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The Statue of Liberty has become known as the "Mother of Exiles, greeting millions of immigrants and embodying hope and opportunity for those seeking a better life in America[,]"[1] not only to Americans but to all people around the world. Yet, despite being designated as the land of dreams and opportunities, the United States has a long history of denying such dreams and opportunities to marginalized communities.[2] The "public charge" rule refers to inadmissibility and deportability grounds in U.S. immigration law that have constantly barred poor noncitizens and noncitizens of color from obtaining legal status.[3] The public charge rule deems any noncitizen who, in the government's opinion, "is likely to at any time to become a public charge" as inadmissible or deportable.[4]

The concept of public charge can be traced back to the Immigration Act of 1882, Congress's first comprehensive immigration statute, which sought to exclude noncitizens that were "unable to take care of themselves without becoming a public charge."[5] Almost a century later, Congress expanded the exclusion provision to provide for the deportation of "any alien who becomes a public charge within one year after his arrival in the United States from cause existing prior to his landing."[6] And in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") further broadened the exclusion on economic grounds by giving consular officers the authority to deny visas to immigrants based on noncitizens' likelihood of becoming a public charge.[7] Additionally, IIRIRA required noncitizen sponsors to provide an affidavit of support, which made them financially responsible for the sponsored noncitizen.[8]

Historically, the U.S. government has used the public charge rule to supplement its anti-immigrant, racist ends.[9]For example, in the 1910s, the government "used anti-Semitic stereotypes to deport a disproportionate number of Jewish immigrants, finding that [their] 'peddler' nature made them 'economically unfit' under" public charge law.[10] In 1914, the government excluded thousands of noncitizens from South Asia because "South Asians did not work hard/or were unclean, which made them unemployable."[11] Guided by traditional gender roles and the misconception that unmarried women were most likely to need economic assistance, a disproportionate number of women were excluded on public charge grounds.[12]

Today, the Immigration and Nationality Act (INA) still includes public charge provisions for exclusions and deportations.[13] Although Congress does not define "public charge" in these statutes, INA § 212(a)(4)(B) provides that immigration inspectors should consider "(I) age, (II) health; (III) family status; (IV) assets,

resources, and financial status; and (V) education and skills" when determining inadmissibility based on this provision.[14] Apart from these factors, Congress gives the executive branch and each new administration broad discretion to define what constitutes a public charge.[15] In 1999, under the Clinton administration, the Immigration and Naturalization Service (INS), now the Department of Homeland Security (DHS), issued its first field guidance, defining "public charge" as a noncitizen who is likely to become or has become "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense."[16] Under this guidance, receipt of "public benefits only for income maintenance," known as cash benefits, would count against noncitizens under public charge rule, but non-cash benefits, such as Medicaid and Supplement Nutrition Assistance Program (SNAP), did not.[17]

Despite various changes in administrations, Clinton's 1999 field guidance governed the law of public charge until Donald Trump took office as President of the United States in 2017.[18] Taking advantage of the fact that previous administrations never formalized the 1999 field guidance into a rule or regulation, the Trump Administration issued and finalized a new regulation defining "public charge."[19] Trump's new rule significantly expanded the definition of "public charge."[20] Most significantly, it changed the standard for denial of applicants from "primarily dependent on the government for subsistence" to "more likely than not… to receive one or more designated public benefits."[21] In addition, the 2019 rule included non-cash government benefits such as SNAP, Section 8 housing assistance, and nonemergency Medicaid benefits, none of which were included under the 1999 rule.[22]

Trump's rule drew fierce criticism from public health officials, immigrant advocacy groups, and lawmakers.[23]Many critics accused the Trump administration of "imposing a 'wealth test for admission' to the United States" through this public charge rule.[24] Critics also pointed out that the public charge rule under Trump punished categories of noncitizens who legally accessed the public benefits offered to them.[25] Samuel R. Bagenstos argues that this rule is "best understood as a revival of eugenics in immigration policy[,]"[26] that is just enforcing "Trump's suggestion that the United States should not accept immigrants from what he called 'shithole countries.'[27] Rose Cuison Villazor and Kevin R. Johnson point out that generally, inadmissibility grounds disproportionately impact noncitizens of color, and that Trump's new "public charge" rule exacerbated "the racial and national-origins impact of the current law."[28] Shanzeh Daudi argues that the President used "the conflation of immigration and healthcare policies … to create unfounded fear of immigrants as a danger."[29] Many jurisdictions around the nation challenged Trump's rule, and various federal judges rebuked it.[30] But in January 2020, the Supreme Court revived the rule while the appeals moved forward.[31]

Shortly after taking office and while these appeals were pending, President Joe Biden stopped applying Trump's 2019 "public charge" rule and "returned to use the 1999 field guidance" in response to the unfair and

inhumane results of Trump's "public charge" rule.[32] The Biden administration published its final public charge rule for DHS in September 2022 and scheduled it to go into effect on December 23, 2022.[33] Biden's new rule reverts to the 1999 public charge definition and only considers cash assistance programs such as Supplemental Security Income (SSI).[34] It also eliminates the 1999 rule's "consideration of a noncitizen's family's reliance on public cash benefits as the sole means of support of the family."[35] And it removes the "heavily weighted" negative and positive factors instituted in Trump's rule.[36]

Although Biden's administration seeks to restore "a more faithful interpretation of the statutory concept of likely at any time to become a public charge" [2022], his rule is not safe.[37] To repeal Trump's rule, the Biden Administration relied on the final judgment of the Illinois federal court,[38] which vacated the 2019 rule nationwide. By not using notice-and-comment procedures as required by the Administrative Procedure Act, the administration has left the rule vulnerable to legal challenges.[39] Upon taking office, the Biden Administration stopped defending Trump's rule in the many cases in which it was previously challenged and opted to dismiss the appeals voluntarily.[40] In *Arizona v. City and Country of San Francisco*, the Supreme Court granted certiorari to decide whether the conservative states that bought suit seeking to intervene and defend Trump's rule in the abandoned appeals should have been permitted to intervene.[41] The Supreme Court dismissed the writ of certiorari as "improvidently granted," suggesting that the Court could not reach the case's merits because of procedural complications.[42] In his concurrence, Chief Justice Roberts leaves the question of whether the repeal of Trump's rule was appropriate unanswered.[43] He points out that this dismissal "should not be taken as reflective of a view on any of the foregoing issues, or on the appropriate resolution of other litigation, pending or future, related to the 2019 Public Charge Rule, its repeal, or its replacement by a new rule."[44]

This open question leaves Biden's rule in a vulnerable place, open to challenges and the possibility of the return to Trump's rule. But most importantly, this uncertainty leaves immigrant families and U.S. citizens with noncitizens family members feeling and acting upon its chilling effect. Scholars describe the chilling effect of Trump's rule as "the trend of immigrant disenrollment from public benefit programs out of confusion over new eligibility rules or fear of jeopardizing their chances of achieving LPR status."[45] The rule's chilling effect will continue to have devastating consequences "for the noncitizen populations in terms of public health, poverty, and food security."[46] In implementing the 2019 rule, Trump weaponized the public charge rule to specifically target racial minorities, and a return to this rule will only perpetuate racism in the U.S. and put many lives at risk.

[1] The Statue of Liberty: The Meaning and Use of a National Symbol, Edsitemite: Lesson Plan (last visited Sept. 27, 2022), https://edsitement.neh.gov/lesson-plans/statue-liberty-meaning-and-use-national-symbol.
[2] *See* Charles Kamasaki, U.S. Immigration Policy: A Classic, Unappreciated Example of Structural Racism, Brookings (March 6, 2021), https://www.brookings.edu/blog/how-we-rise/2021/03/26/us-immigration-policy-a-classic-unappreciated-example-of-structural-racism/.
[3] Rose Cuison Villazor & Kevin R. Johnson, *Trump Administration and the War on immigration Diversity*, 54 Wake Forest L. Rev. 575, (2019).
[4] INA § 212(a)(4); *see also* INA § 237(a)(5) (laying out public charge provision for deportation).
[5] Cuison Villazor & Johnson, *supra* note 3, at 588 (citing the Immigration Act of 1882).

[6] *Id.* In 1917, Congress amended the deportation provision any alien who becomes public charge *within 5 years* after his arrival in the United States from cause existing prior to his landing to at any time. *Id.* at 588 –99 (emphasis added).
[7] *Id.* at 599.
[8] *Id.*
[9] Kaylin Hawkins, *Inadmissible as a Public Charge: Adjudicating the Trump Administration's War on Legal Immigration*, 93 Temple L. Rev. 181 (2020); Samuael R. Bagenstos, Symposium, *The New Eugenic*, 71 Syracuse L. Rev. 751 (2021).
[10] Hawkins, *supra* note 9, at 186.
[11] *Id.*
[12] *Id.*
[13] *See* INA § 212(a)(4) and INA § 237(a)(5).
[14] INA § 212(a)(4)(B).
[15] *See* INA § 212(a)(4); *see also* Bagenstos, supra note 9, at 755.
[16] Field guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689 (March 26, 1999).
[17] Madeline M. Culbreth, Comment, *Public Charge Ground for Inadmissibility: Impact on Noncitizen Health Insurance Coverage*, 25 Richmond Public Interest L. Rev. 131 (2020).
[18] *See id.* at 136–41; *see also* Bagenstos, supra note 9, at 755–57; Hawkins, *supra* note 9, at 192–95; Cuison Villazor & Johnson, *supra* note 3.
[19] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (August 4, 2019); *see also The Public Charge Rule: What was the Public Charge Rule for U.S. Visa Applicant*, Boundless (Sept. 8, 2022) (noting that Trump's rule went into effect in February 2020).
[20] Hawkins, *supra* note 9, at 193; see also Culbreth, *supra* note 21.
[21] Inadmissibility on Public Charge Grounds, *supra* note 19.
[22] Inadmissibility on Public Charge Grounds, *supra* note 19, at 41,295, 41,374.
[23] Hawkins, *supra* note 9, at 194.
[24] *Id.* at 195–96.
[25] *Id.*
[26] Bagenstos, *supra* note 9, at 767
[27] *Id.*
[28] Cuison Villazor & Johnson, *supra* note 3.
[29] Shanzeh Daudi, Comment, *Choosing Between Healthcare and Green Card: The Cost of Public Charge*, 70 Emory L.J. 201 (2020) (pointing out that President Trump simultaneously and inaccurately proclaimed that numerous people with contagious diseases were entering the country while also limiting noncitizens' access to healthcare in support of his racist spurs).
[30] *See* City and Cnty. of San Francisco v. USCIS, 408 F. Supp. 3d 1057 (N.D. Cal. 2019); Cook County, Ill. v. McAleenan, 417 F. Supp. 3d 1008 (N.D. Ill. 2019); Casa de Md. v. Trump, 414 F. Supp. 3d 760 (D. Md. 2019) Make the Road New York v. Cuccinelli, 419 F. Supp. 3d 647 (S.D.N.Y. 2019).
[31] Adam Liptak, *The Supreme Court Weighs Whether States May defend Trump Immigration Policy*, N.Y. Times (Feb. 23, 2022), https://www.nytimes.com/2022/02/23/us/politics/supreme-court-public-charge-rule.html.
[32] Drishti Pillai & Samantha Artiga, *2022 Changes to the Public Charge Inadmissibility Rule and The Implications for Health Care,* KFF (May 05, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/2022-changes-to-the-public-charge-inadmissibility-rule-and-the-implications-for-health-care/ (stating that the main purpose of the 2022 public charge rule is to address the chilling effects of the 2019 rule).
[33] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 55,472 (Sept. 9, 2022).
[34] *Id.* at 55,473.
[35] Pillai & Artiga, *supra* note 31.
[36] Public Charge Ground of Inadmissibility, *supra* note 32, at 55,546.
[37] *See* Press Release, Ken Paxton, Paxton Files Brief with U.S. Supreme Court to Protect Taxpayers from Sky-rocking Costs of Illegal Immigration.(Sept. 2, 2022); *see also* Culbreath, *supra* note at 17, at133.
[38] Cook County, Ill. v. Wolf, No. 19–C–6334, 2020 WL 6393005 (N.D. Ill. Nov. 2, 2020).
[39] *See* Inadmissibility on Public Charge Grounds: Implementation of Vacatur, 86 Fed. Reg. 14,221 (March 15, 2021); A regulation originally promulgated using notice and comment, as Trump's public charge Rule was, may only be repealed through notice and comment. 5 U. S. C. § 551(5).
[40] Arizona v. City and County of San Francisco, California, No. 20–1775 (U.S. June 15, 2022).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Hawkins, *supra* note 9, at 195.
[46] *Id.*