

2-26-2021

Empathy for the Vulnerable? The Fourth Circuit's Internal Struggle to Grapple With the Trump Administration's Immigration Policies: Part II

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Recommended Citation

Anne Marie Lofaso et al., *Empathy for the Vulnerable? The Fourth Circuit's Internal Struggle to Grapple With the Trump Administration's Immigration Policies: Part II*, 123 W. Va. L. Rev. Online 29 (2021).

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Empathy for the Vulnerable? The Fourth Circuit's Internal Struggle to Grapple With the Trump Administration's Immigration Policies: Part II

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EMPATHY FOR THE VULNERABLE? THE FOURTH CIRCUIT'S INTERNAL STRUGGLE TO GRAPPLE WITH THE TRUMP ADMINISTRATION'S IMMIGRATION POLICIES: PART II

*Anne Marie Lofaso, Isabella Anderson, Anna Filatova, Blake Humphrey,
McKenna Meadows, & Brice Phillips**

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I. INTRODUCTION

Part I of this article described and analyzed *Portillo-Flores v. Barr*, a case in which the Fourth Circuit, over Judge Stephanie Thacker's dissent, upheld the Board of Immigration Appeals' ("BIA") denial of asylum to a Salvadorian asylum seeker who, as a child, was beaten nearly to death by MS-13 because his sister fled the country to avoid becoming a gang leader's girlfriend. It contends not only that *Portillo-Flores* is inconsistent with general immigration standards, but also that the Fourth Circuit committed two main legal errors. First, the Fourth Circuit erred in requiring that Portillo-Flores should have reported the persecution to police, even though such a report would have been ineffective or put him in more danger. Second, the Fourth Circuit failed to apply a child-specific standard when evaluating persecution against 14-year-old Portillo-Flores.

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Part II of this article addresses a different class of vulnerable persons: the “public charge.” Under the Immigration and Nationality Act (“INA”), “any alien who . . . is likely at any time to become a public charge is inadmissible” to the U.S.¹ “Public charges” cannot receive a visa to travel to the U.S., be granted admission to it, or receive status in it. While vulnerable groups like refugees, asylees, and other individuals admitted to the U.S. on humanitarian grounds are exempt from the public charge rule, 40% of all immigrants that are subject to the rule constitute another, equally vulnerable group: spouses and minor children of U.S. citizens seeking family-sponsored admission.² This is the focus of Part II of this article.

Prior to the Trump Administration’s Rule, a “public charge” was typically defined as any person likely to be “primarily dependent” on the public, meaning 51% of their income came from public aid.³ With the new Rule, that definition expanded to include any person who uses any means-tested public benefits for more than 12 months in any 36-month period.⁴ This test disregards an applicant’s or immigrant’s degree of dependency in favor of an absolute amount—what many have criticized as a thinly-veiled “wealth test.”⁵

Out of all immigration applications, only 1% or less have been denied on “public charge” grounds since 1999.⁶ But new guidance from DHS in the last two years caused initial denial rates to spike to 3% for the first time in a decade.⁷ The Final Rule not only guarantees an increased denial rate, but instills a chilling fear of rejection in the 40% of would-be applicants who know they may need even a small amount of public aid to afford reunification with loved ones in the U.S.⁸ Perhaps worse, the new Rule further discourages admitted immigrants from applying for necessary public aid to afford life in the U.S. for fear of being separated from their families.⁹

¹ 8 U.S.C. § 1182(a)(4)(A) (West 2020).

² See David J. Bier, *An Explanation of the Public Charge Rule: Frequently Asked Questions*, CATO INST. (Aug. 12, 2019, 12:20 PM), <https://www.cato.org/blog/explanation-public-charge-rule-frequently-asked-questions>.

³ *Id.*

⁴ *Id.*

⁵ See BOUNDLESS, COMMENTS OF BOUNDLESS IMMIGRATION INC. ON THE DEPARTMENT OF HOMELAND SECURITY’S PROPOSED RULE, INADMISSIBILITY ON PUBLIC CHARGE GROUNDS, 83 FED. REG. 51,114 (OCT. 10, 2018) 1 (2018), <https://boundless-wp-production.s3.amazonaws.com/uploads/2018/12/Boundless-public-charge-comment.pdf>; FISCAL POL’Y INST., “ONLY WEALTHY IMMIGRANTS NEED APPLY”: HOW A TRUMP RULE’S CHILLING EFFECT WILL HARM THE U.S. 1 (OCT. 10, 2018) [hereinafter ONLY WEALTHY IMMIGRANTS NEED APPLY], <http://fiscalpolicy.org/wp-content/uploads/2018/10/US-Impact-of-Public-Charge.pdf>.

⁶ Bier, *supra* note 2.

⁷ *Id.*

⁸ See ONLY WEALTHY IMMIGRANTS NEED APPLY, *supra* note 5.

⁹ See Bier, *supra* note 2; Erica Hellerstein, *Immigrants Afraid of Trump’s ‘Public Charge’ Rule Are Dropping Food Stamps, MediCal*, CAL. MATTERS (Sept. 22, 2019), <https://calmatters.org/california-divide/2019/09/immigrants-afraid-trump-public-charge-rule->

These issues underlie several cases challenging the Trump Administration's Rule,¹⁰ and litigation has divided the federal circuit courts.¹¹ This Part analyzes the Fourth Circuit's recent decision in *CASA de Maryland v. Trump*.¹² Section I lays out the majority opinion, which upheld the Trump Administration's exceedingly broad definition of the statutory term "public charge." Section II summarizes Judge Robert B. King's dissent, which suggests the Majority improperly applied the *Chevron* deference test and ignores the historical definition of "public charge." Section III discusses the circuit split arising from "public charge" litigation.

II. THE FOURTH CIRCUIT'S PANEL OPINION IN *CASA DE MARYLAND V. TRUMP*

In *CASA de Maryland v. Trump*,¹³ a divided panel of the Fourth Circuit was tasked with determining the scope of the phrase "public charge" under the INA.¹⁴ *CASA de Maryland*, a Latino and immigration advocacy-and-assistance organization, brought forth a challenge to the Trump Administration's ("Administration") executive interpretation of the term "public charge."¹⁵ The district court issued a nationwide preliminary injunction, holding that the Administration's interpretation of the phrase was unreasonable and impermissible.¹⁶

In 2018, the Trump Administration issued proposed rulemaking regarding the definition of a "public charge" under the INA.¹⁷ As the court explained in detail,

[t]he Rule made three relevant changes to the administration of the inadmissibility prong of the public charge provision. First, it replaced the 1999 Field Guidance's definition of "public charge," which asked whether an alien was likely to become "primarily dependent" on government assistance, with a durational threshold. Specifically, under the Rule, a "public charge" is defined as "an alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any

food-stamps-medical-benefits/; *Looming Immigration Directive Could Separate Nearly 200,000 Married Couples Each Year*, BOUNDLESS (Sept. 24, 2018), <https://www.boundless.com/blog/looming-immigration-directive-separate-nearly-200000-married-couples/>.

¹⁰ *Infra* Sections II.A, B.

¹¹ *Infra* Section II.C.

¹² 971 F.3d 220 (4th Cir. 2020).

¹³ *Id.* (Wilkinson, J.).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 229.

¹⁷ *Id.*; Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018).

36-month period.” . . . Second, the Rule jettisoned the 1999 Field Guidance’s exclusive focus on cash benefits, instead providing that both cash and certain in-kind benefits count as “public benefits” and can be considered in making public charge determinations. . . . Thus, an alien’s receipt of noncash benefits such as Section 8 housing, SNAP (*i.e.*, food stamps), and certain Medicaid benefits would each count towards the 12-month threshold. . . . Third, the Rule enumerated a host of factors that DHS officials are to consider, in addition to those set forth in the INA, before determining whether a given alien is likely to become a “public charge.”¹⁸

The majority defends the government’s promulgation of this rule as considering “several empirical analyses”¹⁹ that preserve important protections for aliens.²⁰ Litigation ensued once the new rule was issued, and quickly, courts became divided.²¹

In *CASA de Maryland*, the plaintiffs made three primary arguments at the district court: (1) the DHS Rule violates both the Administrative Procedures Act (“APA”) and the Fifth Amendment because it is “not in accordance with law” under APA § 706 because the term “public charge” “means ‘primarily dependent on the government for subsistence[;]’” (2) this textual meaning is “unambiguous[;]” and (3) “as a result, ‘DHS lacks the statutory authority to reinterpret public-charge admissibility in a way that is contrary to that definition.’”²²

On appeal, the panel majority opinion—authored by Circuit Judge J. Harvie Wilkinson III—held that the Trump Administration’s promulgated 2018 “public charge” definition was a permissible executive interpretation of the

¹⁸ *CASA de Maryland*, 971 F.3d at 234. The authors find this to be the most helpful and reflective summary of the changes between prior “public charge” definitions and the proposed 2018 Rule in the public record.

¹⁹ *Id.*

²⁰ As the panel majority explained in justifying the science and data behind the change of the definition:

[T]he Rule retains the prevailing test that “[t]he determination of an alien’s likelihood of becoming a public charge at any time in the future must be based on the totality of the alien’s circumstances.” 84 Fed. Reg. [] 41,502. Next, the Rule governs only public charge determinations made in the context of admissibility; deportations, by contrast, would still be decided under the 1999 Field Guidance and the three-part *Matter of B-* test. *See id.* at 41,462. And lastly, the Rule applies only to public charge inadmissibility determinations made by DHS, not the other two executive agencies (the Department of State and the Department of Justice) that are tasked with making public charge decisions in related contexts. *Id.* at 41,294 n.3.

CASA de Maryland, Inc., 971 F.3d at 235.

²¹ *Id.*

²² *Id.* at 236.

INA.²³ The majority reversed the district court's granting of a nationwide preliminary injunction in light of the Supreme Court's holding in *Wolf v. Cook County, Illinois*²⁴ and *Department of Homeland Security v. Wolf*.²⁵

Analyzing the question on the merits, the panel majority framed the issue as a separation of powers question. The court explained that were it to hold the definition impermissible, it would serve as a “stark transgression of the judiciary’s proper role.”²⁶ Enacted in 1882, the court further explained that the “public charge” rule’s long history supports the finding that “the interpretation and application of the public charge provision was entrusted to the executive branch.”²⁷ The court’s detailed historical review attempts to underscore the actual and apparent authority of the executive branch in making such determinations about how the phrase “public charge” is to be interpreted under the INA.

However, the primary issue remains: Is the Trump Administration’s definition of “public charge” reasonable under the INA? Applying rudimentary tools of statutory interpretation to resolve this question,²⁸ Judge Wilkinson directed the court’s analysis toward the plain meaning of “public charge” as the INA was ratified in 1952,²⁹ an interpretive departure from the district court’s analysis that starts with the definition of the phrase as customary in 1882. Relying on *Gustafson v. Alloyd Company*,³⁰ the panel majority concluded that the term “‘public charge’ should be given its broad ordinary meaning, as understood when the INA was enacted in 1952.”³¹

Accordingly, the panel majority held that “the text, structure, and statutory context of the INA all confirm that ‘public charge’ should be given its

²³ *Id.* at 229, 250.

²⁴ 140 S. Ct. 681 (2020).

²⁵ 140 S. Ct. 599 (2020).

²⁶ *CASA de Maryland*, 971 F.3d at 230.

²⁷ *Id.* at 231.

²⁸ For example, when phrases used in a statute are left undefined, the court must “look to the ordinary meaning of the term . . . at the time Congress enacted the statute.” *See Perrin v. United States*, 444 U.S. 37, 42 (1979).

²⁹ As the *CASA de Maryland* Court noted,

Congress enacted the INA in 1952. The ordinary meaning of “public charge” in 1952 was “one who produces a money charge upon, or an expense to, the public for support and care.” *Public Charge, Black’s Law Dictionary* (4th ed. 1951) (defining as used in 1917 Immigration Act); *Black’s Law Dictionary* (3d ed. 1933) (same); *see also* Arthur Cook et al., *Immigration Laws of the United States* § 285 (1929) (defining as person who needs “any maintenance, or financial assistance, rendered from public funds, or funds secured by taxation”). And “charge,” in this context, meant a “cost” or “expense.” *See, e.g., Charge, The New Century Dictionary* (2d ed. 1946); *Webster’s New Century Dictionary of the English Language* (1941).

CASA de Maryland, 971 F.3d at 242.

³⁰ 513 U.S. 561 (1995).

³¹ *CASA de Maryland*, 971 F.3d at 243.

ordinary meaning; that is, someone who produces a money charge upon the public for support and care.”³² Moreover, the court delineated that “as the text of the INA makes clear, the term enjoys, in practice, a certain ambiguity, giving the executive discretion over the type, amount, and duration of public assistance that will render someone a ‘public charge.’”³³ But expressing a proposed limitation, the court held that “the term is unambiguous as to the statutory floor it sets for the executive; a floor that the judiciary is powerless to alter *sua sponte*.”³⁴ As such, because congressional reenactment of a glossed term cannot alter or overcome its plain meaning,³⁵ the Trump Administration’s 2018 interpretation of the phrase “public charge” wholly comports with the INA’s plain text because “the text and structure . . . yield a clear answer: the term ‘public charge’ is naturally read as meaning just that—someone who produces a money charge upon the public for support or care.”³⁶

III. JUDGE KING’S DISSENT IN *CASA DE MARYLAND V. TRUMP*

Judge King dissented from the majority opinion, arguing instead that the DHS Rule must fail at step two under *Chevron* as an unreasonable interpretation of the statutory term “public charge.”³⁷ In contrast to the district court, which found that the Rule failed at both steps under *Chevron*,³⁸ Judge King stated his “willing[ness] to assume” that there might be enough ambiguity in the meaning of “public charge” to proceed to step two.³⁹ However, he would have resolved step two in favor of the plaintiffs because, “in light of the statutory context and the history of the term ‘public charge,’ the Rule’s definition is far too broad and ventures well outside the bounds of any reasonable construction of the term.”⁴⁰

The dissent acknowledged that the Public Charge statute has never defined “public charge” explicitly⁴¹ and argued that the term is not subject to unlimited interpretation because it has “consistently described aliens *significantly* dependent on the government”⁴² since Congress first established a

³² *Id.* at 244.

³³ *Id.*

³⁴ *Id.*

³⁵ *See, e.g.,* *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

³⁶ *CASA de Maryland*, 971 F.3d at 245.

³⁷ *Id.* at 276 (King, J., dissenting).

³⁸ *See id.* at 267.

³⁹ *Id.*

⁴⁰ *Id.* (agreeing with the Seventh Circuit’s similar conclusion in *Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020), that the Rule’s definition of “public charge” “does violence to the English language and the statutory context”).

⁴¹ *Id.* at 268.

⁴² *Id.* at 267 (emphasis added).

public charge provision in 1882.⁴³ The dissent posited that the term's construction under the 1882 statute is further "confirmed by contemporary dictionary definitions, other statutory provisions, legislative history, and judicial decisions."⁴⁴ Here, Judge King departed from the majority, which began its review of the statutory history with the 1952 iteration of the INA.⁴⁵ But the dissent went further than a discussion of the 1882 public charge provision by analyzing the text, structure, legislative history, and judicial interpretations of various public charge provisions to show that the term has been consistently interpreted for over a century.⁴⁶

Judge King instead argued that the DHS Rule must be evaluated against the term's history.⁴⁷ In doing so, the Rule "extraordinarily expands the definition of 'public charge,' resulting in a definition of staggering breadth."⁴⁸ In sharp contrast to what he identified as the intended and limited meaning of the term—an alien likely to become significantly dependent on the government—Judge King emphasized that the DHS Rule actually defines the term in such a way that "an alien will be declared likely to become a public charge if he might receive just a few months' worth of supplemental benefits at any point in his life."⁴⁹

Having identified the "outer limits"⁵⁰ of the "public charge" definition, Judge King concluded that "[u]nder any reasonable construction, a person receiving such a miniscule amount of benefits cannot be said to be significantly dependent on the government."⁵¹ Because he also found that the Rule "fixes a boundless definition of 'public charge,' it lands far afield of any reasonable interpretation of the Public Charge Statute,"⁵² and fails at *Chevron* step two.

⁴³ See *id.* at 268 (citing Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214, 214 (1882)); see also *id.* at 270 ("Congress—when it first used the term 'public charge'—did not intend to label as a 'public charge' any alien in need of some public aid. . . . Rather, the term 'public charge' was reserved for those unable to care for themselves without significant government assistance.").

⁴⁴ *Id.* at 268 (citing Webster's 1828 American Dictionary of the English Language, the overall structure of the 1882 statute, "relevant legislative history," and judicial decisions from the late 1800s).

⁴⁵ *Id.* at 268 n.6 ("By 1952, the term 'public charge' had already amassed seventy years' worth of meaning.").

⁴⁶ See *id.* at 270–75.

⁴⁷ *Id.* at 267–70.

⁴⁸ *Id.* at 275.

⁴⁹ *Id.* at 264; see *id.* at 275–76 ("To be sure, the Rule purportedly retains the totality-of-the-circumstances evaluation that has long applied to public charge determinations, but that evaluation is now singularly focused on whether an alien is 'more likely than not at any time in the future to receive one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period.'" (quoting *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292, 41,502 (Aug. 14, 2019))).

⁵⁰ *Id.* at 278.

⁵¹ *Id.* at 284.

⁵² *Id.*

IV. FEDERAL CIRCUITS ARE NOW SHARPLY DIVIDED

As previously noted, the Fourth Circuit’s majority opinion exacerbated the apparent inter-circuit split between the Fourth Circuit and the Second, Seventh, and Ninth Circuits.⁵³ These courts divide on the proper legislative enactment that controls the Trump Administration’s 2018 promulgation of a new public charge definition—either the definition of “public charge” incorporated in the 1882 act, the 1952 act, or the 1996 amendments to the INA. The underlying differences between these enactments are important because they guide the *Chevron* analysis of whether the current rule is a permissible agency interpretation.

First, in *Cook County. v. Wolf*,⁵⁴ the Seventh Circuit held that an immigrant rights organization, claiming similar organizational injuries to that of Casa de Maryland, possessed Article III standing to challenge the DHS’s “public charge” interpretation.⁵⁵ There, on the merits of whether the agency’s definition was “arbitrary and capricious,” the court analyzed the issue under *Chevron*. Unlike the Fourth Circuit, this court concluded that under *Chevron* steps one and two, “the ambiguity in the public-charge provision does not provide DHS unfettered discretion to redefine ‘public charge’” and “the interpretation reflected in the Rule falls outside the boundaries set by the statute.”⁵⁶ The court thereby concluded that

[t]he Rule has numerous unexplained serious flaws: DHS did not adequately consider the reliance interests of state and local governments; did not acknowledge or address the significant, predictable collateral consequences of the Rule; incorporated into the term “public charge” an understanding of self-sufficiency that has no basis in the statute it supposedly interprets; and failed to address critical issues such as the

⁵³ Ann E. Marimow, *Court Sides with Trump Administration Effort To Impose ‘Public Charge’ Rule*, WASH. POST (Aug. 6, 2020, 2:41 PM), https://www.washingtonpost.com/local/legal-issues/block-on-trump-administration-public-charge-rule-lifted-by-court/2020/08/05/68f23426-d74f-11ea-930e-d88518c57dcc_story.html; Mary Anne Pazanowski, *Trump Agency Can Enforce Public Charge Rule, Fourth Circuit Says*, BLOOMBERG L. (Aug. 5, 2020, 4:09 PM), <https://news.bloomberglaw.com/health-law-and-business/trump-agency-can-enforce-public-charge-rule-fourth-circuit-says> (“The decision creates a circuit split. It came one day after the U.S. Court of Appeals for the Second Circuit upheld an order stopping the rule from taking effect in New York, Connecticut, and Vermont. The U.S. Court of Appeals for the Seventh Circuit ordered the agency to stop enforcing the rule in the Chicago area in June.”).

⁵⁴ 962 F.3d 208 (7th Cir. 2020).

⁵⁵ *Id.* at 219.

⁵⁶ *Id.* at 229.

relevance of the five-year waiting period for immigrant eligibility for most federal benefits.⁵⁷

In *San Francisco v. United States Citizenship and Immigration Services*,⁵⁸ the Ninth Circuit held that because the phrase “public charge” was ambiguous and the DHS’s final rule was entitled to *Chevron* deference, a preliminary injunction was improper because DHS established the required likelihood that the final rule was not arbitrary and capricious.⁵⁹ Noting the post-1882 act and subsequent legislative history, the court explained that it was “unable to discern one fixed understanding of ‘public charge’ that has endured since 1882. If anything has been consistent, it is the idea that a totality-of-the-circumstances test governs public-charge determinations.”⁶⁰ The court further found that

the history of the use of “public charge” in federal immigration law demonstrates that “public charge” does not have a fixed, unambiguous meaning. Rather, the phrase is subject to multiple interpretations, it in fact has been interpreted differently, and the Executive Branch has been afforded the discretion to interpret it.⁶¹

However, in *New York v. United States Department of Homeland Security*,⁶² the Second Circuit held that the DHS’s interpretive rule was inconsistent with the INA and was arbitrary and capricious under the APA. The court applied the *Chevron* deference framework, concluding that the 2018 Rule is contrary to the INA.⁶³ Reciting an extensive history of immigration laws surrounding the “public charge” rule, the court held that the phrase historically has a well-settled meaning: “The absolute bulk of the caselaw, from the Supreme Court, the circuit courts, and the BIA interprets ‘public charge’ to mean a person who is unable to support herself, either through work, savings, or family ties.”⁶⁴

Departing from the Seventh and Ninth Circuits, the Second Circuit concludes that “Congress ratified the settled meaning of ‘public charge’ in

⁵⁷ *Id.* at 233. In a dissent, then–Circuit Judge, now–Supreme Court Justice Amy Coney Barrett relied on a similar analysis to that of Judge Wilkinson in the Fourth Circuit. *Compare id.* at 234, with *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220 (4th Cir. 2020). However, Judge Barrett primarily disagreed with the panel majority’s assessment that “the plaintiffs’ challenge to DHS’s definition of ‘public charge’ is likely to succeed at *Chevron* step two.” *Cook Cnty.*, 962 F.3d at 235.

⁵⁸ 944 F.3d 773 (9th Cir. 2019).

⁵⁹ *Id.* at 800–05.

⁶⁰ *Id.* at 796.

⁶¹ *Id.* at 796–97.

⁶² *Dept. of Homeland Security v. City of New York*, 969 F.3d 42 (2d Cir. 2020), *cert. granted*, 592 U.S. ____ (2021) (No. 20-449).

⁶³ *Id.* at 64.

⁶⁴ *Id.* at 71.

1996.”⁶⁵ In response to the Seventh Circuit, the court explains that it is “similarly unpersuaded by the . . . ‘admittedly incomplete’ historical review and its conclusion that plaintiffs in that case had failed to establish that Congress ratified the settled meaning of the term.”⁶⁶ Rather, the court held that “[i]n light of the judicial, administrative, and legislative treatments of the public charge ground from 1882 to 1996, . . . Congress ratified the settled meaning of ‘public charge’ when it enacted the [Illegal Immigration Reform and Immigrant Responsibility Act].”⁶⁷ In sum, the Second Circuit found that DHS had not provided “any factual basis” for its belief that noncitizens utilizing public benefits would be incapable to meet their basic needs without federal government assistance.⁶⁸ While limiting the scope of the district court’s nationwide injunction to New York, Vermont, and Connecticut, the Second Circuit dealt a substantial blow to the Trump Administration’s enforcement of its 2018 interpretation of the phrase “public charge” in light of Congress’ 1996 ratification of the terms settled meaning.

V. CONCLUSION

The paradox of rules that vulnerable classes of persons face in the United States is both complex and cumbersome. Various groups of vulnerable persons—such as poor immigrants, children, and refugees or asylum seekers fleeing persecution and violence—face significant challenges and hurdles in gaining lawful entry into or remaining in the United States. As illustrated by the two principle Fourth Circuit cases outlined above, the paradox converges on legal untenability when viewed holistically and in a broader context of empathy for the vulnerable.

For example, MS-13, now a sprawling international criminal enterprise that originated in the United States, has been exported from the United States, and violent gang members are returned to countries such as El Salvador. The side-effect in El Salvador generates considerable angst and turmoil for refugees (e.g., Mr. Portillo-Flores) who then seek safe harbor in the United States. MS-13’s activities are extensive in El Salvador, and asylum seekers like Portillo-Flores face a high bar when BIA immigration judges apply rigorous and demanding standards in reviewing removal cases for refugees seeking asylum, notwithstanding Judge Thacker’s dissenting opinion in *Portillo-Flores* noting that the proper, required analysis for BIA is more deferential.

In other circumstances, once poor immigrants have entered the United States, terms like “public charge”—which have been drastically changed by the Trump Administration—make it significantly easier to deport poor immigrants. Legal immigrants, who have received public benefits, such as Supplemental Security Income (“SSI”), Temporary Assistance for Needy Families (“TANF”),

⁶⁵ *Id.* at 73.

⁶⁶ *Id.* at 74.

⁶⁷ *Id.*

⁶⁸ *Id.* at 83.

Supplemental Nutrition Assistance Program (“SNAP”), Medicaid, and public housing assistance for more than a total of 12 months within any 36-month period, can be classified as a “public charge,” thereby becoming ineligible for permanent residency. *Casa de Maryland v. Trump* only effectuates the inconsistent approach that federal courts have taken in responding to DHS’ 2018 promulgation of a new definition of “public charge.” An individual who will prospectively become a “public charge” is deemed ineligible to become a lawful permanent resident and faces deportation.

What is the result for vulnerable people like Mr. Portillo-Flores and for the vulnerable people that organizations like CASA de Maryland serve? In recent years, and more specifically under the Trump Administration, the U.S. government has reinterpreted asylum and immigration laws to make it harder for immigrants, children, and refugees to gain lawful entry into the United States. In 2018, President Trump went so far as announcing an “asylum ban,” which many legal experts considered to be a violation of well-established international law.

This “catch-22” for refugees and asylum seekers is untenable both as a matter of law and as a matter of American values. On one hand, gangs originating in the United States—like MS-13—are “brought to justice” by the U.S. government and international task forces, and gang members are then exported to countries like El Salvador. On the other hand, when refugees and asylum seekers face violence and persecution in their home country because of gangs like MS-13 and they subsequently seek refuge into the United States, the law fails to meaningfully protect them from a calamity that originated in the country they seek protection from.

And when poor immigrants arrive in the United States, as they have for generations, they face significant barriers to entry. While they work in and contribute to the U.S. economy, under new federal rules, they can still face deportation by being declared a “public charge.” Per the Trump Administration’s 2019 rule, the definition of “public charge” has been drastically expanded to include more vulnerable individuals. Despite immigrants wishing to seek a better life for themselves and their families in the United States, under the Trump Administration, poor immigrants are excluded in favor of wealthier, more prosperous immigrants.

As a sovereign nation, the U.S. government indisputably has the power to control its laws and maintain, protect, and defend international borders. While federal courts and judges disagree over operative terms like “public charge” and the requisite standard for BIA removal proceedings of asylum seekers, the end burden of this variability in the law still falls flatly on the most vulnerable persons—immigrants, refugees, children, and asylum seekers—most of whom are people of color.⁶⁹ According to recent Pew Center studies, one-quarter of all

⁶⁹ See generally Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RES. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/>; Phillip Connor & Gustavo López, *5 Facts About the U.S. Rank in Worldwide Migration*, PEW RES. CTR. (May 18, 2016), <https://www.pewresearch.org/fact-tank/2016/05/18/5-facts-about-the-u-s-rank-in-worldwide-migration/>; *Countries of Birth for U.S. Immigrants, 1960-*

U.S. immigrants come from Mexico.⁷⁰ United States immigrants from the top five countries of origin—Mexico, China, India, and El Salvador—comprise 44 % of all U.S. Immigrants.⁷¹ In 2019, more than half of all refugees entering the U.S. came from just two countries—The Democratic Republic of the Congo and Myanmar.⁷²

Now that the Supreme Court has granted certiorari on the public charge rule issue, we may soon discover how these cases will be resolved. However, the Supreme Court’s ruling is likely to tell us more about the Justices’s philosophies on statutory construction and administrative law than give us guidance on how to resolve these thorny political issues. In the Fourth Circuit, these struggles have played out internally in response to the Trump Administration’s rigid—and often inhumane—immigration policies. The court has battled with balancing the applicable rule of law against the needs of vulnerable persons that these laws were arguably designed to protect. Moving forward, immigration policies and asylum laws that are rooted in empathy for the vulnerable would be more consistent and in line with post–Civil War American ideals, so beautifully spoken by the Statue of Liberty herself in the famous poem written for her:

“Give me your tired, your poor,
Your huddled masses yearning to breathe free.
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!”⁷³

Immigration policies reflecting these values—unfortunately too often more honored in the breach than in the observance—would bring out the best we Americans have to offer.

Present, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/immigrants-countries-birth-over-time?width=1000&height=850&iframe=true> (last visited Feb. 22, 2021).

⁷⁰ See Budiman, *supra* note 69.

⁷¹ See *id.*

⁷² See *id.*

⁷³ See Emma Lazarus, *The New Colossus* (1883).