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**CONTRACT RIGHTS UNDER THE I-864
AFFIDAVIT OF SUPPORT:
SEVENTH CIRCUIT’S REASONING
BINDS COURTS’ HANDS IN A
SHIFTING LANDSCAPE FOR PUBLIC
CHARGE DOCTRINE**

JOHN T. BURGER[†]

INTRODUCTION

Annually, more than half a million sponsors enter into a contract with the United States Government.¹ The consideration to the sponsor is almost entirely speculative and unknown. The sponsor’s obligations are indefinite and may be subject to change by the Government after signing. The sponsors routinely sign these agreements without proper counsel, or with interested counsel. Federal agencies are currently designing procedures to

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¹ DEP’T OF HOMELAND SEC., ANN. FLOW REP.: LAWFUL PERMANENT RESIDENTS 5 (Aug. 2018), https://www.dhs.gov/sites/default/files/publications/Lawful_Permanent_Residents_2017.pdf. “[M]ore than half a million sponsors” is an estimate based on the number of Family-Based Lawful Permanent Resident applications approved by the U.S. Government between 2015 and 2017. To be approved, most of these applications require a properly executed Affidavit of Support, discussed at *infra* Part I. It is difficult to know precisely how many Affidavits of Support are executed on an annual basis. More than one sponsor can sign for a single immigrant, while multiple immigrants can be sponsored by the same immigrant. For this reason, “more than half a million” is an estimate based on a one-to-one, sponsor-to-immigrant ratio, where the number of approved applications has ranged from 678,978 to 804,793 between 2015 and 2017. *Id.*

enforce these agreements against sponsors, possibly on a massive scale.² And, if recent case law holds firm, these sponsors will be absolutely defenseless to such claims in a court of law.

The I-864, or Affidavit of Support (“Affidavit”), is a statutorily created contract between the United States Government and a sponsor to an immigrant.³ The sponsor agrees to provide support to the sponsored immigrant where it is necessary to prevent that immigrant from becoming a public charge.⁴ In the I-864, the sponsor agrees that the immigrant will remain at above 125% of the poverty line; if the immigrant falls below the poverty line, the sponsor will be required to issue support payments to make up the difference.⁵ Furthermore, if the immigrant receives public benefits that are included in the public charge guidelines, the agency issuing the benefit may hold the sponsor liable and recoup those benefits under the I-864.⁶ The sponsor’s obligations to the immigrant are indefinite and do not sever upon divorce.⁷

This Affidavit, including the required obligations, is a mandatory part of public charge determinations.⁸ To ensure that an immigrant is admissible, most family-based immigrants must show,⁹ through a totality of the circumstances, that they are not “likely at any time to become a public charge.”¹⁰ If they fail to do so, they will be deemed inadmissible and will be unable to enter the United States.¹¹ While the United States Citizenship and Immigration Services (“USCIS”) has historically defined a “public charge” as “an individual who is likely to become primarily

² See Memorandum on Enforcing the Legal Responsibilities of Sponsors of Aliens, 2009 DAILY COMP. PRES. DOC. 201900334 (May 23, 2019) [hereinafter May 23 Memo].

³ Greg McLawsen, *The I-864 Affidavit of Support: An Intro to the Immigration Form You Must Learn To Love / Hate*, 48 FAM. L.Q. 581, 583 (2015).

⁴ 8 U.S.C. § 1183a(a)(1) (2012).

⁵ McLawsen, *supra* note 3, at 583.

⁶ 8 U.S.C. § 1183a(b)(1)(A).

⁷ *Affidavit of Support Under Section 213A of the INA*, DEP’T OF HOMELAND SEC. (Mar. 6, 2018), <https://www.uscis.gov/i-864> [hereinafter “I-864”].

⁸ See 8 U.S.C.A. § 1182(a)(4)(C)–(D) (West 2014).

⁹ Wherever a U.S. citizen or permanent resident files an immigration petition for a foreign family member, an I-864 form will be required. McLawsen, *supra* note 3, at 583.

¹⁰ 8 U.S.C.A. § 1182(a)(4)(A).

¹¹ 8 U.S.C.A. § 1182(a).

dependent on the government for subsistence,”¹² the Attorney General and consular officers retain considerable discretion in their determination, using a set of statutorily defined factors.¹³

While factors like the immigrant’s age, health, family status, financial health, and education are all part of the public charge determination, the Attorney General may also consider the Affidavit.¹⁴ In practice, the I-864 has been treated as an enforceable contract, which has meant that “a valid Form I-864 is virtually always sufficient to avoid inadmissibility on public charge grounds,” except in cases relating to extreme medical conditions.¹⁵ This setup has created a contractual scheme where, in consideration for undertaking the enforceable support obligations under the Affidavit,¹⁶ the Government virtually guarantees that the immigrant will not be deemed inadmissible as a public charge.¹⁷

For a commonly executed contract that has been enforceable in court for nearly twenty years, case law has been sparse.¹⁸ Specifically, it remains unclear whether common-law defenses like fraud, duress, “unclean hands,” and unconscionability apply to the Affidavit in most jurisdictions.¹⁹ While still an open question in many jurisdictions, the greatest volume of case law for common-law contract defenses in the Affidavit has addressed

¹² *Public Charge*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 26, 2017), <https://www.uscis.gov/greencard/public-charge>. A recently enacted rule, however, changes the previous definition of “public charge” as “primarily dependent on the government,” and instead emphasizes the immigrant’s receipt of “means-tested public benefits.” Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41304, 41355–56 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, & 248). The government justifies the change “as a policy matter” to remedy an “unduly restrictive” obstacle to making public charge determinations. *Id.* at 41356.

¹³ 8 U.S.C.A. § 1182(a)(4)(B).

¹⁴ *Id.*

¹⁵ Greg McLawsen, *USCIS Proposes New Public Charge Rules: The Form I-864 will Become Table Stakes as Scrutiny Shifts to the Applicant*, 23–21 BENDER’S IMMIGR. BULL. 01 (2018).

¹⁶ *See Stump v. Stump*, No. 1:04-CV-253-TS, 2005 WL 1290658, at *6, (N.D. Ind. May 27, 2005). Additionally, the obligation may be enforced in “any appropriate court,” which has been determined to refer to both federal and state courts. 8 U.S.C. § 1183a(e) (2012).

¹⁷ *See McLawsen*, *supra* note 15.

¹⁸ Stephanie L. Tang, *Arguing Affidavits of Support*, 105 ILL. B. J. 34, 36 (2017).

¹⁹ John Patrick Pratt & Ira J. Kurzban, *The Affidavit of Support Creates a Legally Enforceable Contract by the Sponsored Foreign National: Efforts To Collect Damages as Support Obligations Against Divorced Spouses*, 57 FED. LAW. 44, 45 (2010).

a mitigation of damages defense.²⁰ In the prototypical fact pattern, an immigrant, treated as third-party beneficiary to the Affidavit, seeks to enforce her rights against the sponsor, who pleads an affirmative mitigation duty in the hopes it will reduce his liability to the immigrant.²¹ One such case, *Liu v. Mund*, analyzes not only the issue of whether a mitigation of damages defense should apply to the Affidavit, but also larger issues pertaining to the fundamental character and purposes of the form.²²

Courts are currently split on the issue of whether a mitigation of damages defense is available to sponsors to the Affidavit.²³ Leading cases, including *Liu*, rely upon the unique nature of the form to assert that such defenses are precluded.²⁴ This Note will argue that the I-864 should be treated under the same principles as a typical common-law contract. Part I of this Note will trace the history of the I-864 form, primarily focusing on the legislation and case law rendering the form an enforceable contract. Part II will discuss *Liu v. Mund*, focusing extensively on the United States Court of Appeals for the Seventh Circuit's legal and policy arguments, and how other courts have responded in its wake. Subsequently, Part III will respond to the arguments in *Liu*, offering novel arguments. Finally, Part III will offer analysis of the Affidavit in light of recently proposed executive action, making this Note the first to tie these executive actions directly to parties' contract rights.²⁵ Ultimately, this

²⁰ According to the Restatement of Contracts, "damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation." RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (AM. LAW. INST. 1981). The rule hedges against waste by encouraging an injured party to make "reasonable efforts" to offset the injury resulting from a breach of contract. *Id.* The defense is pleaded affirmatively and does not create liability for the party, but merely offsets the damages to which the party may have been entitled under a breach of contract claim. *Id.*

²¹ See, e.g., *Tornheim v. Kohn*, No. 00 CV 5084(SJ), 2002 WL 482534, at *1 (E.D.N.Y. Mar. 26, 2002); see also *Erlor v. Erlor*, 824 F.3d 1173, 1175–76 (9th Cir. 2016); *Liu v. Kell*, 299 F. Supp. 3d 1128, 1131 (W.D. Wash. 2017); *Dorsaneo v. Dorsaneo*, 261 F. Supp. 3d 1052, 1053 (N.D. Cal. 2017); *Stump*, 2005 WL 1290658, at *1; *Zhu v. Deng*, 794 S.E.2d 808, 810–11 (N.C. Ct. App. 2016); *In re Marriage of Kumar*, 220 Cal. Rptr. 3d 863, 864 (Ct. App. 2017).

²² 686 F.3d 418, 422 (7th Cir.), *as amended*, 686 F.3d 418 (7th Cir. 2012).

²³ Tang, *supra* note 18, at 37.

²⁴ See *infra* Part III.

²⁵ See generally *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, & 248).

Note argues that treating the I-864 form as a common-law contract is not only a proper reading of the authorizing statutes, but also that diverging from *Liu* will give courts flexibility to ensure just outcomes in litigation.

I. HISTORY AND DEVELOPMENT OF THE AFFIDAVIT OF SUPPORT
IN PUBLIC CHARGE INADMISSIBILITY: FROM THE NINETEENTH
CENTURY UNTIL 2012

While the enforceable Affidavit of Support is a somewhat recent invention, the exclusion of immigrants based on their purported likelihood of becoming a public charge is not.²⁶ Indeed, the general Immigration Act of 1882, one of the first major Congressional immigration statutes, excluded from entry “idiots, lunatics, convicts, and persons likely to become a public charge.”²⁷ This ground for inadmissibility was reinforced in the Immigration and Nationality Act (“INA”) enacted in 1950.²⁸ An immigrant could increase her odds of admission, however, by having a sponsor execute an I-134, an “affidavit of support,” that stated that the sponsor is “willing and able” to provide financial support to the sponsored immigrant to keep her from becoming a public charge.²⁹ Subsequent case law, however, held that the I-134 was *not* intended to be a judicially enforceable contract, but merely a moral pledge amounting to one of several factors factoring into consular officials’ determination of whether the immigrant was likely to become a public charge.³⁰

The status of the “affidavit of support” requirement changed with the enactment of two statutes: The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), enacted on August 22, 1996,³¹ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”),

²⁶ *Early American Immigration Policies*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sep. 4, 2015), <https://www.uscis.gov/history-and-genealogy/our-history/agency-history/early-american-immigration-policies>.

²⁷ *Id.*

²⁸ See Rómulo E. Guevara & Frederick F. Calope, *Origin and Evolution: Ten Years of the Affidavit of Support Under IIRIRA*, 84 INTERPRETER RELEASES 2849, 2850 (Dec. 10, 2007).

²⁹ *Id.*

³⁰ *San Diego Cty. v. Vilorio*, 276 Cal. App. 2d 350, 357 (Cal. Ct. App. 1969).

³¹ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 [hereinafter PRWORA].

enacted on September 30 of that same year.³² PRWORA, an omnibus welfare reform bill, modified the INA to create a legally enforceable “contract” between the Government and the sponsor of an immigrant beneficiary.³³ IIRIRA retained the “contract” language while specifying the terms of this arrangement.³⁴

The Affidavit, after some initial ambiguity,³⁵ went into full effect in 1999, per the guidelines of the Immigration and Naturalization Service’s Field Guidance for public charge inadmissibility.³⁶ Per PRWORA and IIRIRA, this new Affidavit, eventually the I-864, was mandatory in the public charge determination process and enforceable against the sponsor by the sponsored immigrant; federal, state, and local governments; and agencies providing means-tested benefits.³⁷

The obligations created under this form are “mighty.”³⁸ For example, the sponsor must “maintain the sponsored alien at an annual income that is not less than 125% of the Federal poverty line during the period in which the affidavit is enforceable.”³⁹ As of 2015, this mandatory support amounts to approximately \$15,000 annually for a single-person household, plus approximately \$5,000 per month for each additional household member.⁴⁰ Furthermore, these obligations are indefinite, terminating only when the sponsored immigrant (1) becomes a

³² See Omnibus Consolidated Appropriations Act of Sept. 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1997) [hereinafter IIRIRA] (the provisions of IIRIRA were a rider on this omnibus appropriations bill).

³³ PRWORA, *supra* note 31. In pertinent part: “No affidavit of support may be accepted by the Attorney General or by any consular officer to establish that an alien is not excludable as a public charge under Section 212(a)(4) unless such affidavit is executed *as a contract*.” *Id.* sec. 213A(a) (emphasis added).

³⁴ See IIRIRA, *supra* note 32, sec. 213A. Here, among other provisions, the support obligation was tied to 125% of the federal poverty line.

³⁵ Guevara & Calope, *supra* note 28, at 2852. Because the new affidavit did not go into effect as mandatory until the official release of implementing regulations, it did not immediately supplant the I-134.

³⁶ Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (proposed May 26, 1999).

³⁷ 8 U.S.C. § 1183a(a)(1)(B) (2012). The first known case upholding the form’s enforceability was *Tornheim v. Kohn*, where the court distinguished between the unenforceable I-134 form and the enforceable I-864. *Tornheim v. Kohn*, No. 00 CV 5084(SJ), 2002 WL 482534, *4 (E.D.N.Y. Mar. 26, 2002).

³⁸ McLawsen, *supra* note 3, at 586.

³⁹ 8 U.S.C. § 1183a(a)(1)(A). The contract also provides that the sponsor is required to notify USCIS of any change in address within 30 days of the change. *I-864*, *supra* note 7, at 7.

⁴⁰ See *Annual Update of the HHS Poverty Guidelines*, 79 Fed. Reg. 3593 (Jan 22, 2014).

United States citizen, (2) completes forty quarters of work, (3) loses lawful permanent resident status and leaves the United States, (4) receives a new grant for adjustment of status with a new affidavit of support, or (5) dies.⁴¹ Furthermore, the Affidavit may be used by governments or other benefit-distributing agencies to recoup an immigrant's ill-gotten benefits from sponsors.⁴² As an added note, the I-864 expressly provides that a divorce does not sever a sponsor's obligations to the sponsored immigrant.⁴³

Case law under the I-864 has been relatively sparse.⁴⁴ While governments and agencies retain the right to sue under the form, they have largely declined to do so because of a perception that the collection process is administratively burdensome and politically charged.⁴⁵ For that reason, most of the cases seeking enforcement of the Affidavit have involved an immigrant seeking to enforce the support obligations, most particularly in the context of family law.⁴⁶

After the passage of PRWORA and IIRIRA, courts quickly identified the I-864 Affidavit of Support as an enforceable contract, standing in contrast to its predecessor.⁴⁷ In *Tornheim v. Kohn*, the plaintiff sought to enforce sponsor obligations against the defendant, his father-in-law, using the statutory language created by PRWORA, IIRIRA, and the previously signed I-134 affidavit of support.⁴⁸ There, the United States District Court for the Eastern District of New York held that the I-134 was not an enforceable contract, but a "morally binding agreement," holding, by implication, that the newer I-864 was the enforceable "contract" proscribed originally by PRWORA.⁴⁹ Litigation about

⁴¹ *I-864*, *supra* note 7, at 7; *see also* 8 U.S.C. § 1183a(a)(2)–(3).

⁴² 8 U.S.C. § 1183a(e)(2).

⁴³ *I-864*, *supra* note 7, at 7 (“**NOTE:** Divorce **does not** terminate your obligations under Form I-864.” (emphasis in original)).

⁴⁴ Tang, *supra* note 18, at 36.

⁴⁵ Guevara & Calope, *supra* note 28, at 2852.

⁴⁶ *See* Geoffrey A. Hoffman, *Immigration Form I-864 (Affidavit of Support) and Efforts To Collect Damages as Support Obligations Against Divorced Spouses – What Practitioners Need To Know*, 83 FLA. B.J. 53, 53 (2009).

⁴⁷ Guevara & Calope, *supra* note 28, at 2852.

⁴⁸ *Tornheim v. Kohn*, No. 00 CV 5084(SJ), 2002 WL 482534, at *1 (Mar. 26, 2002).

⁴⁹ *Id.* at *3.

parties' rights has been sparse, but these rights were largely defined ten years later when the Seventh Circuit explored the issue in *Liu v. Mund*.⁵⁰

II. *LIU V. MUND*: THE SEVENTH CIRCUIT TAKES A FIRM POSITION ON PARTIES' CONTRACTUAL RIGHTS UNDER THE I-864

A. *Liu v. Mund: History and Procedural Posture*

Liu v. Mund, written by Circuit Court Judge Richard Posner, forged the landscape for interpreting the Affidavit of Support and remains the leading case on the topic of mitigation of damages.⁵¹ The case centered on a failed marriage between Timothy Mund, an American from Wisconsin, and Wenfang Liu, a Chinese woman that he met and married while living in China.⁵² The couple executed an I-864 when they returned to the United States after two years of marriage, with Mund as the sponsor and Liu as the sponsored immigrant.⁵³ After years of a difficult and allegedly abusive marriage, the couple divorced.⁵⁴ When adjudicating the divorce, the Wisconsin divorce court declined to address the bearing of federal law, including the obligations under the I-864.⁵⁵

Liu then filed an independent suit in the Western District of Wisconsin seeking to enforce Mund's obligations under the I-864 Affidavit of Support.⁵⁶ With respect to the issue of whether Liu was obligated to mitigate her damages, the court noted that Mund failed to properly plead the issue as an affirmative defense, and thus the issue was precluded.⁵⁷ Despite this, the court noted that "the notion that an immigrant has a duty to mitigate damages not only seems fair, but is consistent with the notion of the plaintiff's status as a third-party beneficiary to a

⁵⁰ *Liu v. Mund*, 686 F.3d 418, 422 (7th Cir.), *as amended*, 686 F.3d 418 (7th Cir. 2012); *see also* McLawsen, *supra* note 3, at 586.

⁵¹ McLawsen, *supra* note 3, at 586.

⁵² *Liu*, 686 F.3d at 419.

⁵³ *Id.*

⁵⁴ *Id.*; *see* Reply Brief of the Plaintiff-Appellant, Wenfang Liu at 5, *Liu v. Mund*, 686 F.3d 418 (7th Cir. 2012) (No. 11-1453).

⁵⁵ *Id.* As part of the divorce agreement, Mund was obligated to support Liu at \$500 per month, on the condition that Liu seek work by making at least four job applications per month. *Id.*

⁵⁶ *Id.* at 420.

⁵⁷ *Liu v. Mund*, 748 F. Supp. 2d 958, 962 (W.D. Wis. 2010), *aff'd in part and rev'd in part*, 686 F.3d 418 (7th Cir. 2012).

contract.”⁵⁸ The court then calculated the plaintiff’s damages, noting that Liu’s recovery of support obligations should be tied to her “reasonable efforts to seek work” during that time period.⁵⁹

Liu appealed this issue to the Seventh Circuit, where the court inquired broadly “whether in a suit to enforce the obligation of support created by the federal affidavit the plaintiff has a legal duty to mitigate damages.”⁶⁰ That decision has since become an inflection point in the interpretation of the Affidavit and its requirements,⁶¹ and its reasoning is, therefore, worthy of close analysis.

B. Liu v. Mund: Circuit Judge Posner and the Seventh Circuit Rule Against the Application of a Mitigation of Damages Defense

The Seventh Circuit eventually held that a mitigation defense would be unavailable to the sponsor of an Affidavit.⁶² First, the court quickly rejected the premise that common law principles should govern the contract.⁶³ Taking a dismissive tone, the court drew on its understanding of the history of the common law and its role in statutory interpretation:

But the hoary maxim that statutory repeals of common law rules are disfavored is a poor guide to legislative meaning, for it is the fossil remnant of the traditional hostility of English judges to legislation. Those judges had made up the common law, which for an age was virtually the entire law of England, and they resented legislative interlopers. One would hardly expect legislators to respond by being careful not to step into the common law flower bed.⁶⁴

Despite this approach, the court acknowledged that common law may play a role to provide “details that the legislators didn’t bother to specify.”⁶⁵ For example, the court drew on the common law to hold that Liu, a third-party beneficiary to the Affidavit, would typically have the same duties and rights as a signatory to the contract.⁶⁶

⁵⁸ *Id.* at 963–64.

⁵⁹ *Id.* at 965.

⁶⁰ *Liu*, 686 F.3d at 420.

⁶¹ *See* McLawsen, *supra* note 3, at 586.

⁶² *Liu*, 686 F.3d at 422.

⁶³ *Id.* at 421.

⁶⁴ *Id.* (citations omitted).

⁶⁵ *Id.*

⁶⁶ *Id.*

The court then posed the central question “whether reading a duty of mitigation into the immigration statute and the regulations and the affidavit-contract would serve or disserve statutory and regulatory objectives.”⁶⁷ In other words, the Seventh Circuit framed the defense as an interposition, submitting it to the threshold test of whether it was consistent with the purposes of PRWORA and IIRIRA, rather than assuming that mitigation, as well as other common-law defenses, would be applied as a default or gap-filling rule to the Affidavit as part of the “contract” first articulated in PRWORA.⁶⁸

Gauging the statutory purpose behind the Affidavit, the court made its central distinction:

The Justice Department argues as we noted that to impose a duty to mitigate would encourage immigrants to become self-sufficient. But self-sufficiency, though mentioned briefly in the House Conference Report on the 1996 statute as a goal, see H.R. Rep. No. 104-828, p. 241 (1996), is not the goal stated in the statute; *the stated statutory goal, remember, is to prevent the admission to the United States of any alien who “is likely at any time to become a public charge.”*⁶⁹

In the Seventh Circuit’s construction, then, the primary statutory purpose animating the Affidavit of Support requirement is not to ensure that immigrants who *do* come to the country are self-sufficient, but rather to prevent the entry of at-risk immigrants altogether by imposing a heavy burden on sponsors.⁷⁰ This distinction forms the core of *Liu*’s reasoning, as it formed the basis for the court to eschew the application of common-law principles.⁷¹ Further, it has largely been cited and relied upon directly by subsequent courts.⁷²

This distinction, however, requires some clarification. First, the Seventh Circuit’s observations about “the 1996 statute” refer exclusively to IIRIRA, as is made clear by Judge Posner’s reference to IIRIRA’s House Report.⁷³ As detailed earlier, the

⁶⁷ *Id.*

⁶⁸ Compare *id.* with *infra* notes 116–122 and accompanying text (illustrating a common assumption among lower courts that common-law contract defenses would apply as a default rule where the statute’s meaning was unclear).

⁶⁹ *Liu*, 686 F.3d at 422 (emphasis added).

⁷⁰ *Id.* (“The absence of such a duty . . . tends to make prospective sponsors more cautious about sponsoring immigrants.”).

⁷¹ *Id.* at 421.

⁷² See *infra* Part II.C.

⁷³ See *Liu*, 686 F.3d at 420. In detailing the statutory history, the Circuit Court observes that sponsors’ affidavits “generally had not been understood to impose a

statute that made the Affidavit an enforceable contract was *not* IIRIRA, but the bill that preceded it: the omnibus welfare bill, PRWORA.⁷⁴ Indeed, only the precise terms of the contract were elaborated in IIRIRA, not the fact of its enforceability.⁷⁵ Despite this, neither PRWORA, nor its role in creating an enforceable Affidavit, were mentioned in the opinion.⁷⁶ This observation is significant in light of the opinion's distinction, as "self-sufficiency," a concept dismissed in Judge Posner's opinion, is indeed an express and fundamental purpose in the PRWORA scheme on welfare and immigration.⁷⁷

legal duty on the sponsor to support the sponsored person." *Id.* The opinion then discusses that the Affidavit would eventually become enforceable but does not directly state which statute allowed that shift to come to pass. *Id.*

⁷⁴ See PRWORA, *supra* note 31, sec. 213A(a). Remember that the PRWORA, enacted on August 22, 1996, predated IIRIRA, which was enacted on September 30, 1996.

⁷⁵ See *supra* Part I.

⁷⁶ See *id.*

⁷⁷ See PRWORA, *supra* note 31, sec. 400. The complete purpose statements for PRWORA's approach to immigration and welfare are as follows:

SEC. 400. STATEMENTS OF NATIONAL POLICY CONCERNING WELFARE AND IMMIGRATION.

The Congress makes the following statements concerning national policy with respect to welfare and immigration:

(1) *Self-sufficiency* has been a basic principle of United States immigration law since this country's earliest immigration statutes.

(2) It continues to be the immigration policy of the United States that—

(A) *aliens* within the Nation's borders not depend on public resources to meet their needs, but rather *rely on their own capabilities* and the resources of their families, their sponsors, and private organizations, and

(B) the availability of public benefits not constitute an incentive for immigration to the United States.

(3) Despite the principle of *self-sufficiency*, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.

(4) Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.

(5) It is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order *to assure that aliens be self-reliant* in accordance with national immigration policy.

(6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.

(7) With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this title, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of *assuring that aliens be self-reliant in accordance with national immigration policy.*

After setting forth its understanding of statutory purpose, the Seventh Circuit analyzed the potential policy implications and how the absence of a mitigation doctrine may affect the parties to the case.⁷⁸ Indeed, Judge Posner confidently suggested that imposing an unconditional, indefinite support obligation may have affected Mr. Mund's willingness to sponsor his wife in the first place.⁷⁹ Judge Posner then examined Liu's earning potential and compared it to the "meager" support obligation, concluding that Liu still had a "strong incentive" to seek employment.⁸⁰

Concluding, Judge Posner raised an array of arguments pertaining to judicial interests. First, he cited the "increased complication" that allowing a mitigation defense would create when attempting to enforce the obligation.⁸¹ Then, Judge Posner questioned whether federal courts are a proper forum for such a dispute, seemingly eager to wash his and the court's hands of "domestic-relations disputes."⁸² While these issues are prominent in Judge Posner's opinion, the legal distinction drawn from the supposed purpose of IIRIRA has formed the basis for subsequent courts' rejections of the mitigation doctrine.⁸³

Id. (emphases added).

⁷⁸ See *Liu*, 686 F.3d at 422.

⁷⁹ *Id.* ("Had [Mund] known that by bringing [Liu] to the United States he would be assuming a virtually unconditional obligation to support her indefinitely even if they later divorced, he might not have signed the affidavit, and the couple might have remained in China—and perhaps divorced there, ending her right to become a permanent resident of the United States.").

⁸⁰ *Id.*

⁸¹ *Id.* at 422–23.

⁸² *Id.* at 423. This reluctance to enter into domestic relations law also seems motivated by a perception that this issue is too minor for the federal courts:

The duty is federal and so would presumably be defined by federal common law. We are not pointed to any federal common law duty of mandatory job search, so the federal courts would have to create one for I–864 cases (should the courts ever see another one—which would be likely if we upheld the district court). *It hardly seems worth the effort.*

Id. (emphasis added).

⁸³ See *infra* Part II.C.

C. *Liu v. Mund: Other Jurisdictions Reinforce the Seventh Circuit's Decision and Reasoning*

In the wake of *Liu*, most courts have relied upon the Seventh Circuit's reasoning to preclude a mitigation of damages defense, with few exceptions.⁸⁴ In *Liu v. Kell*, the District Court for the Western District of Washington not only relied on its reading of the statutory purpose to preclude a mitigation defense, but also shared the Seventh Circuit's reluctance to apply common law principles to the I-864 writ large.⁸⁵ The North Carolina Court of Appeals took a similarly deferential stance in *Zhu v. Deng*, following the Seventh Circuit not only in its interpretation of IIRIRA and the Affidavit of Support requirement, but also in its reading of how and whether the common law should be applied.⁸⁶ In *In re Marriage of Kumar*, a California Court of Appeal deferred entirely to the Seventh Circuit's reasoning on the issue of mitigation, quoting the opinion extensively and denying the defense on the basis that "[w]e find *Liu* persuasive."⁸⁷

Other subsequent cases have used *Liu*'s reasoning outside of the particular issue of mitigation. In *Erler v. Erler*, the United States Court of Appeals for the Ninth Circuit analyzed the issue of "household size" in the Affidavit, examining how that would affect the support required from an ex-spouse sponsor.⁸⁸ In doing so, it drew on the Seventh Circuit's understanding of the Affidavit's statutory purpose when discussing whether the sponsor or immigrant may receive "windfall benefits," and ultimately decided that sponsors should bear the greater financial risk.⁸⁹ In *Dorsaneo v. Dorsaneo*, the District Court for

⁸⁴ See McLawsen, *supra* note 3, at 586; see also *Shah v. Shah*, Civil No. 12-4648 (RBK/KMW), 2013 WL 12157867, at *5 (D.N.J. Oct. 28, 2013) (evaluating the split authorities, including *Liu*, on the issue of mitigation before holding that the plaintiff's failure to mitigate remained a question of fact in the case).

⁸⁵ *Liu v. Kell*, 299 F. Supp. 3d 1128, 1133 (W.D. Wash. 2017).

⁸⁶ *Zhu v. Deng*, 794 S.E.2d 808, 819 (N.C. Ct. App. 2016).

⁸⁷ *In re Marriage of Kumar*, 220 Cal. Rptr. 3d 863, 871-72 (Ct. App. 2017).

⁸⁸ *Erler v. Erler*, 824 F.3d 1173, 1175 (9th Cir. 2016). The case involved a divorced immigrant spouse who moved in with her son after a divorce. *Id.* The court drew on *Liu* to hold that the son's support of the ex-spouse would not offset the sponsor's obligations of support, maintaining that "the sponsor is not an intended beneficiary of the affidavit-of-support requirement." *Id.* at 1179.

⁸⁹ *Id.* ("Because the sponsor is not an intended beneficiary of the affidavit-of-support requirement, we see no reason why the sponsor, rather than the immigrant, should receive the windfall. To the contrary, allowing the sponsor to receive the windfall would undermine the purpose of the affidavit of support, which is to prevent the admission to the United States of any alien who is likely at any time to become a public charge. As the Seventh Circuit has recognized, that purpose

the Northern District of California mirrored the Seventh Circuit's reasoning when denying a defense of fraud in the inducement, another potential common-law defense to the Affidavit.⁹⁰

In *Shah v. Shah*, however, the District Court of New Jersey denied a plaintiff's motion for summary judgment where it found that there were triable issues of fact pertinent to plaintiff's alleged failure to mitigate her damages.⁹¹ The court observed that "[c]ourts are divided" on the issue of mitigation,⁹² and did not adopt a definitive stance on the issue.⁹³ The court also entertained, but subsequently dismissed, the defendant's arguments asserting fraud and unconscionability, seemingly assuming that these common-law contract defenses could be applied to the Affidavit.⁹⁴ Still, though, *Liu* remains the leading case on the issue, and courts, including the court in *Shah*, have not challenged its reasoning directly.⁹⁵ The remainder of this Note, then, will focus primarily on why the Seventh Circuit's reasoning in *Liu* should not be exclusively relied upon in interpreting the Affidavit.

is best served by interpreting the affidavit in a way that makes prospective sponsors more cautious about sponsoring immigrants." (internal citations and quotations omitted)).

⁹⁰ *Dorsaneo v. Dorsaneo*, 261 F. Supp. 3d 1052, 1054 (N.D. Cal. 2017) ("[IIRIRA] and implementing regulations show that the purpose of the support obligation is to ensure that family-sponsored immigrants do not become a 'public charge.'"). While the court did not cite directly to *Liu* to support this statement, it drew on similar portions of the legislative record and similarly did not explore PRWORA's role in the statutory scheme. *Id.* It should also be observed that the *Dorsaneo* trial took place within the Ninth Circuit after *Erler*, the Ninth Circuit case that had previously drawn on *Liu* to discern the statutory purpose behind the Affidavit. *See Erler*, 824 F.3d at 1179.

⁹¹ *See Shah v. Shah*, Civil No. 12-4648 (RBK/KMW), 2013 WL 12157867, at *5 (D.N.J. Oct. 28, 2013).

⁹² *Shah*, 2013 WL 12157867, at *5.

⁹³ *Shah*, decided in 2013, was written where the bulk of authority still assumed that common-law defenses could apply to the Affidavit. *See infra* Part III.A.

⁹⁴ *Id.* at *3-4.

⁹⁵ *See* McLawsen, *supra* note 3, at 586; *Shah*, 2013 WL 12157867, at *5; *see also* *Liu v. Kell*, 299 F. Supp. 3d 1128, 1133 (W.D. Wash. 2017); *Zhu v. Deng*, 794 S.E.2d 808, 819 (N.C. Ct. App. 2016); *In re Marriage of Kumar*, 220 Cal. Rptr. 3d 863, 871 (Ct. App. 2017).

III. BREAKING DOWN THE ARGUMENTS: A HARD LOOK AT THE
ARGUMENTS, ASSUMPTIONS, AND MISSED OPPORTUNITIES
UNDERLYING *LIU V. MUND*

In addressing the question of whether courts should apply a mitigation defense, the arguments from the case law and, more particularly, *Liu v. Mund*, may aptly be organized into a set of sub-issues: (1) whether common law contract principles are consistent with the statutory design of the Affidavit of Support; (2) whether the purpose of the affidavit requirement precludes the application of a mitigation duty—and, by implication, other common law contract defenses; (3) whether a mitigation inquiry may be justified in light of concerns about judicial efficiency; and (4) whether equitable considerations favor either a sponsor or immigrant assuming primary responsibility to prevent the immigrant from becoming a public charge.⁹⁶ Another issue, not discussed in any depth in the case law, is possibly monumental: if the Government or benefit-issuing agencies attempt to enforce their rights under the Affidavit—as the Trump Administration has expressed a desire to do⁹⁷—how should this weigh in courts’ interpretation of the obligations and nature of the Affidavit? This Part will address each of these sub-issues in turn.

A. *Common Law Contract Principles Should Be Applied to the Affidavit of Support Because Their Application is Consistent with PRWORA and IIRIRA, Principles of Statutory Construction, and Case Law Preceding Liu*

The pertinent statutory provisions set forth under PRWORA and IIRIRA, together with commonly applied principles of statutory construction, hedge in favor of the application of common law defenses to the I-864. As an interpretive canon, courts presume that common-law rules will apply where Congress has used a word with a well-settled common law tradition and has not expressly defined it to mean otherwise.⁹⁸

⁹⁶ See *supra* Part II(B). This analytical framework is derived primarily from the *Liu* opinion, as well as an amicus curiae brief filed on behalf of plaintiff Wenfang Liu by attorney Frank Dickerson. See *generally* Reply Brief of Amicus Curiae to Assist the Court, *Liu v. Mund*, 686 F.3d 418 (7th Cir. 2012) (No. 11-1453).

⁹⁷ See *generally* May 23 Memo, *supra* note 2.

⁹⁸ See Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 396–98 (2010); see also, e.g., *CTS Corp. v. Waldburger*, 573 U.S. 1, 7–10 (2014) (drawing heavily from Black’s Law Dictionary and other common-law principles to distinguish between the meaning of a “statute of limitations” and a “statute of repose”). This canon is codified in several state statutes. *Id.* at 423–24; see

As Judge Posner acknowledges in *Liu*, “[t]he duty to mitigate is a conventional part of the common law of contracts and can be enforced against a third-party beneficiary.”⁹⁹ Where the statute expressly provides for a “contract,” a concept with a well-settled common law tradition, this canon, combined with the statutory text, could dictate that a court should presume that Congress intended the Affidavit to contain the ancillary doctrines that flow from the common-law law of contracts, including mitigation of damages.¹⁰⁰

In the *Liu* opinion, however, the Seventh Circuit takes care to distance itself from common law canons when contemplating the issue of mitigation of damages.¹⁰¹ After describing his view of the history of common law,¹⁰² Circuit Judge Posner set aside common law principles and reframed the issue as one primarily pertaining to “statutory and regulatory objectives.”¹⁰³ To support this approach, Judge Posner engaged in some sleight of hand: he cited to *Prudential Ins. Co. v. Athmer*, a decision he penned in 1999 that has similarly dismissive language about the common law.¹⁰⁴ Even in that case, however, Judge Posner acknowledged that an abundance of case law supported the principle that “when a question relating to the interpretation and administration of . . . [a government contract] arises that is not answered by the statute itself . . . the answer is to be supplied by federal common law.”¹⁰⁵

also, e.g., CAL. CIV. CODE § 5 (West 2019); COLO. REV. STAT. Ann. § 2-4-203(d) (West 2019); D.C. CODE ANN. § 45-401(A) (West 2019).

⁹⁹ *Liu v. Mund*, 686 F.3d 418, 421 (7th Cir.), *as amended*, 686 F.3d 418 (7th Cir. 2012).

¹⁰⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 350 (AM. LAW. INST. 1981) (articulating the common-law mitigation doctrine). This approach was not necessary with the third-party beneficiary doctrine, however: The statute expressly provides that the immigrant shall be a third party to the Affidavit of Support. *Liu*, 686 F.3d at 420–21.

¹⁰¹ *Liu*, 686 F.3d at 421.

¹⁰² *Id.* (“[J]udges had made up the common law, which for an age was virtually the entire law of England, and they resented legislative interlopers. One would hardly expect legislators to respond by being careful not to step into the common law flower bed.”) (citations omitted).

¹⁰³ *Id.*

¹⁰⁴ *Prudential Ins. Co. of Am. v. Athmer*, 178 F.3d 473, 475 (7th Cir. 1999) (“Since the concept of ‘federal common law’ is nebulous when a statute is in the picture, it might be better to jettison the concept in that context and say simply that in filling gaps left by Congress in a federal program the courts seek to effectuate federal policies.”).

¹⁰⁵ *Id.*

Further, it is important to note that Judge Posner addressed a common-law canon that is distinct from the one described above.¹⁰⁶ In *Liu*, Judge Posner addressed the presumption that “statutory repeals of common law rules are disfavored,” which he ultimately rebuked as a “hoary maxim.”¹⁰⁷ This canon,¹⁰⁸ however, is distinct from the aforementioned presumption that Congress, when employing words with common-law traditions, does so with the understanding that their common-law meaning is intended.¹⁰⁹ While Judge Posner correctly stipulated that the former canon is outdated and out of fashion,¹¹⁰ he did not address the latter canon, which would also be pertinent to the interpretation of the statutory requirement.¹¹¹ Generally, in both *Liu* and *Athmer*, Judge Posner appeared eager to relegate federal common law to a doctrine of last resort, or at least diminish its importance in the statutory interpretation process, for ideological reasons.¹¹²

This approach departs from the majority of previous cases to deal with the specific issue of mitigation under the Affidavit. In *Stump v. Stump*, the District Court for the Northern District of Indiana addressed whether an immigrant had a duty to mitigate her damages after a divorce from her husband, who was her sponsor under the form.¹¹³ The court examined the plaintiff’s efforts to secure employment both before and after the termination of the marriage.¹¹⁴ Taking these facts into consideration in its damages analysis, the court found that the plaintiff had made “reasonable efforts to obtain employment and

¹⁰⁶ See *supra* Part III.A.

¹⁰⁷ *Liu*, 686 F.3d at 421.

¹⁰⁸ A more precise articulation of this canon is that “statutes in derogation of the common law must be strictly construed.” Scott, *supra* note 98, at 396.

¹⁰⁹ See *id.*

¹¹⁰ See *Liu*, 686 F.3d at 421 (“But the hoary maxim that statutory repeals of common law rules are disfavored is a poor guide to legislative meaning, for it is the fossil remnant of the traditional hostility of English judges to legislation.”). In 2010, shortly before *Liu* was decided, the canon that “statutory repeals of common law rules are disfavored” had been expressly rejected in twenty states and codified in none. See Scott, *supra* note 98, at 424.

¹¹¹ *Liu*, 686 F.3d at 421.

¹¹² Judge Posner was a steadfast critic of interpretative canons. See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983) (“I . . . think that most of the canons [of statutory construction] are just plain wrong.”).

¹¹³ *Stump v. Stump*, No. 1:04-CV-253-TS, 2005 WL 1290658, at *1, (N.D. Ind. May 27, 2005).

¹¹⁴ *Id.* at *3.

be self-sufficient” and denied the defendant a mitigation of damages defense on that factual basis.¹¹⁵ Ultimately, the *Stump* court did not expressly declare that a mitigation defense was available under the I-864, but it suggested that the defense should apply in a general sense for two reasons: (1) the plaintiff’s “reasonable efforts,” and not principles of law, were the primary grounds for denying the defense, and (2) “the duty to mitigate, or avoid, damages is a basic tenant of contract law.”¹¹⁶ The *Stump* court, then, assumed that common-law contract principles would govern enforcement of the I-864.¹¹⁷

Cases from other jurisdictions generally took one of two approaches to the issue of mitigation: (1) they imposed the duty outright, or (2) they assumed that such a duty exists but held that the facts did not warrant its imposition.¹¹⁸ Such courts routinely considered a plaintiff’s “reasonable efforts” as a component of a plaintiff’s duty to mitigate under the affidavit.¹¹⁹ Though *Liu* has been influential in deciding whether the Affidavit of Support should be interpreted according to common law contract principles, other courts have followed a different course.¹²⁰ Whatever the merits of this argument against using common law principles, courts outside the Seventh Circuit need

¹¹⁵ *Id.* at *7.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at *5–*7. In the *Stump* court’s construction, the form included an offer and acceptance, and consideration for the support obligations was “‘the sponsored immigrant not being found inadmissible to the United States under section 212(a)(4)(C).’” *Id.* at *6.

¹¹⁸ See *Naik v. Naik*, 944 A.2d 713, 717 (N.J. Super. Ct. App. Div. 2008) (“We construe this language to mean that . . . the sponsored immigrant is expected to engage in gainful employment, commensurate with his or her education, skills, training and ability to work in accordance with the common law duty to mitigate damages.”); see also *Younis v. Farooqi*, 597 F. Supp. 2d 552, 556 (D. Md. 2009) (“Assuming the plaintiff has an obligation to mitigate her damages by seeking employment, she need not apply for every available job in order to mitigate her losses; she need only make reasonable efforts.”); *Shumye v. Felleke*, 555 F. Supp. 2d 1020, 1025–26 (N.D. Cal. 2008) (examining whether divorce settlement agreements, student loans, student grants, and affordable housing subsidies should be considered income to offset the defendant’s financial obligations under the I-864).

¹¹⁹ See *Younis*, 597 F. Supp. 2d at 556; *Naik*, 944 A.2d at 717.

¹²⁰ *Supra* note 118 and accompanying text. As of the time of writing, *Erler v. Erler*, decided by the Ninth Circuit, represents the only other instance where a Federal Circuit Court has analyzed the I-864 in depth. 824 F.3d 1173, 1175 (9th Cir. 2016).

not tether themselves to the Seventh Circuit's particular approach from *Liu* and *Athmer* when deciding whether to apply those principles to the Affidavit.¹²¹

B. The Seventh Circuit, in Liu, Misconstrued the Statutory Purpose of the Affidavit Because Concerns About Immigrants' Self-Sufficiency Are Central to the Requirement

It follows logically that, if the Seventh Circuit sought to relegate common law principles to a doctrine-of-last-resort role, it would need to find that the statutory purpose was sufficiently clear to preclude their use. Where the defendant in *Liu* argued that the purpose is a “general principle of self-sufficiency,”¹²² the Seventh Circuit found that the purpose of the Affidavit is a distinct one: “to prevent the admission to the United States of any alien who ‘is likely at any time to become a public charge.’”¹²³ It would be a mistake, however, to rely uncritically upon this distinction without further exploring the concept of self-sufficiency.¹²⁴

As discussed earlier, the Seventh Circuit's claim that “self-sufficiency . . . is not the goal stated in the statute” is misleading.¹²⁵ When discussing the statutory history, the Seventh Circuit fails to mention that the Affidavit's enforceability requirement comes not from IIRIRA, an immigration-based statute, but from PRWORA, a welfare reform statute highly preoccupied with immigrants' self-sufficiency and

¹²¹ A logical alternative would be to use an approach similar to the approaches used in *Stump*, *Naik*, and *Shah*.

¹²² Brief of Amicus Curiae United States of America Not in Support of a Particular Party or Outcome at 13, *Liu v. Mund*, 686 F.3d 418 (7th Cir. 2012) (No. 11-1453). The government further draws directly from the text of PRWORA: “Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.” 8 U.S.C. § 1601(1) (2006).

¹²³ *Liu v. Mund*, 686 F.3d 418, 422 (7th Cir.), *as amended*, 686 F.3d 418 (7th Cir. 2012).

¹²⁴ See, e.g., *Liu v. Kell*, 299 F. Supp. 3d 1128, 1133 (W.D. Wash. 2017) (“[W]hile an immigrant's self-sufficiency may be a compelling goal, it is not the purpose of the I-864 Affidavit, which is to ensure the immigrant does not become a ‘public charge.’” (quoting *Liu*, 686 F.3d at 422)); *Zhu v. Deng*, 794 S.E.2d 808, 819 (N.C. Ct. App. 2016); *Villars v. Villars*, 305 P.3d 321, 325 (Alaska 2013) (“The purpose of § 1183a is to provide a minimum level of support so that the sponsored immigrant does not become a public charge.” (citing *Liu*, 686 F.3d at 422–23)).

¹²⁵ *Liu*, 686 F.3d at 422; see also *supra* Part II.B.

the receipt of public benefits.¹²⁶ For this reason, the concept of self-sufficiency should not be dismissed offhand, but analyzed, particularly in relation to the public charge doctrine.

The Seventh Circuit argues that “it is not for [the sponsor’s] benefit that the duty of support was imposed; it was imposed for the benefit of federal and state taxpayers and of the donors to organizations that provide charity for the poor.”¹²⁷ In the court’s view, the primary beneficiaries of the Affidavit, and, vis-à-vis, the public charge doctrine, are the taxpayers and donors who would not need to support an immigrant who is a draw on public resources.¹²⁸ In this interpretation, it would stand to reason that (1) an obligation without excusing conditions and (2) deterrence are primary objectives of the Affidavit.¹²⁹ If the obligations of the Affidavit are clear and restrictive, the reasoning goes, taxpayers would assume less risk that the immigrant will draw on public resources for support if (1) sponsors have a difficult-to-escape payment obligation and (2) sponsors have an incentive to refuse to support a financially risky immigrant.

It is less clear, however, how the Seventh Circuit might interpret the goal of self-sufficiency and whom the beneficiaries of such a goal might be.¹³⁰ There are several ways to interpret self-sufficiency in the context of the Affidavit. A narrow interpretation would be that self-sufficiency refers merely to an immigrant’s freedom from financial dependence on the state.¹³¹ A second interpretation would refer to an immigrant’s self-sufficiency as independent not only from the state, but also from others, perhaps including the sponsor.¹³² This second reading would not only construct self-sufficiency as an economic principle, but also link it with a broad moral principle of self-reliance.¹³³

¹²⁶ See *supra* Part II.B.

¹²⁷ *Liu*, 686 F.3d at 422.

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See *id.* Though not expressly included in the Affidavit of Support requirement, immigrants’ “self-sufficiency” was a preeminent policy consideration underlying IIRIRA. 8 U.S.C. § 1601 (2006).

¹³¹ To some extent, this interpretation would harmonize with the 104th Congress’ policy statements concerning welfare and immigration. See 8 U.S.C. § 1601.

¹³² This interpretation is supported by the IIRIRA legislative record as well as one of the terminating conditions in the Affidavit, discussed *infra* Part III.B.

¹³³ This approach is consistent with PRWORA, as well as the government amicus curiae’s position in *Liu v. Mund*. See Brief of Amicus Curiae United States of

If self-sufficiency is narrowly understood as an immigrant's freedom from financial dependence on the state, then it is merely a mirror of the public charge concept.¹³⁴ It could only be distinguished in terms of perspective: the primary objective of self-sufficiency would, in this case, be an immigrant's freedom from dependence on public resources.¹³⁵ In that scenario, a self-sufficient person could be reduced to the opposite of a public charge. Followed logically, this definition would render the Seventh Circuit's distinction a non-sequitur.¹³⁶ In *Liu*, the Seventh Circuit sidestepped the issue and dismissed the self-sufficiency principle in its entirety, despite its centrality in the statutory scheme.¹³⁷ In doing so, it entirely cast aside PRWORA—the statute that authorized the Affidavit's enforceability requirement—and interpreted the Affidavit as being concerned primarily with economic burden-shifting and the protection of taxpayer interests.¹³⁸

The legislative history, structure of the Affidavit, and other factors further suggest that the purposes of the Affidavit extend beyond those set forth in *Liu*. Most obviously, the full titles for

America Not in Support of a Particular Party or Outcome at 13, *Liu v. Mund*, 686 F.3d 418 (7th Cir. 2012) (No. 11-1453) (“[T]he *general principle of self-sufficiency underlying the immigration system* counsels in favor of a duty to mitigate.”) (emphasis added).

¹³⁴ See *id.*

¹³⁵ This would comport with the Immigration and Naturalization Service's definition of “public charge:” “an alien who has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) ‘primarily on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.’” Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (proposed May 26, 1999). It would also harmonize with the stated policy goal that “[i]t continues to be the immigration policy of the United States that aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations.” 8 U.S.C. § 1601(2)(A).

¹³⁶ Substituting the term “public charge” for “person who is not self-sufficient:” “But self-sufficiency . . . is not the goal stated in the statute; the stated statutory goal, remember, is to prevent the admission to the United States of any alien who ‘is likely at any time to become a person who is not self-sufficient.’” *Liu v. Mund*, 686 F.3d 418, 422 (7th Cir.), *as amended*, 686 F.3d 418 (7th Cir. 2012). A doctrine that would exclude not-self-sufficient people would hardly contravene a principle of self-sufficiency.

¹³⁷ *Liu*, 686 F.3d at 422; see also 8 U.S.C. § 1601(1) (stating PRWORA's first statement of policy with respect to immigration and welfare is that “[s]elf-sufficiency has been a basic principle of United States immigration law since the country's earliest immigration statutes”).

¹³⁸ *Liu*, 686 F.3d at 422.

each piece of legislation pertinent to the Affidavit—(1) the *Personal Responsibility and Work Opportunity Reconciliation Act*, and (2) the *Illegal Immigrant Reform and Immigrant Responsibility Act*—suggest that self-sufficiency was at the forefront of Congress' considerations when it made the Affidavit an enforceable contract. Even more tellingly, PRWORA, the statute that made the Affidavit an enforceable contract, does not mention public charge determinations outside of the specific provision rendering the Affidavit enforceable.¹³⁹ These factors suggest that the self-sufficiency of *previously admitted* immigrants, and not the admissibility of *incoming* immigrants, was the foremost concern of the Affidavit requirement.

Furthermore, within the PRWORA scheme, the Affidavit's enforceability requirement is placed among restrictions on immigrants' access to public benefits. No other provisions in that section pertain to an immigrant's inadmissibility to the United States under the public charge doctrine.¹⁴⁰ More broadly, PRWORA's central provisions deal primarily with broad-based reforms to public benefits programs,¹⁴¹ concerns about immigrants' admissibility are, at best, an afterthought in the overall scheme and purpose of PRWORA.¹⁴²

Even independently of an analysis of PRWORA, there is ample evidence in IIRIRA that the purposes for the Affidavit extend beyond deterrence. House Reports for IIRIRA discuss the Affidavit squarely in the context of encouraging an immigrant's self-reliance, declaring "[t]he provision is designed to *encourage immigrants to be self-reliant* in accordance with national immigration policy."¹⁴³ Here and elsewhere in the report, Congress seems concerned with the behavior of the immigrant, and not the sponsor, with respect to the question of who shall bear responsibility to prevent the immigrant from becoming a public charge.¹⁴⁴ This concern suggests that the purpose

¹³⁹ See PRWORA, *supra* note 31, sec. 423.

¹⁴⁰ See *id.* sec. 400.

¹⁴¹ Such reforms include: (1) apportioning the Temporary Assistance for Needy Families on the basis of block grants, (2) restricting eligibility for the Supplemental Security Income program, and (3) implementing various provisions related to children's welfare. See PRWORA, *supra* note 31, secs. 100, 200–04, 400.

¹⁴² *But see id.* sec. 400(6) ("It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.").

¹⁴³ H.R. REP. NO. 104-828, at 241 (1996) (emphasis added). "Self-reliance" and "self-sufficiency" are terms used interchangeably in the legislative record.

¹⁴⁴ *Id.* at 127; see also *id.* at 238 ("The purpose of the congressional grants of authority to States regarding eligibility for public benefits contained in this Act is to

underlying the Affidavit is not only economic burden-shifting, but also a moral principle that immigrants should seek to find work and to become self-sufficient.¹⁴⁵

This reading is also supported by the structure of the Affidavit itself, particularly in its terminating condition that releases the sponsor from the support obligations where the immigrant accumulates a certain amount of work.¹⁴⁶ If protecting taxpayers and communities from dependent immigrants is the sole purpose of the Affidavit requirement, terminating the sponsor's support obligation upon completion of ten years of work would do nothing to effectuate that purpose.¹⁴⁷ Further, of the five terminating conditions contained in the Affidavit, the accumulation-of-work condition is the only condition not directly linked to the immigrant's immigration status.¹⁴⁸

encourage States to implement the *national immigration policy of assuring that aliens be self-reliant and not become public charges*-a fundamental part of U.S. immigration policy since 1882." (emphasis added)). That second passage is also persuasive; if "self-reliance" and "not becom[ing a] public charge[]" are synonymous, then this statement would be repetitive. The congressional record suggests instead that self-reliance is primarily a moral principle, while public charge is more concerned with economic distribution and resources.

¹⁴⁵ *Id.* at 241. This report suggests a reading that sponsors play a "safety net" role instead of assuming primary and sole responsibility for the immigrant. See McLawsen, *supra* note 15.

¹⁴⁶ IIRIRA provides:

An affidavit of support is not enforceable after such time as the alien (i) has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act [42 U.S.C.A § 401 et seq.] or can be credited with such qualifying quarters as provided under subparagraph (B)

8 U.S.C. § 1183a(a)(3)(A) (2012).

¹⁴⁷ If an immigrant has met the work requirement, the immigrant's sponsor would be released from the support obligation under the Affidavit. At this time, there would be no binding guarantee that would preclude the immigrant from becoming a public charge or that would allow the state to recoup benefits in that instance. If the purpose of the affidavit were merely to protect taxpayers, this terminating condition would contravene that purpose by precluding sponsor liability where the immigrant becomes a public charge. While it could be argued that meeting the condition demonstrates that the immigrant has a low risk of becoming a public charge, it is more plausible to conclude that the work condition (a) provides an incentive to the sponsor to encourage the sponsored immigrant to seek work, or (b) communicates the government's expectation that the immigrant will make good-faith efforts to become self-reliant, or both.

¹⁴⁸ The other four grounds for termination are (1) death, (2) naturalization, (3) loss of lawful permanent resident status, or (4) replacement of the Affidavit. See 8 U.S.C. § 1183a.

This condition, seemingly inconsistent with the other components of the Affidavit, has parallel provisions in PRWORA.¹⁴⁹ These provisions deal with eligibility for certain federal and state benefit programs.¹⁵⁰ Tellingly, none of those provisions deal with issues of public charge admissibility. Instead, they pertain only to the receipt of public benefits after an immigrant has already arrived.¹⁵¹

Both the legislative history and the structure of the Affidavit suggest that the purpose of the Affidavit requirement is not just to assign responsibility for the immigrant to the sponsor, but also to encourage an immigrant to become personally self-sufficient both morally and economically. At best, it can be said that Congress' purpose for the Affidavit is mixed. The Affidavit serves the dual purposes of (1) protecting taxpayers from immigrants becoming a strain on public resources and (2) encouraging immigrants to seek employment with the goal of becoming self-sufficient.¹⁵² These purposes lead to opposite outcomes with respect to a mitigation requirement.¹⁵³ The Seventh Circuit's opinion in *Liu*, however, finds a singular purpose for the Affidavit requirement where the authorizing statutes are, at best, ambiguous. This outcome may be justified, or at least explained, however, by the court's ideological disposition toward applying the common law¹⁵⁴ and the court's preferences with respect to the other sub-issues presented in the case.¹⁵⁵

¹⁴⁹ See PRWORA, *supra* note 31, secs. 402(a)(2)(B)(ii), 402(b)(2)(B)(ii), 412(b)(2)(B)(i) (tying eligibility for certain benefits into an attainment of "40 qualifying quarters of coverage").

¹⁵⁰ See *id.*

¹⁵¹ See *id.* secs. 402, 412.

¹⁵² See *supra* notes 139–145 and accompanying text.

¹⁵³ If the primary purpose is to shift a burden onto the sponsor, then a mitigation of damages defense would contravene this purpose by releasing the sponsor from at least a part of the support obligation. If the primary purpose is to encourage self-reliant behavior by the immigrant, a mitigation of damages defense would encourage that behavior by compelling the immigrant to secure resources independently of the sponsor.

¹⁵⁴ See *supra* Part III(A). If the court is reluctant to apply the common law, it follows logically that the court might dig deeper to find a clear legislative purpose to avoid its use, even if such a purpose is not evident from the text of the statute.

¹⁵⁵ See *supra* Part III (identifying the subissues of judicial efficiency and equitable concerns).

C. *The Seventh Circuit's Concerns About Judicial Efficiency Should Not Persuade Courts To Adopt That Court's Interpretation of the Affidavit of Support Requirement*

In later decisions, the Seventh Circuit moved away from statutory analysis and examined the issue of mitigation from a cost-benefit perspective.¹⁵⁶ Focusing on the “meager” support obligation,¹⁵⁷ Judge Posner concluded that the court could not “see much benefit” in imposing a duty to mitigate on the immigrant compared to the cost of imposing it in the present case.¹⁵⁸ Indeed, the plaintiff in *Liu* was entitled to just over ten thousand dollars.¹⁵⁹ If, then, the defendant’s mitigation defense were properly pleaded and corroborated with factual evidence, it would have set off only a few thousand dollars at most.¹⁶⁰ In the specific context of *Liu*, then, it is easy to see how the cost of imposing the defense would outweigh the potential benefit.

While it may have made sense to dismiss a mitigation defense in this specific factual context, the obligation should not be dismissed broadly.¹⁶¹ The support obligation is (1) indefinite, and thus can accrue considerably over time,¹⁶² and is (2) distinct in a majority of states from other familial support obligations.¹⁶³ In different factual scenarios,¹⁶⁴ the benefits to imposing duty to mitigate could certainly offset the costs from a standpoint of judicial efficiency.¹⁶⁵ In these circumstances, the support

¹⁵⁶ See *Liu v. Mund*, 686 F.3d 418, 422–23 (7th Cir.), *as amended*, 686 F.3d 418 (7th Cir. 2012).

¹⁵⁷ *Id.* at 422. At the time of decision, the support obligation, tied to the National Poverty Line, was roughly \$13,500 per year for an individual. *Id.* at 419.

¹⁵⁸ *Id.* at 422–23. When referring to “cost,” Judge Posner refers to the burden of the factual investigation necessary to impose a mitigation of damages defense; here, his language is dismissive, and resists “the increased complication of enforcing the duty of support” and federal courts’ involvement in “domestic-relations disputes.” *Id.*

¹⁵⁹ *Liu v. Mund*, 748 F. Supp. 2d, 958, 965 (W.D. Wis. 2010), *aff’d in part and rev’d in part*, 686 F.3d 418 (7th Cir. 2012).

¹⁶⁰ *Id.*

¹⁶¹ See McLawsen, *supra* note 3, at 586.

¹⁶² Governments and benefits-issuing agencies may sue for benefits received in the ten years preceding the action. See 8 U.S.C. § 1183a(b)(2)(C) (2012).

¹⁶³ See McLawsen, *supra* note 3, at 589.

¹⁶⁴ It would not be difficult to imagine a scenario where more damages were on the line than a few thousand dollars. See *infra* Part III.E.

¹⁶⁵ See *Liu v. Mund*, 686 F.3d 418, 422–23 (7th Cir.), *as amended*, 686 F.3d 418 (7th Cir. 2012).

obligation would be “mighty” and not “meager;”¹⁶⁶ courts should retain distance from *Liu* to ensure more equitable outcomes where the facts differ.¹⁶⁷

D. While the Liu Result May Have Been a Fair Result for the Case, A Broad Denial of a Mitigation of Damages Defense Could Yield Unfair Results and Abuse

Many of the mitigation of damages cases under the I-864 involve two competing narratives: the immigrant alleges that the sponsor is spitefully withholding payments to his ex-spouse, while the sponsor alleges that the immigrant is free-riding.¹⁶⁸ Indeed, *Liu* alleged that Mund was adulterous, as well as physically and psychologically abusive toward her.¹⁶⁹ While such facts were in dispute, Judge Posner mentioned that the parties “had an awful marriage,” and he insinuated that the defendant’s actions may have been “motivated . . . by spite.”¹⁷⁰ If the court felt, as these facts and language suggest, that the plaintiff was more sympathetic than the defendant in this case, it would make sense from an equitable standpoint to deny Mund a mitigation defense.

From a more general standpoint, however, the court stumbled when it addressed the potential issue of free-riding. The court acknowledged that “the duty of support acts as a heavy tax on earned income” for an immigrant, where a low-earning immigrant would have little incentive to seek work absent a duty to mitigate damages.¹⁷¹ If one of the animating purposes of the Affidavit is “to encourage immigrants to be self-reliant,” such an

¹⁶⁶ McLawsen, *supra* note 3, at 586; *Liu*, 686 F.3d at 422.

¹⁶⁷ See, e.g., *Erler v. Erler*, No. CV-12-2793-CRB, 2013 WL 6139721, at *7 (N.D. Cal. Nov. 21, 2013) (“[C]ourts must strike a balance between ensuring that the immigrant’s income is sufficient to prevent her from becoming a public charge while preventing unjust enrichment to the immigrant.”), *vacated and remanded*, 824 F.3d 1173 (9th Cir. 2016). The Ninth Circuit drew primarily from *Liu*’s understanding of the Affidavit in deciding whether a sponsor owed support to his divorced immigrant spouse where she had been living with, and was supported by, her adult son. *Erler*, 824 F.3d at 1179.

¹⁶⁸ See, e.g., *Li Liu v. Kell*, 299 F. Supp. 3d 1128, 1132–33 (W.D. Wash. 2017); *Shah v. Shah*, Civil No. 12-4648 (RBK/KMW), 2013 WL 12157867, at *2 (D.N.J. Oct. 28, 2013); *In re Marriage of Kumar*, 220 Cal. Rptr. 3d 863, 865 (Ct. App. 2017).

¹⁶⁹ Reply Brief of the Plaintiff-Appellant, Wenfang Liu, *Liu*, 686 F.3d 418 (No. 11-1453), 2012 WL 481399, at *7.

¹⁷⁰ *Liu*, 686 F.3d at 422–23.

¹⁷¹ *Id.* at 422 (noting that if Liu were to secure a job and earn \$15,000 per year, she would be working for a net gain of only \$1,500 when compared to the \$13,500 worth of support she would otherwise be entitled to under the Affidavit).

incentive against seeking work would directly contravene that purpose.¹⁷² In *Liu*, Judge Posner sidesteps this potential issue, making favorable assumptions about the plaintiff to minimize concerns about free-riding in the context of her case.¹⁷³ Absent these particular facts—and, perhaps, absent similar willingness to make bold assumptions about a person’s earning potential—courts should distance themselves from *Liu*, following other courts to take a more balanced approach to the incentives created by the affidavit.¹⁷⁴

E. A Speculative Issue: Which Approach Courts Should Take If or When Federal or State Governments Attempt to Enforce Their Rights Under the Affidavit

While *Liu* and most cases discussed above have involved an immigrant enforcing her rights under the Affidavit, courts should not dismiss the possibility that the Federal Government, state governments, or other agencies could attempt to do the same.¹⁷⁵ Currently, fear of political backlash is considered a primary deterrent preventing governments and agencies from attempting to recoup benefits from immigrants’ sponsors.¹⁷⁶ If, however, political factors pressured agencies to *enforce* the Affidavits,¹⁷⁷ it is possible that agencies and governments would do so on a massive scale.¹⁷⁸ Indeed, a memorandum issued by the Trump

¹⁷² See *supra* Part III.B (quoting H.R. Rep. No. 104-828, at 241 (1996)).

¹⁷³ *Liu*, 686 F.3d at 422 (“But [*Liu*] might be able to get, or work her way up to, a much better job than one that pays \$15,000, which is barely minimum wage. College educated, she may just need to improve her spoken English to get a good job. Most Chinese immigrants nowadays do very well in the United States.”).

¹⁷⁴ See, e.g., *Erler v. Erler*, No. CV-12-2793-CRB, 2013 WL 6139721, at *7 (N.D. Cal. Nov. 21, 2013) (“[C]ourts must strike a balance between ensuring that the immigrant’s income is sufficient to prevent her from becoming a public charge while preventing unjust enrichment to the immigrant.”), *vacated and remanded*, 824 F.3d 1173 (9th Cir. 2016); *Stump v. Stump*, No. 1:04-CV-253-TS, 2005 WL 1290658, at *9, (N.D. Ind. May 27, 2005).

¹⁷⁵ 8 U.S.C. 1183a(e)(2) (2012).

¹⁷⁶ *Guevara & Calope*, *supra* note 28, at 2852.

¹⁷⁷ The Trump Administration’s new public charge guidelines, which define and expand the benefits which fall under the “public charge” designation, are likely to increase sponsors’ liability where they sponsor immigrants who are receiving public benefits. See *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. at 41320 (Aug. 12, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, & 248). This change will, at the very least, increase state agencies’ purely economic incentives to enforce their rights under the Affidavit.

¹⁷⁸ In one dramatic instance, the Connecticut Department of Social Services sued roughly 300 sponsors under the Affidavit for benefits received by immigrants under Medicaid and the State-Administered General Assistance Program. Ann

Administration on May 23, 2019, attempts to do exactly that: within ninety days of publication of the memorandum, various agencies must issue guidance and procedures on how to seek reimbursement from sponsors under the Affidavit.¹⁷⁹ Taken together with the purpose statements in the memorandum, it is clear that the Trump Administration intends to put pressure on agencies to utilize these newly minted procedures and to enforce the Affidavits.¹⁸⁰ If such enforcement efforts were to take place, it is unclear what defenses immigrants and their sponsors would have, especially given the scarcity of case law.¹⁸¹

When contemplating actions for enforcement of the Affidavit, it is imperative that courts understand how recent changes to the public charge doctrine have altered parties' rights. A final rule published on the Federal Register on August 14, 2019, makes fundamental changes to the public charge doctrine and to the Affidavit's role in the determination process.¹⁸² First, it expands the scope of benefits that are to be included in public charge determination, divided into two principal categories of "monetizable" and "non-monetizable" benefits.¹⁸³ Courts should be attentive to the benefit scheme in the new benefit guidelines; one commentator noted that the standards may be "utterly Byzantine to the layperson," and therefore, also to the signatories of the Affidavit.¹⁸⁴

Marie Somma, *State Suing Immigrants' Sponsors*, THE HARTFORD COURANT (Mar. 1, 2007), http://articles.courant.com/2007-03-01/news/0703010724_1_legal-immigrants-immigration-advocates-sponsors. The state's then-Attorney General and future Democratic Senator, Richard Blumenthal, shut down the effort. *Id.*

¹⁷⁹ See May 23 Memo, *supra* note 2.

¹⁸⁰ See *id.* ("A key priority of my Administration is restoring the rule of law by ensuring that existing immigration laws are enforced. The immigration laws currently require that, when an alien receives certain forms of means-tested public benefits, the government or non-government entity providing the public benefit *must* request reimbursement from the alien's financial sponsor." (emphasis added)). It should be observed that requests for reimbursement only become mandatory "[u]pon notification that a sponsored alien has received any means-tested public benefit." 8 U.S.C. § 1183a(b)(1)(A). This characterization of the law is consistent with the Trump Administration's stated intent to place pressure on agencies to enforce the Affidavits.

¹⁸¹ Tang, *supra* note 18, at 36. Megan McLeod, an attorney with Connecticut Legal Services in Stamford, Connecticut, expanded on some policy implications of enforcement: "You sponsor an immigrant . . . and that person develops a need for a lung transplant. It's completely impossible and grossly unfair for a sponsor to be charged with paying that back." Somma, *supra* note 178 (alteration in original).

¹⁸² Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41320, 41439.

¹⁸³ *Id.* at 41295, 41297.

¹⁸⁴ McLawsen, *supra* note 15.

A second major change is a reworking of the totality-of-the-circumstances test and an express statement that “plac[ing] an emphasis on the affidavit of support in the public charge determination” is contrary to the design of the determinations.¹⁸⁵ While this is consistent with the statutory scheme, it departs from current procedures, where a sufficiently executed Affidavit is “virtually always” sufficient to preclude a public charge determination.¹⁸⁶ Third, the rules will permit an applicant who is inadmissible on public charge grounds to post a \$10,000 bond that will remain in effect until one of five conditions is met and that may be forfeited when the sponsored immigrant receives public benefits.¹⁸⁷ While these rules are subject to change, they may call into question some of the legal reasoning underlying *Liu*.¹⁸⁸

For example, imagine a hypothetical scenario where an immigrant, enrolled in non-emergency Medicaid,¹⁸⁹ receives an annual average of \$20,000 of benefits for a period of ten years.¹⁹⁰ Theoretically, the sponsor would be liable to the state’s Medicaid agency for the \$200,000 received in public benefits, as he failed to provide the support necessary to keep the immigrant from becoming a public charge.¹⁹¹ If the distributing agency were to bring charges, then, what defenses might the sponsor have to this action? If *Liu*’s reasoning holds firm, such harsh consequences for the sponsor would further the purpose of the Affidavit by recouping benefits for the intended beneficiaries to the Affidavit—taxpayers—and possibly deterring sponsors from

¹⁸⁵ Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41439. The reverse, however, is not true: any immigrant who fails to submit a facially sufficient Affidavit will be deemed inadmissible as likely to become a public charge. 8 U.S.C. § 1182(a)(4)(C)(2).

¹⁸⁶ McLawsen, *supra* note 15; *see also* 84 Fed. Reg. at 41439.

¹⁸⁷ *See* McLawsen, *supra* note 15.

¹⁸⁸ *See supra* Part II.B.

¹⁸⁹ *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51159–60 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, & 248). The Trump Administration’s recent proposal permits non-emergency Medicaid to be considered under consideration for public charge purposes, and estimates an average annual benefit per beneficiary to be \$7,426.59. *Id.*

¹⁹⁰ *See* 8 U.S.C. § 1183a(b)(2)(C) (2012) (providing that governments or other benefit-issuing agencies may not pray for benefits that were issued more than ten years before the onset of the action). This hypothetical scenario, then, imagines a prayer amount of 270% of the estimated annual average of benefits received, multiplied by the maximum number of years under which the government may seek benefits under the statute.

¹⁹¹ *See* 8 U.S.C. § 1183a(a)(2).

supporting immigrants in the first place.¹⁹² However, if courts depart from *Liu*'s reasoning and permit common law defenses,¹⁹³ any of the following might be available to sponsors: lack of consideration,¹⁹⁴ void for vagueness or lack of clear terms,¹⁹⁵ and unconscionability,¹⁹⁶ among others.¹⁹⁷ Departing from *Liu* and remaining open to common law defenses, then, could grant courts the necessary flexibility to prevent harsh outcomes for sponsors and immigrants alike.

¹⁹² See *supra* Part II.B.

¹⁹³ See Pratt & Kurzban, *supra* note 19, at 46–47.

¹⁹⁴ *Stump* addressed this issue by providing that the immigrant not being found inadmissible was the consideration to the Affidavit. *Stump v. Stump*, No. 1:04-CV-253-TS, 2005 WL 1290658, at *6, (N.D. Ind. May 27, 2005). It is crucial to note, however, that the Trump administration's recent proposal would alter the role of the Affidavit of Support in public charge determinations. See *supra* notes 185–186 and accompanying text. If this change were to take effect, it would be necessary to revisit the *Stump* formulation because the consideration to the Affidavit would be different in character. Instead of nearly guaranteeing a waiver of inadmissibility on public charge grounds, the Affidavit's role would be weakened to being just one small factor in a totality-of-the-circumstances test. With this weakened consideration for the sponsor, along with the government's increased consideration—expansion of the benefit scheme—the Affidavit would be more susceptible to a lack-of-consideration defense than it currently is under *Stump* and similar jurisprudence.

¹⁹⁵ The Affidavit of Support, or Form I-864, currently does not specify or name any of the benefits listed by the Federal Register notice. Rather, it alludes to “any covered means-tested public benefit” without an explicit definition of the term or reference to a Federal Register notice. *I-864*, *supra* note 7, at 7. As the scheme of “covered . . . public benefit[s]” is in flux and may become “utterly Byzantine to the layperson,” this could prove fertile ground for a void-for-vagueness defense by the sponsor. See McLawsen, *supra* note 15.

¹⁹⁶ It has been argued that the Affidavit of Support is akin to an unconscionable “contract of adhesion.” See *Al-Mansour v. Shraim*, Civil No. CCB-10-1729, 2011 WL 345876, at *2 (D. Md. Feb. 2, 2011). These arguments have been largely unsuccessful, but have not yet been utilized in a scenario where the government, not an immigrant, is attempting to enforce its rights. See *id.* at *3.; see also *Anderson v. United States*, No. C17-0891RSL, 2017 WL 6558255, at *2 (W.D. Wash. Dec. 22, 2017) (emphasizing that the Affidavit's potential unfairness does not rise to the level of unconscionability). Unconscionability, however, could be a potent argument in certain scenarios, like where an unsophisticated sponsor takes on a vast support obligation by filling an I-864 without proper counsel—a frequent occurrence.

¹⁹⁷ Along with other contract defenses, attorneys' conflicts of interest between a sponsor's and sponsored immigrant's interests would be worthy of close analysis if the public charge benefit scheme is expanded.

CONCLUSION:

COURTS SHOULD NOT RELY SOLELY ON THE SEVENTH CIRCUIT'S
FLAWED REASONING IN *LIU V. MUND* WHEN ADDRESSING THE
AFFIDAVIT OF SUPPORT REQUIREMENT

Courts should not rely on *Liu's* reasoning to preclude common law contract defenses, including the duty to mitigate damages, when adjudicating the Affidavit of Support. The court's reasoning was seemingly rooted in (1) the Seventh Circuit's ideological disposition toward the common law, (2) a misleading analysis of the statutory history, and (3) the particular factual circumstances of *Liu*. If followed to its logical conclusion, the effects of *Liu* could be catastrophic for low-income immigrants and sponsors, and they do little to achieve the goals underlying the Affidavit requirement. Courts, simply put, should not rely on *Liu* to preclude common-law defenses that are "basic tenant[s] of contract law."¹⁹⁸ Therefore, on grounds of legal reasoning, statutory interpretation, sound policy, and good conscience, courts should not feel obligated to support the Seventh Circuit's decision in *Liu v. Mund*.

¹⁹⁸ *Stump v. Stump*, No. 1:04-CV-253-TS, 2005 WL 2757329, at *7, (N.D. Ind. Oct. 25, 2005).