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The Immigration-Welfare Nexus in a New Era?

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THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA?

by
Andrew Hammond*

The Trump Administration's immigration policy is one of the most hotly contested areas of American law. However, few have explored the Administration's interest in using the obscure doctrine of public charge to further its agenda. Public charge determinations allow immigration authorities to prevent individuals from entering the country as well as deport immigrants who use public benefits. What's more, individuals who sponsor family members to enter the United States are liable to pay the federal government back for any public benefits the sponsored family member uses once in the United States. A leaked draft Executive Order and proposed regulations suggest that the Trump Administration plans to use this obscure nexus of alienage law and public benefits regulations in support of its agenda and pit immigrant communities and families against each other.

This Article sketches the intersection of immigration law and the law of public benefits. It begins by mapping the unpredictable landscape of noncitizen eligibility for public benefits. The Article then analyzes public charge doctrine and the ways in which the Trump Administration threatens to upend this longstanding regime through proposed regulations, revised guidance, and punitive enforcement practices. Finally, the Article identifies the contours of data-sharing among federal and state agencies, including what protections exist to prevent government officials from repurposing that data for use in immigration enforcement actions.

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INTRODUCTION	502
I. LEGAL IMMIGRANTS OUTSIDE THE WELFARE STATE.....	503
A. <i>Public Benefits in the United States</i>	504
B. <i>The Intersection of Alienage and Welfare Law Since 1996</i>	508
C. <i>Immigrant Eligibility Rules Post-PRWORA</i>	514
II. PUBLIC CHARGE: IMMIGRATION CONSEQUENCES OF WELFARE	
USE	518
A. <i>Public Charge</i>	518
B. <i>Trump Administration & Public Charge</i>	521
i. <i>The Leaked Draft Executive Order</i>	521
ii. <i>Revisions to the Foreign Affairs Manual</i>	523
iii. <i>The Leaked Notice of Proposed Rulemaking</i>	524
iv. <i>An Initial Appraisal of the Leaked and Proposed Changes</i>	527
III. IMMIGRATION ENFORCEMENT AND PUBLIC BENEFITS DATA	529
A. <i>The Confidentiality of Public Benefits Data</i>	530
i. <i>Medicaid Data</i>	532
ii. <i>SNAP Data</i>	534
iii. <i>TANF Data</i>	535
iv. <i>SSI Data</i>	536
B. <i>The Future of Immigration Enforcement and Public Benefits</i>	
<i>Data</i>	537
IV. CONCLUSION	538

INTRODUCTION

Since a Republican Congress passed and a Democratic President signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) in 1996,¹ the United States has drawn distinctions between citizens and noncitizens for the purposes of public benefits. These distinctions have endured, in a bipartisan fashion, for two decades. During that time, some states used PRWORA to go even further in eliminating eligibility for immigrants. Other states have filled eligibility gaps with state-run public benefit programs.² Some states have done both: extending eligibility to state-funded programs for noncitizens only to eliminate eligibility years later. Suffice it to say, regardless of who occupies the White House now or in the years to come, federal and state law will continue to exclude many in-status immigrants from accessing public benefits like medical, food, cash, and disability assistance.

However, even if the Trump Administration and its allies in Congress leave public benefits eligibility untouched, this administration could alter

¹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, § 1, 110 Stat. 2105 (codified at 42 U.S.C. § 1305 (2000)).

² Adrienne Ortega, . . . *And Health Care for All: Immigrants in the Shadow of the Promise of Universal Health Care*, 35 AM. J. L. & MED. 185, 188 (2009).

how immigration status and poverty law intersect in dramatic ways. Some of those changes, but not all, would require Congressional approval.

One area that would not require new legislation to alter the nexus of immigration law and welfare is public charge doctrine.³ Public charge determinations allow immigration authorities to prevent individuals from entering the country whom they deem likely to rely on government support. Public charge determinations also allow authorities to deport immigrants who use public benefits. While the federal statutes governing public charge determinations are well over a century old, this authority is rarely invoked in removal proceedings.⁴ Although consular officials sometimes deny entry on the basis of public charge, sponsor deeming and seeking reimbursement appears to be even less common than removal on public charge grounds. However, an expansion of public charge liability for the immigrant and his sponsor could drastically alter how immigrants interact with public benefit programs, let alone with one another. And putting public charge doctrine to one side, public benefit data could be repurposed for immigration enforcement purposes.

To explore what the current administration could mean for the intersection of immigration law and poverty law, this Article proceeds in three parts. In Part I, the Article begins by mapping the unpredictable landscape of noncitizen eligibility for public benefits. In Part II, the Article then analyzes public charge doctrine and the ways in which the Trump Administration threatens to upend this longstanding regime. In Part III, this Article identifies the contours of data-sharing among federal and state agencies, including what protections exist to keep that data confidential.

I. LEGAL IMMIGRANTS OUTSIDE THE WELFARE STATE

In recent years, immigration law and its attendant emphasis on an entrance and exit system for noncitizens have overshadowed alienage. By focusing on how the federal government treats noncitizens trying to enter or remain in the country, scholars have given insufficient attention to how the government treats immigrants while they reside in the United States. That inquiry should begin with what basic services are made available to noncitizens. The last 20 years has made such an inquiry more complicated. The 1996 Welfare Reform Act eliminated eligibility for millions of noncitizens for cash assistance, food assistance, medical assistance, and disability benefits. That legislation invited a patchwork of eligibility rules by empowering states to maintain or further eliminate

³ An individual seeking admission to the United States or seeking to adjust status is inadmissible if the individual, “at the time of application for admission or adjustment of status, is likely at any time to become a public charge.” Immigration and Nationality Act (INA) § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A) (2012).

⁴ See, e.g., *Matter of Harutunian*, 14 I & N Dec. 583, 584, 586 (B.I.A. 1974).

which immigrants could access public benefits.⁵

A. *Public Benefits in the United States*

For the sake of clarity, this Article focuses on four means-tested public assistance programs in the United States: Medicaid, the Supplemental Nutrition Assistance Program (SNAP), Temporary Aid to Needy Families (TANF), and Supplemental Security Income (SSI). These four programs represent the bulk of federal and state spending on public assistance to poor families and individuals.⁶ Before explaining how noncitizen eligibility rules function in each of these four programs, it is worth briefly introducing each.

Medicaid

Created in 1965, Medicaid is a program jointly funded by the federal and state governments to assist states in furnishing medical assistance to needy individuals and families.⁷ Anyone who qualifies under program rules can receive Medicaid. States administer Medicaid, which generally determines the financial eligibility criteria for participants.⁸ However, the state rules must comply with certain federal requirements.

First, states must cover “mandatory” populations, including children in families with income below 138% of the federal poverty level (FPL), pregnant women with income below 138% FPL, parents whose income is low enough so as to be eligible for the state’s TANF program, seniors, and persons with disabilities who receive SSI.⁹ A state’s Medicaid program

⁵ PRWORA § 402, 110 Stat. at 2262.

⁶ It is worth noting that while outlays for these programs are substantial, they are dwarfed by spending on defense and the elderly, some of whom are in fact low-income. The federal budget amounted to \$3.9 trillion in the 2016 fiscal year. More than half of the federal budget went to Social Security (24% of the budget or \$916 billion), defense spending (15.5% or \$605 billion), and Medicare (15.2% or \$594 billion). *Policy Basics: Where Do Our Federal Tax Dollars Go?*, CTR. ON BUDGET & POL’Y PRIORITIES (Oct. 4, 2017), <https://www.cbpp.org/research/federal-budget/policy-basics-where-do-our-federal-tax-dollars-go>. For participation rates in public benefits programs, see Press Release, U.S. Census Bureau, 21.3 Percent of U.S. Population Participates in Government Assistance Programs Each Month (May 28, 2015), <https://www.census.gov/newsroom/press-releases/2015/cb15-97.html>.

⁷ 42 U.S.C. § 1396-1 (2012). According to the 2016 Actuarial Report on the Financial Outlook of Medicaid, overall Medicaid spending for FY 2016 was \$575.9 billion, with federal expenditures making up 63% or \$363.4 billion and state expenditures were approximately \$212.5 billion. U.S. DEP’T OF HEALTH & HUMAN SERVS., 2016 ACTUARIAL REPORT ON THE FINANCIAL OUTLOOK FOR MEDICAID iv, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/Downloads/MedicaidReport2016.pdf>.

⁸ 42 U.S.C. § 1396a(a).

⁹ *Id.* § 1396a(k)–(m). So far, 31 states and the District of Columbia have, under the Affordable Care Act, expanded Medicaid to parents and childless adults up to 138% FPL. *Prosperity Now Scorecard: Medicaid Expansion*, PROSPERITY NOW, <http://>

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 505

must also offer medical assistance for certain basic services to most categorically needy populations.¹⁰ States may also receive federal matching funds to extend coverage to optional populations like pregnant women, children, and parents whose income is above 138% FPL; the elderly and persons with disabilities with income below the poverty line; and those who are considered “medically needy” people.¹¹ States may also receive federal funding to provide certain optional services like diagnostic services, prescription drugs and prosthetic devices, rehabilitation and physical therapy, and hospice care.¹²

Supplemental Nutrition Assistance Program (SNAP)

While federal nutrition assistance dates back to the New Deal, the modern SNAP program was created in 1977. SNAP provides food-purchasing assistance to low-income individuals and families.¹³ Like Medicaid, SNAP benefits are considered an entitlement—a state needs to cover every eligible household which applies for the benefit. SNAP benefits are provided on a “household” basis.¹⁴ In federal law, a SNAP “household” means “an individual who lives alone or who, while living with others, customarily purchases food and prepares meals for home consumption separate and apart from the others; or a group of individuals who live together and customarily purchase food and prepare meals together for home consumption.”¹⁵ SNAP households may use the benefit to purchase food at one of the quarter million retailers

scorecard.prosperitynow.org/2016/measure/medicaid-expansion. The Supreme Court held in *NFIB v. Sebelius* that the federal government could not require states to expand Medicaid in such a way, rendering the provision optional. 567 U.S. 519, 588 (2012).

¹⁰ These services include “inpatient hospital services”; “outpatient hospital services”; “pregnancy-related services including prenatal care and 60 days postpartum pregnancy-related services”; “vaccines for children”; “physician services”; “nursing facility services for persons aged 21 or older”; “family planning services and supplies”; “rural health clinic services”; “home health care for persons eligible for skilled nursing services”; “laboratory and x-ray services”; “pediatric and family nurse practitioner services”; “nurse-midwife services”; “federally qualified health-center (FQHC) services and ambulatory services of an FQHC that would be available in other settings”; and “early and periodic screening, diagnostic, and treatment (EPSDT) services for children under age 21.” BARBARA S. KLEES ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., BRIEF SUMMARIES OF MEDICARE & MEDICAID 28 (2016), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MedicareProgramRatesStats/Downloads/MedicareMedicaidSummaries2016.pdf>.

¹¹ An individual is considered medically needy if their income exceeds the state’s regular Medicaid eligibility limit but their medical expenses reduce their disposable income below the Medicaid means-test. 42 C.F.R. § 435.831(d) (2017).

¹² KLEES ET AL., *supra* note 10, at 28–29.

¹³ 7 U.S.C. § 2013 (2012).

¹⁴ *Id.* § 2014(a).

¹⁵ *Id.* § 2012(m).

authorized by the Food and Nutrition Service (FNS) to participate in the program.¹⁶ However, SNAP households cannot use the benefit to purchase other necessary household items, like sanitary products, nor can they use SNAP to purchase hot foods prepared at the retailer.¹⁷

Federal law lays out SNAP eligibility rules and benefit amounts. To qualify for benefits, a SNAP household's income must be at or below 130% FPL,¹⁸ the household's net monthly income (after deductions for expenses like housing and child care) must be less than or equal to 100% FPL, and its assets must fall below limits identified in the federal regulations.¹⁹ SNAP's benefit formula calculates that families will spend 30% of their net income on food.²⁰ Households with no net income receive the maximum amount per month (\$504 for a family of three), but the average monthly benefit is far lower (\$253).²¹ The average monthly benefit per person is \$125 a month or \$1.40 per meal.²²

Temporary Assistance for Needy Families (TANF)

Since the Social Security Act of 1935, the federal government has required states to operate cash assistance programs for poor families with children.²³ Until 1996, Aid to Families with Dependent Children (AFDC)'s federalist structure resembled Medicaid and SNAP in so far as states were required to serve families who applied and met the eligibility requirements.²⁴ Congress replaced AFDC with the Temporary Assistance to Needy Families (TANF) block grant, which vastly expanded state discretion to operate their own programs.²⁵ For TANF, states determine the financial eligibility criteria for families and cash assistance benefit amounts given to families.²⁶ TANF recipients must engage in work

¹⁶ *SNAP Retailer Data, 2016 Year End Summary*, U.S. DEP'T OF AGRIC. (Dec. 15, 2016), <https://fns-prod.azureedge.net/sites/default/files/snap/2016-SNAP-Retailer-Management-Year-End-Summary.pdf>.

¹⁷ 7 U.S.C. §§ 2012(k), 2013(a).

¹⁸ This requirement does not apply to households with an elderly or disabled member. *Id.* § 2014(c)(2).

¹⁹ In fiscal year 2018, the resource limits are \$2,250 for households without an elderly or disabled member and \$3,500 for those with an elderly or disabled member. *A Quick Guide to SNAP Eligibility and Benefits*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/a-quick-guide-to-snap-eligibility-and-benefits> (last updated Sept. 14, 2017).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Social Security Act, ch. 531, 49 Stat. 620, 627 (1935) (codified in scattered sections of 42 U.S.C. (repealed 1996)).

²⁴ *Id.*

²⁵ GENE FALK, CONG. RESEARCH SERV., R44668, *THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: A LEGISLATIVE HISTORY 1* (2017).

²⁶ 42 U.S.C. § 604(a).

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 507

activities and states must sanction recipients who fail to meet those work requirements.²⁷

While TANF can be used for more basic necessities than SNAP, TANF benefit amounts are too low to make ends meet and have further eroded since 1996. No state's TANF benefits get a family of three to 60% FPL.²⁸ Most states' benefits do not even get that family to 30% FPL.²⁹ Far fewer Americans receive TANF: only 1.4 million families compared to the roughly 42 million and 68 million respectively who receive SNAP and Medicaid.³⁰

Supplemental Security Income (SSI)

Created in 1972, Supplemental Security Income (SSI) provides monthly cash assistance to low-income individuals who are age 65 or older, are blind, or have a disability.³¹ Recipients may only have limited resources aside from the SSI benefits.³² In 2017, the maximum monthly benefits for an SSI individual recipient was \$735.³³ There are roughly 5.5 million SSI recipients.³⁴

²⁷ PRWORA, Pub. L. No. 104-193, § 407(c)(1)(A), 110 Stat. 2131, 213 (codified at 42 U.S.C. § 607(c)(1)(A) (2)); *see also* Noah D. Zatz, *What Welfare Requires from Work*, 54 UCLA L. REV. 373, 377 (2006).

²⁸ Ife Floyd, *TANF Cash Benefits Have Fallen by More than 20 Percent in Most States and Continue to Erode*, CTR. ON BUDGET & POLICY PRIORITIES (Oct. 13, 2017), <https://www.cbpp.org/research/family-income-support/tanf-cash-benefits-have-fallen-by-more-than-20-percent-in-most-states>.

²⁹ *Id.*

³⁰ *Id.*; *Supplemental Nutrition Assistance Program Participation and Costs*, U.S. DEP'T OF AGRIC. (Mar. 9, 2018), <https://fns-prod.azureedge.net/sites/default/files/pd/SNAPsummary.pdf>; *December 2017 Medicaid and CHIP Enrollment Data Highlights*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html>.

³¹ 42 U.S.C. § 1381a. The definition of disability differs for children versus adults. Children are considered "disabled" "if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(c)(i). An adult

shall be considered to be disabled . . . if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

Id. § 1382c (a)(3)(A); *see Sullivan v. Zebley*, 493 U.S. 521, 541 (1990) (ruling that SSI determinations for claims by children were inconsistent with the "comparable severity" standard of the Social Security Act).

³² *Supplemental Security Income (SSI) Resources*, U.S. SOC. SEC. ADMIN. (2017), <https://www.ssa.gov/ssi/text-resources-ussi.htm>.

³³ *Supplemental Security Income (SSI) Benefits*, U.S. SOC. SEC. ADMIN. (2017), <https://www.ssa.gov/ssi/text-benefits-ussi.htm>.

³⁴ *Monthly Statistical Snapshot, January 2018, Table 1*, U.S. SOC. SEC. ADMIN. (2018), https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot.

Two qualifications are in order. First, it is worth remembering that there are other public benefit programs that support low-income Americans, including immigrants.³⁵ Second, it is somewhat misleading to talk about these four public benefit programs in tandem because few American families receive multiple benefits. SNAP and Medicaid are the two public benefits that Americans are most likely to receive and to receive in tandem. While most TANF recipients receive SNAP and Medicaid, there are only 2.5 million TANF recipients nationwide and fewer than a quarter of these receive housing assistance.³⁶

B. The Intersection of Alienage and Welfare Law Since 1996

The federal government has always excluded some noncitizens from public benefits programs. Undocumented immigrants are not eligible for cash assistance, food assistance, disability benefits, or medical assistance.³⁷ Hospitals must provide emergency assistance to undocumented individuals, but these individuals are not eligible for Medicaid.³⁸

However, the 1996 legislation, as with much federal legislation targeting marginalized communities, changed the federal landscape for immigrants and their ability to access public benefits.³⁹ Previously, people who were in the U.S. either without documentation or on temporary visas (such as students) were ineligible for public benefits. But in-status immigrants like Lawful Permanent Residents (LPRs) were considered to be analogous to U.S. citizens for the purpose of public benefits.⁴⁰ After

³⁵ Examples of other programs include Head Start; Women, Infants, and Children; Section 8 housing vouchers; and the School Lunch program.

³⁶ TANF: TOTAL NUMBER OF RECIPIENTS, FISCAL YEAR 2017, https://www.acf.hhs.gov/sites/default/files/ofa/2017_recipient_tan.pdf.

³⁷ TANYA BRODER ET AL., NAT'L IMMIGRATION LAW CTR., OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 1 (2015), <https://www.nilc.org/wp-content/uploads/2015/12/overview-immeligfedprograms-2015-12-09.pdf>.

³⁸ Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd(a)(b) (2012) [hereinafter EMTALA]; 42 C.F.R. §§ 413.35(2)(d), 482.2(a)(1)(2)(b), 489.24(a)(i)(ii) (2017). EMTALA mandated hospitals receiving federal funding to screen and stabilize all persons in their emergency department who exhibit emergency medical conditions regardless of citizenship or ability to pay. The legislative history of the Act suggests that Congress was particularly concerned about the widespread practice of "patient dumping." H.R. Rep. No. 100-531, 2d Sess. 2-3 (1988) (defining "dumping" as transferring patients from one hospital to another without first stabilizing them, refusing to provide medical treatment to patients, or delaying treatment to patients because they were either uninsured or too poor to pay for their care.); see also Maria O'Brien Hylton, *The Economics and Politics of Emergency Health Care for the Poor: The Patient Dumping Dilemma*, 1992 BYU L. Rev. 971, 981, 983.

³⁹ See, e.g., BRODER ET AL., *supra* note 37, at 1.

⁴⁰ *Id.*

welfare reform in 1996, in-status immigrants were placed outside the welfare state.

The 1996 legislation, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),⁴¹ radically changed means-tested cash assistance in the United States.⁴² As discussed above, Congress replaced an entitlement program, Aid to Families with Dependent Children (AFDC), with TANF, a program funded through block grants that drastically increased state discretion. Among its many sweeping changes, PRWORA created a citizen/noncitizen distinction not just for TANF, but for Medicaid, SNAP, and SSI as well.⁴³ Indeed, the Congressional Budget Office calculated that 40% of the savings of PRWORA came from eliminating immigrant eligibility in these programs.⁴⁴

Categorizing Immigrants as Qualified or Nonqualified

PRWORA restricted access to these four programs for lawfully present immigrants on the basis of three factors: (1) their immigration status, (2) when they arrived in the United States, and (3) how long they have been present in the U.S.⁴⁵ PRWORA created two categories of immigrants in the law of federal public benefits programs: qualified immigrants and nonqualified immigrants.⁴⁶

Importantly, nonqualified immigrants within the meaning of PRWORA are not unauthorized immigrants within the meaning of immigration law.⁴⁷ In other words, many legal immigrants are considered nonqualified for public benefits purposes. Nor is their exclusion comprehensive: nonqualified immigrants are eligible for emergency Medicaid (if they are otherwise eligible for their state's Medicaid program) and immunizations.⁴⁸ Nonqualified children are eligible for

⁴¹ PRWORA, Pub. L. No. 104-193, § 402(a), 110 Stat. 2105, 2262 (codified at 8 U.S.C. § 1612 (2000)).

⁴² See Andrew Hammond, *Welfare and Federalism's Peril*, 92 WASH. L. REV. 1721, 1731-32 (2017).

⁴³ U.S. DEP'T OF HEALTH & HUMAN SERVS., OVERVIEW OF IMMIGRANTS' ELIGIBILITY FOR SNAP, TANF, MEDICAID, AND CHIP 2 (2012), <https://aspe.hhs.gov/system/files/pdf/76426/ib.pdf>.

⁴⁴ Claire R. Thomas & Ernie Collette, *Unaccompanied and Excluded from Food Security: A Call for the Inclusion of Immigrant Youth Twenty Years After Welfare Reform*, 31 GEO. IMMIGR. L.J. 197, 204 n.32, 208 (2017) ("Due to the passage of PRWORA, approximately 935,000 non-citizens lost benefits . . ."). See also Amanda Levinson, *Immigrants and Welfare Use*, MIGRATION POLICY INST. (Aug. 1, 2002), <http://www.migrationpolicy.org/article/immigrants-and-welfare-use>.

⁴⁵ U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 43, at 2.

⁴⁶ *Id.*

⁴⁷ BRODER ET AL., *supra* note 37, at 2.

⁴⁸ 42 U.S.C. § 1396b(v) (2012). States differ in their definition of emergency services. See, e.g., *Greenery Rehab. Grp., Inc. v. Hammon*, 150 F.3d 226, 228, 233 (2d

the school breakfast and lunch programs, and every state has continued to make Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) available to noncitizens.⁴⁹

PRWORA also made a distinction between qualified immigrants arriving prior to the enactment of PRWORA (August 22, 1996) and those arriving after.⁵⁰ Federal law now prohibits post-PRWORA immigrants from receiving public benefits until they have five years of qualified status.⁵¹ A few categories are exempt from what is often referred to as this “five-year ban”: refugees, asylees, other immigrants exempt on humanitarian grounds, and military personnel/veterans and their families.⁵²

Enabling State Eligibility Rules

PRWORA’s restrictions on immigrant access to public benefits built on earlier efforts at the state level as well as concern among politicians that welfare programs were drawing not only immigrants to the U.S. but also enticing American citizens to move to states with more generous welfare benefits.⁵³ This concern about “welfare magnets” has persisted despite little evidence that it occurs.⁵⁴ Through PRWORA, Congress permitted states to go even further in treating noncitizens differently from citizens in the public benefits context. PRWORA contains a provision that explicitly authorizes states to limit the benefits of new interstate migrants to the levels they would have received had they stayed in their original state.⁵⁵

Challenges to disparate treatment of noncitizens under state law are more likely to succeed, all else being equal, than challenges to federal law. After all, alienage is a suspect classification under the Fourteenth Amendment.⁵⁶ The Supreme Court has identified noncitizens as “a prime example of a ‘discrete and insular’ minority” and therefore, “a state’s

Cir. 1998) (denying Medicaid reimbursement for treating immigrants that had suffered brain injuries so severe that they were incapable of performing basic functions such as feeding themselves).

⁴⁹ 8 U.S.C. § 1615(a) (2012); Molly Redden, *Undocumented Immigrants Avoid Vital Nutrition Services for Fear of Deportation*, THE GUARDIAN (May 9, 2017), <https://www.theguardian.com/us-news/2017/may/09/undocumented-immigrants-wic-nutrition-services-deportation>.

⁵⁰ U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 43, at 2.

⁵¹ PRWORA, Pub. L. No. 104-193, § 403(a), 110 Stat. 2105, 2265 (codified at 8 U.S.C. § 1612 (2000)).

⁵² *Id.* at § 403(b), 110 Stat. at 2265–66.

⁵³ See Steven D. Schwinn, *Toward a More Expansive Welfare Devolution Debate*, 9 LEWIS & CLARK L. REV. 311, 320 (2005).

⁵⁴ *Id.*

⁵⁵ 42 U.S.C. § 604(c) (2012).

⁵⁶ See *Graham v. Richardson*, 403 U.S. 365, 374–75 (1971) (invalidating state-imposed alienage-based classifications).

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 511

alienage-based classifications inherently raise concerns of invidious discrimination and are therefore generally subject to strict judicial scrutiny.”⁵⁷ Even a state’s “otherwise ‘valid interest in preserving the fiscal integrity of [state] programs’ is generally insufficient grounds for a state-imposed burden on alienage to survive an equal protection challenge.”⁵⁸

Congress is not so confined.⁵⁹ When Congress treats noncitizens differently from other groups, courts analyze that action in the context of national immigration policy rather than invidious discrimination.⁶⁰ In light of its plenary power, Congress’s actions must only survive rational basis review.⁶¹

However, this neat distinction between federal and state treatment of noncitizens often fails to aid a court faced with an equal protection challenge to state discrimination of noncitizens in the welfare context.⁶² Put short, most federal public benefits programs are “not solely funded and administered by the federal government.”⁶³ As a result, a state’s alienage-based distinction that uses PRWORA will not “originate purely from state legislation unlike the restrictions struck down in *Graham*.”⁶⁴ Therefore, what should be the standard for such a state law that invokes the federal welfare reform statute?

⁵⁷ *Bruns v. Mayhew*, 750 F.3d 61, 66 (1st Cir. 2014) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938)).

⁵⁸ *Id.*

⁵⁹ *See Mathews v. Diaz*, 426 U.S. 67, 80–85 (1976) (holding that *federal* alienage-based restrictions of Medicare benefits did not violate noncitizen’s Fifth Amendment due process rights).

⁶⁰ *Id.* at 79–80.

⁶¹ *See id.* at 80–85; *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 95 (1976) (“Congress and the President have broad power over immigration and naturalization which the States do not possess.”).

⁶² *Bruns*, 750 F.3d at 66 (“Because Medicaid, unlike Medicare, is not solely funded and administered by the federal government, this case does not fall neatly within the holding of *Mathews*.”). I will set to one side the problem of a constitution that permits a national government to devolve its power to discriminate against noncitizens. *See generally* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 987 (2004) (“[T]he immigration power is an exclusively federal power that must be exercised uniformly.”); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 496 (2001) (arguing that Congress’s 1996 effort to devolve its federal immigration power is unconstitutional). The federal government claims that power can be devolved to state and local actors as well as that, unless preempted, states have some inherent authority to enforce at least certain aspects of immigration law. U.S. DEP’T OF JUSTICE, *Non-Preemption of the Auth. of State & Local Law Enforcement Officials to Arrest Aliens for Immigration Violations*, 26 Op. O.L.C. 1 (2002).

⁶³ *Bruns*, 750 F.3d at 66.

⁶⁴ *Id.*

The Supreme Court suggested an answer in *Plyler* when it reasoned that “if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction.”⁶⁵ That formulation in *Plyler* begs two questions: was there a “federal direction” implicit in PRWORA, and if so, what was it?

The Ninth and Tenth Circuits have held that PRWORA represents a uniform federal policy that states can deny eligibility to some nonimmigrants.⁶⁶ Such a conclusion would suggest that a state’s decision to restrict noncitizens’ access to public benefits pursuant to 8 U.S.C. §§ 1612(b) and 1622(a) need only survive rational basis review.⁶⁷ 8 U.S.C. § 1622(a) reads, “[A] State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien”⁶⁸

It seems odd that Congress could create a uniform federal policy by permitting each state to go its own way. In effect, courts would have to conclude that PRWORA’s devolved discretion is a uniform rule, not its opposite.⁶⁹ Putting to one side whether a Congressional rule permitting *inconsistency* is considered a *consistent* federal direction, the Supreme Court has held that the Equal Protection Clause prohibits state discrimination in actions resulting from “a State’s desire to preserve limited welfare benefits for its own citizens.”⁷⁰ Indeed, state appellate courts in Maryland, Massachusetts, and New York have followed this line of reasoning.⁷¹ Meanwhile, the Supreme Court has rejected previous

⁶⁵ *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982).

⁶⁶ See *Korab v. Fink*, 797 F.3d 572, 583–84 (9th Cir. 2014); *Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004).

⁶⁷ See *Korab*, 797 F.3d at 584 (citing *Plyler* for rational basis standard). But see *Soskin*, 353 F.3d at 1255 (citing *Plyler* for intermediate scrutiny). See also *Bruns*, 750 F.3d at 71 n.3 (citing both cases but declining to reach the issue). Commentators have described these cases as “reflect[ing] a congressional imprimatur theory of state alienage discrimination.” Jenny-Brooke Condon, *The Preempting of Equal Protection for Immigrants?*, 73 WASH. & LEE L. REV. 77, 129–50 (2016) (collecting and discussing post-PRWORA alienage classification cases in state supreme courts and federal appellate courts); see also David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 599 (2017) (concluding that “lower federal courts may be trending toward giving sub-federal laws more deference, with reasoning that seems to channel plenary power analysis”).

⁶⁸ INA § 412, 8 U.S.C. § 1622(a) (2012).

⁶⁹ *Finch v. Commonwealth Health Ins. Connector Auth.*, 946 N.E.2d 1262, 1276–77 (Mass. 2011); *Ehrlich v. Perez*, 908 A.2d 1220, 1240–41 (Md. 2006); *Aliessa ex rel. Fayad v. Novello*, 754 N.E.2d 1085, 1098 (N.Y. 2001).

⁷⁰ *Graham v. Richardson*, 403 U.S. 365, 374 (1971).

⁷¹ *Finch*, 946 N.E.2d at 1276–77; *Perez*, 908 A.2d at 1234–41; *Aliessa*, 754 N.E.2d at 1098; see also Fatma Marouf, *Alienage Classifications and the Denial of Health Care to Dreamers*, 93 WASH. U. L. REV. 1271, 1313 (2016) (pointing out that “[t]he conclusions of these state courts are directly antithetical to the conclusions of the Ninth and Tenth Circuits, creating a division among courts about the proper

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 513

petitions to resolve this question of whether or not the federal government can, in effect, lend the states its more deferential rational basis standard by prescribing a “uniform rule” to follow.⁷²

What is clear is that, under PRWORA, state governments will continue to establish, tweak, and eliminate state-funded programs that provide welfare, food assistance, and medical assistance for immigrants.⁷³ States are far more constrained in their fiscal policy than the federal government.⁷⁴ Forty-nine states are prohibited by statute or their state constitutions to run a deficit.⁷⁵ As a result, states will regularly look to balance their budgets with cuts to services.⁷⁶ Often, these state-funded public benefit programs for immigrants are targets for cuts in the vicissitudes of state budgetary politics.⁷⁷ Federal and state courts have upheld some of these cuts and struck down others.⁷⁸

For example, Medicaid often makes up the largest slice of a state’s budget.⁷⁹ It is conceivable that in some states, immigrants and their allies will be able to organize to beat back proposals to eliminate services, but

standard of review for hybrid statutes that bridge state and federal action”); Mel Cousins, *Equal Protection: Immigrants’ Access to Healthcare and Welfare Benefits*, 12 HASTINGS RACE & POVERTY L.J. 21, 23–26 (2015). The First Circuit summed up this complexity:

[T]his case presents a Gordian knot of federal and state legislation effecting an adverse impact on resident aliens: a federal-state cooperative program (Medicaid), the eligibility for which was subsequently limited on the basis of alienage by federal legislation (PRWORA), to which the state of Maine responded by first creating, and then terminating, supplemental state-funded medical assistance benefits for PRWORA-ineligible aliens only.

Bruns, 750 F.3d at 66.

⁷² Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982).

⁷³ Gregory A. Huber & Thomas J. Espenshade, *Neo-Isolationism, Balanced-Budget Conservatism, and the Fiscal Impacts of Immigrants*, 31 INT’L MIGRATION REV. 1031, 1045 (1997) (“These changes [in PRWORA and IIRIRA] have given new force to state efforts to restrict immigrant use of social services.”).

⁷⁴ See Hammond, *supra* note 42, at 1730 (discussing state budgetary pressures in regards to TANF); Nicholas Bagley, *Federalism and the End of Obamacare*, 127 YALE L.J. F. 1, 9–10 (2017) (“With the exception of Vermont, the states are legally obliged to balance their budgets every year.”).

⁷⁵ *Id.* at 1730 n.19.

⁷⁶ *Id.* at 1744–45.

⁷⁷ Eric Russell, *Maine’s Top Court to Decide Whether Asylum Seekers Can Get Food Stamps*, PORTLAND PRESS HERALD (Nov. 17, 2017), <https://www.pressherald.com/2017/11/17/maines-top-court-to-decide-whether-unemployed-asylum-seekers-can-get-food-stamps/>.

⁷⁸ See *e.g.*, *Pham v. Starkowsky*, 16 A.3d 635 (Conn. 2011).

⁷⁹ PEW CHARITABLE TRUSTS, STATE HEALTH CARE SPENDING ON MEDICAID: A 50-STATE STUDY OF TRENDS AND DRIVERS OF COST (2014), http://www.pewtrusts.org/~media/data-visualizations/interactives/2014/medicaid/downloadables/state_health_care_spending_on_medicaid.pdf; *Medicaid’s Share of State Budgets*, MACPAC, <https://www.macpac.gov/subtopic/medicaids-share-of-state-budgets/>.

not always.⁸⁰ Politicians regularly embrace xenophobic rhetoric and policies to solidify electoral support.⁸¹ The Maine program at issue in *Bruns v. Mayhew* is the most recent, but not the last time the federal courts will struggle to assess the legality of state discrimination of immigrants in public benefit programs.⁸² If anything, the policies and rhetoric of the Trump Administration will embolden political allies in state governments to pursue more statutory changes along these lines.⁸³

C. Immigrant Eligibility Rules Post-PRWORA

Following the passage of PRWORA, Congress restored eligibility for some select populations of immigrants. The Balanced Budget Act of 1997 restored access to SSI and Medicaid for elderly and disabled immigrants.⁸⁴ In 1998, the Agricultural Research, Extension, and Education Reform Act (AREERA) restored SNAP eligibility for immigrant children living in the United States prior to the passage of PRWORA.⁸⁵ The 2002 Farm Bill restored SNAP eligibility for some immigrant children as well as parents after 40 quarters of work status.⁸⁶ Nonetheless, as the House Ways and Means's Green Book stated, "The

⁸⁰ Insights from political science would suggest that immigrant groups will be most successful with Medicaid, given the healthcare industry's reliance on government funding; less successful with food assistance, where they may be able to forge coalitions with grocers, other retailers, and the agriculture industry; and least successful when it comes to cash assistance where the typical allies will be the already-converted, the social service and advocacy groups that already see the benefit in helping families meet basic needs, particularly during economic downturns.

⁸¹ Lisa Sun-Hee Park, *Perpetuation of Poverty Through "Public Charge,"* 78 DENV. U. L. REV. 1161, 1165 n.20 (2001).

⁸² *Bruns v. Mayhew*, 750 F.3d 61 (1st Cir. 2014).

⁸³ Huber & Espenshade, *supra* note 73, at 1048 ("Growing anti-immigrant sentiment has coalesced with forces of fiscal conservatism to make immigrants an easy target of budget cuts."). These forces are also at work in European Union member states. The European Court of Justice recently allowed both the United Kingdom and Germany to restrict immigrant access to public benefits. See *Commission v. United Kingdom* Case C-308/14 (June 14, 2016); *Florin Danov v. Jobcenter Leipzig*, Case C-333/13 (November 11, 2014). See also MARKUS CREPAZ, TRUST BEYOND BORDERS: IMMIGRATION, THE WELFARE STATE, AND IDENTITY IN MODERN SOCIETIES (2008).

⁸⁴ Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997).

⁸⁵ Agricultural Research, Extension, and Education Reform Act of 1998, Pub. L. No. 105-185, 112 Stat. 523 (1998).

⁸⁶ Not all subsequent developments of federal law expanded access. For instance, the Deficit Reduction Act of 2005 tightened eligibility requirements for Medicaid beneficiaries by adding additional requirements for citizenship and immigration documentation. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, 80; see Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 4401, 116 Stat. 134, 333-34.

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 515

basic policy laid out by the 1996 welfare law remains essentially unchanged for noncitizens entering after its enactment.”⁸⁷

Immigrant Eligibility Rules Today

Refugees, asylees, victims of trafficking, Cuban and Haitian immigrants, Iraqi or Afghans with special immigrant status, and individuals granted withholding of deportation or removal are eligible for Medicaid.⁸⁸ Other adult LPRs are eligible after the five-year waiting period.⁸⁹ Immigrants who have LPR status and are either pregnant or under 18 can be covered should a state choose to, or they will also be eligible after the five-year waiting period. DACA recipients and undocumented immigrants remain ineligible,⁹⁰ but as discussed above, Medicaid coverage is mandatory for emergency medical treatment for those populations.⁹¹ Generally, for Medicaid, qualified immigrants include those who came to the U.S. before August 22, 1996 (i.e., before PRWORA) as well as children who came after.⁹²

For SNAP, immigrant children with LPR status, refugees, asylees, members of the armed forces and their dependents, victims of

⁸⁷ STAFF OF H. COMM. ON WAYS & MEANS, 106TH CONG., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 1372 (Comm. Print 2000). See also Claire R. Thomas and Ernie Collette, Unaccompanied and Excluded from Food Security, 31 GEO. IMMIG. L. J 197, 232 (2017) (noting that “since PRWORA’s re-authorization in the Deficit Reduction Act (DRA) of 2005, there has been no congressional push to revisit or amend any of the restrictive Title IV provisions”).

⁸⁸ *Coverage for Lawfully Present Immigrants*, HEALTHCARE.GOV, <https://www.healthcare.gov/immigrants/lawfully-present-immigrants/>.

⁸⁹ *Id.*

⁹⁰ 42 U.S.C. § 1396b(v)(1); INA § 401, 8 U.S.C. § 1611 (2012).

⁹¹ 42 U.S.C. § 1396b(v)(2).

⁹² The Balanced Budget Act of 1997 also provided \$40 billion in federal funding to be used to provide health care coverage for low-income children—generally those in families with income below 200% FPL who do not qualify for Medicaid and would otherwise be uninsured. Title XXI of the Social Security Act, the Children’s Health Insurance Program (CHIP), known from its inception until March 2009 as the State Children’s Health Insurance Program or SCHIP. CHIP funding has been extended through fiscal year 2017 by subsequent legislation, including the Children’s Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 8, 10; the Patient Protection and Affordable Care Act Pub. L. No. 111-148, 124 Stat. 119 (codified at 42 U.S.C. § 18001); and the Medicare Access and CHIP Reauthorization Act of 2015, Pub. L. No. 114-10, 129 Stat. 87. Under CHIP, states may elect to provide coverage to qualifying children by expanding their Medicaid programs, or through a State program separate from Medicaid. A number of States have also been granted waivers to cover parents of children enrolled in CHIP. Moreover, the Affordable Care Act went beyond the “qualified” definition in Medicaid and CHIP to enroll in the marketplace exchanges (100% and 400% FPL) and the immigrants who were lawfully present, but not qualified (0 to 100% FPL).

trafficking, Cuban immigrants, and Haitian immigrants are eligible.⁹³ Adult immigrants with LPR status are eligible after five years.⁹⁴ Asylum applicants, individuals with temporary status (like tourists or students), and undocumented noncitizens are ineligible.⁹⁵ If a household constitutes more than one person, then the income of each member of the household is aggregated for purposes of the income test.⁹⁶ This is true even where other members of the household are not applying for SNAP benefits and, indeed, would not qualify if they did apply. If a household contains any members who are not applying for SNAP benefits, then the SNAP benefits allotted to that household will not cover those non-applicant members, despite the fact that their income is included in the income test. Thus, SNAP applicants' income is considered to include the income earned by each member of their household, even if one or more of those other members are not qualified aliens.⁹⁷

For TANF, generally those immigrants who came before PRWORA are eligible, and those who came after are not.⁹⁸ Unlike Medicaid and SNAP, TANF eligibility rules make no distinction between immigrant children and their parents.⁹⁹ States can create a substitute program for immigrant families to replace the terminated benefits from federal cash assistance, but they can only use funds from their block grant for this purpose if these families have lived in the United States for at least five years.¹⁰⁰ States must use their own funds if they want to cover immigrant families during their first five years of residence. Twenty-eight states responded to this elimination of federal eligibility by creating their own programs, but those programs often reflected tightened conditionality, including requirements for residency and naturalization as well as time limits.¹⁰¹ Several states have chosen to continue to allow immigrant families to receive TANF or SNAP during their first five years of residency.¹⁰²

⁹³ *SNAP Policy on Non-Citizen Eligibility*, U.S. DEP'T OF AGRIC., <https://www.fns.usda.gov/snap/snap-policy-non-citizen-eligibility> (last updated Mar. 24, 2017).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 7 U.S.C. § 2014 (2012).

⁹⁷ *Id.* § 2015(f).

⁹⁸ U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 43.

⁹⁹ *See, e.g.,* Barbara J. Shaklee, *Undocumented Immigrant Children: Legal Considerations Regarding Human Services Needs*, 34 COLO. L 93 (2005).

¹⁰⁰ STAFF OF H. COMM. ON WAYS & MEANS, 106TH CONG., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 1375 (Comm. Print 2000).

¹⁰¹ KAREN C. TUMLIN & WENDY ZIMMERMAN, *IMMIGRANTS AND TANF: A LOOK AT IMMIGRANT WELFARE RECIPIENTS IN THREE CITIES* (2003).

¹⁰² *Mapping Public Benefits for Immigrants in the States*, PEW CHARITABLE TRUSTS

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 517

LPRs, whether they are children or adults, are eligible to receive SSI benefits five years after receiving their green card and after earning 40 work credits from the Social Security Administration (SSA).¹⁰³ Refugees, asylees, victims of trafficking, Cuban immigrants, Haitian immigrants, and Iraqi or Afghan special immigrants are eligible to receive benefits.¹⁰⁴ If only one member of a couple qualifies for SSI, SSA may consider part of the ineligible spouse's income as the eligible spouse's.¹⁰⁵

Consequences for Mixed-Status Families

Public benefits eligibility creates an irrational regime in light of the constitutional commitment to birthright citizenship.¹⁰⁶ Parental status rarely affects children's statutory eligibility or entitlement to these programs, but parental status nevertheless impedes access.¹⁰⁷ Undocumented and legal, but unqualified, immigrants often do not know their children may be eligible for public benefits. They face poorly trained agency workers who do not know how to properly handle "mixed-status" applications. Parents may not have the required documentation for their children, and, above all, they are deterred by the threat of detention and deportation.¹⁰⁸

(Sept. 24, 2014), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2014/09/mapping-public-benefits-for-immigrants-in-the-states>.

¹⁰³ *Supplemental Security Income (SSI) for Noncitizens*, U.S. SOC. SEC. ADMIN. (Aug. 2017), <https://www.ssa.gov/pubs/EN-05-11051.pdf>.

¹⁰⁴ 42 U.S.C. § 1382c(a)(1) (2012); 8 U.S.C. § 1611 (2012).

¹⁰⁵ *Supplemental Security Income (SSI) Income*, U.S. SOC. SEC. ADMIN. (2017), <https://www.ssa.gov/ssi/text-income-ussi.htm>.

¹⁰⁶ U.S. CONST. amend. XIV, § 1 (stating that persons born in the United States and subject to its jurisdiction obtain citizenship). *See* *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (noting that the Fourteenth Amendment, "in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States"). It is worth noting that some individuals who are born abroad may also acquire citizenship at birth. *See* INA § 301(c), 8 U.S.C. § 1401(c) (a child born abroad to two U.S. citizen parents acquires U.S. citizenship provided that one of the parents had a residence in the United States or one of its outlying possessions prior to the child's birth); *id.* § 1401(g) (a child born abroad to one U.S. citizen parent and one alien parent acquires U.S. citizenship at birth); *id.* § 1409(a) (a child born abroad out of wedlock to a U.S. citizen father acquires citizenship if the child meets the conditions provided); *id.* § 1409(c) (a child born abroad out of wedlock to a U.S. citizen mother acquires citizenship if the mother was a U.S. citizen at the time of the child's birth and if the mother was previously physically present in the United States or its territories for a continuous period of one year).

¹⁰⁷ Paula Fomby & Andrew J. Cherlin, *Public Assistance Use Among U.S.-Born Children of Immigrants*, 38 INT'L MIGRATION REV. 584, 591, 599 (2004) (using sample of 2,400 low-income households from three U.S. cities and finding that children with foreign-born caregivers are less likely than children with native-born caregivers to receive benefits from TANF, SSI, SNAP, Medicaid, and WIC).

¹⁰⁸ *See generally* HIROKAZU YOSHIKAWA, IMMIGRANTS RAISING CITIZENS:

Without public benefits to stabilize families in crisis, children will go without food, care, and medical services, increasing the risks of severe hardship, hunger, and homelessness. This inconsistent eligibility within mixed-status families could be solved if nonqualified parents naturalized, but that is not as easy or as desirable as some suspect.¹⁰⁹ Furthermore, as we will see in Part II, immigrant adults in the U.S. have reason to suspect that participating in public benefit programs can have negative consequences for their immigration status.

II. PUBLIC CHARGE: IMMIGRATION CONSEQUENCES OF WELFARE USE

Welfare eligibility rules for immigrants do not exist in a vacuum. Rather, these eligibility rules are inextricably connected to immigration enforcement through the longstanding doctrine of public charge. This Part relates the history of that doctrine, the current state of the law, and the Trump Administration's interest in vastly expanding liability for immigrant communities.

A. *Public Charge*

Concerns about how recently arrived immigrants would support themselves in America date back to the founding era.¹¹⁰ Indeed, American municipalities and states repurposed the poor law regime the U.S. borrowed from Britain as a proto-regulatory regime for immigration enforcement.¹¹¹ Just as British municipalities could expel recent internal

UNDOCUMENTED PARENTS AND THEIR YOUNG CHILDREN (2011) (documenting challenges faced by mixed-status families in New York City). In 2013, ICE issued a Parental Interests Directive that created additional protections for parents and legal guardians in ICE custody and for those who had been deported, as well as increased coordination between immigration enforcement and state and local child welfare agencies. *See also Parental Interests Directive Fact Sheet*, U.S. IMMIG. & CUSTOMS ENF'T, <https://www.ice.gov/doclib/about/offices/ero/pdf/parentalInterestsFactsheet.pdf>.

¹⁰⁹ *See* INA § 316, 8 U.S.C. § 1427 (setting out the requirements for naturalization). Incidentally, many lawful permanent residents have not pursued citizenship. *See also* Ana Gonzalez-Barrera et al., *The Path Not Taken: Two-Thirds of Legal Mexican Immigrants Are Not U.S. Citizens*, PEW RESEARCH CTR. (Feb. 4, 2013), http://www.pewhispanic.org/files/2013/02/Naturalizations_Jan_2013_FINAL.pdf [<https://perma.cc/H8ZD-TAHB>] (finding that “[i]n 2011 Mexican immigrants have a comparatively lower rate of naturalization, 36% of those eligible, compared with 68% for all non-Mexican immigrants”).

¹¹⁰ *See* HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* 43, 45 (2017); *see also* SAM WHITE, *A COLD WELCOME: THE LITTLE ICE AGE AND EUROPE'S ENCOUNTER WITH NORTH AMERICA* 85 (2017) (explaining how British population growth and elite concerns about vagrancy and poverty, in part, made colonies in North America more enticing to the British government).

¹¹¹ HIROTA, *supra* note 110, at 43, 45.

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 519

migrants in the United Kingdom, American states and cities expelled recent arrivals to the United States on the grounds that these immigrants could not support themselves.¹¹² Eager to rid their communities of those that would rely on public support, governments resorted to physical expulsion.

Congress first enacted a public charge provision in 1882, barring “any person unable to take care of himself or herself without becoming a public charge.”¹¹³ In 1903, Congress extended public charge to the deportation context.¹¹⁴ Congress has modified both the admissibility and removability provisions of public charge over the last century to promote the “national policy” that “aliens within the Nation’s borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations. . . .”¹¹⁵

The Immigration and Nationality Act (INA) makes deportable any “alien who, within five years from the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry. . . .”¹¹⁶ Case law has limited this provision to the rare cases in which (a) the public assistance program imposed on the noncitizen or other persons an obligation to repay the agency and (b) the agency’s demand for reimbursement has not been satisfied.¹¹⁷

Currently, it is exceedingly rare for immigration authorities to use public charge as a ground for deportation. There were only eight public charge deportations from 1961 to 1970, only 31 from 1971 to 1980, and 12 from 1981 to 1990.¹¹⁸ But public charge inadmissibility is widely used.¹¹⁹ Consular officers have broad discretion in disqualifying visa applicants under this provision: any alien is inadmissible who “in the

¹¹² *Id.* at 43.

¹¹³ Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 316. *See* *Ekiu v. United States*, 142 U.S. 651 (1892) (upholding exclusion of Japanese woman as a public charge).

¹¹⁴ Immigration Act of 1903, ch. 1012, § 20, 32 Stat. 1213. *See also* *Gegiow v. Uhl*, 239 U.S. 3 (1915) (holding that noncitizen could not be excluded as a public charge on ground that local labor market was “overstocked”). The 1903 statute applied to immigrants who became public charges within two years of entry. The modern statute extends to immigrants who become public charges within five years.

¹¹⁵ PRWORA § 400(2)(A), 8 U.S.C. § 1601(2)(A) (2012).

¹¹⁶ INA § 237(a)(5), 8 U.S.C. § 1227(a)(5).

¹¹⁷ *See* *Matter of B*, 3 I. & N. Dec. 323, 326 (B.I.A. 1948).

¹¹⁸ James R. Edwards, Jr., *Public Charge Doctrine: A Fundamental Principle of American Immigration Policy*, CTR. FOR IMMIGR. STUD. (May 1, 2001), <https://cis.org/Public-Charge-Doctrine-Fundamental-Principle-American-Immigration-Policy>.

¹¹⁹ INA § 212, 8 U.S.C. § 1182; INA § 237, 8 U.S.C. § 1227; *see Evidence Which May Be Presented to Meet the Public Charge Provisions of the Law*, U.S. DEP’T OF STATE, https://lv.usembassy.gov/wp-content/uploads/sites/58/2016/08/en_k_visas_financial_support_evidence.pdf.

opinion of the consular officer . . . or in the opinion of the Attorney General . . . is likely at any time to become a public charge.”¹²⁰

When Congress passed PRWORA, it also altered public charge doctrine. Under 8 USC § 1183a, an immigrant’s sponsor became liable under the enforceable affidavit of support for any means-tested benefits provided to the sponsored immigrant.¹²¹ Subsequent regulations limited those “means-tested” benefits to the four discussed in this Article, plus medical assistance through Children’s Health Insurance Program (CHIP).¹²²

For TANF, if a qualified immigrant has a sponsor, a state administering a TANF program must include a portion of the sponsor’s income in the qualified immigrant’s income for purposes of determining that alien’s eligibility to receive benefits.¹²³ For SSI, any qualified immigrant’s income and resources shall be deemed to include the income and resources of his sponsor and such sponsor’s spouse.¹²⁴ “If only one member of a couple qualifies for SSI, [SSA] may consider part of the ineligible member’s income as the eligible spouse’s.”¹²⁵ Furthermore, any qualified immigrant’s income and resources shall be deemed to include the income and resources of his sponsor and such sponsor’s spouse.¹²⁶

Currently, public charge determinations in the admissibility context must assess an immigrant’s age, health, family status, financial status, resources, education, and skills. In addition to those requirements, family-sponsored immigrants must submit an enforceable affidavit of support.¹²⁷ This determination must be prospective and based on the totality of the circumstances, articulating the reasons for the officer’s determination.¹²⁸

In removal, an immigrant is deportable only if he has become a public charge within the first five years after entry from causes not affirmatively shown to have arisen since entry.¹²⁹ Unlike the totality of the circumstances test for admissibility,¹³⁰ the public charge test for

¹²⁰ INA § 212, 8 U.S.C. § 1182.

¹²¹ INA § 213A, 8 U.S.C. § 1183a.

¹²² Federal Means-Tested Public Benefits Paid by the Social Security Administration, 62 Fed. Reg. 45,284 (Aug. 26, 1997).

¹²³ 42 U.S.C. § 608(f) (2012).

¹²⁴ 42 U.S.C. § 1382c(f)(3).

¹²⁵ SOC. SEC. ADMIN., A GUIDE TO SUPPLEMENTAL SECURITY INCOME (SSI) FOR GROUPS AND ORGANIZATIONS 13 (2018).

¹²⁶ 42 U.S.C. § 1382c(f)(3).

¹²⁷ INA § 212, 8 U.S.C. § 1182(a)(4)(B).

¹²⁸ Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,690 (Mar. 26, 1999).

¹²⁹ INA § 237(a)(5), 8 U.S.C. § 1227(a)(5).

¹³⁰ Matter of Harutunian, 14 I. & N. Dec. 583, 588 (B.I.A. 1974).

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 521

removability is a three-part test that “(1) [t]he State or other governing body must, by appropriate law, impose a charge for the services rendered to the alien”; “(2) [t]he authorities must make demand for payment of the charges upon those persons made liable under State law”; and “(3) there must be a failure to pay for the charges.”¹³¹

Subsequent agency action limited public benefits for the purposes of public charge doctrine only when an immigrant became “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.”¹³² Thus, public charge determinations only look to an individual’s receipt of TANF, SSI, or institutionalization through Medicaid. Importantly, SNAP and the typical use of Medicaid are excluded.

B. Trump Administration & Public Charge

The Trump Administration has considered multiple ways to upend longstanding public charge doctrine including through Executive Orders, instructions to Consular officials, and new regulations. At this writing, it appears that this administration has decided to pursue this agenda via a notice of proposed rulemaking by the Department of Homeland Security. Before analyzing that notice and its ramifications, it is worth detailing the Trump Administration’s other efforts (and false starts) to date.

i. The Leaked Draft Executive Order

In the first weeks of the Trump Administration, the Washington Post and Vox obtained copies of a leaked draft Executive Order dated January 23, 2017.¹³³ The Executive Order, if signed, would expand the definition

¹³¹ Matter of B, 3 I. & N. Dec. 323, 326 (B.I.A. 1948).

¹³² Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. at 28,689.

¹³³ Memorandum from Andrew Bremberg to President Trump (Jan. 23, 2017), <https://s3.amazonaws.com/aws.upl/nwica.org/executive-order-on-protecting-taxpayer-resources-by-ensuring-our-immigration-laws-promote-accountability-and-responsibility.pdf>; Abigail Hauslohner & Janell Ross, *Trump Administration Circulates More Draft Immigration Restrictions, Focusing on Protecting U.S. Jobs*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/world/national-security/trump-administration-circulates-more-draft-immigration-restrictions-focusing-on-protecting-us-jobs/2017/01/31/38529236-e741-11e6-80c2-30e57e57e05d_story.html?utm_term=.136ea4e3f02f; Helen Klein Murillo, *The Presidential Memorandum and the “Public Charge” Law*, LAWFARE INST. (Mar. 7, 2017), <https://lawfareblog.com/presidential-memorandum-and-public-charge-law>; see also Emma Green, *First, They Excluded the Irish*, THE ATLANTIC (Feb. 2, 2017), <https://www.theatlantic.com/politics/archive/2017/02/trump-poor-immigrants-public-charge/515397/>.

of public charge and also embolden enforcement actions against “sponsors” who submit financial affidavits on behalf of immigrants.¹³⁴

Among its many provisions, the draft Executive Order would require the Department of Homeland Security (DHS) to rescind “any field guidance concerning the inadmissibility or deportability of aliens on the ground that they are likely to be or have become public charges . . . and replace it immediately with new field guidance consistent with the provisions of this order.”¹³⁵ Presumably, this provision is intended to rescind the 1999 Field Guidance that restricts public charge determinations to only TANF, SSI, and institutionalization for long-term care.

The draft Executive Order also would require DHS to propose, through notice and comment rulemaking, two rules.¹³⁶ First, the draft Executive Order directs DHS to propose a rule that provides standards for inadmissibility and deportability on public charge grounds if an immigrant is “likely to receive” for inadmissibility and “does receive” for deportability “public benefits for which eligibility or amount is determined in any way on the basis of income, resources, or financial need.”¹³⁷

Second, the draft Executive Order would direct the DHS to propose a rule that would define “means-tested public benefits” under 8 U.S.C. § 1183a and require reimbursement from sponsors of immigrants who have signed affidavits of support under 8 U.S.C. § 1183a(a)(1) “to include all Federal programs for which eligibility for benefits, or the amount of such benefits, are determined in any way on the basis of income, resources, or financial aid.”¹³⁸ The draft Executive Order also would direct the heads of all executive departments and agencies “to seek reimbursement from sponsors who signed legally enforceable affidavits . . . for the costs of Federal means-tested public benefits . . . and bring court actions against or refer to the Attorney General those sponsors if necessary to compel reimbursement.”¹³⁹ These agencies would also

¹³⁴ Think tanks promptly began analyzing the order’s effects. See Samuel Hammond & Robert Orr, *Redefining “Public Charge”: Gauging the Threat to Noncitizens from Trump’s Draft EO*, NISKANEN CTR., https://niskanencenter.org/wp-content/uploads/2017/02/Redefining_Public_Charge.pdf; Michael Fix & Randy Capps, *Leaked Draft of Possible Trump Executive Order on Public Benefits Would Spell Chilling Effects for Legal Immigrants*, MIGRATION POLICY INST. (Feb. 2017), <https://www.migrationpolicy.org/news/leaked-draft-possible-trump-executive-order-public-benefits-would-spell-chilling-effects-legal>.

¹³⁵ Memorandum from Andrew Bremberg to President Trump, *supra* note 133, at 3.

¹³⁶ *Id.* at 3–4.

¹³⁷ *Id.* at 3.

¹³⁸ *Id.* at 4.

¹³⁹ *Id.* at 5.

“inform the Department of Homeland Security whenever they provide any alien with Federal means-tested public benefits” as defined in the draft Executive Order.¹⁴⁰

ii. Revisions to the Foreign Affairs Manual

On January 3, 2018, the State Department revised the public charge section of its Foreign Affairs Manual.¹⁴¹ The Foreign Affairs Manual is a guide for U.S. consular and embassy officials, which, among other things, instructs them on how to make decisions about whether a noncitizen can enter the United States and under what status category, including which immigrant visa.

The revisions to the Foreign Affairs Manual do not (and could not) change the most important aspects of public charge determination, i.e. which public benefits are considered in the analysis *and* how the expected use of public benefits should be weighted in the admissibility determination. The revisions do not expand the types of public benefits, preserving the State Department official’s exclusive focus on cash assistance and long-term care. The revisions also maintain that the official must consider the probable use of public benefits in light of the totality of the circumstances, which includes consideration of each factor, including “a) age, b) health, c) family status, d) assets, resources, and financial status, and e) education and skills.”¹⁴²

However, the Foreign Affairs Manual revisions do provide more precise guidance on each of these factors. For instance, applicants with a health condition may be asked to provide proof either of health insurance or the ability to pay health-related expenses while in the U.S. And the revised instructions allow State Department officials to consider receipt of *non-cash* benefits to be considered as part of the “totality of the circumstances” test if such a fact is relevant in predicting whether the person will rely on cash assistance or long-term care in the future.

Furthermore, the revisions to the Foreign Affairs Manual change how officials at U.S. embassies and consulates should treat a sponsor’s affidavit of support (the I-864 Form). Previous State Department practice analyzed the sufficiency of resources identified in the Form I-864. FAM 302.8-2(B) used to contain the following: “A properly filed, non-fraudulent Form I-864 in those cases where it is required, should normally be considered sufficient to meet the INA 212(a)(4) requirements and satisfy the totality of the circumstances analysis.” The

¹⁴⁰ *Id.* at 6.

¹⁴¹ U.S. DEP’T OF STATE, “Public Charge” Update to 9 FAM 302.8 (Jan. 4, 2018) https://fam.state.gov/fam/09FAM/09FAM030208.html#M302_8. See also NAT’L IMMIG. L. CTR., Changes to “Public Charge” Instructions in the U.S. State Department’s Manual (Feb. 8, 2018). <https://www.nilc.org/issues/economic-support/public-charge-changes-to-fam/>.

¹⁴² 9 FAM 302.8-2(B)(2)(a)(1).

Foreign Affairs Manual also used that language in FAM 302.8-2(B) where it informed consular officers to accept the Form I-864 as satisfying the public charge analysis and not to question the credibility of the sponsor “unless there are significant public charge concerns relating to the specific case, such as if the applicant is of advanced age or has a serious medical condition.” Now, 9 FAM 302.8-2(B)(3), as revised provides that a “properly filed and sufficient, non-fraudulent” Affidavit of Support by itself may not satisfy INA 212(a)(4)’s public charge requirement. A properly filed and sufficient Affidavit of Support remains essential, but it does not preclude denial on public charge grounds. Officers now must consider these affidavits as one factor in the totality of the applicant’s circumstances.

Finally, the revisions also change how embassy and consulate staff consider the use of public benefits by family members. The new instructions allow State Department officials to consider whether an applicant’s family member has received public benefits as part of the public charge determination. This factor can be overcome “if the applicant can demonstrate that their prospective income and assets and the income and assets of others in the family are sufficient to support the family at 125% FPL.”¹⁴³

Recall that these changes cannot affect the public charge determination for people already residing in the United States who are seeking to adjust to lawful permanent resident status since that determination is made not by the State Department, but by USCIS. And since public charge does not apply to legal immigrants seeking U.S. citizenship, these instructions cannot apply to lawful permanent residents seeking to naturalize. Rather, these changes to the Foreign Affairs Manual only impact non-citizens seeking admission to the United States via consular processing in their home country.

However, the revisions to the Foreign Affairs Manual may anticipate coming changes to the federal regulations that govern public charge analysis in both admissibility and deportability determinations. As discussed below, the Foreign Affairs Manual changes track to the leaked notice of proposed rulemaking from the Department of Homeland Security.¹⁴⁴

iii. The Leaked Notice of Proposed Rulemaking

The Department of Homeland Security has notified the Office of Management and Budget (OMB) that it will propose regulations on “public charge” provisions of immigration law through a Notice of

¹⁴³ NAT’L IMMIG. L. CTR., Changes to “Public Charge” Instructions in the U.S. State Department’s Manual (Feb. 8, 2018), <https://www.nilc.org/issues/economic-support/public-charge-changes-to-fam/>.

¹⁴⁴ Draft NPRM at 53–90 (covering much the same ground as the FAM changes, but in greater detail).

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 525

Proposed Rulemaking (NPRM).¹⁴⁵ Homeland Security’s notice to OMB indicates that the NPRM will be published later in 2018. On February 8, 2018, media outlets began reporting on and published a leaked copy of the draft NPRM.¹⁴⁶ On March 28, 2018, the Washington Post published a more recent draft of the NPRM with a preamble to the proposed rule.¹⁴⁷ The Washington Post reported that, according to “a person with knowledge of the deliberations,” “the draft [NPRM] is essentially complete and awaiting final approval by Homeland Security Secretary Kirstjen Nielsen.”¹⁴⁸

The draft NPRM the Washington Post obtained would create a new definition of public benefits in public charge determinations. The proposed regulation would include but not be limited to: a) SSI, b) TANF, c) State or local cash benefit programs (i.e. General Assistance), d) “[a]ny other Federal public benefits for purposes of maintaining the applicant’s income,” e) nonemergency Medicaid benefits, f) subsidized healthcare, g) SNAP, h) WIC, i) CHIP, j) housing assistance under the McKinney-Vento Homeless Assistance Act or the Housing Choice Voucher Program (i.e. Section 8), k) means-tested energy benefits such as the Low Income Home Energy Assistance Program (LIHEAP), (l) institutionalization for both long-term and short-term care at government expense, m) the earned income tax credit (EITC) and similar refundable tax credits, when the credit exceeds the alien’s tax liability; and n) “[a]ny other public benefit, as described in § 212.21 except for those public benefits described in 8 CFR 212.24.”¹⁴⁹ In effect,

¹⁴⁵ *Inadmissibility and Deportability of Public Charge Grounds*, EXEC. OFFICE OF THE PRESIDENT (2017), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1615-AA22>.

¹⁴⁶ Dara Lind, *Exclusive: Trump’s Draft Plan to Punish Legal Immigrants for Sending US-Born Kids to Head Start*, VOX (Feb. 8, 2018), <https://www.vox.com/2018/2/8/16993172/trump-regulation-immigrants-benefits-public-charge>; Yeganeh Torbati, *Exclusive: Trump Administration May Target Immigrants Who Use Food Aid, Other Benefits*, REUTERS (Feb. 8, 2018), <https://www.reuters.com/article/us-usa-immigration-services-exclusive/exclusive-trump-administration-may-target-immigrants-who-use-food-aid-other-benefits-idUSKBN1FS2ZK>.

¹⁴⁷ Nick Miroff, *Trump Proposal Would Penalize Immigrants who Use Tax Credits and Other Benefits*, WASH. POST (March 28, 2018), https://www.washingtonpost.com/world/national-security/trump-proposal-would-penalize-immigrants-who-use-tax-credits-and-other-benefits/2018/03/28/4c6392e0-2924-11e8-bc72-077aa4dab9ef_story.html?noredirect=on&utm_term=.fbb3cb25a51f

¹⁴⁸ *Id.*

¹⁴⁹ Draft NPRM at 210–11 (proposed 8 C.F.R. § 212.23). The benefits excluded from this new definition are a) Social Security’s Old-Age, Survivors, and Disability Insurance (OASDI) benefits, b) veteran’s benefits, c) government pension benefits, d) government employee health insurance, e) government employee transportation benefits, f) unemployment insurance, g) worker’s compensation, h) Medicare benefits, (“unless the premiums are partially or fully paid by a government agency”), i) state disability insurance, j) government loans, k) in-state college tuition and any

the draft NPRM would expand the definition of public benefits in public charge determinations to nearly every federal (and many state) means-tested benefits with the exception of Head Start.

The draft NPRM also identifies the “primarily dependent on the government” standard as “[o]ne of the principal problems with the current definition of public charge.”¹⁵⁰ In the NPRM, DHS rejects the primary dependence standard in which the immigration official must find “an applicant for admission or adjustment of status is 50% or more dependent on the government.”¹⁵¹ Instead, relying on dictionary definitions and a skimpy and selective reading of legislative history and caselaw, DHS asserts that “a public charge is one who is supported at public expense, i.e., one who uses or receives public benefits.”¹⁵² Conflating public benefit use with dependence is not new to federal law.

In addition to expanding the definition of public benefits to include more programs and mere use, the draft NPRM expands it still further by encompassing use of public benefits by family members “includ[ing], but not limited to the alien’s spouse, parent, child, legal ward or person who is under a legal guardianship.”¹⁵³ DHS maintains that “[t]hese types of relationships between the alien and other people are relevant to [its] consideration of the alien’s assets, resources, and financial status, and frequently family status as well.”¹⁵⁴ Considering the number of citizen children and the number of legal immigrant children who access public benefits in the United States, this proposed regulatory provision could drastically expand public charge liability.¹⁵⁵

The draft NPRM also identifies “factors that DHS has determined will generally weigh heavily in a public charge determination.”¹⁵⁶ DHS enumerates several “heavily weighed negative factors,” such as whether the individual “is currently using or receiving one or more public benefits,” “has used or received one or more public benefits within the last 36 months,” or “has a medical condition and is unable to show evidence of unsubsidized health insurance” or some other means to pay

subsidized or unsubsidized government student loans, l) Head Start, m) benefits under the Individuals with Disabilities Education Act, and n) non-refundable tax credits, and refundable tax credits that are neither means- tested nor intended to help the individual beneficiary meet basic living.

¹⁵⁰ Draft NPRM at 42.

¹⁵¹ *Id.*

¹⁵² *Id.* at 42–43.

¹⁵³ *Id.* at 44.

¹⁵⁴ *Id.* at 45.

¹⁵⁵ Samantha Artiga and Anthony Damico, *Nearly 20 Million Children Live in Immigrant Families that Could Be Affected by Evolving Immigration Policies*, KAISER FAM. FOUND. (April 18, 2018).

¹⁵⁶ *Id.* at 208.

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 527

for treatment.¹⁵⁷ The only two “heavily weighed positive factors” are if the individual “has financial assets, resources, and support of at least 250[% FPL]” or income from employment at the same level.¹⁵⁸

iv. An Initial Appraisal of the Leaked and Proposed Changes

What will happen if President Trump signs the public charge executive order or the Department of Homeland Security publishes the NPRM and eventually promulgates new regulations? While a signed executive order would mark a major departure from settled public charge doctrine, there are reasons to be skeptical of its practical effect, at least immediately. Much of the action ordered by the President, including the almost all-encompassing definition of public benefits, would require notice and comment rulemaking under the Administrative Procedure Act.¹⁵⁹ That is why the NPRM is more likely to alter public charge doctrine than a signed executive order would.

Second, a signed executive order would not alter the fact that public charge determinations involve a totality of the circumstances test that the President cannot alter. Unlike a conviction for welfare fraud (or any federal felony conviction, for that matter), mere use of a welfare program does not guarantee inadmissibility or deportability. Congress has laid out the other factors that immigration judges must consider.

Even if the Department of Homeland Security promulgated an expanded definition of public benefits, fewer immigrants would experience expanded liability than one might think. Federal statutes exempt some immigrants from public charge considerations (and the draft NPRM acknowledges these exemptions): Refugees, asylees, survivors of trafficking and other serious crimes, VAWA-petitioners, individuals with special immigrant juvenile status, and several other categories of noncitizens.¹⁶⁰ Others do not qualify for public benefits during their first five years in the country—the same period of time contemplated in the public charge “look back.”¹⁶¹ Indeed, the fact that most immigrants are subject to the “five-year bar” was lost on the President and his advisers.¹⁶²

¹⁵⁷ *Id.* 212.22(c) (1) (ii)–(iii).

¹⁵⁸ *Id.* 212.22(c) (2) (i)–(ii).

¹⁵⁹ 5 U.S.C. § 553(c) (2012).

¹⁶⁰ See Draft *NPRM* at 38–41.

¹⁶¹ Memorandum from Andrew Bremberg to President Trump, *supra* note 133, at 4.

¹⁶² In a June 21, 2017 speech in Cedar Rapids, Iowa, President Trump said, “The time has come for new immigration rules which say that those seeking admission into our country must be able to support themselves financially and should not use welfare for a period of at least five years,” and that he would propose legislation “very shortly.” Miriam Valverde, *Trump Says ‘Time Has Come’ for Law Restricting Federal Assistance to Immigrants. It Already Exists*, POLITIFACT (June 27, 2017), <http://www.politifact.com/truth-o-meter/article/2017/jun/27/trump-says-time-has-come-immigration-law-barring-i/>. *But see* PRWORA, Pub. L. No. 104-193, § 403(a), 110 Stat.

Perhaps the greatest challenge to implementing such an executive order is sheer practicality. Despite build-ups in personnel, Immigration and Customs Enforcement (ICE) simply does not have the agents to methodically apprehend and detain millions of public benefits recipients.¹⁶³ Even with more personnel, it is not clear that ICE offices or agents in the field would prioritize apprehending law-abiding residents over other populations.

This reality returns us to the odd feature of public charge as a focus of concern for the Trump Administration. Public charge doctrine in deportations only applies to in-status immigrants who are seeking to adjust to lawful permanent residency. As a legal matter, public charge has nothing to do with undocumented individuals. Rather, it is one factor in the determination of whether an individual should be permitted to obtain LPR status.¹⁶⁴ In other words, it is hard to imagine how ICE could prioritize this population given this administration's purported priorities.

Relatedly, federal immigration enforcement authorities would most likely need the cooperation of state governments, the custodians of much of the information on public benefits recipients, regardless of citizenship status. As laid out in Part I, many public benefit programs in the United States have cooperative design features where the federal and state governments jointly administer the program. In the case of Medicaid and SNAP, those programs heavily involve both federal and state governments. TANF is almost entirely state-run; SSI is almost entirely federal. While some of this data is reported in bulk and in individualized form to the federal government, from a law enforcement perspective, the data itself may not be the most useful. Moreover, most public benefits are not considered debts requiring repayment unless the individual receiving

2105, 2265 (codified at 8 U.S.C. § 1612 (2000)). The inaccuracy of this statement was not lost on journalists. *See, e.g.*, Robert Farley et al., *Fact Check: Trump Makes Misleading Claims at Iowa Rally*, USA TODAY (June 23, 2017), <https://www.usatoday.com/story/news/politics/2017/06/23/fact-check-trump-makes-misleading-claims-iowa-rally/103131784/>; Linda Qui, *In One Rally, 12 Inaccurate Claims from Trump*, N.Y. TIMES (June 22, 2017), <https://www.nytimes.com/2017/06/22/us/politics/factcheck-donald-trump-iowa-rally.html?mtrref=www.google.com&gwh=8C19E035F46705EC8CBEB4752B431E01&gwt=pay>; Ali Vitali, *Trump: Immigrants Should Not Get Welfare for at Least Five Years*, NBC NEWS (June 21, 2017), <https://www.nbcnews.com/politics/white-house/trump-immigrants-should-not-get-welfare-least-five-years-n775336>; Mallory Shelbourne, *Trump Wants to Keep New Immigrants from Getting Welfare—Which Is Already the Law*, THE HILL (June 21, 2017), <http://thehill.com/homenews/administration/338901-trumps-suggests-creating-law-that-has-been-enacted-since-1996>.

¹⁶³ *See, e.g.*, Lisa Rein, *Trump Plan to Hire 15,000 Border and Immigration Personnel Isn't Justified, Federal Watchdog Says*, WASH. POST, (Aug. 2, 2017), https://www.washingtonpost.com/politics/trump-plan-to-hire-15000-border-and-immigration-personnel-isnt-justified-federal-watchdog-says/2017/08/02/c9345136-77a1-11e7-8839-ec48ec4cae25_story.html?utm_term=.0f5b3341dcc8.

¹⁶⁴ For admissibility, the public charge determination is one factor in whether to allow an individual to enter the United States.

the benefits is a sponsored immigrant.¹⁶⁵ The federal government would need state governments' cooperation to pursue recipients and their sponsors. In Part III, I discuss how complicated procuring that data from state governments could be.

On the other hand, in some ways, this draft Executive Order has already had an impact.¹⁶⁶ The leaked draft Executive Order on public charge, along with numerous other Trump Administration news relating to immigration, has been heavily covered in the media. Among advocates and service providers, there is concern that immigrant families who are in-status and legally eligible for public benefits are withdrawing from these programs out of concern that it increases their exposure to immigration enforcement.¹⁶⁷ And if the proposed regulations in the draft NPRM become law and are not successfully challenged in federal court, public charge doctrine could fundamentally reshape how we provide basic services in the United States, not just to immigrants, but to citizens who happen to have foreign-born parents.

III. IMMIGRATION ENFORCEMENT AND PUBLIC BENEFITS DATA

Another emerging area of concern for immigrant communities is to what extent the federal government can use data gathered to administer public benefits programs to pursue immigration enforcement actions. Advocates for immigrant communities have related this concern from immigrant families. In my own practice in Chicago, my legal aid organization received requests from healthcare providers, food pantries, and community-based organizations regarding what legal constraints, if any, prevent ICE from requesting public benefits data from state agencies.

Once again, this potential repurposing of public benefits data for immigration enforcement reflects the reality of mixed-status families. Immigrants and their families have expressed concern that undocumented adults who have enrolled their in-status and/or citizen

¹⁶⁵ Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,690, 28,691 (Mar. 26, 1999).

¹⁶⁶ Emily Baumgaertner, *Spooked by Trump Proposals, Immigrants Abandon Public Nutrition Services*, N.Y. TIMES (March 6, 2018) <https://www.nytimes.com/2018/03/06/us/politics/trump-immigrants-public-nutrition-services.html>; Kristina Johnson, *In Trump Era, the Long Fight Against Hunger Is Even Tougher*, KQED (Nov. 14, 2017), <https://www.kqed.org/bayareabites/2017/11/14/in-trump-era-the-long-fight-against-hunger-is-even-tougher/> (recounting that “[s]ome people are afraid that, by signing up, they will be added to a national database and tracked down by immigration services if they or someone in their family is undocumented” and how “[m]any also fear that by receiving food assistance they would count as a ‘public charge,’ and thus be disqualified [from] citizenship”).

¹⁶⁷ Artiga & Damico, *supra* note 155; Wendy E. Parmet and Elizabeth Ryan, *New Dangers For Immigrants And The Health Care System*, HEALTH AFFAIRS (April 20, 2018).

family members in public benefits could have increased exposure to federal immigrant authorities.

As we will see, there are some protections in federal law that prevent federal and state officials from turning over individualized public benefits data to federal immigration authorities. However, these protections vary across programs.

A. *The Confidentiality of Public Benefits Data*

Federal law prohibits federal, state, or local government officials from restricting the transmission of certain information to immigration authorities.¹⁶⁸ Federal law also contains a similar provision that similarly restricts it to state and local governments.¹⁶⁹

In a different context from public benefits, the U.S. Department of Commerce grappled with how these two statutory provisions interact with 13 U.S.C. § 9(a), which prohibits Commerce from disclosing census information.¹⁷⁰ In a general counsel memorandum opinion, Commerce concluded that 8 U.S.C. §§ 1373 and 1644 “displace conflicting state or local non-disclosure laws, even if they have been enacted by statute or ordinance.”¹⁷¹ As applied to federal agencies, those statutes, Commerce

¹⁶⁸ Specifically, 8 U.S.C. § 1373(a) (2012) states,

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

Note that, with the passage of the Homeland Security Act of 2002, the Immigration and Naturalization Service (INS) ceased to exist and most of its functions were transferred to three new entities: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and the U.S. Customs and Border Protection (CBP). U.S. CITIZENSHIP & IMMIGRATION SERVS., OVERVIEW OF INS HISTORY 11 (2012). Many of the statutes and regulations refer to INS.

¹⁶⁹ 8 U.S.C. § 1644 states, “Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”

¹⁷⁰ Memorandum Opinion from Randolph D. Moss, Acting Assistant Attorney Gen., Office of Legal Counsel, to General Counsel, U.S. Dep’t of Commerce 1, 5 (May 18, 1999). Section 9(a) reads:

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

¹⁷¹ *Id.* at 7.

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 531

reasoned, also “may be comfortably construed to limit the discretionary authority of federal officers or employees, or federal entities like administrative agencies, to adopt disclosure prohibitions or restrictions; federal officials or entities generally may exercise discretionary authority of this sort only to the extent that Congress allows by statute.”¹⁷² However, Commerce did not go so far as to conclude that either statute manifested a clear enough congressional intent to override the disclosure restrictions in 13 U.S.C. § 9(a) or other federal statutes.¹⁷³ Commerce noted that “repeals by implication are not favored,” and that federal statutes should be construed as consistent with each other whenever possible.¹⁷⁴ One federal statute should only be read as repealing a second federal statute where the first statute explicitly names and repeals the second statute.¹⁷⁵

The Second Circuit rejected a facial challenge to these federal statutes insofar as they apply to state and local entities.¹⁷⁶ That court conceded that while “the Tenth Amendment limits the power of Congress to regulate by directly compelling [states] to enact and enforce a federal regulatory program,”¹⁷⁷ “Congress has plenary power to legislate on the subject of aliens.”¹⁷⁸ Moreover, Congress is not compelling states and local governments to enact or administer any federal regulatory program. Rather, these provisions merely prohibit state and local government entities or officials from directly restricting the exchange of information with federal immigration enforcement officers.¹⁷⁹ The Tenth Amendment does not provide “an untrammelled right to forbid all voluntary cooperation by state or local officials with particular federal programs.”¹⁸⁰

The Privacy Act of 1974 also governs the collection and disclosure of information about individuals that is maintained in systems of records by any federal agencies.¹⁸¹ However, the Privacy Act likely does not provide

¹⁷² *Id.*

¹⁷³ *Id.* at 11.

¹⁷⁴ *Id.* at 5.

¹⁷⁵ *Id.* at 7.

¹⁷⁶ *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999).

¹⁷⁷ *Id.* at 33 (internal quotation marks omitted).

¹⁷⁸ *Id.* at 34.

¹⁷⁹ *Id.* at 35.

¹⁸⁰ *Id.*

¹⁸¹ 5 U.S.C. § 552a(b) (2012) provides:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the

any protection against disclosure of an undocumented immigrant's status to immigration enforcement officials.¹⁸²

In 2000, an interagency notice issued by five federal agencies analyzed disclosure requirements in public benefits statutes.¹⁸³ According to the Interagency Notice, agency personnel "know" a person is present illegally (and therefore are required to disclose to immigration enforcement agencies) only where (a) the unlawful presence is a finding of fact or conclusion of law that is made by the agency as part of a formal determination that is subject to administrative review on an alien's claim for benefits under the relevant program, and (b) that finding of fact or conclusion of unlawful presence is supported by a determination by USCIS, ICE, CBP, or the Executive Office of Immigration Review.¹⁸⁴ The Interagency Notice notes that a Systematic Alien Verification for Entitlements (SAVE) response showing no DHS record on an individual or an immigration status making the individual ineligible for a benefit is not a "determination" for purposes of disclosure.¹⁸⁵

i. Medicaid Data

Of the major public benefits programs, the federal Medicaid statute offers arguably the strongest data protections for recipients: "A State plan for medical assistance must provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan."¹⁸⁶

head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought.

¹⁸² Undocumented immigrants do not fall under 5 U.S.C. § 552a's definition of "individuals." For the purposes of the statute, "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence." *Id.* § 552a(a). The term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency." *Id.* § 552a(a)(4). Even if undocumented immigrants did qualify as "individuals," disclosure of their immigration status should still be permitted under 5 U.S.C. § 552a(b)(7) since ICE, CBP, and the Justice Department are law enforcement agencies.

¹⁸³ Responsibility of Certain Entities to Notify the Immigration and Naturalization Service of Any Alien Who the Entity "Knows" Is Not Lawfully Present in the United States, 65 Fed. Reg. 58,301 (Sept. 28, 2000). One example of a disclosure requirement analyzed by the Interagency Notice is TANF's mandatory disclosure requirement:

Each State to which a grant is made under section 603 of this title shall, at least 4 times annually and upon request of the Immigration and Naturalization Service, furnish the Immigration and Naturalization Service with the name and address of, and other identifying information on, any individual who the State knows is unlawfully in the United States.

42 U.S.C. § 611a, 608(g) (2012).

¹⁸⁴ 65 Fed. Reg. at 58,302.

¹⁸⁵ *Id.*

¹⁸⁶ 42 U.S.C. § 1396a(a)(7)(A)(i).

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 533

The restricted information includes information on a “non-applicant,”¹⁸⁷ which federal regulations define as “an individual who is not seeking an eligibility determination for himself or herself and is included in an applicant’s or beneficiary’s household to determine eligibility for such applicant or beneficiary.”¹⁸⁸ And the federal regulations are clear that “[t]he agency’s policies must apply to all requests for information from outside sources, including governmental bodies, the courts, or law enforcement officials.”¹⁸⁹ Furthermore, the state agency “must obtain permission from a family or individual, whenever possible, before responding to a request for information from an outside source.”¹⁹⁰

Purposes directly related to plan administration include (a) establishing eligibility, (b) determining the amount of medical assistance, (c) providing services for beneficiaries, and (d) conducting or assisting an investigation, prosecution, or civil or criminal proceeding related to the administration of the plan.¹⁹¹ The fourth and final purpose is for enforcement actions for Medicaid fraud.¹⁹²

Furthermore, federal regulations require that “[a] State plan must provide, under a State statute that imposes legal sanctions, safeguards meeting the requirements of this subpart that restrict the use or disclosure of information concerning applicants and beneficiaries to purposes directly connected with the administration of the plan.”¹⁹³

The regulations also provide that an agency may request a non-applicant’s Social Security number (SSN), provided that the provision of such SSN is voluntary and the SSN is only used (i) to determine an applicant’s or beneficiary’s eligibility for Medicaid or other insurance affordability program or (ii) for a purpose directly connected to the administration of the State plan.¹⁹⁴ Moreover, the U.S. Department of Health and Human Services (HHS) must establish an electronic service through which states may verify certain information with other federal agencies, including DHS.¹⁹⁵ However, HHS has asserted that state agencies administering Medicaid “may not request information regarding a non-applicant’s citizenship or immigration status.”¹⁹⁶ Similarly, the Triagency Guidance provides that state agencies will not

¹⁸⁷ 42 C.F.R. § 431.300(b) (2017).

¹⁸⁸ *Id.* § 435.4.

¹⁸⁹ *Id.* § 431.306(e).

¹⁹⁰ *Id.* § 431.306(d).

¹⁹¹ *Id.* § 431.302.

¹⁹² *Id.*

¹⁹³ *Id.* § 431.301.

¹⁹⁴ *Id.* § 435.907(e)(3).

¹⁹⁵ *Id.* § 435.949(a).

¹⁹⁶ Eligibility Changes Under the Affordable Care Act of 2010, 77 Fed. Reg. 17,144, 17,165 (Mar. 23, 2012).

attempt to determine via DHS the immigration status of non-applicant household members who do not provide their immigration status.¹⁹⁷

Therefore, under the plain meaning of the federal Medicaid statute, a federal or state administrator cannot disclose to ICE, CBP, or the Department of Justice information regarding an applicant or recipient's immigration status for the purpose of immigration enforcement because such a purpose is not directly connected with the administration of the plan. Furthermore, federal regulations define information concerning an applicant or recipient as to include information on a non-applicant. Thus, under this regulation, HHS and the state agencies administering Medicaid would not be permitted to disclose a non-applicant's immigration status to ICE or CBP. ICE itself suggested such a reading in its October 25, 2013 letter, entitled "Clarification of Existing Practices Related to Certain Health Care Information," describing its agency policy.¹⁹⁸

ii. SNAP Data

Administered by the U.S. Department of Agriculture, federal law governing SNAP provides that a state's plan of operation for the program must provide safeguards that prohibit the use or disclosure of information obtained from applicant households except in specifically enumerated circumstances.¹⁹⁹ One of these circumstances is provided in 7 U.S.C. § 2020(e)(15), which says that a state's plan of operation of SNAP must provide information to immigration authorities if "any member of a household is ineligible to receive supplemental nutrition assistance program benefits because that member is present in the United States in violation of the Immigration and Nationality Act."

An adult representative of each household applying for SNAP benefits must certify in writing that all members of the household who

¹⁹⁷ Letter from Olivia Golden, Assistant Sec'y, Admin. for Children & Families, to State Health and Welfare Officials (July 26, 2013) [hereinafter Letter from Olivia Golden], <https://www.hhs.gov/civil-rights/for-individuals/special-topics/needly-families/triagency-letter/index.html>.

¹⁹⁸ Consistent with the ACA's, the SSA's, and implementing regulations' limitations on the use of information provided by individuals for such coverage, and in line with ICE's operational focus, ICE does not use information about such individuals or members of their household that is obtained for purposes of determining eligibility for such coverage as the basis for pursuing a civil immigration enforcement action against such individuals or members of their household, whether that information is provided by a federal agency to the Department of Homeland Security for purposes of verifying immigration status information or whether the information is provided to ICE by another source.

Clarification of Existing Practices Related to Certain Health Care Information, U.S. IMMIGRATION & CUSTOMS ENF'T (Oct. 25, 2013), <https://www.ice.gov/doclib/ero-outreach/pdf/ice-aca-memo.pdf>.

¹⁹⁹ 7 U.S.C. § 2020(e)(8) (2012).

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 535

will receive benefits are citizens or are qualified aliens.²⁰⁰ When a household indicates inability or unwillingness to provide documentation of alien status for any household member, the state agency must classify that member as an ineligible alien. In such cases, the state agency must not continue efforts to obtain that documentation.²⁰¹ A classification as an ineligible alien does not constitute a “determination” for purposes of the SNAP Mandatory Disclosure Requirement.²⁰²

USDA was not one of the agencies that issued the 2000 Interagency Notice discussed above, but federal SNAP regulations allow for the unlawful immigration disclosure requirement to be satisfied by complying with the guidance in the 2000 Interagency Notice.²⁰³

Although a household member does not have to provide documentation of alien status to the state agency administering SNAP, if a household member does provide such documentation, then the state agency must (i) submit photocopies of the documentation to the Department of Homeland Security for verification, and (ii) verify the documentation through the Systematic Alien Verification for Entitlements (SAVE) Program.²⁰⁴ Under the 2000 Interagency Notice, a SAVE response showing no DHS record on an individual or an immigration status making the individual ineligible for benefits is not a “determination” for purposes of the SNAP Mandatory Disclosure Requirement.²⁰⁵ The Triagency guidance issued by HHS and USDA in 2000 emphasizes that SNAP agents will not attempt to determine via DHS the immigration status of non-applicant household members who do not provide their immigration status.²⁰⁶

Therefore, while SNAP lacks the statutory prohibitions that govern the Medicaid program, its mandatory disclosure requirements are limited by the joint agency guidance and notices issued in 2000 by the relevant federal agencies.

iii. TANF Data

The U.S. Department of Health and Human Services (HHS) oversees state administration of TANF funds.²⁰⁷ Federal law requires HHS to disclose an undocumented immigrant’s immigration status where HHS knows that the immigrant is not lawfully present in the United

²⁰⁰ *Id.* § 2020(e)(2)(B)(v)(II).

²⁰¹ 7 C.F.R. § 273.4(b)(2) (2012).

²⁰² 7 U.S.C. § 2020(e)(15).

²⁰³ 7 C.F.R. § 273.4(b).

²⁰⁴ *Id.* § 272.11(d). The SAVE Program is administered by the Department of Homeland Security. *Id.* § 272.11(a).

²⁰⁵ See *supra* note 186 and accompanying text.

²⁰⁶ Letter from Olivia Golden, *supra* note 181.

²⁰⁷ 42 U.S.C. § 616 (2012).

States. HHS was one of the five agencies that issued the Interagency Notice.

Federal law prohibits HHS from disclosing information except as permitted by other federal law or by regulations promulgated by HHS.²⁰⁸ But federal regulations allow TANF administrators to disclose information without the consent of the individual “[t]o another government agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law” if the head of that agency does so in writing and specifies the law enforcement purpose.²⁰⁹ Since ICE, CBP, and the Department of Justice are law enforcement agencies and immigration enforcement is a law enforcement activity, an agency or official would be permitted to disclose such information to ICE, CBP, or the U.S. Attorney General upon written request.

That said, TANF administrators are not likely to turn over information otherwise. Federal law requires that each state that participates in TANF to furnish ICE or CBP (at least four times annually and upon request of ICE or CBP) with the name and address of any individual who the state “knows” is unlawfully in the United States.²¹⁰ According to the 2000 Interagency Notice, federal law only requires disclosure where the relevant individual’s unlawful presence in the U.S. is a finding of fact or conclusion of law (i) that is made by the agency as part of a formal determination that is subject to administrative review, and (ii) that is supported by a determination of USCIS, ICE, CBP, or the Executive Office of Immigration.²¹¹

iv. SSI Data

As for data on SSI recipients, federal law prohibits the Social Security Administration (SSA) from disclosing information except as permitted by

²⁰⁸ 42 U.S.C. § 1306(a)(2).

²⁰⁹ Specifically, 42 U.S.C. § 1306(a)(1) provides:

No disclosure . . . of any such file, record, report, or other paper, or any information, obtained at any time by any person from the head of the applicable agency or from any officer or employee of the applicable agency, shall be made except as the head of the applicable agency may by regulations prescribe and except as otherwise provided by Federal law.

See also 45 C.F.R. § 5b.9(b) (2017) (providing that HHS may disclose information to another government agency for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the other government agency submits a written request to HHS specifying the record desired and the law enforcement activity for which the record is sought).

²¹⁰ 42 U.S.C. § 611a.

²¹¹ Responsibility of Certain Entities to Notify the Immigration and Naturalization Service of Any Alien Who the Entity “Knows” Is Not Lawfully Present in the United States, 65 Fed. Reg. 58,302 (Sept. 28, 2000).

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 537

other federal law or by regulations promulgated by SSA.²¹² The implementing regulations of SSA do not appear to permit agency officials to turn over individualized data for immigration enforcement purposes. In its implementing regulations, SSA promulgated that “[t]he Privacy Act allows [SSA] to disclose information if the head of the law enforcement agency makes a written request giving enough information to show that the information is needed” if the request involves an investigation by criminal law enforcement concerning a violent crime or a fraudulent application for benefits in another social security or public benefits program.²¹³ Moreover, SSA was also one of the five agencies that issued the 2000 Interagency Notice, so one would expect SSA to administer the SSI program along the lines discussed above.²¹⁴

B. The Future of Immigration Enforcement and Public Benefits Data

There is no indication the Trump Administration will use public benefits data as a tool in immigration enforcement. However, the Executive Order signed on January 25, 2017, and the resulting Sanctuary Cities litigation suggests that this issue is one about which it may be worth speculating. The January 25th Executive Order and the legal challenges suggest that the current administration is interested in using non-immigration-enforcement agencies at the federal and state level for these purposes *and* that certain states and cities will challenge those efforts in federal court.²¹⁵ Indeed, the litigation will turn, in part, on the meaning of 8 U.S.C. § 1373, the same provision discussed earlier in this Part.

Regardless of the outcome of the litigation in Chicago and Santa Clara, state and local governments can take steps to protect personalized data and reassure immigrant families to continue to seek basic assistance. State agencies should not elicit, collect, or store immigration status information that is not required by federal law. State agencies should not

²¹² See *supra* note 194. Note that SSA is defined as one of the applicable agencies. 42 U.S.C. § 1306(a)(2).

²¹³ Specifically, “for criminal law enforcement purposes where a violent crime has been committed and the individual about whom the information is being sought has been indicted or convicted of that crime” or “when necessary to investigate or prosecute criminal activity involving the social security program or in other income-maintenance or health-maintenance programs if the information concerns eligibility, benefit amounts, or other matters of benefit status in a social security program and is relevant to determining the same matters in the other program.” 20 C.F.R. § 401.155(a) (2017).

²¹⁴ 65 Fed. Reg. at 58,302.

²¹⁵ *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 937 (N.D. Ill. 2017); *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 508 (N.D. Cal. 2017). See generally *Printz v. United States*, 521 U.S. 898, 898 (1997) (holding that the federal Government cannot compel a state or local government to administer a federal program or regulation).

use information except for purposes directly related to the program or service. State agencies need to be flexible on forms of proof to capture income (e.g., allowing self-attestation). State agencies should have and follow a data retention policy. State agencies should not respond to bulk requests; administrative subpoenas need to be individualized. The Attorney General of Massachusetts published guidance for schools and health care providers regarding immigration enforcement, and the City of San Francisco published client-facing FAQs on this topic.²¹⁶ Eventually, those interested in protecting personalized data of public benefits recipients would do well to incorporate the Medicaid privacy protections in other programs.

IV. CONCLUSION

Over the last 20 years, the United States has seen fit to draw distinctions between citizens and noncitizens for the purposes of public benefits. This lawmaking has been a bipartisan project, crafted by Democratic and Republican members in both houses of Congress and signed into law by multiple Presidents. Similarly, states across the country have used the provisions of the 1996 Welfare Reform Act to create a patchwork of rules governing the eligibility of noncitizens for state-run public benefit programs. The election of Donald Trump to the Presidency does not change this unsettled era of immigration law and welfare law.

However, even if President Trump leaves public benefits eligibility alone, his administration could change the immigration-welfare nexus in American law in dramatic ways. Some would require Congressional approval; others would not. Public charge doctrine, while in federal statute for well over a century, is rarely used in removal proceedings. Sponsor deeming and seeking reimbursement appears to be even less common. However, an expansion of public charge liability for the immigrant and his sponsor could drastically alter how immigrants interact with public benefit programs, let alone with one another. And putting public charge doctrine to one side, public benefit data could be repurposed for immigration enforcement purposes. The proposed regulations that could be published later this year represent the gravest threat to medical assistance, food assistance, and disability assistance for immigrants and their families since the 1996 Welfare Reform Act.

Today, the United States is home to 20 million children who have at least one immigrant parent. That's one in four children in America. Nearly nine in ten (17.7 million) of these children are citizens. If the Trump Administration's proposed changes to public charge come to pass, equal protection for citizens who happen to have foreign-born

²¹⁶ On file with author.

2018] THE IMMIGRATION-WELFARE NEXUS IN A NEW ERA? 539

parents will cease to be a constitutional commitment—it will be little more than an empty promise.²¹⁷

²¹⁷ Artiga & Damico, *supra* note 155.