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Immigrants and Interdependence: How the COVID-19 Pandemic Exposes the Folly of the New Public Charge Rule

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IMMIGRANTS AND INTERDEPENDENCE:
HOW THE COVID-19 PANDEMIC EXPOSES THE FOLLY
OF THE NEW PUBLIC CHARGE RULE

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ABSTRACT

On February 24, 2020, just as the Trump administration began taking significant action to prepare for an outbreak of COVID-19 in the United States, it also began implementing its new public charge rule. Public charge is an immigration law that restricts the admission of certain noncitizens based on the likelihood that they will become dependent on the government for support. The major effect of the new rule is to chill noncitizens from enrolling in public benefits, including Medicaid, out of fear of negative immigration consequences. These chilling effects have persisted during the pandemic. When noncitizens are afraid to (1) seek treatment or testing for COVID-19 or (2) access public benefits in order to comply with stay-at-home guidance, it impedes efforts to slow the spread of COVID-19, contributing to the strain on the health care system. This Essay describes how the pandemic has exposed the folly of the public charge rule: Discouraging noncitizens from accessing public benefits to support their health and well-being is and always has been unwise from a public health perspective. The pandemic merely magnifies the negative consequences of this policy.

This Essay contributes to scholarly conversations about how immigration law and policy have framed the United States’ response to the COVID-19 pandemic. Specifically, it provides an in-depth analysis of the negative public health consequences of the new public charge rule during the pandemic.

Keywords: Public charge, public health, pandemic, COVID-19, coronavirus, immigrants, Medicaid

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INTRODUCTION

The coronavirus disease 2019 (COVID-19) pandemic is an unprecedented public health crisis in the modern era, and the United States has taken unprecedented measures to address it.\(^1\) To curb the spread of COVID-19, public officials at every level of government have required or encouraged all residents to practice social distancing, also referred to as “physical distancing.”\(^2\) This involves limiting contact with people outside of one’s household in order to reduce potential exposure to the virus.\(^3\) Across the United States, schools, workplaces, restaurants, athletic stadiums, entertainment venues, and other “non-essential” businesses have closed to the public.\(^4\)

The spread of COVID-19 and the extraordinary measures to combat it have brought to light the enduring failures of our human ecosystem, leaving people with the fewest resources at heightened risk of acquiring (and spreading) the virus.\(^5\) One vulnerable population that faces unique and

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1 Joan Stephenson, *Coronavirus Outbreak—an Evolving Global Health Emergency*, JAMA (Feb. 4, 2020), https://jamanetwork.com/channels/health-forum/fullarticle/2760671 (explaining that, although the action of mandatory quarantine orders is an unprecedented action and one that has not occurred in the last 50 years, it is necessary in light of an unprecedented public health threat).
3 *Id.*
disproportionate risks in this pandemic is noncitizens.\textsuperscript{6} Like many U.S. citizens, noncitizens work in low-wage positions that are considered essential and in which close contact with other people is unavoidable.\textsuperscript{7} These include home health aides, caregivers for children and the elderly, farming, and warehouse operations.\textsuperscript{8} Workers in these industries face a higher risk of exposure to the virus. Alongside citizens, noncitizens have also lost income due to reductions in hours and layoffs in the restaurant and retail sectors.\textsuperscript{9}

There is growing recognition that supportive measures for people living in or near poverty are as necessary as medications to treat the spread of COVID-19.\textsuperscript{10} In late March 2020, Congress passed emergency legislation that expands and enhances existing means-tested public benefit programs in order to ensure that people can follow social distancing guidelines; self-isolate if they have symptoms or are exposed to someone with symptoms; and obtain appropriate medical treatment such as telehealth screening and testing related to COVID-19.\textsuperscript{11} Unlike U.S. citizens, however, noncitizens who are eligible for publicly funded healthcare and other benefits face a unique risk of accessing them: denial of immigration benefits.

Public charge is an immigration law that restricts the admission of noncitizens based on the likelihood that they will become dependent on the U.S. government for support.\textsuperscript{12} The public charge statute has always been a part of U.S. immigration law.\textsuperscript{13} Before 2019, the government rarely rejected applicants on public charge grounds.\textsuperscript{14} However, in August 2019, the U.S. Department of Homeland Security (DHS) finalized a regulation, Inadmissibility on Public Charge Grounds (the “public charge rule” or “new rule”), that would expand the application of public charge inadmissibility in several ways, thus transforming the operation of public charge law and potentially excluding many more noncitizens from becoming lawful permanent residents (LPR).\textsuperscript{15}

Under the new rule, a noncitizen’s use of public benefits, including Medicaid, is a more significant (and more negatively weighted) factor in the public charge analysis.\textsuperscript{16} The focus of the public

\begin{thebibliography}{10}
\bibitem{7} Id.
\bibitem{9} Chishti & Bolter, supra note 6.
\bibitem{10} Benfer & Wiley, supra note 5 (explaining how “immediate legal, social, and financial protections” are needed to support social distancing and combat COVID-19).
\bibitem{13} Id. at 179 (citing Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214).
\end{thebibliography}
charge analysis has shifted from dependence on government support to any use of public benefits, “even in a relatively small amount or for a relatively short duration.”

The new rule was scheduled to go into effect in October 2019, but a group of states and advocates for immigrants filed lawsuits challenging it on several grounds. Five federal district judges issued preliminary injunctions temporarily halting implementation of the new rule. However, in January 2020, the U.S. Supreme Court stayed the injunction, allowing DHS to implement the new rule while the litigation proceeds. DHS began enforcing the new rule on February 24, 2020.

Under the new rule, some noncitizens who live in the United States and who enroll in public benefits that provide health coverage or supplement budgets for food, housing, and other essentials will risk denial of future applications for LPR status. However, the greater effect of DHS’s dramatic reformulation of public charge has been to sow confusion among noncitizens about the relationship between use of public benefits and eligibility for immigration benefits. A marked decrease in public benefits enrollment by noncitizens and their family members, even those who are not subject to public charge, is attributed to the Trump administration’s proposed and enacted immigration policies.

Implementation of the public charge rule coincided with the administration’s first significant actions to prepare for an outbreak of COVID-19 in the United States. Noncitizens who hope to gain LPR status—the first step on the path to becoming a U.S. citizen—may be unwilling to seek treatment or testing for COVID-19 or to access public benefits in order to comply with stay-at-home guidance based on their understanding of the public charge rule. The COVID-19 pandemic has exposed the folly of the new rule by revealing that its major effect is to chill noncitizens from accessing public benefits that would support their health and well-being. The new rule leaves

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18 See Wendy E. Parmet, Supreme Court Allows Public Charge Rule to Take Effect While Appeals Continue, HEALTH AFF. BLOG (Feb. 3, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200131.845894/full/ (noting that the plaintiffs argued that the new rule “exceeded DHS' statutory authority, violated the Administrative Procedures Act, discriminated on the basis of disability, and offended the Equal Protection Clause of the Constitution”).
19 Id.
22 See infra Part II.
23 Id.
noncitizens and the people with whom they live, including U.S. citizens, disproportionately vulnerable to suffering and possibly dying from untreated COVID-19. It also leaves them at heightened risk of food insecurity, homelessness, and other maladies linked with a sudden loss of income and increased exposure to infectious disease.

I. THE NEW PUBLIC CHARGE RULE

Under the prior interpretation of the public charge statute, applicants for LPR status were denied admission if they were likely to become primarily dependent on the government. In effect, a public charge was a person who was likely to become totally dependent on the government for support, as demonstrated by the receipt of public benefits that provide cash assistance or institutionalization for long-term care. Under this policy, fewer than one percent of applicants for admission were denied. The new rule redefines 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.” The new rule also expands the types of public benefits that would be considered in determining whether an applicant for LPR status is a public charge. For the first time, enrollment in Medicaid, the Supplemental Nutrition Assistance Program (SNAP or “Food Stamps”), and subsidized housing programs would be considered a negative factor in the public charge analysis.

As one of us has detailed elsewhere, public health considerations were an influential factor in the development of public charge policy for more than a century. The prior policy, as described in a 1999 Immigration and Naturalization Service (INS) Field Guidance, states that the agency’s interpretation of the public charge statute was intended “to reduce the negative public health consequences generated by the existing confusion 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.” The INS was aware that noncitizens were forgoing or disenrolling from public benefits based on a fear of being deemed a public charge. Specifically, the INS was concerned that noncitizens would be unable to access “emergency and other medical assistance, children’s immunizations, and basic nutrition programs, as well as the treatment of communicable diseases.”

The new rule abandons this public health rationale. First, DHS declined to respond to detailed analyses submitted in the notice-and-comment process describing the potential impact of the new...
rule’s chilling effect. 36 Second, it departed from a longstanding interpretation of the statute that balances public health considerations with the goal of supporting the long-term self-sufficiency of noncitizen members of the community who seek to reside in the United States permanently. 37 DHS, the successor agency to the INS, acknowledges and blatantly disregards the likely negative public health consequences of the new rule’s chilling effect. 38 In its notice of proposed rulemaking, DHS states:

Disenrollment or foregoing enrollment in public benefits program [sic] by aliens otherwise eligible for these programs could lead to:
- Worse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children, and reduced prescription adherence;
- Increased use of emergency rooms and emergent care as a method of primary health care due to delayed treatment;
- Increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated; …
- Increased rates of poverty and housing instability; and
- Reduced productivity and educational attainment. 39

Despite acknowledging these consequences, DHS did not attempt to quantify them or weigh them against the perceived benefits of the rule. 40 This disregard for the negative public health consequences of public charge policy represents a dramatic shift in the way that the public charge statute has been interpreted. 41 Of particular relevance, noncitizen access to testing and treatment for communicable diseases was previously considered a vital public health concern that the INS intended to promote through public charge policy. 42

When policymakers have incorporated public health concerns into public charge policy, it is not merely—or even primarily—for humanitarian reasons. 43 Rather, it helps to accomplish one of the main goals of the public charge statute, which is to foster long-term self-sufficiency among noncitizens living in the United States. 44 Under the old policy, noncitizens were not penalized for use of non-cash public benefits such as Medicaid, SNAP, and housing if they became ill, disabled, or otherwise unable to earn adequate income because it was understood that such benefits would “sustain and improve their ability to remain self-sufficient.” 45 The new rule, on the other hand,

36 Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,313 (“DHS finds it difficult to predict the rule’s disenrollment impacts with respect to people who are not regulated by this rule, such as people who erroneously believe themselves to be affected. … DHS will not alter this rule to account for…unwarranted choices [to disenroll from a public benefit program or forego enrollment in response to this rule when such individuals are not subject to this rule.]”)
37 Makhlouf, supra note 12, at 202-208.
39 Id.
41 Makhlouf, supra note 12, at 190-93.
42 Inadmissibility and Deportability on Public Charge Grounds, 64 Fed Reg. at 28,676.
43 Makhlouf, supra note 12, at 184.
44 Id.
45 Id. at 188-89 (quoting 64 Fed. Reg. at 28,678).
ignores this history. Rather, it is part of a larger agenda by this administration to (1) slash enrollments in public benefits in service of a flawed, ahistorical conception of self-sufficiency, and (2) enact punitive immigration policy designed to discourage noncitizens from entering or remaining in the United States.

II. CHILLING EFFECTS

Long before the new rule was even proposed, drafts had been leaked to the media and instilled widespread fear of enrolling in public benefits among noncitizens. Beginning in 2018, advocates and the media observed that noncitizens were disenrolling from or forgoing enrollment in public benefits out of fear of negative immigration consequences in anticipation of a change in public charge policy. This administration’s anti-immigrant rhetoric and crackdown on immigration enforcement has exacerbated this “chilling effect” on noncitizen enrollment in public benefits. Much of the reasonable confusion about the new rule has to do with who is subject to a public charge determination, how use of public benefits is considered in the analysis, and which public benefits are considered.

This means that noncitizens who are not subject to the public charge rule, such as LPRs and naturalized citizens, will be or already have been deterred from enrolling in public benefits based on a fear of negative immigration consequences. Confusion about how public benefits use factors into the public charge analysis will undoubtedly cause some applicants for LPR status to avoid health-promoting public benefits even if, based on the totality of circumstances analysis, they would not be considered a public charge. The chilling effect extends to public benefits that are not considered in the public charge analysis at all, such as Emergency Medical Assistance, Medicaid for pregnant women and children under the age of 21, the Special Supplemental

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46 Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,314 (“DHS does not believe that Congress intended for DHS to administer [the public charge law] in a manner that fails to account for aliens’ receipt of food, medical, and housing benefits so as to help aliens become self-sufficient. DHS believes that it will ultimately strengthen public safety, health, and nutrition through this rule by denying admission or adjustment of status to aliens who are not likely to be self-sufficient.”).
47 Makhlouf, supra note 12, at 204.
51 Makhlouf, supra note 12, at 207.
Nutrition Program for Women, Infants, and Children (WIC), and the Children’s Health Insurance Program (CHIP).54

The Migration Policy Institute (MPI) estimates that 10 million noncitizens, which is 47% of the noncitizen population in the United States, will disenroll from or forgo enrollment in public benefits because of the chilling effects of changes in public charge policy.55 These noncitizens reside with 12 million U.S. citizen family members, including about 8 million citizen children.56 Forgone enrollment in public benefits by an individual affects the budget of the entire household. Therefore, the families of noncitizens chilled from accessing public benefits suffer alongside them.

III. PUBLIC HEALTH CONSEQUENCES

The new rule’s disregard of public health consequences weakens our fight against the COVID-19 pandemic by discouraging noncitizens from accessing (1) health care for treatment of COVID-19 symptoms and (2) public benefits that enable compliance with social distancing.

The major effect of the new rule—chilling noncitizens from enrolling in public benefits, including Medicaid—will negatively impact public health during the pandemic by reducing access to testing for and treatment of COVID-19 symptoms. Reporters have documented that the chilling effect of the new rule persists during the pandemic.57 Noncitizens with COVID-19 symptoms who have declined to enroll in Medicaid and who do not have resources to pay out of pocket for health care will suffer disproportionately from untreated disease and will contribute to the uncontrolled spread of the virus. Any policy that discourages people who may have COVID-19 from accessing health care during the pandemic will weaken our fight against the spread of the virus.

Noncitizens who have lost income for pandemic-related reasons may fear enrolling in other public benefits as well, including those that would supplement their budgets for food, housing, utilities, medicine, personal protective equipment (PPE), cleaning supplies, internet, transportation, and other essentials. Low- and middle-income noncitizens are unlikely to have substantial savings to weather a prolonged period of unemployment or underemployment. Unlike U.S. citizens who can rely on public benefits for income support during the pandemic emergency, noncitizens who fear being deemed a public charge will face the difficult decision of making do with less or seeking employment with an essential business that will put them at increased risk of exposure to the virus. Consequences may be particularly severe for noncitizens who are at higher risk for severe illness from COVID-19 because they have underlying health conditions, but who cannot afford to leave their jobs.

Noting that the long-term sequelae of infection with COVID-19 may be serious, particularly for high-risk individuals, it is obvious that the new rule is not calculated to promote long-term self-
sufficiency among noncitizens. Noncitizens who are discouraged from accessing public benefits to supplement their housing budgets may suffer from housing instability. If they lose housing, they may be forced to move in with another family or go to a shelter—both of which will make it more difficult to practice social distancing and will increase their exposure to the virus. Similarly, inability to pay a utility bill can lead to a shutoff. If the water is shut off, it is harder to comply with recommendations about handwashing (the best defense against contracting the virus) and regularly cleaning and disinfecting high-touch surfaces. Heating utility shutoffs are linked with suppression of the immune system, which would make the entire household more susceptible to illness, including COVID-19. Food insecurity has also been linked with “fatigue and reduced immune response, which increase the risk of contracting communicable diseases.”

Noncitizens who are discouraged from accessing SNAP due to the new rule may need to rely on food pantries or other potential sources of exposure to the novel coronavirus in order to have enough to eat. Household members of noncitizens who are experiencing symptoms of COVID-19 will likely find it harder to manage their illness if they are chilled from accessing public benefits for which they are eligible. For example, noncitizen or mixed-status households that decline to enroll in SNAP are more likely to be food-insecure. Not only are children in such households more susceptible to illness, a suppressed immune response makes it harder for them to recover from illnesses. Similarly, unstable or unsafe housing (including lack of access to heat, electricity, and water) is associated with poor recovery from illness. Inability of people diagnosed with COVID-19 to manage their symptoms at home will ultimately lead them to seek care in a hospital, where they will consume scarce health care resources.

The major effect of the new rule—discouraging noncitizens from accessing health care and public benefits that support health and well-being—will, in a pandemic, ultimately increase the uncontrolled spread of disease, putting more people at risk of developing COVID-19. It impedes efforts to slow the spread of the pandemic, potentially straining and overwhelming the health care system. In short, implementation of the new rule risks drawing out the pandemic as well as the unprecedented policies to combat it, which have brought life as we know it to a halt.

IV. THE FOLLY, EXPOSED

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62 See, e.g., James Hamblin, *Why Some People Get Sicker Than Others*, ATLANTIC (Apr. 21, 2020), https://www.theatlantic.com/health/archive/2020/04/coronavirus-immune-response/610228/ (describing how variation in immune responses based on social determinants of health, including housing, will determine who becomes sickest from COVID-19); id. (“Ultimately, people who are unable to take time off of work when sick—or who don’t have a comfortable and quiet home, or who lack access to good food and clean air—are likely to bear the burden of severe disease.”).
On March 14, 2020—just nineteen days after the new rule was implemented—U.S. Citizenship and Immigration Services (USCIS), a sub-agency within DHS, issued an alert regarding a modification of the public charge determination process that is intended to encourage noncitizens with symptoms of COVID-19 to seek treatment.63 This guidance, which is posted to the USCIS website but is not otherwise codified, states that testing and treatment relating to COVID-19 that is subsidized by Medicaid will not be considered in public charge inadmissibility determinations.64 Although this indicates a partial recognition by DHS of the negative public health consequences of the new rule, it falls short because it still potentially penalizes noncitizens who enroll in Medicaid during the pandemic. Medicaid provides full-scope health coverage that includes coverage for conditions that put people at high risk of severe illness from COVID-19, such as asthma, diabetes, and heart disease. If a noncitizen with such a condition seeks medical attention for COVID-19 symptoms, must they decline treatment for any other condition? It is unreasonable to expect people in that position to determine whether the treatment they are receiving is related to COVID-19, or to direct their health care providers to stop treating conditions that USCIS may determine is “unrelated.” The patient cannot control what a provider bills to Medicaid, and, as a result, may reasonably decline to enroll in Medicaid during the pandemic.

The USCIS Alert also falls short of addressing the negative health consequences of the public charge rule because it does not eliminate consideration of any other public benefits in the public charge analysis, even if such enrollment is on account of the pandemic and can promote good health in ways unrelated to medical care.65 Rather, the alert describes a new process by which noncitizens who enroll in public benefits for pandemic-related reasons can introduce evidence of those reasons for consideration by USCIS.66 The decision of how to consider such evidence is within the discretion of individual USCIS officers who have virtually unlimited discretion to weigh this evidence.67

The coronavirus pandemic has made obvious the essential folly of the public charge rule: Discouraging noncitizens from accessing public benefits to support their health and well-being is and always has been unwise from a public health perspective. Working collectively to assure the conditions in which people can be healthy is important all the time—not only during a public health crisis. The pandemic merely magnifies the negative public health consequences of the new rule because it puts U.S. citizens at risk of developing COVID-19, a deadly disease without a cure or even a therapeutic treatment. In this time of crisis and uncertainty, there is heightened awareness of the degree to which the health of individuals across the country and, indeed, around the world,

64 Id. (“To address the possibility that some aliens impacted by COVID-19 may be hesitant to seek necessary medical treatment or preventive services, USCIS will neither consider testing, treatment, nor preventive care (including vaccines, if a vaccine becomes available) related to COVID-19 as part of a public charge inadmissibility determination…even if such treatment is provided or paid for by one or more public benefits, as defined in the rule (e.g. federally funded Medicaid”).
65 Id.
66 Id.
67 Id. (“To the extent relevant and credible, USCIS will take all…evidence into consideration in the totality of the alien’s circumstances.”).
is interconnected. Good policy must honor these ties of interdependence and reinforce the shared responsibility for stopping the spread of COVID-19.\textsuperscript{68}

**CONCLUSION**

It remains to be seen whether USCIS’s March 2020 guidance on consideration of Medicaid and other public benefits use in the public charge determination will have any effect on noncitizens’ decisions about enrollment. It is likely that many noncitizens will continue to forgo enrollment in public benefits due to the chilling effects of the new rule, the lack of clarity in the USCIS alert, and mistrust of the administration. A noncitizen interviewed by the *New York Times* captured this sentiment: “We’re petrified. The president says one thing one day and does another the next.”\textsuperscript{69}

Given the likelihood that USCIS’s attempt to mitigate the negative public health consequences of the new rule will fail, DHS should suspend implementation of the new rule retroactively to the date of implementation and for the duration of the pandemic. The suspension should apply across the board, to all noncitizens subject to public charge and to all use of public benefits. Only a clear statement from DHS suspending the operation of the public charge rule will persuade noncitizens to seek testing and treatment for COVID-19 and enroll in public benefits to support their health and well-being during this uncertain time. When the pandemic crisis has ended, DHS will be in a better position to make clear-headed and enduring policy on the appropriate consideration of noncitizen use of public benefits in immigration applications.

In April, a group of states Attorneys General requested the U.S. Supreme Court to lift the stay permitting implementation of the public charge rule during the pandemic. This request was denied; however, the decision does not preclude the plaintiffs from pursuing relief at the district court level and at least one state Attorney General has indicated that she plans to do so. The federal judges hearing these requests should include in their deliberation an analysis of the new rule’s negative public health consequences. The same analysis should also influence the ongoing litigation challenging the legality of the new rule, given what the changed circumstances during the pandemic have revealed about the folly of this administration’s public charge policy.


\textsuperscript{69} Jordan, supra note 57.