No. 19-36020

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1 et al.,
Plaintiffs – Appellees,

v.

DONALD TRUMP et al.,
Defendants – Appellants.

Appeal from the United States District Court
for the District of Oregon
Case No. 3:19-cv-1743-SI
The Honorable Michael H. Simon, Presiding

Brief of Amici Curiae Disability Rights California, Center for Public Representation, Disability Rights Advocates, Disability Rights Education & Defense Fund, Disability Rights Oregon, National Council on Independent Living, National Disability Rights Network, and The Arc in Support of Plaintiffs-Appellees

All parties have consented. FRAP Rule 29(a)(2).

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae make the following disclosures:

1. Amici are not publicly held corporations;
2. Amici have no parent corporations;
3. Amici do not have 10 percent or more of stock owned by a corporation.

Dated: February 6, 2020 DISABILITY RIGHTS CALIFORNIA

By: /s/ Nicholas Levenhagen
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STATEMENT OF AUTHORSHIP

Pursuant to Rule 29(a)(4)(E) and (b)(4) of the Federal Rules of Appellate Procedure, amici curiae certify that:

1. No counsel for either party authored this brief in whole or in part;
2. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and
3. No person other than the named amici curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

Dated: February 6, 2020 DISABILITY RIGHTS CALIFORNIA

By: /s/ Nicholas Levenhagen

INTERESTS OF AMICI CURIAE

Amici curiae are eight 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, amici provide public education, litigate, and conduct research for people with disabilities and their families. All amici are dedicated to the liberty, equality, and full inclusion of individuals with disabilities. Individual statements of interest from each amicus organization appear in the addendum to this brief. The brief is submitted with the consent of all parties and without a motion requesting leave pursuant to Federal Rule of Appellate Procedure 29(a)(2).

SUMMARY OF ARGUMENT

Individuals with disabilities have faced discriminatory barriers immigrating to the United States throughout much of this country's history, stereotyped as "defective" and "undesirable."[1] Congress sought to remedy this "history of discriminating against the disabled"[2] by enacting legislation designed to remove such barriers,[3] including the elimination of language in the Immigration and Nationality Act ("INA") that automatically excluded immigrants on the basis of certain disabilities.[4]

Proclamation No. 9945, titled "Presidential Proclamation on the Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System" (the "Proclamation") would re-impose these discriminatory barriers, requiring immigrants to provide proof of health

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[1] Douglas C. Baynton, *Defectives in the Land: Disability and American Immigration Policy*, 1882-1924, 24 J. AM. ETHNIC HIST. 31, 34-35 (2005).

[2] *M.R. v. Dreyfus*, 697 F.3d 706, 733 (9th Cir. 2012) (discussing Congress's findings in passing the Americans with Disabilities Act, including that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion").

[3] Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973); Americans with Disabilities Act of 1990, Public Law 101-336, 108th Congress, 2nd session (July 26, 1990).

[4] *See* Immigration Act of 1990, Pub. L. No. 101-649 § 603(a)(15), 104 Stat. 4978, 5083-84 (1990).

insurance coverage through "approved" plans that are not accessible for most people with disabilities due to medical underwriting, pre-existing condition exclusions, and other requirements.[5] The purported goal of the Proclamation is to reduce the costs of uncompensated care, yet it excludes health insurance options available to individuals with disabilities that have been shown to reduce these costs, including subsidized Affordable Care Act ("ACA") marketplace health plans and Medicaid.[6] The Proclamation thus acts as a de facto bar to entry for immigrants with disabilities without any rational link to its alleged purpose.

Further, the Proclamation seeks to override Congress's decision to

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[5] 84 Fed. Reg. 53,991 (Oct. 9, 2019).

[6] Medicaid is the primary public health insurance program for people with low incomes and is a program administered and financed jointly by states and the federal government. 42 U.S.C. § 1396 *et seq*.; 42 C.F.R. § 430 *et seq*.; *Report to Congress on Medicaid and CHIP*, MEDICAID AND CHIP PAYMENT AND ACCESS COMMISSION 70 (March 2018), https://www.macpac.gov/wp-content/uploads/2018/03/Report-to-Congress-on-Medicaid-and-CHIP-March-2018.pdf (finding a 30% decline in uncompensated hospital care costs following the ACA and Medicaid expansion). This report is discussed in Jessica Schubel & Matt Broaddus, *Uncompensated Care Costs Fell in Nearly Every State as ACA's Major Coverage Provisions Took Effect*, CENTER ON BUDGET POLICIES AND PRIORITIES (May 23, 2018), https://www.cbpp.org/research/health/uncompensated-care-costs-fell-in-nearly-every-state-as-acas-major-coverage.

make these health benefits available to immigrants with disabilities without creating barriers to admissibility.[7] Critically, when Congress added a multi-factor test to the INA for determining whether an immigrant may be barred from entry as a "public charge,"[8] it refused to adopt proposals that would make the receipt of certain non-cash benefits, including Medicaid, grounds for inadmissibility.[9] Congress rejected later efforts to expand the "public charge" criteria to include the receipt of these health benefits.[10]

The Proclamation attempts to replace the multi-factor public charge test provided by Congress with a *single-factor* test based exclusively on whether a visa applicant has "approved" health insurance to determine if they will be a "financial burden."[11] The President is not vested with the

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[7] *See* 26 U.S.C. § 36B(a); 26 U.S.C. § 36B(c)(1)(B). As noted by the District Court, "Congress has repeatedly refused to include Medicaid and other means-tested non-cash public benefits in the public charge inadmissibility standards." Excerpts of Record ("ER") 31.

[8] *See* 8 U.S.C. § 1182(a)(4).

[9] *See* H.R. Rep. 104-469, 89 (1996); S. Rep. No. 104-249, 63-64 (1996).

[10] *See, e.g.*, S. Rep. No. 113-40, 42 (2013) (proposing to expand public charge criteria to require visa applicants to show they were not likely to receive Medicaid or Children's Health Insurance Program benefits); S. Rep. 113-40, 63 (2013) (proposing to deny applicants receiving health benefits).

[11] 84 Fed. Reg. 53,991 (Oct. 9, 2019).

authority to revise a statute in this manner.[12] This remains true even if the Final Rule on Public Charge Ground of Inadmissibility (the "Final Rule") recently issued by the Department of Homeland Security to expand the public charge criteria goes into effect.[13] Amici respectfully urge this Court to uphold the district court's decision to preliminarily enjoin enforcement of this discriminatory and unconstitutional Proclamation.

ARGUMENT

I. Persons with Disabilities Must Be Treated on an Equal Basis as Other Individuals Seeking Entry to the United States

A. The Proclamation, if Implemented, Would Re-impose Historical and Discriminatory Barriers to Immigration for Persons with Disabilities That Are Contrary to and Inconsistent with Current Federal Laws

In the 19th and early 20th century, invidious immigration laws and policies were used to bar people with disabilities from entering the United States. The Commissioner General of Immigration reported in 1907 that the "exclusion from this country of the morally, mentally, and physically deficient is the principal object to be accomplished by the immigration

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[12] *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes").

[13] *See* Final Rule, 84 Fed. Reg. 41,292 (Aug. 14, 2019).

laws."[14] Federal statutes directed immigration officials to automatically exclude "[a]ll idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous."[15] Regulations promulgated in 1917 provided medical examiners with a long list of disabilities that could be cause for exclusion, including arthritis, deafness, deformities, poor eyesight, poor physical development, and spinal curvature, among other conditions.[16]

Over time, the disability rights movement helped change public attitudes towards individuals with disabilities and Congress enacted legislative protections against disability-based discrimination.[17] The Rehabilitation Act of 1973 was enacted to prohibit disability-based discrimination by recipients of federal funding and all executive agencies

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[14] Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in THE DISABILITY STUD. READER 17, 27 (Lennard J. Davis ed., 4th ed. 2013).

[15] Immigration Act of 1907, ch. 1134, 34 Stat. 898, 899 (1907).

[16] Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, *supra* note 14 at 26-27 (citing *Regulations*, U.S. PUB. HEALTH SERV. 16-19 (1917)).

[17] *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973); Americans with Disabilities Act of 1990, Public Law 101-336. 108th Congress, 2nd session (July 26, 1990).

within the Federal government. Section 504 of the Rehabilitation Act ("Section 504") was modeled after Title VI of the Civil Rights Act of 1964 and declared: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[18]

In 1990, Congress further expanded protections against disability-based discrimination through the Americans with Disabilities Act ("ADA"), with a mission to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency[.]"[19] That same year, Congress amended the INA to end the discriminatory automatic exclusion of immigrants with certain mental disabilities.[20]

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[18] *Id*.; *see also* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, 78 Stat. 241, 252-53 (1964). These protections apply to the activities and programs of agencies, including the Department of Homeland Security, that enforce immigration laws and policies, prohibiting the use of "criteria or methods" that "[s]ubject qualified individuals with a disability to discrimination on the basis of disability" or "[d]efeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with a disability." *See* 6 C.F.R. §§ 15.30(b), 15.49.

[19] 42 U.S.C. § 12101(a)(7).

[20] *See* Immigration Act of 1990, Pub. L. No. 101-649 § 603(a)(15), 104 Stat. 4978, 5083-84 (1990).

Despite these social and legal advancements, Proclamation No. 9945 will return the nation to an earlier era when people with disabilities were considered an undesirable "burden"[21] that should be prohibited from entry.[22] The Proclamation purports merely to reduce "uncompensated care costs" by barring immigrants who cannot provide proof of coverage through an "approved" health insurance plan.[23] But the list of "approved" health insurance options fails to include plans that will provide meaningful coverage to most people with disabilities.[24] Rather, the Proclamation incentivizes the use of restrictive and discriminatory "junk"[25] plans that will

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[21] Douglas C. Baynton, *Defectives in the Land*, *supra* note 1.

[22] 84 Fed. Reg. 53,991 (Oct. 9, 2019).

[23] *Id*.

[24] *E.g.*, Affordable Care Act (the "ACA") marketplace plans with subsidies and Medicaid. *See generally* 42 U.S.C. §§ 300gg – 300gg-5, 1396a, 18021 – 18024, 18031, 18116, 18071, 18091; 26 U.S.C. §§ 36B, 5000A; *see also* discussion *infra* § II.

[25] "Junk plans" generally refer to health insurance plans that do not offer coverage for essential health benefits, have annual and lifetime caps, medically underwrite, discriminate based on pre-existing conditions, and have other restrictions that place consumers at financial risk. *See, e.g.* Alison Kodjak, *Buyer Beware: New Cheaper Insurance Policies May Have Big Coverage* Gaps, NPR.ORG (Oct. 1, 2018, 9:32 AM), https://www.npr.org/sections/health-shots/2018/10/01/652141154/buyer-beware-new-cheaper-insurance-policies-may-have-big-coverage-gaps.

inevitably result in *increased* uncompensated care costs, while barring prospective immigrants with disabilities from entering the country, reuniting with their loved ones, and pursuing the American dream.

B. The Proclamation Acts as a De Facto Bar to Entry for Immigrants with Disabilities

The Proclamation lists eight "approved" health insurance options that may be used to comply with the Proclamation's requirements for entry into the United States. "Approved" health insurance plans pursuant to the Proclamation include: (1) employer-sponsored plans, (2) unsubsidized ACA marketplace plans, (3) short-term limited duration insurance ("STLDI") plans, (4) catastrophic plans, (5) a family member's plan, (6) TRICARE, (7) a visitor health insurance plan, and (8) Medicare.[26] As noted by the District Court, however, many of these options are not legally or practically accessible for the majority of immigrants.[27]

Most visa applicants are family-based and will not have employer-sponsored health insurance upon arrival.[28] Family member plans, if

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[26] 84 Fed. Reg. 53,991 (Oct. 9, 2019).

[27] ER 9-10.

[28] Even if employer-based insurance is an option for an immigrant, employers generally impose a waiting period for health insurance coverage

available, are generally limited to spouses and children under 26 years of age. TRICARE is only available to members of the U.S. military and their immediate family.[29] Unsubsidized ACA marketplace plans are only available to individuals who can provide proof of residence in the United States.[30] Catastrophic plans have the same requirement and are limited in availability.[31] And Medicare is generally only available to immigrants over

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that is longer than the 30-day period provided by the Proclamation. *See, e.g.*, Penny Morey, *What does "The waiting period is 30 days for all insurance plans" refer to?*, ENTREPRENEUR.COM (July 12, 2010), https://www.entrepreneur.com/answer/222129 (noting that "First-day coverage is just about unheard of these days. Many companies actually have a 60 or 90 day waiting period for benefits").

[29] *See Plans & Eligibility*, TRICARE.MIL, https://www.tricare.mil/Plans/Eligibility (last visited Jan. 28, 2020).

[30] Under the ACA and related regulations, an individual applying for private health insurance coverage through a Marketplace must show proof of residency in a U.S. state or territory as well as lawful presence to become eligible for such coverage. A person applying for entry into the U.S. by definition does not yet have lawful presence. 42 U.S.C. § 18032(f); 45 C.F.R. 155.305(a). As a result, the Proclamation offers no real access to insurance, and bars individuals who could otherwise become lawfully present immigrants and qualify for health insurance under federal law.

[31] 42 U.S.C. § 18022(e). These high-deductible plans are further limited to individuals under the age of 30 or strict hardship or affordability exemptions.

65 years old who have sufficient work history in the United States and have been continuously living in the United States for five years.[32]

The only "approved" health insurance plans that may be realistically available are short-term insurance or visitor insurance plans. Both types often have significant coverage restrictions, however, and people with disabilities are often excluded from coverage due to medical underwriting and pre-existing condition exclusions.[33] This leaves most immigrants with disabilities without *any* "approved" health insurance coverage options, acting as a de facto bar to entry into the country.

1. *Limitations of Short-term Insurance Policies*

Short-term health insurance policies are designed to fill gaps in coverage that may occur when an individual is transitioning from one plan

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[32] 42 U.S.C. §§ 1395o, 1395i-2(a), 1395w-21(a)(3), and 1395w-101(a)(3)(A); Medicare provides benefits for individuals aged 65 or older and individuals who are entitled to Social Security Disability Insurance ("SSDI") benefits for at least 25 months. 42 U.S.C. §§ 423, 426(b), 1395c, 1395i-2a; 42 C.F.R. § 406.12.

[33] *See, e.g.*, Karen Pollitz, Michelle Long, Ashley Semanskee & Rabah Kamal, *Understanding Short-Term Limited Duration Health Insurance*, KAISER FAMILY FOUNDATION (Apr. 23, 2018), https://www.kff.org/health-reform/issue-brief/understanding-short-term-limited-duration-health-insurance.

or coverage to another.[34] These plans are not subject to the ACA's rules and consumer protections that apply to major medical health insurance policies sold to individuals in the non-group market, including, for example, requirements to provide minimum coverage standards and essential health benefits, prohibitions on lifetime and annual limits, and the prohibition on medical underwriting and pre-existing condition exclusions.[35] Short-term insurance plans are thus permitted to turn down applicants with health conditions or charge higher premiums, without limit, based on health status, gender, age, and other factors.[36] Due to the lack of protections for people

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[34] 81 Fed. Reg. 75,317 (Oct. 31, 2016), *Excepted Benefits; Lifetime and Annual Limits; and Short-Term, Limited Duration Insurance* (citing Anna Wilde Mathews, *Sales of Short-Term Health Policies Surge*, WALL STREET J. (Apr. 10, 2016), https://www.wsj.com/articles/sales-of-short-term-health-policies-surge-1460328539.

[35] *See generally* Patient Protection and Affordable Care Act, Public Law No. 111-148, 124 Stat. 119 (2010). In enacting the ACA, Congress specified the category of insurance plans to which the ACA's rules and consumer protections applied by cross-referencing HIPAA's definition of "individual health insurance coverage" and defining plans that complied with the ACA's requirements as "qualified health plans." This had the effect of exempting short term insurance plans – excluded from the HIPAA definition of individual health insurance – from the ACA's requirements for "qualified health plans" and other market reforms for individual health insurance coverage. *See* 42 U.S.C. § 300gg-91(b)(5); 81 Fed. Reg. 75,317 (Oct. 16, 2016).

[36] *See* Pollitz, et al., *supra* note 33.

with pre-existing conditions,[37] the sale of short-term insurance plans has been prohibited in several states, including states with large immigrant populations like California and New York.[38]

2. *Limitations of Visitor Insurance Policies*

Visitor insurance plans are designed for individuals visiting the United States rather than long-term residents. Like short-term insurance plans, visitor insurance plans are also not covered by the protections afforded under the ACA and have broad exclusions for coverage of pre-existing conditions.[39] Further, these plans frequently have strict limitations

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[37] *See id*. (reviewing short-term health insurance plans and finding that "all policies reviewed exclude coverage for pre-existing conditions").

[38] *ACA Open Enrollment: For Consumers Considering Short-Term Policies*, KAISER FAMILY FOUNDATION (Oct. 25, 2019), https://www.kff.org/health-reform/fact-sheet/aca-open-enrollment-for-consumers-considering-short-term-policies. California, Massachusetts, New Jersey, and New York prohibit the sale of short-term health insurance policies that lack protections for people with pre-existing conditions. Additionally, Colorado, Connecticut, New Mexico, and Rhode Island impose tighter rules on short-term plans, and as a result, no short-term plans are currently sold in these states. Some other states that apply much stricter limits to short-term policies are Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Vermont, and Washington.

[39] *See* Louise Norris, *Can recent immigrants to the United States get health coverage if they're over 65?,* MEDICARERESOURCES.ORG (Aug. 23, 2019), https://www.medicareresources.org/faqs/can-recent-immigrants-to-the-united-states-get-health-coverage-if-theyre-over-65 (noting that immigrant-

on the amount and type of coverage, including preventative and maternity care, and do not include out-of-pocket maximums that would limit an enrollee's financial exposure and guard against uncompensated care costs.[40] People with disabilities will generally not qualify for a visitor insurance plan, and even if they could, the lack of protections and limitations on coverage would only lead to increased costs of uncompensated care.

3. *The Discriminatory "Growing Private Marketplace"*

The government claims the options for complying with the Proclamation's requirements are expanding through a "growing private marketplace for plans to meet the Proclamation's requirements."[41] The examples cited by the government, however, only highlight the restrictive and discriminatory nature of these policies. For example, the government

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focused travel and short-term insurance plans are "not considered minimum essential coverage under the ACA" and consumers should "be on the lookout for exclusions, including not only pre-existing conditions, but a long list of exams and treatments one might otherwise expect under individual coverage").

[40] *Id.* ("These policies may focus on emergency benefits and may have a maximum benefit… or daily limits on expenses such as hospital stays").

[41] Dkt. 23, *Doe #1, et al. v. Trump, et al*., Case No. 19-36020, Brief for Appellants, p. 7 (9th Cir., filed January 2, 2020).

suggests visiting Insubuy.com.[42] The plans available through this website, however, are "generally designed to cover any new medical conditions, injuries or accidents… [t]hey will not cover routine maintenance of pre-existing conditions, maternity, birth control, or preventative check-ups."[43] The government also suggests visiting Visitorscoverage.com.[44] This website makes clear that "these insurance plans are not the same as major health insurance plans," and a review of the available plans reveals there are policy maximums and no general coverage for pre-existing conditions, maternity care, or preventative check-ups, among other strict limitations.[45]

The websites highlighted by the government do not suggest a growing list of options for obtaining comprehensive coverage that will help reduce the costs of uncompensated care. Rather, they suggest a growing market of

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[42] *Id*.

[43] *See Immigrant Visa Medical Insurance*, INSUBUY.COM, https://www.insubuy.com/immigrant-visa-medical-insurance (last visited Jan. 28, 2020).

[44] Dkt. 23, *Doe #1, et al. v. Trump, et al.*, Case No. 19-36020, Brief for Appellants, p. 7 (9th Cir., filed January 2, 2020).

[45] *2019 Presidential Proclamation on Short-Term Insurance for Immigrants*, VISITORSCOVERAGE.COM, https://www.visitorscoverage.com/2019-Presidential-Proclamation-Immigrant-Insurance (last visited Jan. 28, 2020). Notably, none of the websites the government suggests visiting to obtain health insurance are accessible for individuals with sensory disabilities.

predatory "junk" plans that exclude coverage for people with disabilities and are likely to lead to an *increase* in uncompensated care costs, in contrast to the purported purpose of the Proclamation. As discussed in the next section, the Proclamation excludes insurance programs that have been shown to reduce uncompensated care costs: subsidized ACA insurance plans and Medicaid.

II. The Proclamation Deliberately Excludes Existing Options for Comprehensive Health Insurance Coverage Through the ACA and Medicaid for Immigrants with Disabilities

A. The ACA Has Increased Access to Healthcare for People with Disabilities and Reduced the Costs of Uncompensated Care

In enacting the ACA, Congress elected to make lawfully present immigrants eligible for subsidized health insurance coverage through ACA marketplaces or Medicaid.[46] By excluding these comprehensive plans from the list of acceptable insurance options, the Proclamation contravenes Congressional intent; it also ignores the significant financial and health benefits the ACA and Medicaid provide to immigrants with disabilities and to States' healthcare systems.

In the years before the passage of the ACA, private health insurance

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[46] 26 U.S.C § 36B(c)(1)(B) (Special rule for certain individuals lawfully present in the United States).

was out of reach for the majority of people with disabilities who did not qualify for employer-based coverage, Medicaid, or Medicare. This was because insurance companies could discriminate based on disability, doing so through pre-existing condition exclusions, annual or lifetime limits on benefits, and high premiums.[47] Moreover, private health insurance companies did not have to cover mental health and substance use disorder services, durable medical equipment (e.g., wheelchairs), or rehabilitation and habilitation services.[48] Beyond these barriers to private health insurance, access to Medicaid and Medicare was not a guarantee. Individuals who earned income above a defined poverty line, or had too many resources, and those without a "qualifying permanent disability" were excluded from Medicaid coverage.[49] Even those who qualified for Medicaid and Medicare

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[47] *See Pre-Existing Conditions*, HHS.GOV, https://www.hhs.gov/healthcare/about-the-aca/pre-existing-conditions/index.html (last visited Feb. 5, 2020).

[48] Jody S. Hyde & Gina A. Livermore, *Gaps in Timely Access to Care Among Workers by Disability Status: Will the Patient Protection and Affordable Care Act Reforms Change the Landscape?*, 26 J. OF DISABILITY POL'Y STUD. 221, 221 (2016).

[49] *The Impact of the Affordable Care Act on People with Disabilities: A 2015 Status Report*, NATIONAL COUNCIL ON DISABILITY (Jan. 26, 2016), https://ncd.gov/sites/default/files/NCD_ACA_Report02_508.pdf.

often faced significant waiting times to access benefits.[50]

The ACA effectively changed the healthcare landscape for people with disabilities by requiring that private health plans offer certain essential healthcare benefits, including mental health and substance use disorder treatment; prohibiting discrimination based on health status and pre-existing conditions; expanding Medicaid eligibility; and expanding Medicaid services.[51] As a result, the ACA reduced uncompensated care costs,[52] and increased access to healthcare through private health insurance plans and Medicaid expansion for more than 3 million Americans with disabilities,

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[50] Disability-based Medicare benefits require a two-year waiting period. 42 U.S.C. § 1396a(a)(10)(A)(i)(II)(aa); 42 C.F.R. § 435.120 (2019). In some states, individuals seeking Medicaid coverage based on disability face waits of up to a year. *Social Security Administration (SSA) Annual Data for Initial Disability Cases Involving the Processing Centers Average Processing Time*, SOC. SECURITY ADMIN. (2018), https://www.ssa.gov/open/data/program-service-centers.html.

[51] *See* 42 U.S.C. §§ 18031, 1396a.

[52] *See, e.g*, Ezekiel J. Emanuel, *Name the much-criticized federal program that has saved the U.S. $2.3 trillion. Hint: it starts with Affordable*, STAT NEWS (Mar. 22, 2019), https://www.statnews.com/2019/03/22/affordable-care-act-controls-costs ("from 2010 to 2017 the ACA reduced healthcare spending a total of $2.3 trillion."); Schubel & Broaddus, *supra* note 6, ("Hospitals saw significant reductions in uncompensated care costs as the ACA's Medicaid expansion to low-income adults, marketplace subsidies, and major insurance market reforms took effect in 2014").

including immigrants.[53]

B. Subsidized ACA Plans Are Intended to Reduce Uncompensated Care and Expand Access to Healthcare for People with Disabilities, Including Immigrants

The ACA's provisions for financial support were groundbreaking for people with disabilities and made expressly available for immigrants.[54] Subsidized health insurance through reduced monthly premiums (the premium tax credit) and out-of-pocket costs (the cost-sharing subsidy) made health insurance within reach.[55] But beyond this financial support, comprehensive requirements for all health insurance, public or private, meant that individuals with disabilities who were previously ineligible for coverage (including for Medicaid) due to income and/or or pre-existing

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[53] *Compare* W. Erickson et al., *2009 Disability Status Report United States*, CORNELL UNIV. YANG-TAN INST. ON EMP'T & DISABILITY 55, 56 (2011), http://www.disabilitystatistics.org/StatusReports/2009-PDF/2009-StatusReport_US.pdf *with* W. Erickson et al., *2017 Disability Status Report United States*, CORNELL UNIV. YANG-TAN INST. ON EMP'T & DISABILITY 31 (2019), http://www.disabilitystatistics.org/StatusReports/2017-PDF/2017-StatusReport_US.pdf.

[54] 26 U.S.C § 36B(c)(1)(B) (Special rule for certain individuals lawfully present in the United States).

[55] *Explaining Health Care Reform: Questions About Health Insurance Subsidies*, KAISER FAMILY FOUNDATION (Jan. 16, 2020), https://www.kff.org/health-reform/issue-brief/explaining-health-care-reform-questions-about-health.

conditions could now find health insurance coverage that was both affordable, and met their needs.[56] In turn, this comprehensive healthcare coverage reduced uncompensated care costs. The Medicaid and CHIP Payment and Access Commission is a non-partisan legislative branch agency that has studied uncompensated care costs for many years. It found, (coinciding with the implementation of the ACA), between 2013-2015 there was a 35% decline in the uninsured rate, as well as a 30% decline in uncompensated hospital care costs.[57]

C. Medicaid Provides Comprehensive Coverage for Persons with Disabilities and Reduces Uncompensated Care Costs

1. *Medicaid Provides Comprehensive Health Care, Long-Term Care, and Home and Community-Based Services*

The Medicaid program is a joint federal-state program that provides healthcare, long-term care, and home community-based services ("HCBS")

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[56] In 2018, an estimated 53.8 million Americans between 18 and 65 had a pre-existing condition based on the 2018 National Health Interview Survey (NHIS). *See* Gary Claxton, Cynthia Cox Follow, Anthony Damico, Larry Levitt, & Karen Pollitz, *Pre-Existing Condition Prevalence for Individuals and Families*, KAISER FAMILY FOUNDATION (Oct. 4, 2019), https://www.kff.org/health-reform/issue-brief/pre-existing-condition-prevalence-for-individuals-and-families.

[57] MEDICAID AND CHIP PAYMENT AND ACCESS COMMISSION, *supra* note 6, at 70; *see also* Schubel & Broaddus, *supra* note 6.

to individuals who meet certain income, eligibility, and assets requirements.[58] Medicaid covers nearly 7 million nonelderly adults with disabilities, over 6.9 million people over 65, and 6.1 million children with special healthcare needs.[59] People with disabilities frequently rely on Medicaid because it is the only form of insurance[60] that covers many home and community-based services such as personal care services (an aide to help with activities of daily living), specialized therapies and treatment, and habilitative and rehabilitative services. These home and community-based services are critically important for people with disabilities, enabling them to receive the medical and personal care services they need while living in their homes rather than in more expensive institutional settings, like nursing

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[58] *See* 42 U.S.C. §§ 1396, 1396(a).

[59] MaryBeth Musumeci, Priya Chidambaram, & Molly O'Malley Watts, *Medicaid Financial Eligibility for Seniors and People with Disabilities: Findings from a 50-State Survey*, KAISER FAMILY FOUNDATION (June 14, 2019), https://www.kff.org/report-section/medicaid-financial-eligibility-for-seniors-and-people-with-disabilities-findings-from-a-50-state-survey-issue-brief.

[60] *See Medicaid Works for People with Disabilities*, C. ON BUDGET AND POL'Y PRIORITIES (Aug. 29, 2017), https://www.cbpp.org/research/health/medicaid-works-for-people-with-disabilities.

homes.[61] Medicaid funding for these services supports states in meeting their community integration obligations under the Americans with Disabilities Act and the *Olmstead* decision. [62]

2. *Medicaid Enables People with Disabilities to Access Employment*

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[61] *See, e.g.*, Wendy Fox-Grage & Jenna Walls, *State Studies Find Home and Community-Based Services to Be Cost-Effective*, AARP PUB. POL'Y INST. (Mar. 2013), https://www.aarp.org/content/dam/aarp/research/public_policy_institute/ltc/2013/state-studies-find-hcbs-cost-effective-spotlight-AARP-ppi-ltc.pdf (finding much lower per-individual, average costs for HCBS compared with institutional care); Jean Accius & Brendan Flinn, *Stretching the Medicaid Dollar: Home and Community-Based Services Are a Cost-Effective Approach to Providing Long Term Services and Supports* (Feb. 2017), https://www.aarp.org/content/dam/aarp/ppi/2017-01/Stretching%20Medicaid.pdf (finding significant evidence that investing in HCBS is cost-effective and can slow the rate of Medicaid spending growth).

[62] Medicaid funded home and community-based services ensure that people with disabilities received services in the most integrated setting as required by the Supreme Court's *Olmstead* decision. *Olmstead v. L.C.* 527 U.S. 581 (1999). *Olmstead* holds that the community integration mandate under title II of the ADA requires that public entities must provide community-based services to people with disabilities when (1) such services are appropriate; (2) the affected people do not oppose community-based treatment; and (3) community-based services can be reasonably accommodated, taking into account the resources available to the public entity and the needs of others who are receiving disability services from the entity. *Id*. at 607.

In addition to supporting people to live in their own homes rather than institutions, Medicaid services are a significant source of support for people with disabilities in the workforce. Studies show that Medicaid is positively associated with employment and the integration of individuals with disabilities,[63] in part because Medicaid covers employment supports[64] that enable people with disabilities to work.[65] In fact, many individuals with disabilities who use private insurance through their employer *also* use

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[63] *See, e.g.* Jean P. Hall, et al., *Effect of Medicaid Expansion on Workforce Participation for People With Disabilities*, 107 AM. J. OF PUB. HEALTH 262 (Feb. 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5227925; Larisa Antonisse, et al., *The Effects of Medicaid Expansion under the ACA: Updated Findings from a Literature Review*, KAISER FAMILY FOUNDATION 11 (Sept. 2017), http://files.kff.org/attachment/Issue-Brief-The-Effects-of-Medicaid-Expansion-Under-the-ACA-Updated-Findings-from-a-Literature-Review (collecting 202 studies of Medicaid expansion under the ACA, and concluding that many studies show a significant positive correlation between Medicaid expansion and employment rates and none show a negative correlation).

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

[65] *See Employment & HCBS*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/ltss/employment/employment-and-hcbs/index.html (last visited Feb. 5, 2020) ("Habilitation services are flexible in nature, and can be specifically designed to fund services and supports that assist an individual to obtain or maintain employment").

Medicaid benefits because no other insurer provides the services that they need.[66]

The ACA's Medicaid expansion has further increased access to employment for people with disabilities. People with disabilities living in States which expanded Medicaid are significantly more likely to be employed, as well as significantly less likely to be unemployed because of disability. The ACA's Medicaid expansion has ensured that people with disabilities are less likely to be forced to forego working to their fullest potential because they will lose healthcare due to income thresholds or other barriers to coverage.

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[66] *See, e.g.*, Andraéa LaVant, *Congress: Medicaid Allows Me to Have a Job and Live Independently*, AM. CIV. LIBERTIES UNION (Mar. 22, 2017, 1:45 PM), 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 learned that commercial/private insurance does not cover the services I need to live independently. I would still need to rely on the services supplied through Medicaid just to ensure that I could go to work and maintain the independence that I had worked so hard to attain"); Alice Wong, *My Medicaid, My Life*, N.Y. TIMES (May 3, 2017), https://www.nytimes.com/2017/05/03/opinion/my-medicaid-my-life.html ("I am unapologetically disabled and a fully engaged member of society. None of that would be possible without Medicaid").

3. *Medicaid Expansion Improved Access to Care and Reduced Uncompensated Care Costs*

Given the Proclamation's stated goal of reducing uncompensated care costs, excluding Medicaid from the list of approved insurance plans is nonsensical. As a result of the ACA's Medicaid expansion particularly, low-income adults under the ACA had larger coverage gains, resulting in a 47 percent decrease in uncompensated care costs on average.[67] Medicaid expansion increased people's use of preventative care, and reduced emergency room use; reduced medical debt; improved people's credit; reduced hospital uncompensated care costs; and improved States' budgets.[68]

D. The Proclamation Bars the Entry of Immigrant Family Members Who Otherwise Will Assist with Caregiving and Decrease Healthcare Costs

People with disabilities rely on both paid and unpaid[69] caregivers to remain in their own homes, work, and participate in society.[70] Medicaid pays

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[67] MEDICAID AND CHIP PAYMENT AND ACCESS COMMISSION, *supra* note 6, at 70; *see also* Schubel & Broaddus, *supra* note 6.

[68] *Id*.

[69] Nga T. Thact & Joshua M. Wiener, *An Overview of Long-Term Services and Supports and Medicaid: Final Report*, U.S. DEPT. OF HHS ASPE (Aug. 8, 2018), https://aspe.hhs.gov/basic-report/overview-long-term-services-and-supports-and-medicaid-final-report.

[70] *Id.*

for caregivers for people with disabilities in a variety of settings, including home health aides in nursing facilities and in-home settings, and attendant care in an individual's home.[71] Informal caregivers – usually family members - meet a significant part of the growing need for care in the United States. According to a report from the U.S. Department of Health and Human Services, "[i]nformal caregivers are an essential provider of uncompensated [long-term care services]. In 2009, informal caregivers … provided up to three-quarters of these services, amounting to an estimated $450 billion in unpaid care."[72]

The effect of the Proclamation is thus to bar entrance to immigrant family members who could provide care to a spouse, child, or other family

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[71] *See, e.g, Mandatory & Optional Medicaid Benefits*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/benefits/mandatory-optional-medicaid-benefits/index.html (last visited Feb. 5, 2020); *States' Requirements for Medicaid-Funded Personal Care Service Attendants*, U.S. DEPT. OF HHS OIG (DEC. 2006), https://oig.hhs.gov/oei/reports/oei-07-05-00250.pdf; *Medicaid Benefits: Home Health Services – Nursing Services, Home Health Aides, and Medical Supplies/Equipment*, KAISER FAMILY FOUNDATION, https://www.kff.org/medicaid/state-indicator/home-health-services-includes-nursing-services-home-health-aides-and-medical-suppliesequipment/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last visited Feb. 5, 2020).

[72] Thact & Wiener, *supra* note 70, at 2.

member. This will not save money for the federal government. Rather, people with disabilities who need attendant care will go without, leading to needless falls and accidents, poor nutrition, missed doses of medication and dangerous and unhealthy living conditions and eventually, costly emergency room and institutional care.

Moreover, barring potential immigrants based on health insurance status will negatively impact the workforce for caregivers generally. The United States healthcare system relies on over three million immigrants, who account for 18.2 percent of all healthcare workers.[73] The need for direct care workers for people with disabilities and seniors is only growing.[74]

Many people with disabilities who receive Medicaid are eligible for

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[73] *See* Leah Zallman et al., *Care For America's Elderly And Disabled People Relies On Immigrant Labor*, HEALTH AFFAIRS (June 2019), https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2018.05514; *U.S. Home Care Workers: Key Facts*, PHI, https://phinational.org/wp-content/uploads/legacy/phi-home-care-workers-key-facts.pdf (last visited February 5, 2020); American Network of Community Options and Resources (Ancor) *Addressing the Disability Services Workforce Crisis of the 21st Century* 2017, ANCOR 38 (2017), https://cqrcengage.com/ancor/file/ZuL1zlyZ3mE/Workforce%20White%20Paper%20-%20Final%20-%20hyperlinked%20version.pdf.

[74] *Id.*

attendant care, which Medicaid covers[75] and family members can provide.[76] Barring entry to a family member who will be able to provide caregiving to an American citizen who may have a disability does not save states, or the federal government money. Rather, the result will be higher costs due to poor health status, falls and accidents and increased dependence on emergency services and nursing facility care.

III. The Proclamation Contravenes Congress's Decision to Provide Comprehensive Healthcare Coverage to Immigrants with Disabilities Without Creating Barriers to Entry

The district court correctly found that Congress has taken steps to ensure that immigrants with disabilities have access to healthcare coverage, including means-tested coverage, without creating a barrier to entry.[77] In 2009, Congress added a multi-factor test to the INA for determining if an individual seeking entry to the United States is inadmissible because they are

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[75] *See, e.g*, Mandatory & Optional Medicaid Benefits, *supra* note 71.

[76] 42 U.S.C. § 1396d.

[77] ER 30-31 ("the Proclamation excludes in its permissible insurance plans mean-tested health benefits such as Medicaid and subsidized plans under the ACA, notwithstanding the fact that Congress has repeatedly refused to include Medicaid and other means-tested non-cash public benefits in the public charge inadmissibility standards").

likely to become a "public charge."[78] In doing so, it rejected legislative proposals to tie public charge inadmissibility to the receipt of certain non-cash public benefits, including Medicaid.[79] Instead, Congress provided that immigrants would be eligible for emergency Medicaid, crisis counseling, and mental health and substance use disorder treatment, among other services.[80] And it later expanded the options available for immigrants to obtain comprehensive healthcare coverage by providing premium tax credits to assist in purchasing plans that comply with the ACA's minimum essential coverage standards.[81]

As noted by the district court, Congress has continuously rejected efforts to expand the criteria for "public charge" determinations to include the receipt of non-cash health benefits – criteria that would gravely harm individuals with disabilities who rely on these services and supports for

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[78] 8 U.S.C. § 1182(a)(4).

[79] H.R. Rep. 104-469, 89; S. Rep. No. 104-249, 63-64 (1996).

[80] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996); *see also* CHIP Reauthorization Act of 2009 ("CHIPRA"), Pub. L. No. 111-3, 123 Stat. 8 (2009) (providing federal dollars for states to fund Medicaid coverage for newly-arrived immigrant children up to age 21 and pregnant women during their first five years in the United States).

[81] 26 U.S.C. § 36B(c)(1)(b).

independence and self-sufficiency.[82] In 2013, the U.S. Senate voted down an amendment that would have expanded the public charge criteria to include the likelihood of receiving health insurance coverage through Medicaid or the Children's Health Insurance Program ("CHIP").[83] A similar proposal to bar immigrants who were likely to receive non-cash health benefits was also rejected.[84]

Despite these clear directives from Congress, the Proclamation seeks to override the multi-factor public charge test provided in the INA and replace it with a *single-factor* test based exclusively on whether a visa applicant can access a restrictive list of "approved" health insurance plans to determine if they will be a "financial burden."[85] The statute requires this multi-factor analysis, regardless of whether the Final Rule issued by the Department of Homeland Security to expand the public charge criteria goes

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[82] ER 29-31.

[83] S. Rep. No. 113-40, 42 (2013).

[84] S. Rep. 113-40, 63 (2013).

[85] 84 Fed. Reg. 53,991 (Oct. 9, 2019). In determining whether an individual is inadmissible as a "public charge," the consular officer or Attorney General "shall *at a minimum* consider" (1) age, (2) health, (3) family status, (4) assets, resources, and financial status, and (5) education and skills. 8 U.S.C. § 1182(a)(4) (emphasis added).

into effect.[86] The President simply does not have the authority to override the legislature and rewrite the statute in this manner.[87] The Proclamation far exceeds the President's Constitutional authority and must be enjoined from taking effect.

CONCLUSION

For the reasons stated above, amici respectfully urge this Court to uphold the district court's decision to preliminarily enjoin Proclamation No. 9945.

Dated: February 6, 2020 Respectfully submitted,

By: /s/ Nicholas Levenhagen

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[86] *See* Final Rule, 84 Fed. Reg. 41,292 (Aug. 14, 2019).

[87] *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (the Constitution does not authorize the President "to enact, to amend, or to repeal statutes"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. Rs. of App. P. 29(a)(5) & 32(a)(7)(B) and Circuit Rules 32-1(a) because this brief contains 6,925 words, excluding the tables, certificates, and disclosures.

Dated: February 6, 2020 DISABILITY RIGHTS CALIFORNIA

By: /s/ Nicholas Levenhagen

ADDENDUM: STATEMENTS OF AMICI CURIAE GROUPS

Center for Public Representation (CPR): CPR is a national, nonprofit legal advocacy organization that has been assisting people with disabilities for more than 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 provided comments to Defendant-Appelles in opposition to the Proclamation, and advocates nationally for access to healthcare, including through Medicaid.

Disability Rights Advocates (DRA): DRA is a non-profit, public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of people with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public

accommodations, public services, employment, transportation, education, and housing. DRA's clients, staff and board of directors include people with various types of disabilities. With offices in New York City and Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities nationwide.

Disability Rights Education & Defense Fund (DREDF): DREDF is a national law and policy center that protects and advances the civil and human rights of people with disabilities through legal advocacy, training, education, and development of legislation and public policy. DREDF, directed by individuals with disabilities and parents who have children with disabilities, is committed to increasing accessible and equally effective healthcare for people with disabilities and eliminating persistent health disparities that affect the length and quality of their lives.

Disability Rights California (DRC): DRC is the non-profit P&A agency mandated under state and federal law to advance the legal rights of Californians with disabilities DRC was established in 1978 and is the largest disability rights legal advocacy organization in the nation. As part of its mission, DRC works to ensure that people with disabilities have access to necessary services and supports that enable them to live in the community and avoid institutionalization. In 2019 alone, DRC assisted more than 24,000

Californians with disabilities.

Disability Rights Oregon (DRO): DRO is the nonprofit Protection and Advocacy agency mandated under federal law to promote and defend the rights of Oregonians with disabilities, the Client Assistance Program that advocates for Oregonians entitled to services and benefits under the Rehabilitation Act of 1973, and the Ticket to Work and Work Incentives Improvement Act of 1999 benefit counseling program that advises people with disabilities in Oregon and southwest Washington on how employment may impact Social Security disability beneficiaries. Since 1977, DRO has worked to ensure people with disabilities have equality of opportunity, full participation and the ability to exercise meaningful choice, including access to healthcare, Medicaid, and employment. In the last decade, DRO served 18,700 Oregonians with disabilities.

National Council on Independent Living (NCIL): NCIL is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of centers for independent living, state independent living councils, people with disabilities and other disability rights organizations. NCIL advances independent living and the rights of people with disabilities. NCIL envisions a world in which people with disabilities are valued equally and participate

fully.

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

The Arc of the United States (The Arc): Founded in 1950, The Arc is the nation's largest community-based organization of and for people with intellectual and developmental disabilities ("I/DD"). The Arc promotes and protects the human and civil rights of people with I/DD and actively supports their full inclusion and participation in the community throughout their lifetimes. The Arc has a vital interest in ensuring that all individuals

with I/DD receive the appropriate protections and supports to which they are entitled by law.