

1 Latham & Watkins LLP
 Sarah M. Ray (*pro hac vice* pending)
 2 sarah.ray@lw.com
 Kyle A. Virgien (*pro hac vice* pending)
 3 kyle.virgien@lw.com
 Diana A. Aguilar (*pro hac vice* pending)
 4 diana.aguilar@lw.com
 Charles F. Sprague (*pro hac vice* pending)
 5 charles.sprague@lw.com
 505 Montgomery Street, Suite 2000
 6 San Francisco, California 94111-6538
 Telephone: +1.415.391.0600
 7 Facsimile: +1.415.395.8095

8 Emily Chiang, WBSA No. 50517
 American Civil Liberties Union
 9 of Washington Foundation
 901 Fifth Avenue, Suite 630
 10 Seattle, WA 98164
 Telephone: +1.206.624.2184
 11 echiang@aclu-wa.org

12 Attorneys for Proposed *Amici Curiae*
 American Civil Liberties Union, Center for
 13 Public Representation, *et al.*

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**UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF WASHINGTON
 AT RICHLAND**

STATE OF WASHINGTON, et. al., <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al., <p style="text-align: center;">Defendants.</p>	
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CASE NO. 4:19-cv-05210-RMP

[PROPOSED] BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION, CENTER FOR PUBLIC REPRESENTATION, ET AL. IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

INTRODUCTION AND INTEREST OF *AMICI CURIAE*..... 1

FACTUAL AND LEGAL BACKGROUND..... 6

 A. Immigrants’ Access to Public Benefits..... 6

 B. The Final Public Charge Rule..... 7

 C. Section 504 of the Rehabilitation Act..... 9

ARGUMENT..... 10

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE FINAL RULE VIOLATES SECTION 504 OF THE REHABILITATION ACT. 10

 A. Under the Final Rules’ “Health” Criterion, Individuals with Disabilities Are Automatically Penalized..... 11

 B. The Final Rule Also Penalizes Individuals with Disabilities for Using Medicaid—the Only Provider of Necessary Services that Promote Self-Sufficiency..... 12

 C. The Final Rule Triple-Counts the Same Factual Circumstances Against an Individual with Disabilities..... 16

II. THE FINAL RULE WILL CAUSE IRREPARABLE HARM TO BOTH CITIZENS AND NON-CITIZENS WITH DISABILITIES. 17

CONCLUSION..... 20

TABLE OF AUTHORITIES

Page(s)

CASES

1

2

3

4

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INTRODUCTION AND INTEREST OF AMICI CURIAE

Amici curiae are eighteen nonprofit organizations that represent, advocate for, and support the disability community. Collectively, *amici* operate in all fifty States and six Territories and represent tens of thousands of people with disabilities and their family members across the country. Among other services, the *amici* provide public education, litigate, and conduct research for people with disabilities and their families. All *amici* are dedicated to the liberty, equality, and integration of individuals with disabilities. Individual statements of interest from each *amici* organization appear in the appendix to this brief.

The United States is a nation shaped by immigration and founded on ideals of equality—however imperfectly realized. Contrary to these values, for more than a century, immigrants with disabilities were legally excluded from this country based on the flawed notion that individuals with disabilities were “undesirables.” But over time, public attitudes changed as reflected in various congressional acts, including the enactment of the Rehabilitation Act of 1973 and the revision of immigration laws to eliminate disability-specific exclusions. The Department of Homeland Security’s Final Rule on Public Charge Ground of Inadmissibility (the “Final Rule”), whether

1 unintentionally or deliberately,¹ seeks to reinstate those exclusionary provisions.

2 In the early twentieth century, the “principal object” of immigration law was
3 “the exclusion from this country of the morally, mentally and physically
4 deficient[.]”² Citing the “public charge” requirement as authority, Ellis Island
5 immigration inspectors would pick people out of line who appeared to be “disabled”

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12 ¹ The current administration has openly displayed hostility towards immigrants with
13 disabilities. President Donald J. Trump tweeted that Central American asylum
14 seekers waiting in Tijuana, Mexico will bring “large scale crime and disease” to the
15 United States. Chantal Da Silva, *Donald Trump Says Migrants Bring ‘Large Scale
16 Crime and Disease to America’*, NEWSWEEK (Dec. 11, 2018),
17 [https://www.newsweek.com/donald-trump-says-migrants-bring-large-scale-crime-
18 and-disease-america-1253268](https://www.newsweek.com/donald-trump-says-migrants-bring-large-scale-crime-and-disease-america-1253268) (emphasis added). President Trump also falsely said
19 that Haitians “all have AIDS.” Michael D. Shear & Julie Hirschfeld Davis, *Stoking
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21 (Dec. 23, 2017), [https://www.nytimes.com/2017/12/23/us/politics/trump-
22 immigration.html](https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html). The Trump Administration has indicated a desire to stop granting
23 “deferred action” to people undergoing medical treatment, often with disastrous
24 consequences. See Miriam Jordan, *Faced With Criticism, Trump Administration
25 Reverse Abrupt End to Humanitarian Relief*, N.Y. TIMES (Sept. 2, 2019),
26 <https://www.nytimes.com/2019/09/02/us/trump-immigration-deferred-action.html>.

27 ² Douglas C. Baynton, *Defectives in the Land: Disability and American Immigration
28 Policy, 1882-1924*, 24 J. AM. ETHNIC HIST. 31, 34 (2005).

1 or “diseased,” and deny them entry into the United States.³ While this treatment
2 was often rationalized at the time as a matter of simple economics, contemporaneous
3 documents reveal that these policies were rooted in eugenic considerations and the
4 flawed notion that people with disabilities are somehow “deficient.”⁴

5 By the 1960s, spurred by the civil rights movement, the nation’s perception
6 of individuals with disabilities had begun to change. And Congress responded. In
7 1973, on a bipartisan basis, Congress passed the Rehabilitation Act, which prohibits
8 disability discrimination by the Federal government. Section 504 of the
9 Rehabilitation Act (“Section 504”) was modeled, in part, after Title VI of the Civil
10 Rights Act of 1964, and declared: “No otherwise qualified handicapped individual
11 in the United States . . . shall, solely by reason of his handicap, be excluded from the
12 participation in, be denied the benefits of, or be subjected to discrimination under
13 any program or activity receiving Federal financial assistance.” Rehabilitation Act

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17 ³ See, e.g., Mark C Weber, *Opening the Golden Door: Disability and the Law of*
18 *Immigration*, 81, J. GENDER, RACE & JUST. 153, 156 (2004) (“Inspectors looked for
19 any of a long list of diseases and abnormalities, including arthritis, asthma, deafness,
20 the loss of an eye or a limb, deformities, poor vision, underdevelopment, and
21 dementia.”).

22 ⁴ See Baynton, *supra*, at 34-35 (“In a letter to the Comm’r General, the Ellis Island
23 Commissioner wrote that the Bureau had ‘no more important work to perform than
24 to pick out all the mentally defective immigrants, for these are not only likely to join
25 the criminal classes and become public charges, but by leaving feebleminded
26 descendants they start vicious strains which leads to misery and loss in the future
27 generation and influence unfavorably the character and lives of hundreds of
28 persons.”).

1 of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973)⁵; *see also* Civil Rights
 2 Act of 1964, Pub. L. No. 88-352, tit. VI, 78 Stat. 241, 252-53 (1964). This language
 3 made clear that access for people with disabilities is a matter of *equal opportunity*,
 4 not a welfare benefit or act of charity.⁶

5 In the half-century since, Congress has repeatedly reaffirmed this
 6 commitment to ensuring equal opportunity for individuals with disabilities. In 1990,
 7 Congress enacted the Americans with Disabilities Act (“ADA”), which declares that
 8 “the Nation’s proper goals regarding individuals with disabilities are to assure
 9 equality of opportunity, full participation, independent living, and economic self-
 10 sufficiency for such individuals.” 42 U.S.C. § 12101 (a)(7). That same year,
 11 Congress amended the Immigration Code to end the discriminatory exclusion of
 12 people with certain disabilities. *See* Immigration Act of 1990, Pub. L. No. 101-649
 13 § 603(a)(15), 104 Stat. 4978, 5083-84 (1990) (the “Immigration Act”) (deleting
 14 language excluding, *inter alia*, “[a]liens who are mentally retarded” or who are
 15 “afflicted with . . . a mental defect”). These changes marked an end to explicitly
 16 discriminatory prohibitions on individuals with disabilities in the Immigration Code,
 17 exclusions that for more than 100 years were listed alongside the statutory public

23 ⁵ The Rehabilitation Act Amendments of 1992 updated the term “handicap” to
 24 individual with a “disability.” *See* PL 102–569 (HR 5482), 106 Stat 4344 (Oct. 29,
 25 1992).

26 ⁶ *See generally* Nat’l Council on Disability, *Equal of Opportunity: The Making of*
 27 *the Americans with Disabilities Act* (Jul. 26, 1997),
 28 <https://files.eric.ed.gov/fulltext/ED512697.pdf>.

1 charge prohibition.⁷ Despite this clear congressional intent, the Final Rule
2 unlawfully reverts to the categorical exclusions against people with disabilities that
3 prevailed over a century ago.⁸

4 The Final Rule discriminates against disabled immigrants and their families
5

6 ⁷ Congress's support for the integration of people with disabilities has not wavered.
7 Most recently, in 2008, Congress removed HIV and AIDS from the list of infectious
8 diseases that would prevent an individual from immigrating to or visiting the United
9 States. See Tom Lantos and Henry J. Hyde U.S Global Leadership Against
10 HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No.
11 110-293, 122 Stat. 2918; 42 C.F.R. § 34.2(b).

12 ⁸ DHS has made it clear that this is exactly what it seeks to do. In its publication of
13 the Final Rule, DHS included the following footnote as support for its assertion that
14 it can rely on an immigrant's disability in making the public charge determination:
15 "*Ex parte Mitchell*, 256 F. 229 (N.D.N.Y. 1919) (referencing disease and disability
16 as relevant to the public charge determination); *Ex parte Sakaguchi*, 277 F. 913, 916
17 (9th Cir. 1922) (taking into consideration that the alien was an able-bodied woman,
18 among other factors, and finding that there wasn't evidence that she was likely to
19 become a public charge); *Barlin v. Rodgers*, 191 F. 970, 974-977 (3d Cir. 1911)
20 (sustaining the exclusion of three impoverished immigrants, the first because he had
21 a 'rudimentary' right hand affecting his ability to earn a living, the second because
22 of poor appearance and 'stammering' such that made the alien scarcely able to make
23 himself understood, and the third because he was very small for his age); *United*
24 *States ex rel. Canfora v. Williams*, 186 F. 354 (S.D.N.Y. 1911) (ruling that an
25 amputated leg was sufficient to justify the exclusion of a sixty year old man even
26 though the man had adult children who were able and willing to support him.)"
27 *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292, 41,368 n.407 (Aug.
28 14, 2019) (to be codified at 8 CFR Parts 103, 212, 213, 214, 245 and 248).

1 with devastating effects. The confusion surrounding the Final Rule poses a serious
2 threat of harm to the disability community, both citizens and noncitizens alike. The
3 Department of Homeland Security (“DHS”) acknowledges these discriminatory
4 results and makes no attempt to defend them as necessary policy or consistent with
5 its non-discrimination obligations under Section 504. Rather, DHS contends that
6 federal law actually *requires* it to exclude immigrants with disabilities in
7 discriminatory fashion. As explained below, this is both legally and factually
8 incorrect. The *amici curiae* respectfully urge the court to grant the State of
9 Washington’s preliminary injunction.

10 **FACTUAL AND LEGAL BACKGROUND**

11 **A. Immigrants’ Access to Public Benefits**

12 In 1996, Congress passed the Personal Responsibility and Work Opportunity
13 Reconciliation Act of 1996 (“PRWORA”) to comprehensively reform the U.S.
14 welfare system. PRWORA generally limited immigrants’ access to public benefits.
15 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L.
16 No. 104-193, 110 Stat. 2105 (1996). However, recognizing the importance of
17 certain programs, Congress specified that *all* immigrants regardless of legal status
18 would be eligible for emergency Medicaid, crisis counseling, and mental health and
19 substance use disorder treatment. As detailed below, these benefits are of particular
20 importance to immigrants with disabilities.

21 PRWORA’s changes to benefits eligibility generated considerable public
22 confusion about the extent of the “public charge” rule, which resulted in a sharp
23 decline in the usage of non-cash public benefits. The Immigration and
24 Naturalization Service (“INS”) (now, DHS) responded by issuing Field Guidance
25 clarifying the meaning of a “public charge” “in order to reduce the negative public
26 health consequences generated by the existing confusion and to provide aliens with
27 better guidance as to the types of public benefits that will and will not be considered
28 in public charge determinations.” Field Guidance on Deportability and

1 Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999)
 2 (“1999 Field Guidance”). In this Field Guidance, INS interpreted “public charge”
 3 to mean an applicant who is “*primarily dependent on the government for*
 4 *subsistence*, as demonstrated by either (i) the receipt of public cash assistance for
 5 income maintenance or (ii) institutionalization for long-term care at government
 6 expense.” *Id.* (emphasis added). Immigrants who received non-cash benefits were
 7 not considered a public charge under this rule. *Inadmissibility on Public Charge*
 8 *Grounds*, 83 Fed. Reg. 51,114, 51,163-64 (Oct. 10, 2018).

9 **B. The Final Public Charge Rule**

10 On August 14, 2019, DHS published the Final Rule, which modifies the
 11 prevailing test⁹ by assigning mandatory ratings (heavily weighted positive, positive,
 12 negative, or heavily weighted negative) to the statutory factors to be considered: the
 13 applicant’s “age,” “health,” “family status,” “assets, resources, and financial status,”
 14 and “education and skills.” 84 Fed. Reg. at 41,369. The Final Rule states that, when
 15 considering an individual’s health, DHS will treat as a negative factor having “a
 16 medical condition that is likely to require extensive medical treatment or
 17 institutionalization or that will interfere with the alien’s ability to provide and care
 18 for himself or herself, to attend school, or to work upon admission or adjustment of
 19 status.” 8 C.F.R. § 212.22(b)(2). Accordingly, all or almost all immigrants with
 20 disabilities would be assigned a negative health factor. *Cf.* 29 U.S.C. § 705(9)(B)
 21 (defining “disability,” for purposes of Section 504 of the Rehabilitation Act, as
 22 having “the meaning given” the term in the ADA’s definition of disability); 42
 23 U.S.C. § 12102(1)(A) (defining a disability, under the ADA, as “a physical or mental

24
 25 ⁹ The applicable statute states that in making a public charge determination “the
 26 consular officer or the Attorney General shall at a minimum consider the alien’s—
 27 (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status;
 28 and (V) education and skills.” 8 U.S.C. § 1182(a)(4)(B).

1 impairment that substantially limits one or more major life activities of such
2 individual”).

3 That same medical condition is considered a heavily weighted negative factor
4 if the applicant lacks private insurance. 8 C.F.R. § 212.22(c)(1)(iii). The receipt or
5 authorization to receive benefits, including Medicaid, for 12 months within 36
6 months of filing an application (for a visa, admission, adjustment of status, extension
7 of stay, or change of status) is also deemed a heavily weighted negative factor, 8
8 C.F.R. §§ 212.22(c)(1)(ii).

9 The lack of a “medical condition” described above is one of a few factors that
10 will be given a positive value under the Final Rule. 8 C.F.R. § 212.22(b)(2). The
11 only heavily weighted positive factors are (1) income, assets, resources, and support
12 that are at least 250% of the Federal Poverty Level and (2) enrollment in a private
13 insurance plan, but only if the applicant does not use tax credits to offset health care
14 premium costs under the Affordable Care Act. 8 C.F.R. § 212.22(c)(2).

15 Under the Final Rule, DHS officials may find in favor of admissibility *only if*
16 the positive factors outweigh the negative factors. 84 Fed. Reg. at 41,397-98. If an
17 immigrant is assigned a heavily weighted negative factor, she will be considered a
18 public charge unless she has two or more countervailing positive factors or one
19 heavily weighted positive factor. *Id.*

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1 **C. Section 504 of the Rehabilitation Act**

2 Section 504 of the Rehabilitation Act prohibits federal executive agencies
3 from discriminating against individuals with disabilities in any program or activity.¹⁰
4 Section 504 reaches government action that, either through purpose or effect,
5 discriminates against individuals with disabilities. *See* 28 C.F.R. § 41.51(b)(3) (“A
6 recipient [of federal funds] may not, directly or through contractual or other
7 arrangements, utilize criteria or methods of administration: (i) That have *the effect*
8 of subjecting qualified handicapped persons to discrimination on the basis of
9 handicap; (ii) That have the *purpose or effect* of defeating or substantially impairing
10 accomplishment of the objectives of the recipient’s program with respect to
11 handicapped persons”) (emphasis added).

12 In *Alexander v. Choate*, the Supreme Court made clear that Congress intended
13 Section 504 to forbid all forms of disability discrimination, including invidious
14 animus and benign neglect. *See* 469 U.S. 287, 294–97 (1985) (“Discrimination
15 against the handicapped was perceived by Congress to be most often the product,
16 not of invidious animus, but rather of thoughtlessness and indifference—of benign
17 neglect. . . . [M]uch of the conduct that Congress sought to alter in passing the
18 Rehabilitation Act would be difficult if not impossible to reach were the Act
19 construed to proscribe only conduct fueled by a discriminatory intent.”); *Crowder v.*
20 *Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996) (“In *Choate*, the Court concluded that
21 Congress intended to protect disabled persons from discrimination arising out of

22
23 ¹⁰ *See* 29 U.S.C. § 794; 6 C.F.R. § 15.1; DHS Directive No. 065-01 (Aug. 25, 2013);
24 DHS Instruction No: 065-01-001 (Mar. 7, 2015); DHS Guide 065-01-001-01
25 (“Guide”), at 23-24 (Jun. 6, 2016); Mem. for Maurice C. Inman, Jr., General
26 Counsel, Immigration and Naturalization Service, from Robert B. Shanks, Deputy
27 Assistant Attorney General, Office of Legal Counsel, Re: Section 504 of the
28 Rehabilitation Act of 1973 (Feb. 2, 1983).

1 both discriminatory animus and ‘thoughtlessness,’ ‘indifference,’ or ‘benign
2 neglect.’).

3 Section 504 applies to all DHS activities and programs, including public
4 charge determinations, which means DHS cannot utilize discriminatory “criteria or
5 methods” in making public charge determinations. *See* 6 C.F.R. §§ 15.30(b), 15.49.
6 The “criteria or methods” are discriminatory if they “[s]ubject qualified individuals
7 with a disability to discrimination on the basis of disability” or “[d]efeet or
8 substantially impair accomplishment of the objectives of a program or activity with
9 respect to individuals with a disability.” 6 C.F.R. § 15.30(b)(4).¹¹

10 **ARGUMENT**

11 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS**
12 **BECAUSE THE FINAL RULE VIOLATES SECTION 504 OF THE**
13 **REHABILITATION ACT.**

14 DHS admits that the Final Rule will have an “outsized” impact on people with
15 disabilities, but claims that “it is not the intent, nor is it the effect of this rule to find
16 a person a public charge solely based on his or her disability.” 84 Fed. Reg. at
17 41,368. DHS is wrong: the Final Rule’s “health” and “resources” “criteria,” in
18 combination, make anyone with a significant disability virtually certain to be
19 excluded in a public charge determination. Therefore, the “purpose or effect” of the

20 ¹¹ The government violates Section 504 when it “excludes [individuals] from a
21 program based on an eligibility criterion that impermissibly screens out [individuals]
22 with disabilities.” *C.D. v. New York City Dep’t of Educ.*, No. 05 Civ. 7945 (SHS),
23 2009 WL 400382, at *13 (S.D.N.Y. Feb. 11, 2009); *see also Franco-Gonzalez v.*
24 *Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *4 (C.D. Cal. Apr.
25 23, 2013) (finding that the government violates Section 504, even in cases of non-
26 intentional discrimination, if individuals with disabilities “are unable to
27 meaningfully access the benefit offered . . . because of their disability.”) (*citing*
28 *Alexander*, 469 U.S. at 299).

1 Final Rule is to selectively exclude immigrants with disabilities from admission into
2 the United States or adjustment of status in violation of Section 504 of the
3 Rehabilitation Act.

4 **A. Under the Final Rules’ “Health” Criterion, Individuals with**
5 **Disabilities Are Automatically Penalized.**

6 Under the Final Rule, DHS automatically assigns a negative weight to any
7 applicant having “a medical condition that is likely to require extensive medical
8 treatment or institutionalization *or that will interfere with the alien’s ability to*
9 *provide and care for himself or herself, to attend school, or to work upon admission*
10 *or adjustment of status.”* 8 C.F.R. § 212.22(b)(2) (emphasis added). In effect, this
11 criterion converts the “health” inquiry into a “disability” inquiry. Although
12 “disability” is not fully synonymous with “medical condition,” people with
13 disabilities experience functional limitations that often have underlying medical
14 diagnoses. When these medical diagnoses are inadequately treated or
15 accommodated, they can result in an individual’s inability to provide self-care,
16 attend school, or work. Thus under this broadly defined criterion, almost every
17 person with a “disability” will be assigned an automatic negative weight under the
18 Final Rule. *Cf.* 29 U.S.C. § 705(9)(B) (defining “disability” under Section 504 to
19 mean “a physical or mental impairment that substantially limits one or more life
20 activities of the individual”). There is absolutely nothing in the legislative history
21 that suggests that this was Congress’s intent when it designated “health” as one of
22 the factor to be considered in a public charge determination. In fact, it would have
23 been contrary to congressional action at the time given that Congress had just passed
24 the ADA.

25 Not only will this criterion assign a negative weight to almost every person
26 with a disability; it will count as a heavily weighted negative factor for all of these
27 people with disabilities who lack private insurance. As explained below, *see infra*
28 at § I.B., many people with disabilities cannot receive the services they require from

1 private insurance and thus would be subject to this heavily weighted negative factor.
2 Further, under the Final Rule the *lack* of a medical condition is one of the few
3 positive factors recognized by DHS. *See* 8 C.F.R. § 212.22(b)(2). Thus, all other
4 factors being equal, individuals with a disabilities will be severely disadvantaged by
5 automatically being assigned one or more negative factors, and automatically be
6 disqualified from one of the few positive factors DHS will consider in making a
7 public charge determination. This sharply different treatment of individuals who are
8 similarly situated “but for their disability” amounts to discrimination under Section
9 504. *See Lovell v. Chandler*, 303 F.3d 1039, 1053 (9th Cir. 2002) (finding a Section
10 504 violation where “but for their disability,” the plaintiffs would have received
11 Medicaid under the state’s QUEST program).

12 **B. The Final Rule Also Penalizes Individuals with Disabilities for**
13 **Using Medicaid—the Only Provider of Necessary Services that**
14 **Promote Self-Sufficiency.**

15 An applicant’s use of, or even approval for, Medicaid for more than 12 months
16 in any 36 month period counts as a heavily weighted negative factor under the Final
17 Rule. *See* 8 C.F.R. §§ 212.22(c)(1)(ii), 212.21(b)(5). The benefits Medicaid
18 provides are *essential* for millions of people with disabilities, and a third of
19 Medicaid’s adult recipients under the age of 65 are people with disabilities.¹² Studies
20 show that Medicaid is positively associated with employment and the integration of
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26 ¹² *See Medicaid Works for People with Disabilities*, C. ON BUDGET AND POL’Y
27 PRIORITIES, [https://www.cbpp.org/research/health/medicaid-works-for-people-](https://www.cbpp.org/research/health/medicaid-works-for-people-with-disabilities)
28 [with-disabilities](https://www.cbpp.org/research/health/medicaid-works-for-people-with-disabilities) (last visited Sept. 9, 2019).

1 individuals with disabilities,¹³ in part because Medicaid covers employment
2 supports¹⁴ that enable people with disabilities to work.¹⁵ Congress has specified that
3 Medicaid services are designed to help individuals with disabilities “attain or retain
4 [the] capability for independence or self-care.” 42 U.S.C. § 1396-1.

5 One reason Medicaid services are essential to the disability community is the
6 lack of coverage by private insurance of services people with disabilities typically

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10 ¹³ See e.g. Jean P. Hall, *et al.*, *Effect of Medicaid Expansion on Workforce*
11 *Participation for People With Disabilities*, 107 AM. J. OF PUB. HEALTH 262 (Feb.
12 2017), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2016.303543>; Larisa
13 Antonisse, *et al.*, Kaiser Family Foundation, *The Effects of Medicaid Expansion*
14 *under the ACA: Updated Findings from a Literature Review* 11 (Sept. 2017),
15 [http://files.kff.org/attachment/Issue-Brief-The-Effects-of-Medicaid-Expansion-](http://files.kff.org/attachment/Issue-Brief-The-Effects-of-Medicaid-Expansion-Under-the-ACA-Updated-Findings-from-a-Literature-Review)
16 [Under-the-ACA-Updated-Findings-from-a-Literature-Review](http://files.kff.org/attachment/Issue-Brief-The-Effects-of-Medicaid-Expansion-Under-the-ACA-Updated-Findings-from-a-Literature-Review) (collecting 202
17 studies of Medicaid expansion under the ACA, and concluding that many studies
18 show a significant positive correlation between Medicaid expansion and
19 employment rates and none show a negative correlation).

20 ¹⁴ Supported employment is a Medicaid-funded service to assist people with
21 disabilities in obtaining and maintaining employment in the general workforce,
22 including job placement, job training, job coaching, transportation, and personal care
23 services at work.

24 ¹⁵ See *Employment & HCBS*, MEDICAID.GOV,
25 [https://www.medicaid.gov/medicaid/ltss/employment/employment-and-](https://www.medicaid.gov/medicaid/ltss/employment/employment-and-hcbs/index.html)
26 [hcbs/index.html](https://www.medicaid.gov/medicaid/ltss/employment/employment-and-hcbs/index.html) (last visited Sept. 9, 2019) (“Habilitation services are flexible in
27 nature, and can be specifically designed to fund services and supports that assist an
28 individual to obtain or maintain employment.”).

1 need.¹⁶ Medicaid is the *only* insurer that generally covers many home- and
2 community-based services, including personal care services, specialized therapies
3 and treatment, habilitative and rehabilitative services, and durable medical
4 equipment.¹⁷ Even highly educated professionals, business owners, and other well-
5 off individuals with disabilities who use private insurance *also* retain Medicaid

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16 ¹⁶ See *Medicaid Works for People with Disabilities*, C. ON BUDGET AND POL’Y
17 PRIORITIES, [https://www.cbpp.org/research/health/medicaid-works-for-people-](https://www.cbpp.org/research/health/medicaid-works-for-people-with-disabilities)
18 [with-disabilities](https://www.cbpp.org/research/health/medicaid-works-for-people-with-disabilities) (last visited Sept. 5, 2019).

19 ¹⁷ See Mary Beth Musumeci, *et al.*, Kaiser Family Foundation, *Medicaid Home and*
20 *Community –Based Services Enrollment and Spending* (Apr. 04, 2019)
21 [https://www.kff.org/medicaid/issue-brief/medicaid-home-and-community-based-](https://www.kff.org/medicaid/issue-brief/medicaid-home-and-community-based-services-enrollment-and-spending/)
22 [services-enrollment-and-spending/](https://www.kff.org/medicaid/issue-brief/medicaid-home-and-community-based-services-enrollment-and-spending/) (last visited Sept. 9, 2019) (“Medicaid fills a gap
23 by covering HCBS that are often otherwise unavailable and/or unaffordable through
24 other payers or out-of-pocket[.]”). Home and community based services are services
25 that help people with disabilities live, work and participate in their communities.
26 See *Home & Community-Based Services*, MEDICAID.GOV,
27 <https://www.medicaid.gov/medicaid/hcbs/authorities/1915-c/index.html> (last
28 visited Sept. 5, 2019).

1 coverage because no other insurer provides the services that they need.¹⁸ In
2 recognition of the coverage limitations in private insurance for individuals with
3 disabilities, Congress authorized the Medicaid Buy-In program. This program
4 allows people to use Medicaid even when their incomes are above the standard limits
5 for regular Medicaid eligibility by paying a premium—which thereby permits them
6 *to remain in the workforce*.¹⁹

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8 ¹⁸ See, e.g., Andraéa LaVant, *Congress: Medicaid Allows Me to Have a Job and Live*
9 *Independently*, AMERICAN CIVIL LIBERTIES UNION (Mar. 22, 2017, 1:45 PM),
10 [https://www.aclu.org/blog/disability-rights/congress-medicaid-allows-me-have-](https://www.aclu.org/blog/disability-rights/congress-medicaid-allows-me-have-job-and-live-independently)
11 [job-and-live-independently](https://www.aclu.org/blog/disability-rights/congress-medicaid-allows-me-have-job-and-live-independently) (“Almost immediately after starting at my new job, I
12 learned that commercial/private insurance does not cover the services I need to live
13 independently. I would still need to rely on the services supplied through Medicaid
14 just to ensure that I could go to work and maintain the independence that I had
15 worked so hard to attain.”); Asim Dietrich, *Medicaid Cuts are a Matter of Life or*
16 *Death for People with Disabilities*, ARIZ. CAP. TIMES (Jul. 13, 2017),
17 [https://azcapitoltimes.com/news/2017/07/13/medicaid-cuts-are-a-matter-of-life-or-](https://azcapitoltimes.com/news/2017/07/13/medicaid-cuts-are-a-matter-of-life-or-death-for-people-with-disabilities/)
18 [death-for-people-with-disabilities/](https://azcapitoltimes.com/news/2017/07/13/medicaid-cuts-are-a-matter-of-life-or-death-for-people-with-disabilities/) (“Even with such a severe disability, I live a full
19 life. I am an attorney who works on behalf of others with disabilities, I am a board
20 member at a local disability advocacy organization called Ability 360, and I have an
21 active social life. The only reason I am able to have such a full life is Medicaid.”);
22 Alice Wong, *My Medicaid, My Life*, NEW YORK TIMES (May 3, 2017),
23 <https://www.nytimes.com/2017/05/03/opinion/my-medicaid-my-life.html> (“I am
24 unapologetically disabled and a fully engaged member of society. None of that
25 would be possible without Medicaid.”).

26 ¹⁹ See e.g., *Medicaid “Buy In” Q&A*, HHS ADMIN. FOR COMMUNITY LIVING & DOL
27 OFFICE OF DISABILITY AND EMPLOYMENT POLICY,
28 <https://www.dol.gov/odep/topics/MedicaidBuyInQAF.pdf> (last updated Jul. 2019).

1 Despite congressional recognition of the importance of Medicaid to people
2 with disabilities, and contrary to evidence showing that Medicaid services *help*
3 individuals with disabilities avoid becoming public charges, the Final Rule treats
4 using Medicaid as a heavily weighted negative factor. 84 Fed. Reg. at 41,298-99.
5 An immigrant assigned a heavily weighted negative factor will be considered a
6 public charge unless she or he has two or more countervailing positive factors or one
7 heavily weighted positive factor. *Id.* But as explained above, immigrants with
8 disabilities are automatically precluded by definition from a positive health factor;
9 thus, an immigrant's use of public benefits designed to increase self-sufficiency will
10 almost invariably result in a public charge finding.

11 **C. The Final Rule Triple-Counts the Same Factual Circumstances**
12 **against an Individual with Disabilities.**

13 As noted, under the Final Rule, an immigrant's medical condition and his or
14 her use of Medicaid can both be deemed a heavily weighted negative factor. 8 C.F.R.
15 § 212.22(c)(1). And the lack of the same medical condition is a positive factor. *See*
16 8 C.F.R. § 212.22(b)(2). Also, as discussed above, many individuals with
17 disabilities rely on Medicaid in part because it provides services not available
18 through private insurance that allow these individuals to work. The Final Rule
19 combines these criteria to in effect triply punish individuals with disabilities: first
20 for having the medical condition that impedes their ability to work, second for using
21 Medicaid's services that they need to work and otherwise be productive members of
22 their communities, and third by disqualifying them from a potential positive factor.

23 Consider an immigrant who uses Medicaid because she needs rehabilitative
24 services. This individual will have a medical condition that interferes with her
25 ability to work, and, if she lacks private insurance, it will count as a heavily weighted
26 negative factor. Her use of (or approval for) Medicaid services for more than 12
27 months in the past 36 months would then constitute *another* heavily weighted
28 negative factor. And regardless of how healthy she is otherwise, she cannot qualify

1 for the “health” positive factor. Therefore, the Final Rule would invariably deem
2 this individual a public charge by triple-counting her disability.

3 This example starkly demonstrates the falsity of DHS’ argument that “[u]nder
4 the totality of the circumstances framework, the disability itself would not be the
5 sole basis for an inadmissibility finding.” Section 504 is violated where an
6 individual is denied a benefit on the basis of his or her disability, even if other factors
7 are considered. *See Lovell*, 303 F.3d at 1053 (finding a Section 504 violation where
8 other factors in a “restrictive income and assets test,” because “those disabled
9 persons were denied QUEST coverage by the State solely because of their
10 disabilities”).

11 **II. THE FINAL RULE WILL CAUSE IRREPARABLE HARM TO**
12 **BOTH CITIZENS AND NON-CITIZENS WITH DISABILITIES.**

13 DHS concedes the Final Rule’s designation of Medicaid as a public benefit
14 will have a “potentially outsized impact . . . on individuals with disabilities,” 84
15 Fed. Reg. at 41,368, but fails to appreciate the magnitude of the harm. As explained
16 in the preceding section, the Final Rule will cause irreparable harm to immigrants
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1 with disabilities who will either be denied admission or an adjustment of status.²⁰
2 Conversely, in order to avoid a public charge determination, immigrants with
3 disabilities will be forced to forego necessary medical services.²¹ For example,
4 imagine an immigrant who had been in the United States long enough to be eligible
5 for a Medicaid buy-in program that he uses to get personal care services (which are
6 unavailable through private health insurance), enabling him to work. He would have
7 to drop out of the Medicaid Buy-In program (and thereby lose the personal care
8 services and possibly his employment as a result) in order to minimize the risk being
9 considered a public charge (which would prohibit him from becoming a legal

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11 ²⁰ Mandatory exclusion from the United States can be a death sentence for some
12 immigrants with disabilities. For example, Maria Isabel Bueso, an immigrant
13 diagnosed with a rare life-threatening condition was denied extension of Deferred
14 Action Status. Isabel has lived in the United States for 16 years as a legal resident.
15 The United States Citizenship and Immigration Services (USCIS) has ordered her
16 removal to Guatemala, where the lifesaving medical treatment she receives is not
17 available. *See e.g. Congressman DeSaulnier Announces Private Bill to Protect*
18 *Maria Isabel Bueso from Deportation*, CONGRESSMAN MARK DESAULNIER:
19 CALIFORNIA'S 11TH CONG. DIST. (Sept. 3, 2019),
20 [https://desaulnier.house.gov/media-center/press-releases/congressman-desaulnier-](https://desaulnier.house.gov/media-center/press-releases/congressman-desaulnier-announces-private-bill-protect-maria-isabel-bueso)
21 [announces-private-bill-protect-maria-isabel-bueso](https://desaulnier.house.gov/media-center/press-releases/congressman-desaulnier-announces-private-bill-protect-maria-isabel-bueso).

22 ²¹ *Cf.* Avital Fischer, Sumeet Banker, and Claire Abraham, *Pediatricians Speak Out:*
23 *A 'Public Charge Rule' is Dangerous for Children*, THE HILL (Sept. 1, 2019, 5:00
24 PM), [https://thehill.com/opinion/healthcare/459565-pediatricians-speak-out-a-](https://thehill.com/opinion/healthcare/459565-pediatricians-speak-out-a-public-charge-rule-is-dangerous-for-children)
25 [public-charge-rule-is-dangerous-for-children](https://thehill.com/opinion/healthcare/459565-pediatricians-speak-out-a-public-charge-rule-is-dangerous-for-children) (“[O]ne in seven immigrant adults
26 reported that they or a family member did not participate in benefit programs to
27 which they were entitled, for fear of jeopardizing their ability to secure legal
28 permanent residence status.”).

1 permanent resident).

2 Confusion surrounding the Final Rule will cause immigrants to forego public
3 benefits to which they are entitled and which would not result in a “negative” factor,
4 out of fear that accessing those benefits would adversely impact their immigration
5 status. But the harm caused by the Final Rule is not limited to non-citizen
6 immigrants. Confusion surrounding the Final Rule is also likely to cause immigrant
7 parents to refuse government benefits for their citizen children even though the usage
8 of those benefits would not be counted against the parents. DHS admits that the
9 programs named in the Final Rule will experience a 2.5% disenrollment rate and that
10 hundreds of thousands of people eligible for benefits will unenroll because other
11 members of their households are foreign-born noncitizens. 84 Fed. Reg. at 41,463,
12 66-69. Disability organizations have fielded countless calls, emails, and letters from
13 people who are confused and concerned as to whether they should disenroll from
14 benefits.²² A researcher quoted by the *Los Angeles Times* recently warned: ““We’re
15 already seeing chilling effects. . . . There are families that are stopping benefits for
16 their U.S. citizen children. There are green card holders and naturalized citizens that

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22 ²² As just one example, Disability Rights California “has received calls from families
23 who are afraid to apply for [In-Home Supportive Services] for their children, even
24 though their children are eligible and receipt of IHSS could prevent their costly out-
25 of-home placement.” *Disability Rights California Comments in Response to*
26 *Proposed Rulemaking on Inadmissibility on Public Charge Grounds* (Dec. 10,
27 2018), [https://www.disabilityrightsca.org/post/proposed-changes-to-federal-rules-](https://www.disabilityrightsca.org/post/proposed-changes-to-federal-rules-for-public-charge-an-immigration-policy-that-hurts-people)
28 [for-public-charge-an-immigration-policy-that-hurts-people.](https://www.disabilityrightsca.org/post/proposed-changes-to-federal-rules-for-public-charge-an-immigration-policy-that-hurts-people)

1 stopped benefits even though they won't be affected.”²³ And a recently published
2 study in the Journal of the American Medical Association Pediatrics found that
3 between “0.8 and 1.9 million children with medical needs could be disenrolled” from
4 health and nutrition benefits as a result of the version of the rule proposed by DHS
5 in October, 2018.²⁴

6 CONCLUSION

7 The Final Rule seeks to turn back the clock to a shameful era of eugenic
8 immigration policies by establishing a set of criteria ensuring that immigrants with
9 disabilities will be considered “public charges.” This rule will irreparably harm the
10 community of individuals with disabilities both by denying disabled immigrants
11 admission or adjustment of status and by discouraging citizens and noncitizens from
12 accessing the benefits that allow them to study, work, and participate fully in society.
13 The *amici curiae* therefore respectfully urge the Court to heed the overwhelming
14 opposition among the disability community to the Final Rule and grant Plaintiffs’
15 request for relief.

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22 ²³ Leila Miller, *Trump administration’s ‘public charge’ rule has chilling effect on*
23 *benefits for immigrants’ children*, LOS ANGELES TIMES (Sept. 3, 2019),
24 [https://www.latimes.com/california/story/2019-09-02/trump-children-benefits-](https://www.latimes.com/california/story/2019-09-02/trump-children-benefits-public-charge-rule)
25 [public-charge-rule](https://www.latimes.com/california/story/2019-09-02/trump-children-benefits-public-charge-rule).

26 ²⁴ Leah Zallman, Karen Finnegan, David Himmelstein, *et al.*, *Implications of*
27 *Changing Public Charge Immigration Rules for Children Who Need Medical Care*,
28 J. AMER. MED. ASSOC. PEDIATRICS (Sept. 1, 2019).

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Respectfully submitted,

By /s/Emily Chiang
Emily Chiang, WBSA No. 50517
American Civil Liberties Union
of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Telephone: +1.206.624.2184
echiang@aclu-wa.org

-and-

Sarah M. Ray (*pro hac vice* pending)
sarah.ray@lw.com
Kyle A. Virgien (*pro hac vice*
pending)
kyle.virgien@lw.com
Diana A. Aguilar (*pro hac vice*
pending)
diana.aguilar@lw.com
Charles F. Sprague (*pro hac vice*
pending)
charles.sprague@lw.com

Latham & Watkins LLP
505 Montgomery Street, Suite 2000
San Francisco, California 94111-
6538
Telephone: +1.415.391.0600
Facsimile: +1.415.395.8095

*Attorneys for Proposed Amici Curiae
American Civil Liberties Union,
Center for Public Representation, et
al.*

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Appendix: Statements of Amici Curiae Groups

The **American Civil Liberties Union** (“ACLU”) is a nationwide, nonprofit nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. With more than three million members, activists, and supporters, the ACLU fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction. The ACLU’s Disability Rights Program envisions a society in which discrimination against people with disabilities no longer exists, and in which people understand that disability is a normal part of life. This means a country in which people with disabilities are valued, integrated members of the community, and where people with disabilities have jobs, homes, education, healthcare, and families.

The **Center for Public Representation** (“CPR”) is a national, nonprofit legal advocacy organization that has been assisting people with disabilities for more forty years. CPR uses legal strategies, systemic reform initiatives, and policy advocacy to enforce civil rights, expand opportunities for inclusion and full community participation, and empower people with disabilities to exercise choice in all aspects of their lives. CPR has litigated systemic cases on behalf of people with disabilities in more than twenty states and has authored amici briefs to the United States Supreme Court and many courts of appeals. CPR is both a national and statewide legal backup center that provides assistance and support to the federally-funded protection and advocacy agencies in each state and to attorneys who represent people with disabilities in Massachusetts. CPR has helped lead the effort to educate and engage the disability community about the “public charge” rule at issue in this case.

The **American Association of People with Disabilities** (“AAPD”) works to increase the political and economic power of people with disabilities. A national

1 cross-disability organization, AAPD advocates for full recognition of the rights of
2 over 61 million Americans with disabilities.

3 The **Association of University Centers on Disabilities** (“AUCD”) is a
4 nonprofit membership association of 130 university centers and programs in each of
5 the fifty States and six Territories. AUCD members conduct research, create
6 innovative programs, prepare individuals to serve and support people with
7 disabilities and their families, and disseminate information about best practices in
8 disability programming.

9 The **Autistic Self Advocacy Network** (“ASAN”) is a national, private,
10 nonprofit organization, run by and for autistic individuals. ASAN provides public
11 education and promotes public policies that benefit autistic individuals and others
12 with developmental or other disabilities. ASAN’s advocacy activities include
13 combating stigma, discrimination, and violence against autistic people and others
14 with disabilities; promoting access to health care and long-term supports in
15 integrated community settings; and educating the public about the access needs of
16 autistic people. ASAN takes a strong interest in cases that affect the rights of autistic
17 individuals and others with disabilities to participate fully in community life and
18 enjoy the same rights as others without disabilities.

19 The **Coelho Center for Disability Law, Policy and Innovation** (“The
20 Coelho Center”) was founded in 2018 by the Honorable Tony Coelho, primary
21 author of the Americans with Disabilities Act. Housed at Loyola Law School in Los
22 Angeles, The Coelho Center collaborates with the disability community to cultivate
23 leadership and advocate innovative approaches to advance the lives of people with
24 disabilities. The Coelho Center brings together thought leaders, advocates, and
25 policy makers to craft agendas that center disabled voices.

26 **Disability Rights Advocates** (“DRA”) is a non-profit, public interest law firm
27 that specializes in high impact civil rights litigation and other advocacy on behalf of
28 persons with disabilities throughout the United States. DRA works to end

1 discrimination in areas such as access to public accommodations, public services,
2 employment, transportation, education, and housing. DRA’s clients, staff and board
3 of directors include people with various types of disabilities. With offices in New
4 York City and Berkeley, California, DRA strives to protect the civil rights of people
5 with all types of disabilities nationwide.

6 **Disability Rights Education and Defense Fund** (“DREDF”) is a national
7 cross-disability law and policy center that protects and advances the civil and human
8 rights of people with disabilities through legal advocacy, training, education, and
9 development of legislation and public policy. We are committed to increasing
10 accessible and equally effective healthcare for people with disabilities and
11 eliminating persistent health disparities that affect the length and quality of their
12 lives. DREDF's work is based on the knowledge that people with disabilities of
13 varying racial and ethnic backgrounds, ages, genders, and sexual orientations are
14 fully capable of achieving self-sufficiency and contributing to their communities
15 with access to needed services and supports and the reasonable accommodations and
16 modifications enshrined in U.S. law.

17 **Disability Rights Washington** is a non-profit agency whose mission is to
18 advance the civil and human rights of people with disabilities. It is the organization
19 designated by federal law and the Governor of Washington to provide protection and
20 advocacy services to people in Washington with disabilities, including mental,
21 developmental, physical, and sensory disabilities. As such, Disability Rights
22 Washington has a federal mandate to provide and full range of advocate on behalf
23 of people with disabilities. Disability Rights Washington responds to thousands of
24 calls and letters annually from individuals with legal problems related to their
25 disabilities, monitors settings serving people with disabilities including treatment
26 facilities, correctional facilities, and community setting including individual's own
27 homes, investigates abuse and neglect of people with disabilities, educates policy
28 makers on disability issues, and engages in systemic impact litigation on behalf of

1 people with disabilities on numerous issues including the delivery of public benefits
2 and disability related services, civil rights protections, and constitutional rights.

3 The **Judge David L. Bazelon Center for Mental Health Law** is a national
4 nonprofit advocacy organization that provides legal assistance to individuals with
5 mental disabilities. The Center was founded in 1972 as the Mental Health Law
6 Project. Through litigation, policy advocacy, and public education, the Center
7 advances the rights of individuals with mental disabilities to participate equally in
8 all aspects of society, including health care, housing, employment, education,
9 community living, parental and family rights, and other areas. The Center worked
10 with others to develop comments of the Consortium for Citizens with Disabilities
11 concerning the "public charge" rule at issue in this case, and has litigated cases, filed
12 amicus briefs, and engaged in other advocacy on a number of issues concerning the
13 rights of immigrants with disabilities.

14 **Little Lobbyists** is a family-led organization that seeks to protect and expand
15 the rights of children with complex medical needs and disabilities through advocacy,
16 education, and outreach. We advocate for our children to have access to the health
17 care, education, and community inclusion they need to survive and thrive.

18 **Mental Health America** ("MHA"), formerly the National Mental Health
19 Association, is a national membership organization composed of individuals with
20 lived experience of mental illnesses and their family members and advocates. The
21 nation's oldest and leading community-based nonprofit mental health organization,
22 MHA has more than 200 affiliates dedicated to improving the mental health of all
23 Americans, especially the 54 million people who have severe mental disorders.
24 Through advocacy, education, research, and service, MHA helps to ensure that
25 people with mental illnesses are accorded respect, dignity, and the opportunity to
26 achieve their full potential. MHA is against policies that discriminate against people
27 with mental health conditions.

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1 The **National Association of Councils on Developmental Disabilities**
2 (“NACDD”) is the national nonprofit membership association for the Councils on
3 Developmental Disabilities located in every State and Territory. The Councils are
4 authorized under federal law to engage in advocacy, capacity-building, and systems-
5 change activities that ensure that individuals with developmental disabilities and
6 their families have access to needed community services, individualized supports,
7 and other assistance that promotes self-determination, independence, productivity,
8 and integration and inclusion in community life.

9 The **National Council on Independent Living** (“NCIL”) is the oldest cross-
10 disability, national grassroots organization run by and for people with disabilities.
11 NCIL’s membership is comprised of centers for independent living, state
12 independent living councils, people with disabilities and other disability rights
13 organizations. NCIL advances independent living and the rights of people with
14 disabilities. NCIL envisions a world in which people with disabilities are valued
15 equally and participate fully.

16 The **National Disability Rights Network** (“NDRN”) is the non-profit
17 membership organization for the federally mandated Protection and Advocacy
18 (P&A) and Client Assistance Program (CAP) agencies for individuals with
19 disabilities. The P&A and CAP agencies were established by the United States
20 Congress to protect the rights of people with disabilities and their families through
21 legal support, advocacy, referral, and education. There are P&As and CAPs in all
22 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American
23 Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a
24 P&A and CAP affiliated with the Native American Consortium which includes the
25 Hopi, Navajo and San Juan Southern Piute Nations in the Four Corners region of the
26 Southwest. Collectively, the P&A and CAP agencies are the largest provider of
27 legally based advocacy services to people with disabilities in the United States.

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1 The **National Federation of the Blind** (“NFB”) is the nation’s oldest and
2 largest organization of blind persons. The NFB has affiliates in all fifty states,
3 Washington, DC, and Puerto Rico. The NFB and its affiliates are widely recognized
4 by the public, Congress, executive agencies of state and federal governments, and
5 the courts as a collective and representative voice on behalf of blind Americans and
6 their families. The organization promotes the general welfare of the blind by
7 assisting the blind in their efforts to integrate themselves into society on terms of
8 equality and by removing barriers that result in the denial of opportunity to blind
9 persons in virtually every sphere of life, including education, employment, family
10 and community life, transportation, and recreation.

11 **The Arc of the United States** (“The Arc”), founded in 1950, is the nation’s
12 largest community-based organization of and for people with intellectual and
13 developmental disabilities (“I/DD”). The Arc promotes and protects the human and
14 civil rights of people with I/DD and actively supports their full inclusion and
15 participation in the community throughout their lifetimes. The Arc has a vital interest
16 in ensuring that all individuals with I/DD receive the appropriate protections and
17 supports to which they are entitled by law.

18 Founded in 1946 by paralyzed veterans, **United Spinal Association** is a
19 national membership organization of 56,000 persons with spinal cord injuries or
20 disorders, the vast majority of whom use wheelchairs. United Spinal Association has
21 represented the interests of the wheelchair-using community in litigation for
22 decades. United Spinal Association was a key negotiator with members of Congress
23 regarding the provisions of the Americans with Disabilities Act and the Fair Housing
24 Amendments Act. Addressing the needs and rights of people with disabilities,
25 especially those with mobility impairments, has always been part of United Spinal
26 Association’s mission.

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