not likely to become a public charge, even though currently unemployed).

G. Immigration and Nationality Act of 1952

In 1952, Congress again revised the immigration laws. This revision included among the categories of inadmissible persons:

> (15) Aliens 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, are likely at any time to become public charges.

An Act to Revise the Laws Relating to Immigration, Naturalization, and Nationality; and for Other Purposes, Pub. L. No. 414, § 212, 66 Stat. 163, 183 (1952) ("1952 Act"). Thus, Congress continued to eschew bright-line rules and confirmed the existing practice of allowing reviewing officers to make public charge determinations based on the totality of circumstances. Following the passage of the 1952 Act, the BIA, noting the "extensive judicial interpretation" of the public charge provision, observed:

> The general tenor of the holdings is that the statute requires more than a showing of a possibility that the alien will require public support. Some specific circumstance, such as mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present. *A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge*, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency.

Matter of Martinez-Lopez, 10 I. & N. Dec. 409, 421-22 (BIA 1962) (emphasis added). The BIA held that a 22-year old with farming experience was not likely to become a public charge, despite not speaking English, as he would work among people who spoke Spanish. *Id*. at 411. Twenty years later, the BIA continued to emphasize that the public charge determination must consider "the totality of the alien's circumstances," and held that "[t]he fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge." *Matter*

of Perez, 15 I. & N. Dec. 136, 137 (BIA 1974); *see also Matter of Harutunian*, 14 I. & N. Dec. 583, 588 (BIA 1974) ("[W]hile economic factors should be taken into account, the alien's physical and mental condition, *as it affects ability to earn a living*, is of major significance.") (emphasis added).

II. CONGRESS HAS REFUSED TO ALLOW THE PUBLIC CHARGE DETERMINATION TO FOCUS ON THE RECEIPT OF NON-CASH BENEFITS

More recent iterations of the public charge statute reflect a broader Congressional concern with the number of persons who rely on the welfare system, *i.e.*, cash assistance, to survive. Yet even in the face of this concern, Congress has not altered the core meaning of "public charge" in the immigration context, and both Congress and the executive branch have continued to exclude the receipt of in-kind benefits from the public charge framework.

A. Immigration Act of 1990

In 1990, Congress amended the immigration laws to exclude any immigrant 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." Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978. The amended act omitted references to "paupers," "professional beggars," and "vagrants," with the Congressional Record explaining that "[t]hese relics have been replaced by one generic standard which exclude aliens who are "likely to become a public charge." 136 Cong. Rec. 36797, 36844 (1990).[3]

[3] As of 1990, Black's Law Dictionary defined "public charge" as "an indigent. A person whom it is necessary to support at public expense by reason of poverty alone or illness and poverty." *Public Charge*, BLACK'S LAW DICTIONARY (6th ed. 1990).

B. 1996 Immigration Act

In 1996, Congress again revised the immigration laws to list five factors that "shall at a minimum" be considered when determining whether a noncitizen is likely to become a public charge: age; health; family status; assets, resources, and financial status; and education and skills. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 531, 110 Stat. 3009 (hereinafter "1996 Act"). The 1996 Act further provides that the agency "may also consider any affidavit of support . . . ." *Id.*

Notably, the legislative history leading to the passage of the 1996 Act indicates that a group of legislators proposed to define "public charge" in the statute as including "any alien who receives benefits described in subparagraph (D) for an aggregate period of at least 12 months" (or 36 months in the case of a battered spouse or child). 142 Cong. Rec. 24313, 24425 (1996). The benefits listed in subparagraph D (receipt of which would brand a noncitizen as a public charge) included "means-tested public benefits." Significantly, a majority of Congress *refused* to enact that definition, thereby leaving in place more than a century of judicial interpretation and refusing to allow an agency to use the receipt of such benefits as a basis to prevent admission.[4]

Contemporaneous with the passage of the 1996 Act, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193, 110 Stat. 2105, which restricted most noncitizens from accessing many public support programs. Congress

[4] *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983) (interpretation informed by the fact that Congress had a "prolonged and acute awareness" of an established agency interpretation of a statute, considered the precise issue, and rejected bills to overturn the prevailing interpretation); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (rejecting statutory construction that would implement substance of provision that Conference Committee rejected).

nonetheless also made clear that certain benefits would be (or would, after a time, become) available to lawful permanent residents (as defined in the INA). *See, e.g.*, 8 U.S.C. §§ 1611(b), 1613(c), 1621(b).[5] Among the available benefits were public health assistance (such as medical immunizations) and programs that deliver in-kind services (such as soup kitchens and short-term shelter). *See id*. This statute stands as powerful evidence that Congress intended lawfully present noncitizens to receive certain benefits. *Amici* respectfully submit that it strains credulity for the State Department to suggest now that Congress, having explicitly stated that noncitizens may receive these benefits, somehow also intended that those same noncitizens who accept the benefits will be subject to deportation as public charges.

C. 1999 INS Field Guidance

In 1999, the Immigration and Naturalization Service ("INS") published guidance on public charge determinations. *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999). The guidance was deemed "necessary to help alleviate public confusion over the meaning of the term 'public charge' in immigration law and its relationship to the receipt of Federal, State, and local public benefits" and "to provide aliens with better guidance as to the types of public benefits that will and will not be considered in public charge determinations." *Id.* It "both summarizes longstanding law with respect to public charge and provides new guidance on public charge determinations in light of the recent changes in law," notably the 1996 Act and welfare reform laws. *Id.* INS's notice explained:

> 'public charge' means an alien who has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) '*primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public*

[5] The IFR would deny admission to noncitizens based on the perceived likelihood of their accepting benefits at any time for the rest of their lives. *See* 84 Fed. Reg. at 55,001 (describing "likely at any time to become a public charge" to refer to "at any time in the future").

> *cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense*.'

Id. (emphasis added). The guidance further emphasized that (i) "[i]nstitutionalization for short periods of rehabilitation does not constitute such primary dependence" and (ii) "officers should not place any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance with respect to determinations of admissibility or eligibility for adjustment on public charge grounds." *Id.*[6] INS observed correctly that a compelling reason to limit the definition to those receiving cash benefits is that

> certain federal, state, and local benefits are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient. Thus, participation in such non-cash programs is not evidence of poverty or dependence.

Id. at 28,692. Moreover, INS thus confirmed that decisions of the BIA and Attorney General, regulations, "and section 212(a)(4) itself" create a "totality of the circumstances" test. *Id.* at 28,690 (footnotes omitted).

D. Rejection of 2013 Amendments

More recently, in 2013 the U.S. Senate rejected two proposed amendments relevant to the public charge issue. The first amendment, which sought to "expand[] the criteria for 'public charge,' such that applicants would have to show they were not likely to qualify even for non-

[6] Commentators have noted that the 1999 Field Guidance demonstrated the intent of INS and the Department of Health and Human Services to confirm that the immigration laws enacted in 1996 did not make immigrants ineligible for the Children's Health Insurance Program (CHIP), short-term Medicaid (but not nursing or other long-term care), housing subsidies, food stamps, and other non-cash assistance. *See* MOLONEY, *supra*; *see also* Park, *supra*, at 1172 (noting that the guidance "clarified public charge criterion to exclude non-cash benefits, such as Medicaid and special-purpose cash benefits that are not intended for income maintenance").

cash employment supports such as Medicaid, the SNAP program, or [CHIP]," was rejected by voice vote. S. Rep. No. 113-40, at 42 (2013). The second amendment "would have expanded the definition of 'public charge' such that people who received non-cash health benefits could not become legal permanent residents" and "would also have denied entry to individuals [determined] likely to receive these types of benefits in the future." *Id*. at 63. By voice vote, this amendment also "was not agreed to . . . ." *Id.* While the rejection of these proposed amendments does not have the force of law, it certainly evidences that the only body in Congress to consider the "public charge" criteria in the last decade rejected enactment of the very type of rule the State Department now seeks to impose by fiat. *See City of Chicago v. Barr*, Nos. 18-2885 & 19-3290, 2020 WL 2078395, at *15 (7th Cir. Apr. 30, 2020) (rejecting the Attorney General's interpretation of a federal statute because, among other things, it would effectively "override" Congress's "repeated[] refus[al] to pass legislation that would do precisely" what the Attorney General interpreted the statute to accomplish).

CONCLUSION

For over 130 years, all three branches of the federal government have understood "public charge" to refer to a person who is "primarily dependent" upon the government for subsistence. The State Department's IFR departs from this long-standing precedent by requiring consular officers to treat the temporary receipt of non-cash benefits as a basis to find that an immigrant is likely to become a public charge, and, in some instances, to accord this factor heavy negative weight. Because the IFR is contrary to existing law, arbitrary and capricious, *amici* respectfully urge this Court to grant Plaintiffs' Motion for Summary Judgment.

Dated: May 22, 2020

Respectfully submitted,

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APPENDIX

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