No. 20A__

In the Supreme Court of the United States

TEXAS, ALABAMA, ARIZONA, ARKANSAS, INDIANA, KANSAS, KENTUCKY LOUISIANA, MISSISSIPPI, MONTANA, OHIO, OKLAHOMA, SOUTH CAROLINA, AND WEST VIRGINIA,

Applicants,

v.

COOK COUNTY, ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, CHAD F. WOLF, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. DEPARTMENT OF HOMELAND SECURITY, KENNETH T. CUCCINELLI, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT,

Respondents.

APPLICATION FOR LEAVE TO INTERVENE AND FOR A STAY OF THE JUDGMENT ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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INTRODUCTION

The States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia (the "States"), respectfully seek leave to intervene and a stay of the Northern District of Illinois's grant of partial summary judgment entered November 2, 2020 pending the timely filing of a petition for a writ of certiorari. App. C at 2. In the alternative, the States seek summary reversal of the Seventh Circuit's order denying their motions to (1) recall that court's mandate, (2) reconsider its motion to dismiss, and (3) intervene as defendants-appellants in order to defend the Public Charge Rule (the "Rule") in the Seventh Circuit. App. A.

This Court has already granted multiple stays involving the Rule, including in this very case. This Court had also granted certiorari in a case presenting a materially indistinguishable challenge. *Department of Homeland Security v. New York*, No. 20-449, 2021 WL 666376 (U.S. Feb. 22, 2021). It should once again grant a stay in this case.

The States' interests in this matter were adequately represented by the United States during the previous Administration. But on March 9, and without notice to the States or other interested parties, the Biden

Administration agreed to voluntarily dismiss its appeal in every pending challenge to the Rule.[1]

The effect of these voluntary dismissals was to leave in place a partial grant of summary judgment issued by the district court in this matter preventing enforcement of the Rule nationwide while evading appellate review of that judgment—and, ultimately, evading this Court's review. This unusual tactic effectively reversed a full year of notice and comment rulemaking at a stroke, also evading the procedures required by the Administrative Procedure Act to rescind or modify the Rule.

Having received no notice of this dramatic change in position, the States promptly moved to vindicate their interests. Merely two days after the voluntary dismissals, they filed all the necessary motions to intervene in this matter in order to defend those interests and the Rule. The Court of Appeals denied those motions without explanation.[2]

Allowing the United States to avoid the consequences of APA rulemaking by stipulating to dismissal—with a now-aligned party to take advantage of a now-favorable ruling—will yield pernicious results. Most

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[1] Because they are now aligned, both plaintiffs and defendants in the underlying litigation are listed as respondents in this application.

[2] The States have also sought leave to intervene in proceedings in the Fourth and Ninth Circuits. App. M-O; App. L. The Fourth Circuit denied the motions pending before it on March 18, 2021. A motion to intervene remains pending before the Ninth Circuit.

prominently, it will require nonparties like the States to intervene in litigation at the first sign of an affected interest, or else risk both their interests in favorable rules as well as their ability to participate in normal administrative procedures required by the APA.

In order to vindicate their interests in both the Rule and in the ability to participate in any modification of it, the States seek leave to intervene and a stay pending the timely filing of a petition for certiorari. Alternatively, the States seek summary reversal of the Court of Appeals' orders preventing them from intervening in the court below.

Statement of the Case

Since the late Nineteenth Century, Congress has prohibited immigration by individuals who are likely to become a "public charge." Immigrant Fund Act, 47th Cong. ch. 376, §§ 1-2, 22 Stat. 214 (1882). Congress has not defined that term, stating only that the Executive "shall at a minimum consider the alien's (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." 8 U.S.C. § 1182(a)(4)(B)(i). The meaning of the term has evolved over time to consider "a totality-of-the-circumstances" with "different factors . . . weigh[ing] more or less heavily at different times, reflecting changes in the way in which we provide assistance to the needy." *City & Cty. of San Francisco v. United States Citizenship & Immigr. Servs.*, 944 F.3d 773, 796 (9th Cir. 2019).

In 1999, the Clinton Administration recognized that the definition of "public charge" was ambiguous and proposed a rule that would have defined "public charge" to include any alien:

> who is likely to become primarily dependent on the Government for subsistence as demonstrated by either: (i) [t]he receipt of public cash assistance for income maintenance purposes, or (ii) [i]nstitutionalization for long-term care at Government expense.

Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,681 (May 26,1999). At the same time, it issued an informal guidance document that would apply the proposed definition pending the issuance of a final rule. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999). That rulemaking process was never completed, leaving the 1999 informal guidance in place. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,348 n.295 (Aug. 14, 2019).

In 2018, the Trump Administration proposed, and in 2019 promulgated, a new rule that defined "public charge" in a way that accounted for a broader range of government benefits. The Rule now considers not just cash aid for purposes of determining whether an immigrant is likely to become a public charge, but also valuable non-cash benefits such as Medicaid, food stamps, and federal housing assistance. *Id.* at 41,501. Under the Rule, officials look at the totality of an alien's circumstances to determine whether that alien is likely to "receive[] one or more" of the specified public benefits "for more than 12 months in the aggregate

within any 36-month period." *Id.*; *see id.* at 41,369. These circumstances include an alien's age, financial resources, family size, education, and health. *Id.* at 41,501-04.

This case is one of several related challenges to the Rule. Plaintiffs, here respondents, include a County and the Illinois Coalition for Immigrant and Refugee Rights, a non-profit organization providing benefits for aliens. They brought this action challenging the Rule under the APA and sought a preliminary injunction. *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1013-14 (N.D. Ill. 2019), *aff'd on other grounds sub nom. Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020) Purporting to apply *Gegiow v. Uhl*, 239 U.S. 3 (1915), the district court concluded that the term "'public charge' encompasses only . . . persons with 'a mental or physical defect of a nature to affect their ability to make a living'—[who] would be substantially, if not entirely, dependent on government assistance on a long-term basis." *Cook County*, 417 F. Supp. 3d at 1023. Because the Rule included individuals who depend on supplemental, often non-cash benefits, the district court held the rule invalid. Thus, the district court issued a preliminary injunction blocking the defendants from enforcing the rule, but only in the State of Illinois. *Id.* at 1030.

The United States immediately appealed and moved to stay the preliminary injunction. The Seventh Circuit denied the stay, but this Court ultimately granted one. *Cook County*, 962 F.3d at 217; *Wolf v. Cook County*, 140 S. Ct. 681 (2020).

A divided panel of the Seventh Circuit subsequently affirmed the district court's preliminary injunction. *Cook County*, 962 F.3d at 234. With this Court's stay still in place, the United States filed a petition for a writ of certiorari. *Mayorkas v. Cook County*, No. 20-450 (U.S. Oct 7, 2020). While that petition remained pending, this Court granted certiorari in another case concerning the validity of the Rule. *See Dep't of Homeland Sec.*, 2021 WL 666376.

Litigation continued in the district court during these proceedings, where the Plaintiffs moved for partial summary judgment on their APA claims. *See* App. C at 2. The district court granted the motion, vacated the Rule, and entered a partial final judgment under Rule 54(b). *Id.* at 14. Unlike the district court's preliminary injunction, the vacatur was explicitly "not limited to the State of Illinois." *Id.* at 8. The United States then appealed that ruling to the Seventh Circuit and proceeded to litigate that appeal for over three months.

Following the change in Administration, the United States decided to abandon its defense of the Rule. On March 9, 2021, the United States filed nearly simultaneous motions to dismiss its appeals defending the Rule in all cases challenging it, including, among others, in both this case and in *New York*, which had been awaiting review by this Court. *See* App. P; App. J. The Seventh Circuit granted the defendants' unopposed motion to voluntarily dismiss the appeal and issued its mandate the same day. App. B.

Only two days later—promptly after learning of the United States' decision to abandon its defense of the Rule—the States filed three related motions in the Seventh Circuit. First, the States moved the Court of Appeals to recall its mandate. App. I. Second, the States asked the Court of Appeals to reconsider or rehear the order granting the stipulated motion to dismiss. *Id.* Third, the States requested that the Court of Appeals allow them to intervene in order to defend the Rule, since the defendants had abandoned their defense. *Id.* The Court of Appeals denied these motions on March 15 in a one-line order. App. A.

ARGUMENT

This Court should stay the district court's judgment pending a petition by the States for certiorari. There is more than a "reasonable probability" that the Court will grant review, *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)—it has already done so. Moreover, by repeatedly staying orders enjoining the Rule, this Court has indicated that it is likely to conclude the decision below was erroneous. *See id.* And the same interests that entitle the States to intervene are likely to be harmed absent a stay. *Id.*

In the alternative, this Court should summarily reverse the Seventh Circuit's refusal to permit the States to intervene. The United States' decision to abandon its defense of the Rule, with no notice to any affected parties (including the States) leaves the States with a vital interest undefended by the party who would normally be tasked with defending its

own rule. By stipulating to dismissal without providing notice to the affected States, the United States has both prejudiced the States' concrete interests and made an end run around the procedural protections that would otherwise have been available to the States (and any other adversely affected party) under the APA.

I. The States Are Entitled to Seek Relief in This Court.

Under 28 U.S.C. § 1254(1), any party may file a petition for certiorari. This Court has interpreted "party" broadly to allow intervention by those with interests that are vitally affected by the judgment below. *See*, *e.g.*, *Gonzales v. Oregon*, 546 U.S. 807 (2005); *Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation Dist.*, 104 S. Ct. 193 (1983); *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969); *Banks v. Chi. Grain Trimmers*, 389 U.S. 813 (1967).

The States' interests are vitally affected here. In particular, the States have important interests in conserving their Medicaid and related social-welfare budgets. Providing for the healthcare needs of economically disadvantaged individuals represents a substantial portion of the States' budgets. For example, in Texas in 2020, over 4 million Texans relied on Medicaid. Tex. Health & Human Servs. Comm'n, *Texas Medicaid and Chip in Perspective* 2 (13th ed. 2020), https://tinyurl.com/y4bhjfyv. Medicaid is jointly financed by the federal government and the States. *Id.* at 4. In 2018-19, Medicaid funds represented

approximately 22% of Texas's budget. Kaiser Family Foundation, *Medicaid Expenditures as a Percent of Total State Expenditures by Fund*, https://tinyurl.com/czpjys9v (last visited Mar. 17, 2021). In the past several years, the federal government has paid for slightly less than 60% of Texas's Medicaid expenditures. Tex. Health & Human Servs. Comm'n, *supra*, at 74. Although the exact amount of Texas's Medicaid budget spent on immigrants who would otherwise be inadmissible under the DHS Rule has varied, the total budget is always measured in billions of dollars. *Id.* (reflecting that total Texas-financed expenditures for Medicaid represented approximately $30.8 billion).

Invalidating the Rule will have a disproportionate impact on the States, particularly border States. For example, Texas, Arizona, and Montana have among the largest international borders in the Union and provide Medicaid services to many immigrants. The Rule would reduce that burden by rendering inadmissible any alien who would likely require Medicaid services for more than 12 months in a 36-month period. Accordingly, fewer aliens requiring Medicaid and other public services would be admitted to the United States, including into these States, thus reducing the States' Medicaid budgets. The United States' decision to abandon its defense of the Rule will cost the States many millions of dollars.

These vital interests were adequately represented by the United States until March 9. Rather than follow its normal practice and abey

this litigation regarding the Rule pending further rulemaking, the Biden Administration stipulated to dismiss its appeals defending the Rule in this case and related cases—leaving the judgment here vitiating the rule nationwide in place.

The States had no notice of this decision. To the contrary, the United States defended the Rule across multiple courts for more than a year before reaching this decision. Absent the ability to intervene and to seek a stay and ultimately certiorari, the States will have no way to vindicate their vital interests. Because the Rule has been rendered unenforceable through litigation rather than being rescinded or modified through notice-and-comment rulemaking, the States will likewise be deprived of the benefits of regular APA proceedings. Allowing them to seek a stay and then certiorari is necessary to afford the States *some* process to protect these vital interests.

This Court has also made clear that "[o]ne who has been denied the right to intervene in a case in a court of appeals may petition for certiorari to review that ruling." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30 (1993) (citing *Automobile Workers*, 382 U.S. at 208-09); *see also Hohn v. United States*, 524 U.S. 236, 247-48 (1998) ("We have also held that § 1254(1) permits us to review denials of motions for leave to intervene in the Court of Appeals in proceedings to review the decision of an administrative agency."). The States are also

entitled to seek certiorari, and a stay pending a petition for a writ of certiorari, on this independent basis.

II. This Court Should Enter a Stay Pending the Filing of a Petition for Certiorari.

A stay pending the disposition of a petition for a writ of certiorari is appropriate where there is: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm [will] result from the denial of a stay." *Conkright*, 556 U.S. at 1402 (citation and internal quotation marks omitted).

Those factors are amply met here. Indeed, this Court has previously granted certiorari and stay applications in cases involving the Rule—including in this very case. *Wolf*, 140 S. Ct. 681. This Court had likewise granted stays of nationwide injunctions issued by a district court in *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020). Multiple courts of appeals had also held that stays were appropriate. *See City & County of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019); *Casa de Md., Inc. v. Trump*, No. 19-2222 (4th Cir. Dec. 9, 2019). Finally, this Court had granted certiorari in another challenge to the Rule. *See Dep't of Homeland Sec.*, 2021 WL 666376.

The only differences here are that the Defendants have since agreed to voluntarily dismiss their cases, while the States now instead seek to defend the Rule. But neither of these distinctions matter for this Court's stay analysis. Nor would plans by the United States to replace the Rule through the ordinary administrative process. This Court should grant a third stay for the same reasons it entered the previous two.

A. There is a Reasonable Probability that this Court Will Grant Certiorari.

There is a reasonable probability that the Court will grant certiorari. *Conkright*, 556 U.S. at 1402. There is no need for the States to speculate. Before the case was voluntarily dismissed last week, this Court had already granted certiorari in a case involving the Rule. *See Dep't of Homeland Sec.* 2021 WL 666376. There, the Second Circuit had affirmed in part an injunction against the Rule based on its conclusion that the Rule was likely inconsistent with immigration law and arbitrary and capricious and affirmed a nationwide injunction. And again, this Court had previously entered a stay.

When the United States decided to abandon its defense of the Rule, the question presented by this case met all of the usual requirements for review by this Court: a conflict with another circuit's decision on an important matter, the decision of an important federal question in a way

that conflicts with this Court's decisions, and the decision of an important question of federal law that has not been but should be settled by this Court. Sup. Ct. R. 10.

First, there was a well-defined split among federal courts over the rule's legality. Over the dissent of then-Judge Barrett, the Seventh Circuit had concluded it was likely to be held improper. *Cook County*, 962 F.3d at 228. The Second Circuit had similarly found the Rule to exceed the scope of DHS's delegated power. *New York v. U.S. Dep't of Homeland Security*, 969 F.3d 42, 74-75 (2d Cir. 2020).

By contrast, a panel of the Fourth Circuit reversed a preliminary injunction against enforcement of the Rule based on the conclusion that "[t]he DHS Rule . . . comports with the best reading of the INA." *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 250, *vacated for rehearing en banc*, 981 F.3d 311 (4th Cir. 2020) (dismissed Mar. 11, 2021). Indeed, the Fourth Circuit went so far as to say that "[t]o invalidate the Rule would . . . entail the disregard of the plain text of a duly enacted statute," and would "visit palpable harm upon the Constitution's structure and the circumscribed function of the federal courts that document prescribes." *Id.* at 229. Similarly, in entering a stay pending appeal of preliminary injunctions against the Rule, the Ninth Circuit issued a lengthy published opinion concluding that "[t]he Final Rule's definition of 'public charge' is consistent with the relevant statutes, and DHS's action was not arbitrary or capricious." *City & County of San Francisco*, 944 F.3d at 790.

Second, this question remains vitally important. Decisions about whether and under what conditions to admit immigrants implicate a "fundamental sovereign attribute exercised by the Government's political departments." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). As the Second Circuit noted, making these decisions correctly is essential "[b]ecause there is no apparent means by which DHS could revisit adjustment determinations" once made. 969 F.3d at 86-87.

Congress explicitly directed the Executive Branch to deny admission or adjustment of status to aliens who, "in the opinion of the [Secretary of Homeland Security]," are "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The Rule provides key guidance in doing so, issuing formal, objective standards by which that determination will be made. The propriety of the Rule is a question of national importance which this Court has already once determined merits its attention. *Dep't of Homeland Sec.*, 2021 WL 666376, at *1.

Third, this case is virtually indistinguishable from *New York*, and the only distinctions make the case *more* worthy of certiorari, not less. Like the court in *New York*, the district court here held that the Rule violated the APA, because it exceeded the Department of Homeland Security's authority, was not in accordance with law, and was arbitrary and capricious. *See* App. C at 2. In granting the motion, the district court explicitly explained that vacatur of the rule was "not limited to the State of Illinois." *Id.* at 8.

The only distinguishing factors are: (1) that the district court entered a partial final judgment instead of a preliminary injunction, and (2) unlike in *New York*, the district court's order applies nationwide.[3] These factors, however, make the case more worthy of this Court's attention. This Court prefers applications for certiorari arising from final judgments rather than interlocutory orders, *Abbott v. Veasey*, 137 S. Ct. 613 (2017) (Roberts, C.J., respecting the denial of certiorari), and the United States has already taken the position that the finality of the trial court's decision renders the rule no longer effective anywhere in the country. 86 Fed. Reg. 14221 (Mar. 15, 2021); *see also* App. K ("confirming that 'following the Seventh Circuit dismissal,' the 'final judgment from the Northern District of Illinois, which vacated the 2019 public charge rule, went into effect'").[4] Unlike when this Court granted review in *New York*, there will be no second chance to review this question.

[3] In *New York*, the district court had initially issued a nationwide injunction. 969 F.3d at 50. But, recognizing an already existing difference in opinion among the federal courts, the Second Circuit limited the injunction's scope to the three States within its purview. *Id.*

[4] U.S. Federal Register National Archives: *Inadmissibility on Public Charge Grounds; Implementation of Vacatur* (Mar. 15, 2021), https://tinyurl.com/c6bapsf7.

B. There is at Least a Fair Prospect that the Court Would Vacate the injunction.

There is at least a fair prospect that the Court would vacate the district court's partial grant of summary judgment here. *Conkright*, 556 U.S. at 1402. By previously granting a stay here and in *New York*, this Court has already made this determination. Again, the only material change is the United States' abandoning its defense of the Rule—and the now-nationwide scope of relief granted by the district court.

Once properly defended, challenges to the Rule are unlikely to succeed because they lack merit. The Rule's interpretation of "public charge" is consistent with the ordinary meaning of the term "public charge," other statutes enacted by Congress at the same time, and the historic usage of the term "public charge."

A. Congress has not defined the term "public charge," stating only that the Executive "shall at a minimum consider the alien's (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." 8 U.S.C. § 1182(a)(4)(B)(i). And since at least the late 1990s, the United States has recognized that the term is ambiguous. The Rule gives the term "public charge" its natural meaning by including non-cash benefits as a consideration in determining whether an alien will rely on public support and thus be inadmissible. As the Fourth Circuit explained, "[t]he ordinary meaning of 'public charge' . . . was 'one who produces a money charge upon, or an expense

to, the public for support and care.'" *CASA de Md.*, 971 F.3d at 242 (quoting BLACK'S LAW DICTIONARY 295 (4th ed. 1951)).

After all, the Rule encompasses benefits that allow an immigrant to buy food, obtain housing, and pay for medical care. 84 Fed. Reg. at 41,501. These benefits are no less expensive to the States or significant to the immigrant because they are provided in kind rather than in cash. *See Cook County*, 962 F.3d at 241 (Barrett, J., dissenting). An immigrant who relies on multiple such benefits for a period of time, or on one such benefit for an extended period, falls easily within the ordinary usage of the term "public charge."

B. The Rule is further consistent with the text of the immigration laws. In legislation adopted concurrently with the public charge provision, *see* 8 U.S.C. § 1182(a)(4)(B)(i), Congress determined that it should be the official "immigration policy of the United States" to ensure that the "availability of public benefits not constitute an incentive for immigration to the United States." 8 U.S.C. § 1601(2)(B). Congress again cited the "compelling" interest in ensuring "that aliens be self-reliant in accordance with national immigration policy." *Id.* at 1601(5). Congress further emphasized that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," and that 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 . . . and (B) the availability of

public benefits not constitute an incentive for immigration to the United States." *Id.* at § 1601(1)(2).

The Rule is also congruent with the broader statutory scheme. For example, Congress required an alien seeking admission or adjustment of status to submit "affidavit[s] of support" from sponsors. *See* 8 U.S.C. § 1182(a)(4)(C)-(D). Those sponsors must, in turn, agree "to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line." *Id.* § 1183a(a)(1)(A). Congress reinforced this requirement for self-sufficiency by allowing federal and state governments to seek reimbursement from the sponsor for "any means-tested public benefit" the government provides to the alien during the period the support obligation remains in effect. *Id.* § 1183a(a)(1)(B). That provision is not limited to cash support. Aliens who fail to obtain the required affidavit are treated by operation of law as inadmissible on the public-charge ground, regardless of individual circumstances. *Id.* § 1182(a)(4).

The States' interests here provide an obvious example. That state-obligated Medicaid funding does not come in the form of cash does not mean that the States are not obligated to raise and expend many millions of dollars on Medicaid for these individuals. For example, in 2018, the cost of the average Medicaid beneficiary in Texas was $9,247 per capita; in Ohio, $8,248; in West Virginia, $7,232. Medicaid.gov, *Medicaid Per Capita Expenditures*, https://tinyurl.com/heayt2 (last visited Mar. 17,

2021). That figure is higher for older beneficiaries or those with chronic illness or disabilities. *See id.* Likewise, the availability of substantial assistance—though not granted in the form of direct cash payments—may well provide significant nonmonetary inducement for aliens to immigrate to the United States contrary to law.

C. Finally, as explained by the Ninth Circuit, the Rule is consistent with the history of the term public charge. "Since 1882, when the Congress enacted the first comprehensive immigration statute, U.S. law has prohibited the admission to the United States of 'any person unable to take care of himself or herself without becoming a public charge.'" *City & Cty. of San Francisco*, 944 F.3d at 779. As the Ninth Circuit concluded "[t]he history of the term 'public charge' confirms that its definition has changed over time to adapt to the way in which federal, state, and local governments have cared for our most vulnerable populations." *Id.* at 792. The court recognized that the meaning of "public charge" has involved "a totality-of-the-circumstances test" with "different factors . . . weigh[ing] more or less heavily at different times, reflecting changes in the way in which we provide assistance to the needy." *Id.* at 796.

In short, the Court is likely to reject challenges to the Rule because it "easily" qualifies as a "permissible construction of the INA." *City & County of San Francisco*, 944 F.3d at 799; *see CASA de Md.*, 971 F.3d at 251 (holding that the Rule is "unquestionably lawful"); *Cook County*, 962 F.3d at 234 (Barrett, J., dissenting).

C. There is a Likelihood that Irreparable Harm Will Result from the Denial of a Stay.

Irreparable harm will result from the denial of a stay. *Conkright*, 556 U.S. at 1402. Once again, by granting the previous stay in this case and *New York*, this Court has already determined that irreparable harm will result absent a stay. Moreover, as the Ninth Circuit recognized, "decisions to grant adjustment of status to aliens who could otherwise not be eligible are not reversible." *City & County of San Francisco*, 944 F.3d at 805. Thus, aliens who would be inadmissible under a duly promulgated rule would be rendered admissible to the United States with no chance of correction. The States will also suffer irreparable harm in at least two ways.

First, as a direct consequence, the States will be required to budget for and expend many millions of dollars in additional aid through Medicaid and other programs that would otherwise not have been required. Funds spent to provide public services to the economically disadvantaged will, by definition, never be recoverable. The abruptness with which the Executive abandoned the Rule also deprives the States of the ability to plan for this additional expense as they normally would during an orderly rulemaking process.

Second, and only slightly less directly, States lose their procedural right to defend their interests. To be clear, the States do not contest that the Executive may change the Rule through further rulemaking about

the definition of "public charge" so long as its preferred interpretation is reasonable and falls within the scope of authority delegated by Congress. But the requirements of APA rulemaking apply with equal force whether the Executive is *creating* a rule or *modifying* it. *See e.g.*, *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569-71 (2019). Because the Rule was made through formal notice-and-comment procedures, it can only be unmade the same way. *Cf. Motor Vehicle Mfr's Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S 29, 41, 46-47 (1983).

As part of that process, the States would have had the right to submit input and to protect their interests before the agency. If unsatisfied with the ultimate result, they would have been permitted to challenge whether the Executive "articulated 'a satisfactory explanation' for [its] decision, 'including a rational connection between the facts found and the choice made.'" *Dep't of Com.*, 139 S. Ct. at 2569 (quoting *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43).

Yet by voluntarily dismissing the challenges to the Rule while leaving a favorable judgment in place, the new Administration has short-circuited that process, made an end run around the requirements of the APA, and deprived the States of the input they would have under the normal process. This type of procedural harm is also one that is remediable by the courts. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt

the injury-causing party to reconsider the decision that allegedly harmed the litigant.").

III. In the Alternative, the States Seek Summary Reversal of the Court of Appeals' Denial of their Motions to Recall the Mandate, to Rehear or Reconsider the Motion to Dismiss, and to Intervene.

Should this Court decline to grant a stay pending filing of a petition for certiorari, the States seek summary reversal of the court of appeals' orders preventing them from intervening below to defend the Rule and their interests. Under these unusual circumstances—where the United States defended the Rule for over a year before precipitously abandoning that defense with no notice to any of the States—the court below erred in failing to allow the States to intervene to defend the Rule.

A. The Court of Appeals Should Have Recalled its Mandate.

"[T]he courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion." *Calderon v. Thompson*, 523 U.S. 538, 549 (1998). Just such circumstances are present in this case: The United States went through a year-long rulemaking process, including receiving more than 250,000 comments to promulgate the rule. 84 Fed. Reg. at 41,297. The United States then defended the rule in district courts and courts of appeals throughout the country—only to abandon that defense with no notice to any of the affected states on March 9. This action left in place the partial summary judgment rendering the rule unenforceable—without going

through any of the procedures required by formal rulemaking. These are exceptional circumstances that justify the recall of the mandate.

B. The Court of Appeals Should Have Granted the States' Motion to Rehear or Reconsider the Motion to Dismiss.

Motions for reconsideration are appropriate where, through no fault of the movant, a court has committed an error of fact or law in deciding on a motion. *Cf. Lightspeed Media Corp. v. Smith*, 830 F.3d 500, 505-506 (7th Cir. 2016). The court of appeals made such an error here by allowing the parties—whose interests are now aligned—to dismiss the appeal under Federal Rule of Appellate Procedure 42 without allowing the numerous interested nonparties, including the States, opportunity to protect the interests formerly protected by the United States.

Though the nominal parties to this matter approved dismissal, the partial summary judgment issued by the district court directly implicates the interests of the States—who were not informed of the dismissal, had no opportunity to vindicate their interests, and are now deprived of the benefits of the Rule by the district court's judgment. As discussed above, the States are also deprived of their ability to provide input and defend their interests in the normal rulemaking process.

Allowing voluntary dismissal to be used this way will lead to pernicious consequences. If the United States and an aligned party are allowed to simply dismiss cases on appeal once a favorable judgment has been reached, nonparties like the States will be forced to intervene at

the first sign of litigation that may affect their interests. Indeed, it would paradoxically require States to more hastily intervene when the federal government already *supports* their interests precisely to avoid the sudden switch-and-dismissal performed here. That is precisely the opposite of how the federal rules are intended to work—namely "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

C. The Court of Appeals Should Have Granted the States' Motion to Intervene.

Although the Federal Rules of Civil Procedure do not apply directly in appellate proceedings, both this Court and lower federal courts have recognized that the rules controlling district court intervention may serve as useful guidance regarding whether to permit intervention in other contexts. *See, e.g.*, *Scofield*, 382 U.S. at 217 n.10; *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 517-18 (7th Cir. 2004); *Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985). The States meet Rule 24's standards for intervention.

Under Rule 24, "[t]he grounds for intervention of right may be stated as: (1) timeliness, (2) cognizable interest, (3) impairment, and (4) lack of adequate representation." *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 74 (D.C. Cir. 1988); *see also Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854,

862 (6th Cir. 2000); *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).

The States sought to intervene in the lower court in a timely manner. Although the States have been aware of their interests in the Rule for some time, this case clearly presents "unusual circumstances" warranting intervention. *State v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019). The United States defended the Rule for more than a year across multiple courts, and the States' interests were appropriately represented in that defense. The States therefore relied on the United States to defend the Rule in lieu of burdening the courts with additional briefing reiterating that defense. It was not until March 9, when the United States voluntarily moved to dismiss this case that the States learned that the new Administration intended, in essence, to repeal the Rule by stipulation in litigation. On learning of that decision, the States immediately moved to intervene, not just here but in the Fourth and Ninth Circuits where other appeals were also pending. App. M-O; App. L. The Fourth Circuit denied the motions pending before it on March 18, while the motion before the Ninth Circuit remains pending. Upon the Seventh Circuit's denial of those motions, the States also timely sought relief from this Court.

As discussed above, the States also have a real and cognizable interest in this litigation that will be impaired absent intervention. Unlike in *New York*, there will be no later opportunity or alternative vehicle to

review the question. In the Southern District of New York, the United States has taken the position that the litigation there is moot because the district court's opinion in this case sets aside the rule in the entire country. App. K.[5] And it has already begun to take steps to enforce the now outdated 1999 informal guidance rather than the duly promulgated Rule. *See* 86 Fed. Reg. at 14221 (Mar. 15, 2021) ("This rule removes from the Code of Federal Regulations . . . the regulatory text that DHS promulgated in the August 2019 rule and restores the regulatory text to appear as it did prior to the issuance of the August 2019 rule."). In other words, though this case has been litigated by one county and one interest group, the district court's ruling applies nationwide. Now that the United States has voluntarily dismissed this appeal, nothing will stop the district court's nationwide vacatur from taking effect and adversely impacting the States' budgets, including their Medicaid expenditures.

Finally, no party now adequately represents the States' interests because the United States has abandoned its defense of the Rule nationwide. Absent the States' intervention, they will be bound by the invalidation of the Rule without having any ability to defend those interests. The court of appeals erred by not allowing the States to intervene.

[5] Should this Court stay the effect of the Northern District of Illinois order, the States intend to intervene in the New York case as well.

Conclusion

This Court should permit the States to intervene and stay the district court's judgment pending the timely filing of a petition for a writ of certiorari. In the alternative, this Court should summarily reverse the Court of Appeals' order denying the States' motions to intervene.

Respectfully submitted.

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Leslie Rutledge
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Mark Brnovich
Attorney General of Arizona

Todd Rokita
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March 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

March 15, 2021

By the Court:

No. 20-3150	COOK COUNTY, ILLINOIS and ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, Plaintiffs - Appellees v. CHAD F. WOLF, et al., Defendants - Appellants
Originating Case Information:	
District Court No: 1:19-cv-06334 Northern District of Illinois, Eastern Division District Judge Gary Feinerman	

Upon consideration of the **MOTION TO RECALL THE MANDATE TO PERMIT INTERVENTION AS APPELLANT**, filed on March 11, 2021, by counsel for the intervenors,

IT IS ORDERED that the motions are **DENIED**.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

March 9, 2021

By the Court:

No. 20-3150	COOK COUNTY, ILLINOIS and ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, Plaintiffs - Appellees v. CHAD F. WOLF, et al., Defendants - Appellants
Originating Case Information:	
District Court No: 1:19-cv-06334 Northern District of Illinois, Eastern Division District Judge Gary Feinerman	

Upon consideration of the **UNOPPOSED MOTION TO VOLUNTARILY DISMISS APPEAL**, filed on March 9, 2021, by counsel for appellants,

IT IS ORDERED that this case is **DISMISSED**, pursuant to Federal Rule of Appellate Procedure 42(b).

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

NOTICE OF ISSUANCE OF MANDATE

March 9, 2021

To: Thomas G. Bruton
UNITED STATES DISTRICT COURT
Northern District of Illinois
Chicago , IL 60604-0000

No. 20-3150	COOK COUNTY, ILLINOIS and ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, Plaintiffs - Appellees v. CHAD F. WOLF, et al., Defendants - Appellants
Originating Case Information:	
District Court No: 1:19-cv-06334 Northern District of Illinois, Eastern Division District Judge Gary Feinerman	

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

TYPE OF DISMISSAL: F.R.A.P. 42(b)

STATUS OF THE RECORD: no record to be returned

NOTE TO COUNSEL:
If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten (10) days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

- -

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

Date: **Received by:**

_____ _____

form name: **c7_Mandate**(form ID: **135**)

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COOK COUNTY, ILLINOIS, an Illinois governmental entity, and ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC.,	)	19 C 6334
Plaintiffs,	)	Judge Gary Feinerman
vs.	)	
CHAD F. WOLF, in his official capacity as Acting Secretary of U.S. Department of Homeland Security, U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency, KENNETH T. CUCCINELLI II, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services, and U.S. CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Cook County and Illinois Coalition for Immigrant and Refugee Rights, Inc. ("ICIRR") allege in this suit that the Department of Homeland Security's ("DHS") final rule, *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("Final Rule" or "Rule"), is unlawful. Doc. 1. Plaintiffs claim that the Rule violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*., because (1) it exceeds DHS's authority under the public charge provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(4)(A); (2) is not in accordance with law; and (3) is arbitrary and capricious. Doc. 1 at ¶¶ 140-169. ICIRR also claims that the Rule violates the equal protection component of the Fifth Amendment's Due Process Clause. *Id*. at ¶¶ 170-188.

On October 14, 2019, this court preliminarily enjoined DHS from enforcing the Final Rule in the State of Illinois, reasoning that the Rule likely violates the APA because it interprets

the term "public charge" in a manner incompatible with its statutory meaning. Docs. 85, 87, 106 (reported at 417 F. Supp. 3d 1008 (N.D. Ill. 2019)). DHS appealed. The Seventh Circuit denied DHS's motion to stay the preliminary injunction pending appeal, No. 19-3169 (7th Cir. Dec. 23, 2019), but the Supreme Court issued a stay, 140 S. Ct. 681 (2020) (mem.). Meanwhile, DHS moved to dismiss the suit under Civil Rules 12(b)(1) and 12(b)(6). Doc. 124. This court denied DHS's motion and granted ICIRR's request for extra-record discovery on its equal protection claim. Docs. 149-150 (reported at 461 F. Supp. 3d 779 (N.D. Ill. 2020)). And this court denied DHS's motion to certify under 28 U.S.C. § 1292(b) an interlocutory appeal of the denial of its motion to dismiss the equal protection claim. Docs. 183-184 (reported at 2020 WL 3975466 (N.D. Ill. July 14, 2020)).

Shortly after this court denied DHS's motion to dismiss, the Seventh Circuit affirmed the preliminary injunction, reasoning that the Final Rule likely violates the APA. 962 F.3d 208 (7th Cir. 2020). Armed with the Seventh Circuit's decision, Plaintiffs move for summary judgment on their APA claims. Doc. 200. They seek a partial judgment under Civil Rule 54(b)—one that would vacate the Rule pursuant to the APA and allow continued litigation on ICIRR's equal protection claim. Docs. 217-218. Plaintiffs' motion is granted. A Rule 54(b) judgment is entered, the Final Rule is vacated, DHS's request to stay the judgment is denied, and ICIRR's equal protection claim may proceed in this court.

Discussion

The pertinent background is set forth in this court's opinions and the Seventh Circuit's opinion, familiarity with which is assumed.

I. Plaintiffs' Summary Judgment Motion

DHS forthrightly concedes that the Seventh Circuit's opinion affirming the preliminary injunction effectively resolves the APA claims on the merits in Plaintiffs' favor. Doc. 209 at 7

("Defendants do not dispute that the Seventh Circuit's legal conclusions concerning the Rule may justify summary judgment for Plaintiffs on their APA claims here."); Doc. 219 at 1 ("Plaintiffs have argued, and Defendants do not dispute, that the Court may grant Plaintiffs' pending [summary judgment motion] in light of the Seventh Circuit's decision affirming the Court's preliminary injunction order."). That concession is appropriate given the Seventh Circuit's conclusion that the Final Rule is both substantively and procedurally defective under the APA. 962 F.3d at 222-33.

As for substance, the Seventh Circuit held in pertinent part as follows:

> … Even assuming that the term "public charge" is ambiguous and thus might encompass more than institutionalization or primary, long-term dependence on cash benefits, it does violence to the English language and the statutory context to say that it covers a person who receives only *de minimis* benefits for a *de minimis* period of time. There is a floor inherent in the words "public charge," backed up by the weight of history. The term requires a degree of dependence that goes beyond temporary receipt of supplemental in-kind benefits from any type of public agency.
>
> * * *
>
> The ambiguity in the public-charge provision does not provide DHS unfettered discretion to redefine "public charge." We find that the interpretation reflected in the Rule falls outside the boundaries set by the statute.

Id. at 229.[*] As for procedure, and in the alternative, the Seventh Circuit held that the Rule was "likely to fail the 'arbitrary and capricious' standard" due to "numerous unexplained serious

[*] Although the Seventh Circuit reached its conclusion under step two of *Chevron* and this court stopped at step one, there is less dissonance between the two opinions than meets the eye. Adopting the methodological approach urged by DHS—which it has since abandoned—that "'the late 19th century [is] the key time to consider' for determining the meaning of the term 'public charge,'" 417 F. Supp. 3d at 1023 (quoting DHS's brief in opposition to Plaintiffs' motion for preliminary injunction), this court concluded from an examination of contemporaneous court decisions, dictionaries, and commentary that "an alien [cannot] be deemed a public charge based on the receipt, or anticipated receipt, of a modest quantum of public benefits for short periods of time," *id*. at 1026. *See id*. at 1022-29 (analyzing the cases, dictionaries, and commentary). And as just noted, the Seventh Circuit held that "[t]here is a

flaws: DHS did not adequately consider the reliance interests of state and local governments; did not acknowledge or address the significant, predictable collateral consequences of the Rule; incorporated into the term 'public charge' an understanding of self-sufficiency that has no basis in the statute it supposedly interprets; and failed to address critical issues such as the relevance of the five-year waiting period for immigrant eligibility for most federal benefits." *Id*. at 233. Given these holdings, DHS is right to acknowledge that this court should grant summary judgment to Plaintiffs on their APA claims.

The parties disagree, however, about the appropriate remedy. Plaintiffs ask this court to vacate the Final Rule. Doc. 201 at 35-37. DHS contends that this court should vacate the Rule only insofar as it affects Plaintiffs, meaning that the vacatur should be limited to the State of Illinois. Doc. 209 at 27-29. Plaintiffs are correct.

The APA provides in pertinent part that "[t]he reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[A]gency action" includes "the whole or a part of an agency rule." *Id*. § 551(13). By the APA's plain terms, then, an agency rule found unlawful in whole is not "set aside" just for certain plaintiffs or geographic areas; rather, the rule "shall" be "set aside," period. *See Murphy v. Smith*, 138 S. Ct.

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floor inherent in the words 'public charge,'" and that "[t]he term requires a degree of dependence that goes beyond temporary receipt of supplemental in-kind benefits from any type of public agency." 962 F.3d at 229. Both opinions rest on a common premise: whatever play in the joints the statutory term "public charge" might enjoy, it cannot be stretched to cover the full measure of noncitizens deemed by the Final Rule to be public charges. *See generally* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 Va. L. Rev. 597, 599 (2009) ("[*Chevron*] artificially divides one inquiry into two steps. The single question is whether the agency's construction is permissible as a matter of statutory interpretation; the two *Chevron* steps both ask this question, just in different ways. As a result, the two steps are mutually convertible."); *id*. at 602 ("Congress' intention may be ambiguous within a range, but not at all ambiguous as to interpretations outside that range, which are clearly forbidden.").

784, 787 (2018) ("[T]he word 'shall' usually creates a mandate, not a liberty, so the verb phrase 'shall be applied' tells us that the district court has some nondiscretionary duty to perform.") (quoting 42 U.S.C. § 1997e(d)(2)); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall'… normally creates an obligation impervious to judicial discretion.") (quoting 28 U.S.C. § 1407(a)).

Precedent confirms that the APA's text means what it says. For example, in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the Supreme Court affirmed the D.C. Circuit's decision to set aside an agency rule concerning Medicaid reimbursement costs. Rather than limit relief to the "group of seven hospitals" that had filed suit, the Court declared the Rule "invalid." *Id*. at 207, 216. There is nothing unusual about this result, for that is simply what courts do when they determine that an agency action violates the APA. *See, e.g., DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020) (holding that DHS's rescission of the Deferred Action for Childhood Arrivals program "must be vacated" due to the agency's violation of the APA); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("Courts enforce [arbitrary and capricious review] with regularity when they set aside agency regulations which … are not supported by the reasons that the agencies adduce."); *H & H Tire Co. v. U.S. Dep't of Transp.*, 471 F.2d 350, 355-56 (7th Cir. 1972) ("When an administrative decision is made without consideration of relevant factors it must be set aside.") (internal quotation marks omitted); *Empire Health Found. ex rel. Valley Hosp. Med. Ctr. v. Azar*, 958 F.3d 873, 886 (9th Cir. 2020) ("[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.") (internal quotation marks omitted); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (same).

DHS cites *Johnson v. United States Office of Personnel Management*, 783 F.3d 655 (7th Cir. 2015), for the proposition that the APA authorizes courts to limit the vacatur of agency action to a defined geographic area. Doc. 209 at 27. True enough, *Johnson* held that "partial vacatur is sometimes an appropriate remedy" for an APA violation. 783 F.3d at 663. But by "partial vacatur," the Seventh Circuit meant a circumstance where a court invalidates the unlawful parts of an agency action and leaves the valid parts in place. *See ibid*. (citing *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77 (D.D.C. 2010), where the district court invalidated only part of a Clean Water Act permit). The Seventh Circuit did not mean that an agency rule can be vacated only as to certain plaintiffs or certain States. Nor could the court possibly have meant that. As Judge Moss has aptly observed: "As a practical matter, … how could [a] [c]ourt vacate [a challenged] Rule with respect to the … plaintiffs in [a] case without vacating the Rule writ large? What would it mean to 'vacate' a rule as to some but not other members of the public? What would appear in the Code of Federal Regulations?" *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019).

DHS retorts that an order vacating the Final Rule without any geographic limitation would be akin to entering the kind of nationwide injunction that the Fourth Circuit and two Justices have criticized in other cases involving APA challenges to the Rule. Doc. 209 at 27-30; *see DHS v. New York*, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., joined by Thomas, J., concurring in the grant of stay); *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 255-63 (4th Cir. 2020). DHS's analogy is inapt. As an initial matter, the two cases cited by DHS arose in the preliminary injunction posture—the district courts there could not have vacated the Rule at that early juncture, so the only question concerned the appropriate scope of preliminary relief. Here, by contrast, Plaintiffs ask this court to vacate the Rule after a judgment on the merits. Although

vacatur will prevent DHS from enforcing the Rule against nonparties, that is a consequence not of the court's *choice* to grant relief that is broader than necessary, but of the APA's *mandate* that flawed agency action must be "h[e]ld unlawful and set aside." 5 U.S.C. § 706(2).

Moreover, DHS's analogy fails to recognize that the two remedies—vacatur of a rule, and a nationwide injunction against its implementation—have significant differences. A nationwide injunction is a "drastic and extraordinary remedy" residing at the outer bounds of the judicial power. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. If a less drastic remedy (such as partial or complete vacatur of [the agency's] deregulation decision) was sufficient to redress [the challengers'] injury, no recourse to the additional and extraordinary relief of an injunction was warranted."). Vacatur, by contrast, is the ordinary remedy—again, precisely the remedy demanded by the APA's text when a rule is held to violate the APA. *See* 5 U.S.C. § 706(2) (providing that the court "shall" "set aside" the challenged "agency action" if it is adopted "in excess of statutory … authority" or is "arbitrary [and] capricious"); *see also Humane Soc'y of U.S. v. Zinke*, 865 F.3d 585, 614 (D.C. Cir. 2017) ("A common remedy when we find a rule invalid is to vacate."). As Judge Randolph has explained:

> Once a reviewing court determines that the agency has not adequately explained its decision, the [APA] requires the court—in the absence of any contrary statute—to vacate the agency's action. The [APA] states this in the clearest possible terms. Section 706(2)(A) provides that a "reviewing court" faced with an arbitrary and capricious agency decision "shall"—**not may**—"hold unlawful and set aside" the agency action. Setting aside means vacating; no other meaning is apparent. Often we do this simply as a matter of course.

Checkosky v. SEC, 23 F.3d 452, 491 (D.C. Cir. 1994) (opinion of Randolph, J.) (citation omitted).

In sum, the Final Rule is vacated, and the vacatur is not limited to the State of Illinois.

II. Rule 54(b) Judgment

With the APA claims resolved in Plaintiffs' favor, the question becomes whether the court should enter judgment under Rule 54(b) or, rather, under Rule 58—and, relatedly, what should happen to ICIRR's equal protection claim. Plaintiffs urge this court to enter a Rule 54(b) judgment on their APA claims and allow ICIRR to continue litigating its equal protection claim. Docs. 217-218. DHS does not expressly address whether a Rule 54(b) or Rule 58 judgment should be entered, but argues in its brief—and reiterated last week at oral argument, Doc. 220—that the court should stay further proceedings on the equal protection claim if judgment is entered on the APA claims. Doc. 219 at 1, 4-5. The court will enter a Rule 54(b) judgment and, given the particular facts and circumstances of this suit and parallel suits pending elsewhere, will not stay litigation on the equal protection claim.

"When a case involves more than one claim, Rule 54(b) allows a federal court to direct entry of a final judgment on 'one or more, but fewer than all, claims,' provided there is no just reason for delay." *Peerless Network, Inc. v. MCI Commc'ns Servs., Inc.*, 917 F.3d 538, 543 (7th Cir. 2019) (quoting Fed. R. Civ. P. 54(b)). "A proper Rule 54(b) order requires the district court to make two determinations: (1) that the order in question was truly a 'final judgment,' and (2) that there is no just reason to delay the appeal of the claim that was 'finally' decided." *Gen. Ins. Co. of Am. v. Clark Mall Corp.*, 644 F.3d 375, 379 (7th Cir. 2011) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 434-37 (1956)). Plaintiffs satisfy both requirements.

As to the "final judgment" requirement, "a judgment must be final in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Ibid*. (internal quotation marks omitted). A judgment is not "truly final" if "there is too much factual overlap with claims remaining in the district court." *Peerless Network*, 917 F.3d at 543.

When "multiple claims arise from the same set of facts," the court must "consider whether they are based on entirely different legal entitlements yielding separate recoveries or different legal theories aimed at the same recovery—the latter of which makes Rule 54(b) partial final judgment improper." *Ibid*. (internal quotation marks omitted).

The final judgment requirement is satisfied here. The APA claims concern whether the Final Rule properly implements the INA's public charge provision and whether DHS's rulemaking was arbitrary and capricious, Doc. 1 at ¶¶ 140-169; 962 F.3d at 222-33, while the equal protection claim concerns whether the Rule is motivated by the impermissible discriminatory purpose of favoring white immigrants over nonwhite immigrants, Doc. 1 at ¶¶ 170-188; 461 F. Supp. 3d at 784-92. Other than their common attack on the Rule itself, there is minimal factual (or legal) overlap between those claims. *See Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 518 F.3d 459, 465 (7th Cir. 2008) (holding that tort and property law claims arising from the collapse of a water canal had "some overlapping historical facts" but nonetheless were "sufficiently distinct" for purposes of Rule 54(b)); *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 515-16 (7th Cir. 2002) (upholding the entry of a Rule 54(b) judgment on a copyright claim because "the only facts before [the court] on … appeal" were "unlikely to be at issue" in the trademark claim that remained in the district court). Granted, a portion of one of Plaintiffs' APA claims alleges that the economic justifications articulated by DHS for the Rule are a pretext for racial discrimination, Doc. 1 at ¶ 166; 2020 WL 3975466, at *2, but the Seventh Circuit's opinion did not rely on pretext, and this court's grant of summary judgment on the APA claims likewise does not rely on pretext given that it rests exclusively on the Seventh Circuit's opinion. *See Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1163 (7th Cir. 1997) ("[S]ome overlap between the facts in the retained and the appealed claims is not fatal.").

Moreover, the APA and equal protection claims are not "different legal theories aimed at the same recovery." *Peerless Network*, 917 F.3d at 543 (internal quotation marks omitted). The only remedy Plaintiffs seek under the APA is vacatur of the Final Rule. Doc. 201 at 35-37; Doc. 213 at 2-6; Doc. 217 at 3; Doc. 218 at 1. For its equal protection claim, ICIRR seeks a declaration that the Rule violates the Fifth Amendment and, more importantly, a permanent injunction enjoining DHS and its officials from implementing and enforcing the Rule, Doc. 1 at pp. 58-59, which could entail a requirement that, until a new rule is promulgated, DHS resume applying its 1999 field guidance, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28,689 (May 26, 1999). As noted, the Supreme Court in *Monsanto Co.* made clear that "complete vacatur of [an agency's] … decision" is a "less drastic remedy" than the "additional and extraordinary relief of an injunction." 561 U.S. at 165-66. It follows that victory for ICIRR on its equal protection claim may yield relief in addition to the relief the court is granting on Plaintiff's APA claims. *See Nat'l Ski Areas Ass'n v. U.S. Forest Serv.*, 910 F. Supp. 2d 1269, 1288 (D. Colo. 2012) (in addition to vacating a Forest Service administrative directive, granting injunctive relief against the agency's enforcement thereof "to ensure good faith between the parties while the [directive] runs through APA procedural process on remand"). Whether ICIRR will prevail on its equal protection claim, whether injunctive relief would be appropriate to remedy an equal protection violation, and what that relief might entail remain to be seen and cannot be answered at this juncture, when the parties have only recently commenced discovery and have not sought judgment on that claim. *See Marie v. Mosier*, 196 F. Supp. 3d 1202, 1216 (D. Kan. 2016) (collecting cases in which district courts in the wake of *Obergefell v. Hodges*, 576 U.S. 644 (2015), enjoined state laws banning same sex marriage, and

rejecting the argument that the unlikelihood that those laws might be enforced made a permanent injunction unnecessary).

As to the "no just reason to delay the appeal" requirement, "a district court must take into account judicial administrative interests as well as the equities involved." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980). Regarding the judicial system's interests, the "goal … is to prevent 'piece-meal appeals' involving the same facts." *Peerless Network*, 917 F.3d at 543 (quoting *Curtiss-Wright Corp.*, 446 U.S. at 10). Entry of a Rule 54(b) judgment is fully consistent with that aim because, as noted, the APA claims on which the court grants summary judgment have little overlap with ICIRR's equal protection claim. And regarding the equities, the Seventh Circuit has held that continued operation of the Final Rule will inflict ongoing harms on Cook County and on immigrants, 962 F.3d at 233, and this court has held that the same is true of ICIRR, 417 F. Supp. 3d at 1029-30. Because a Rule 54(b) judgment would give immediate effect to this court's vacatur of the Rule—which DHS resumed implementing in September, *see Public Charge Fact Sheet*, U.S. Citizenship & Immigr. Servs., https://www.uscis.gov/news/public-charge-fact-sheet (last updated Sept. 22, 2020)—there is no just reason for delaying the entry of judgment or DHS's appeal thereof.

In sum, the entry of a Rule 54(b) final judgment on the APA claims is proper. The question remains whether this court should allow litigation to proceed on ICIRR's equal protection claim. In urging a stay of litigation on that claim, DHS invokes the constitutional avoidance doctrine, arguing that "courts 'will not decide a constitutional question if there is some other ground upon which to dispose of the case,' especially if the other ground 'afford[s] [a plaintiff] all the relief it seeks.'" Doc. 219 at 3 (quoting *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 205 (2009)) (alterations by DHS). DHS's argument fails because, as

noted, ICIRR's equal protection claim provides a basis for injunctive relief, which Plaintiffs do not seek—and would have faced an uphill battle obtaining—on their APA claims. *See Monsanto Co.*, 561 U.S. at 165-66; *O.A.*, 404 F. Supp. 3d at 153-54.

DHS argues in the alternative that this court should stay litigation on ICIRR's equal protection claim because discovery on that claim "could consume significant resources of both the Court and the parties." Doc. 219 at 5. If this case were the only challenge to the Final Rule pending in federal court, DHS's argument would have significant weight. But as DHS confirmed at argument, Doc. 220, discovery is proceeding on equal protection claims brought in two parallel public charge cases. *See Washington v. U.S. DHS*, No. 19 C 5210 (E.D. Wash.); *New York v. U.S. DHS*, No. 19 C 7777 (S.D.N.Y.). Proceeding with discovery on ICIRR's equal protection claim here therefore is unlikely to impose on DHS much work in addition to the work it is already doing in those other cases.

III. Stay of Judgment Pending Appeal

While acknowledging that, given the Seventh Circuit's ruling, summary judgment should be granted to Plaintiffs on the APA claims, DHS asks this court to stay its judgment pending appeal. Doc. 209 at 29-30. "The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction. … To determine whether to grant a stay, [the court] consider[s] the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014); *see also Venckiene v. United States*, 929 F.3d 843, 853 (7th Cir. 2019) (same).

The hierarchical structure of the judiciary makes this a straightforward decision for a district court. The Seventh Circuit held in the cases just cited that the standard for granting a stay pending appeal mirrors that for granting a preliminary injunction, and held in this case that

the criteria for a preliminary injunction have been met. 962 F.3d at 221-34. Accordingly, because (as the Seventh Circuit held) Plaintiffs are entitled to a preliminary injunction, DHS is not entitled to a stay pending appeal.

DHS counters with the argument that the Supreme Court, in staying this court's preliminary injunction order, "'necessarily conclud[ed]' that Plaintiffs were unlikely to succeed on the merits" and "necessarily … determin[ed] that the balance of the harms and the public interest support a stay." Doc. 209 at 29 (quoting *CASA de Md.*, 971 F.3d at 230) (first alteration in original). But the Seventh Circuit effectively rejected that line of reasoning in affirming the preliminary injunction:

> With respect to the balance of harms, we must take account of the Supreme Court's decision to stay the preliminary injunction entered by the district court. The Court's stay decision was not a merits ruling. … We do not know why the Court granted this stay, because it did so by summary order, but we assume that it abided by the normal standards. Consequently, the stay provides an indication that the Court thinks that there is at least a fair prospect that DHS should prevail and faces a greater threat of irreparable harm than the plaintiffs.
>
> The stay thus preserves the status quo while this case and others percolate up from courts around the country. There would be no point in the merits stage if an issuance of a stay must be understood as a *sub silentio* disposition of the underlying dispute. With the benefit of more time for consideration and the complete preliminary injunction record, we believe that it is our duty to evaluate each of the preliminary injunction factors, including the balance of equities. In so doing, we apply a 'sliding scale' approach in which "the more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." *Valencia v. City of Springfield*, 883 F.3d [959,] 966 [(7th Cir. 2018)]. We also consider effects that granting or denying the preliminary injunction would have on the public. *Ibid*.
>
> In our view, Cook County has shown that it is likely to suffer (and has already begun to suffer) irreparable harm caused by the Rule. Given the dramatic shift in policy the Rule reflects and the potentially dire public health consequences of the Rule, we agree with the district court that the public interest is better served for the time being by preliminarily enjoining the Rule.

962 F.3d at 233-34. In reaching that decision, the Seventh Circuit also had the benefit of a Ninth Circuit opinion holding that the Final Rule likely complied with the APA, *see City and Cnty. of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019), and necessarily rejected the Ninth Circuit's approach. Given the Seventh Circuit's holding that, despite the Supreme Court's stay, the Final Rule was substantively and procedurally invalid under the APA and preliminary injunctive relief was appropriate, this court will not stay its vacatur of the Rule.

Conclusion

Plaintiffs' summary judgment motion is granted. The court enters a Rule 54(b) judgment vacating the Final Rule, to take effect immediately. Litigation may proceed in this court on ICIRR's equal protection claim.

November 2, 2020

_____
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COOK COUNTY, ILLINOIS, an Illinois governmental entity, and ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC.,	)	19 C 6334
Plaintiffs,	)	Judge Gary Feinerman
vs.	)	
KEVIN K. McALEENAN, in his official capacity as Acting Secretary of U.S. Department of Homeland Security, U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency, KENNETH T. CUCCINELLI II, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services, and U.S. CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency,	)	
Defendants.	)	

(CORRECTED) MEMORANDUM OPINION AND ORDER

In this suit under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, Cook County and Illinois Coalition for Immigrant and Refugee Rights, Inc. ("ICIRR") challenge the legality of the Department of Homeland Security's ("DHS") final rule, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212-14, 245, 248). Doc. 1. The Final Rule has an effective date of October 15, 2019. Cook County and ICIRR move for a temporary restraining order and/or preliminary injunction under Civil Rule 65, or a stay under § 705 of the APA, 5 U.S.C. § 705, to bar DHS (the other defendants are ignored for simplicity's sake) from implementing and enforcing the Rule in the State of Illinois. Doc. 24. At the parties' request, briefing closed on October 10, 2019, and oral argument was held on October 11, 2019. Docs. 29, 81. The motion is granted, and DHS is enjoined from implementing the Rule in the State of Illinois absent further order of court.

Background

Section 212(a)(4) of the Immigration and Nationality Act ("INA") states: "Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A). The public charge provision has a long pedigree, dating back to the Immigration Act of 1882, ch. 376, §§ 1-2, 22 Stat. 214, 214, which directed immigration officers to refuse entry to "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." The provision has been part of our immigration laws, in various but nearly identical guises, ever since. *See* Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084; Immigration Act of 1907, ch. 1134, § 2, 34 Stat. 898, 899; Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 876; INA of 1952, ch. 477, § 212(a)(15), 66 Stat. 163, 183; Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, § 531(a), 110 Stat. 3009-546, 3009-674 to -75 (1996).

Prior to the rulemaking resulting in the Final Rule, the federal agency charged with immigration enforcement last articulated its interpretation of "public charge" in a 1999 field guidance document. *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28,689 (May 26, 1999). The field guidance defined a "public charge" as a person "primarily dependent on the government for subsistence," and instructed immigration officers to ignore non-cash public benefits in assessing whether an individual was "likely at any time to become a public charge." *Ibid*. That definition and instruction never made their way into a regulation.

On October 10, 2018, DHS published a Notice of Proposed Rulemaking, Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (Oct. 10, 2018), which was followed by a sixty-day public comment period. Some ten months later, DHS published the Final Rule, which addressed the comments, revised the proposed rule, and provided analysis to support the Rule. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,292. As DHS described it, the Rule "redefines the term 'public charge' to mean an alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." 84 Fed. Reg. at 41,295.

By adopting a duration-based standard, the Rule covers aliens who receive only minimal benefits so long as they receive them for the requisite time period. As the Rule explains: "DHS may find an alien inadmissible under the standard, even though the alien who exceeds the duration threshold may receive only hundreds of dollars, or less, in public benefits annually." *Id*. at 41,360-61. The Rule "defines the term 'public benefit' to include cash benefits for income maintenance, [the Supplemental Nutrition Assistance Program], most forms of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher (HCV) Program, Section 8 Project-Based Rental Assistance, and certain other forms of subsidized housing." *Id*. at 41,295. The Rule sets forth several nonexclusive factors DHS must consider in determining whether an alien is likely to become a public charge, including "the alien's health," any "diagnosed … medical condition" that "will interfere with the alien's ability to provide and care for himself or herself," and past applications for the enumerated public benefits. *Id*. at 41,502-04. The Rule provides that persons found likely to become public charges are ineligible "for a visa to come to the United States temporarily or permanently, for admission, or for adjustment of status to that of a

lawful permanent resident." *Id*. at 41,303. The Rule also "potentially affect[s] individuals applying for an extension of stay or change of status because these individuals would have to demonstrate that they have not received, since obtaining the nonimmigrant status they are seeking to extend or change, public benefits for" more than the allowed duration. *Id*. at 41,493.

Cook County and ICIRR challenge the Rule's legality and seek to enjoin its implementation. Cook County operates the Cook County Health and Hospitals System ("CCH"), one of the largest public hospital systems in the Nation. Doc. 27-1 at p. 326, ¶ 5. ICIRR is a membership-based organization that represents nonprofit organizations and social and health service providers throughout Illinois that deliver and seek to protect access to health care, nutrition, housing, and other services for immigrants regardless of immigration status. *Id*. at pp. 341-342, ¶¶ 3-10. Cook County and ICIRR maintain that the Rule will cause immigrants to disenroll from public benefits—or to not seek benefits in the first place—which will in turn generate increased costs and cause them to divert resources from their existing programs meant to aid immigrants and safeguard public health. Doc. 27-1 at pp. 330-338, ¶¶ 25-52; *id*. at pp. 342-350, ¶¶ 11-42. Cook County and ICIRR argue that the Rule exceeds the authority granted to DHS under the INA and that DHS acted arbitrarily and capriciously in promulgating the Rule.

Discussion

"To win a preliminary injunction, the moving party must establish that (1) without preliminary relief, it will suffer irreparable harm before final resolution of its claims; (2) legal remedies are inadequate; and (3) its claim has some likelihood of success on the merits." *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381 (7th Cir. 2018). "If the moving party makes this showing, the court balances the harms to the moving party, other parties, and the public." *Ibid*. "In so doing, the court employs a sliding scale approach: the more likely the plaintiff is to

win, the less heavily need the balance of harms weigh in [its] favor; the less likely [it] is to win, the more need [the balance] weigh in [its] favor." *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018) (alteration and internal quotation marks omitted). "The sliding scale approach is not mathematical in nature, rather it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief." *Stuller, Inc. v. Steak N Shake Enters.*, 695 F.3d 676, 678 (7th Cir. 2012) (internal quotation marks omitted). "Stated another way, the district court sits as would a chancellor in equity and weighs all the factors, seeking at all times to minimize the costs of being mistaken." *Ibid*. (alteration and internal quotation marks omitted). A request for a temporary restraining order is analyzed under the same rubric, *see Carlson Grp., Inc. v. Davenport*, 2016 WL 7212522, at *2 (N.D. Ill. Dec. 13, 2016), as is a request for a stay under 5 U.S.C. § 705, *see Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 446 (7th Cir. 1990) ("The standard is the same whether a preliminary injunction against agency action is being sought in the district court or a stay of that action [under 5 U.S.C. § 705] is being sought in [the appeals] court.").

I. Likelihood of Success on the Merits

A. Standing

DHS argues at the outset that Cook County and ICIRR lack Article III standing. Doc. 73 at 20-23. "To assert [Article III] standing for injunctive relief, [a plaintiff] must show that [it is] under an actual or imminent threat of suffering a concrete and particularized 'injury in fact'; that this injury is fairly traceable to the defendant's conduct; and that it is likely that a favorable judicial decision will prevent or redress the injury." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 949 (7th Cir. 2019) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).

On the present record, Cook County has established its standing. In *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), where a municipality alleged under the Fair Housing

Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, that real estate brokers had engaged in racial steering, the Supreme Court held for Article III purposes that "[a] significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." *Gladstone*, 441 U.S. at 110-11. That was so even though the causal chain resulting in the municipality's injury involved independent decisions made by non-parties; as the Court explained, "racial steering effectively manipulates the housing market" by altering homebuyers' decisions, which "reduce[s] the total number of buyers in the … housing market," particularly where "perceptible increases in the minority population … precipitate an exodus of white residents." *Id*. at 109-10. That reduction in buyers, in turn, meant that "prices may be deflected downward[,] … directly injur[ing] a municipality by diminishing its tax base." *Id*. at 110-11.

Applying *Gladstone*, the Seventh Circuit in *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086 (7th Cir. 1992), held that Chicago had standing in a similar FHA case, reasoning that "racial steering leads to resegregation" and to "[p]eople … becom[ing] panicked and los[ing] interest in the community," generating "destabilization of the community and a corresponding increased burden on the City in the form of increased crime and an erosion of the tax base." *Id*. at 1095. The Seventh Circuit added that Chicago's standing also rested on the fact that its "fair housing agency ha[d] to use its scarce resources to ensure compliance with the fair housing laws" rather than to "perform its routine services." *Ibid*.

The Supreme Court's decision earlier this year in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), is of a piece with *Gladstone* and *Matchmaker*. In a challenge to the Department of Commerce's addition of a citizenship question to the census, the Court held that the plaintiff States had shown standing by "establish[ing] a sufficient likelihood that the

reinstatement of a citizenship question would result in noncitizen households responding to the census at lower rates than other groups, which in turn would cause them to be undercounted and lead to" injuries to the States such as "diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources." *Id*. at 2565. In so holding, the Court explained that the fact that a "harm depends on the independent action of third parties," even when such actions stem from the third parties' "unfounded fears," does not make an injury too "speculative" to confer standing. *Id*. at 2565-66.

Cook County asserts injuries at least as concrete, imminent, and traceable as did the government plaintiffs in *Gladstone*, *New York*, and *Matchmaker*. As the parties agree, the Final Rule will cause immigrants to disenroll from, or refrain from enrolling in, critical public benefits out of fear of being deemed a public charge. Doc. 27-1 at pp. 330-332, ¶¶ 25, 30; *id*. at pp. 344-345, ¶¶ 19-20, 23; 84 Fed. Reg. at 41,300 ("The final rule will … result in a reduction in transfer payments from the Federal Government to individuals who may choose to disenroll from or forego enrollment in a public benefits program."); *id*. at 41,485 (similar). Cook County adduces evidence showing, consistent with common sense, that where individuals lack access to health coverage and do not avail themselves of government-provided healthcare, they are likely to forgo routine treatment—resulting in more costly, uncompensated emergency care down the line. Doc. 27-1 at pp. 331-333, 335-337, ¶¶ 30-32, 41-50. Additionally, because uninsured persons who do not seek public medical benefits are less likely to receive immunizations or to seek diagnostic testing, the Rule increases the risk of vaccine-preventable and other communicable diseases spreading throughout the County. *Id*. at pp. 329-330, 333, ¶¶ 20-21, 33; *id*. at pp. 358-359, ¶¶ 29, 32. Both the costs of community health epidemics and of uncompensated care are likely to fall particularly hard on CCH, which already provides approximately half of all charity care in

Cook County, *id*. at pp. 335-336, ¶¶ 42-43, including to non-citizens regardless of their immigration status, *id*. at p. 327, ¶ 11. Indeed, DHS itself recognizes that the Rule will cause "[s]tate and local governments … [to] incur costs" stemming from "changes in behavior caused by" the Rule. 84 Fed. Reg. at 41,469; *see also id*. at 41,300-01 ("DHS estimates that the total reduction in transfer payments from the Federal and State governments will be approximately $2.47 billion annually due to disenrollment or foregone enrollment in public benefits programs by foreign-born non-citizens who may be receiving public benefits."); *id*. at 41,469 ("DHS agrees that some entities, such as State and local governments or other businesses and organizations, would incur costs related to the changes …."). DHS specifically noted that "hospital systems, state agencies, and other organizations that provide public assistance to aliens and their households" will suffer financial harm from the Rule's implementation. *Id*. at 41,469-70.

Given its operation of and financial responsibility for CCH, that is more than enough to establish Cook County's standing under the principles set forth in *Gladstone*, *New York*, and *Matchmaker*. DHS's contrary arguments fail to persuade.

First, DHS suggests that it is "inconsistent" for Cook County to maintain both that immigrants will forgo treatment and that they will come to rely more on uncompensated care from CCH. Doc. 73 at 21. But as Cook County observes, Doc. 80 at 14, there is no inconsistency: Immigrants will "avoid seeking treatment for cases other than emergencies," Doc. 1 at ¶ 109, and the emergency treatment they seek will involve additional reliance on uncompensated care from CCH, Doc. 27-1 at p. 330, ¶ 21 ("When individuals are uninsured, they avoid seeking routine care and instead risk worse health outcomes and use costly emergency services."). The Rule itself acknowledges as much. 84 Fed. Reg. at 41,384 ("DHS

acknowledges that increased use of emergency rooms and emergent care as a method of primary healthcare due to delayed treatment is possible and there is a potential for increases in uncompensated care ….").

Second, DHS argues that because some non-citizen residents of Cook County have already disenrolled from benefits and are unlikely to re-enroll, the County cannot rely on their disenrollment as showing that others will follow suit. Doc. 73 at 21. That argument ignores the plain logic of Cook County's position—if the mere prospect of the Rule's promulgation after the Notice of Proposed Rulemaking in October 2018 prompted some immigrants to disenroll, it is likely that the Rule's going into effect will prompt others to do so as well. Again, the Rule itself acknowledges that disenrollment is a likely result of the Rule's implementation. 84 Fed. Reg. at 41,300-01.

Third, DHS argues that Cook County's invocation of its need to divert resources is a "novel" and unsupported extension of organizational "standing from the private organizations to whom it has always been applied to a local government entity." Doc. 73 at 22. Even if this argument were correct, it would not speak to the injuries to the County arising from CCH's provision of uncompensated care. But the argument is wrong, as municipal entities and private organizations alike may rely on the need to divert resources to establish standing. *See Matchmaker*, 982 F.2d at 1095 (holding that Chicago had Article III standing because its "fair housing agency has to use its scarce resources to ensure compliance with the fair housing laws … [and] cannot perform its routine services … because it has to commit resources against those engaged in racial steering"); *see also City of Milwaukee v. Saxbe*, 546 F.2d 693, 698 (7th Cir. 1976) ("In any case where a municipal corporation seeks to vindicate the rights of its residents, there is no reason why the general rule on organizational standing should not be followed.").

As for ICIRR, the Supreme Court held in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), that if a private organization shows that a defendant's "practices have perceptibly impaired" its ability to undertake its existing programs, "there can be no question that the organization has suffered injury in fact." *Id*. at 379; *see also Common Cause Ind.*, 937 F.3d at 954 ("[I]mpairment of [an organization's] ability to do work within its core mission [is] enough to support standing.") (emphasis omitted). ICIRR adduces evidence that its existing programs include efforts within immigrant communities to increase access to care, improve health literacy, and reduce reliance on emergency room care. Doc. 27-1 at pp. 341-342, ¶ 4-10. ICIRR further shows that the Rule is likely to decrease immigrants' access to health services, food, and other programs. *Id*. at p. 344-345, ¶¶ 19-20, 23. Indeed, ICIRR already has expended resources to prevent frustration of its programs' missions, to educate immigrants and staff about the Rule's effects, and to encourage immigrants not covered by but nonetheless deterred by the Rule to continue enrolling in benefits programs. *Id*. at pp. 343-345, ¶¶ 14-15, 22. If the Rule goes into effect, those consequences are likely to intensify and ICIRR's diversion of resources likely to increase. *Id*. at pp. 343-347, ¶¶ 16, 18, 23-31. ICIRR's standing is secure. *See Common Cause Ind.*, 937 F.3d at 964 (Brennan, J., concurring) ("[I]f a defendant's actions compromise an organization's day-to-day operations, or force it to divert resources to address new issues caused by the defendant's actions, an Article III injury exists.").

In pressing the contrary result, DHS contends that ICIRR "does not allege that the Rule will disrupt any of its current programs," and therefore that ICIRR is not "required" to alter its activities but instead "simply elected to do so." Doc. 73 at 22-23. But the evidence adduced by ICIRR suggests a "concrete and demonstrable injury to the organization's activities," not "simply a setback to [its] abstract social interests." *Havens*, 455 U.S. at 379. That is enough to

establish standing, for "[w]hat matters is whether the organization['s] activities were undertaken because of the challenged law, not whether they [we]re voluntarily incurred or not." *Common Cause Ind.*, 937 F.3d at 956 (internal quotation marks omitted).

B. Ripeness

DHS next contends that this case is not ripe. Doc. 73 at 23-25. Suits directed at agency action "are appropriate for judicial resolution" where the challenged action is final and the issues involved are legal ones, provided that the plaintiff shows that the action's impact on it "is sufficiently direct and immediate." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-52 (1967). The challenged agency action here is the Final Rule's promulgation, the issues involved (as discussed below) are purely legal challenges to DHS's implementation of the public charge provision enacted by Congress, and—as shown above and addressed below in the discussion of irreparable harm—Cook County and ICIRR allege a direct and immediate impact of the Rule on them. Under these circumstances, the suit is ripe. *See OOIDA v. FMCSA*, 656 F.3d 580, 586-87 (7th Cir. 2011) (rejecting a federal agency's ripeness challenge, which posited that the "petitioners [we]re not currently under a remedial directive," because "the threat of enforcement is sufficient" to show hardship under *Abbott Laboratories*); *id*. at 586 ("Where … a petition involves purely legal claims in the context of a facial challenge to a final rule, a petition is presumptively reviewable.") (internal quotation marks omitted).

DHS retorts that this suit will not be ripe until the Rule is applied to actual admissibility or adjustment determinations. Doc. 73 at 23-24. At most, DHS's argument pertains to any individual non-citizen's challenge to the Rule. It is far from clear that ripeness would pose an impediment even to claims by affected individuals. *See OOIDA*, 656 F.3d at 586 ("[T]he threat of enforcement is sufficient" to make a suit ripe "because the law is in force the moment it

becomes effective and a person made to live in the shadow of a law that she believes to be invalid should not be compelled to wait and see if a remedial action is coming."). In any event, certain of Cook County's and ICIRR's injuries—like their need to respond to the Rule's chilling effect on benefits enrollment, or to divert resources to educate immigrants about the Rule—result from the Rule's promulgation. It follows that their claims are ripe.

C. Zone of Interests

DHS next argues that Cook County and ICIRR fall outside the "zone of interests" protected by the INA. Doc. 73 at 25-26. "[A] person suing under the APA must satisfy not only Article III's standing requirements, but an additional test: The interest … assert[ed] must be 'arguably within the zone of interests to be protected or regulated by the statute'" that the agency action allegedly violated. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). "Whether a plaintiff comes within the 'zone of interests' is an issue that requires [the court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (internal quotation marks omitted). The question here is whether Cook County and ICIRR "fall[] within the class of plaintiffs whom Congress has authorized to sue under" the relevant statutes. *Id*. at 128.

"[I]n the APA context, … the [zone of interests] test is not 'especially demanding.'" *Lexmark*, 572 U.S. at 130 (quoting *Match-E-Be-Nash-She-Wish Band*, 567 U.S. at 225). As the Supreme Court explained, it has "always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff" and the test does not require any "indication of congressional purpose to benefit the would-be plaintiff." *Match-E-Be-Nash-She-Wish Band*, 567 U.S. at 225 (internal quotation marks omitted); *see also Lexmark*, 572 U.S. at

130 (reaffirming *Match-E-Be-Nash-She-Wish Band* and distinguishing non-APA cases). Accordingly, the zone of interests test "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish Band*, 567 U.S. at 225 (internal quotation marks omitted). The appropriate frame of reference here is not only the public charge provision, but the immigration laws as a whole. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987) (holding that the court should "consider any provision that helps [it] to understand Congress' overall purposes in the" relevant statutes); *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 186 (D.C. Cir. 2012) ("Importantly, in determining whether a petitioner falls within the zone of interests to be protected by a statute, we do not look at the specific provision said to have been violated in complete isolation, but rather in combination with other provisions to which it bears an integral relationship.") (internal quotation marks omitted). And even if an APA plaintiff is not among "those who Congress intended to benefit," the plaintiff nonetheless falls within the zone of interests if it is among "those who in practice can be expected to police the interests that the [relevant] statute protects." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998); *see also Amgen, Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004) ("[T]he salient consideration under the APA is whether the challenger's interests are such that they in practice can be expected to police the interests that the statute protects.") (internal quotation marks omitted); *ALPA Int'l v. Trans States Airlines, LLC*, 638 F.3d 572, 577 (8th Cir. 2011) (same).

Cook County and ICIRR both satisfy the zone of interests test. As DHS observes, the principal interests protected by the INA's "public charge" provision are those of "aliens improperly determined inadmissible." Doc. 73 at 25. ICIRR's interests in ensuring that health

and social services remain available to immigrants and in helping them navigate the immigration process are consistent with the statutory purpose, as DHS describes it, to "ensure[] that only certain aliens could be determined inadmissible on the public charge ground." *Ibid*. There is ample evidence that ICIRR's interests are not merely marginal to those of the aliens more directly impacted by the public charge provision. Not only is ICIRR precisely the type of organization that would reasonably be expected to "police the interests that the statute protects," *Amgen*, 357 F.3d at 109 (internal quotation mark omitted), but the INA elsewhere gives organizations like ICIRR a role in helping immigrants navigate immigration procedures generally, *see*, *e.g.*, 8 U.S.C. § 1101(i)(1) (requiring that potential T visa applicants be referred to nongovernmental organizations for legal advice); *id*. § 1184(p)(3)(A) (same for U visa applicants); *id*. § 1228(a)(2), (b)(4)(B) (recognizing a right to counsel for aliens subject to expedited removal proceedings); *id*. § 1229(a)(1), (b)(2) (requiring that aliens subject to deportation proceedings be provided a list of pro bono attorneys and advised of their right to counsel); *id*. § 1443(h) (requiring the Attorney General to work with "relevant organizations" to "broadly distribute information concerning" the immigration process). Especially given the APA's "generous review provisions," *Clarke*, 479 U.S. at 395 (internal quotation marks omitted), these considerations place ICIRR's claims "at the least[] 'arguably within the zone of interests'" protected by the INA, *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017) (quoting *Data Processing*, 397 U.S. at 153).

In pressing the contrary result, DHS relies principally on Justice O'Connor's in-chambers opinion in *INS v. Legalization Assistance Project of the Los Angeles County Federation of Labor*, 510 U.S. 1301 (1993). Doc. 73 at 25-26. That reliance is misplaced. As an initial matter, Justice O'Connor's opinion is both non-binding and concededly "speculative."

Legalization Assistance Project, 510 U.S. at 1304. In any event, the opinion predates the Court's articulation in *Match-E-Be-Nash-She-Wish Band* and *Lexmark* of the current, more flexible understanding of the zone of interests test in APA cases.

Cook County satisfies the zone of interests test as well. In *City of Miami*, the Supreme Court held that Miami's allegations of "lost tax revenue and extra municipal expenses" placed it within the zone of interests protected by the FHA, which allows "any person who … claims to have been injured by a discriminatory housing practice" to file a civil action for damages. 137 S. Ct. at 1303 (internal quotation marks omitted). Cook County asserts comparable financial harms from the Final Rule. True enough, Cook County is not itself threatened with an improper admissibility or status adjustment determination, but neither did Miami itself suffer discrimination under the FHA. In both *City of Miami* and here, the consequences of the challenged action generate additional costs for the municipal plaintiff. If such injuries place a municipality within the FHA's zone of interests in a non-APA case like *City of Miami*, they certainly do so in this APA case.

D. *Chevron* Analysis

The APA provides for judicial review of final agency decisions. *See* 5 U.S.C. §§ 702, 706; *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."). The question here is whether DHS exceeded its authority in promulgating the Final Rule. Under current precedent, which this court must follow, resolution of that question is governed by the framework set forth in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

"At *Chevron*'s first step, [the court] determine[s]—using ordinary principles of statutory interpretation—whether Congress has directly spoken to the precise question at issue."

Coyomani–Cielo v. Holder, 758 F.3d 908, 912 (7th Cir. 2014). If "Congress has directly spoken to the precise question at issue … the court … must give effect to the unambiguously expressed intent of Congress," *Indiana v. EPA*, 796 F.3d 803, 811 (7th Cir. 2015) (quoting *Chevron*, 467 U.S. at 842-43) (alterations in original) (internal quotation marks omitted), and end the inquiry there, *see Coyomani–Cielo*, 758 F.3d at 912. "If, however, 'the statute is silent or ambiguous with respect to the specific issue,'" *Chevron*'s second step, at which "a reviewing court must defer to the agency's interpretation if it is reasonable," comes into play. *Indiana*, 796 F.3d at 811 (quoting *Chevron*, 467 U.S. at 843-44). As shown below, because the pertinent statute is clear, there is no need to go beyond *Chevron*'s first step.

"When interpreting a statute, [the court] begin[s] with the text." *Loja v. Main St. Acquisition Corp.*, 906 F.3d 680, 683 (7th Cir. 2018). "Statutory words and phrases are given their ordinary meaning." *Singh v. Sessions*, 898 F.3d 720, 725 (7th Cir. 2018); *see also United States v. Titan Int'l, Inc.*, 811 F.3d 950, 952 (7th Cir. 2016). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Brumfield v. City of Chicago*, 735 F.3d 619, 628 (7th Cir. 2013); *see also LaPlant v. N.W. Mut. Life Ins. Co.*, 701 F.3d 1137, 1139 (7th Cir. 2012) ("We try to give the statutory language a natural meaning in light of its context.").

Congress has expressed in general terms that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," 8 U.S.C. § 1601(1), that "[t]he immigration policy of the United States" provides that "aliens within the Nation's borders not depend on public resources to meet their needs," *id*. § 1601(2)(A), and that "the availability of public benefits [is] not [to] constitute an incentive for immigration to the United States," *id*. § 1601(2)(B). But those provisions express only general

policy goals without specifying what it means for non-citizens to be "[s]elf-sufficient" or to "not depend on public resources to meet their needs." *Cf. NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992) ("You cannot discover how far a statute goes by observing the direction in which it points. Finding the meaning of a statute is more like calculating a vector (with direction and length) than it is like identifying which way the underlying 'values' or 'purposes' point (which has direction alone).") (internal quotation marks omitted). The public charge provision is intended to implement those general policy goals—yet in none of its iterations since its original enactment in 1882 did Congress define the term "public charge."

This lack of a statutory definition gives rise to the interpretative dispute that divides the parties. Cook County and ICIRR submit that the term "public charge" includes only "those who are likely to become *primarily and permanently dependent* on the government for *subsistence*." Doc. 27 at 15 (emphasis in original). DHS submits that the term is broad enough to include any non-citizen "who receives" a wide range of "designated public benefits for more than 12 months in the aggregate within a 36-month period," Doc. 73 at 18-19—including, as the Final Rule acknowledges, those who "receive only hundreds of dollars, or less, in public benefits annually" for any twelve months in a thirty-six month period, 84 Fed. Reg. at 41,360-61. As Cook County and ICIRR contend, and as DHS implicitly concedes through its silence, if Cook County and ICIRR are correct about what "public charge" means, the Final Rule fails at *Chevron* step one, as there would be "no ambiguity for the agency to fill." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018).

Settled precedent governs how to ascertain the meaning of a statutorily undefined term like "public charge." "[I]t's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary … meaning … at the time Congress enacted the

statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (alterations in original and internal quotation marks omitted). As noted, the term "public charge" entered the statutory lexicon in 1882 and has been included in nearly identical inadmissibility provisions ever since. For this reason, the court agrees with DHS's foundational point that, given the "unbroken line of predecessor statutes going back to at least 1882 [that] have contained a similar inadmissibility ground for public charges," Doc. 73 at 16, "the late 19th century [is] the key time to consider" for determining the meaning of the term "public charge," *id*. at 27.

Fortunately, the Supreme Court told us just over a century ago what "public charge" meant in the relevant era, and thus what it means today. In *Gegiow v. Uhl*, 239 U.S. 3 (1915), several Russian nationals brought suit after they were denied admission to the United States on public charge grounds because, the immigration authorities reasoned, they were bound for Portland, Oregon, where the labor market would have made it impossible for them to obtain employment. *Id*. at 8-9. In holding that the aliens could not be excluded on that ground, the Court observed that in the statute identifying "who shall be excluded, 'Persons likely to become a public charge' [we]re mentioned between paupers and professional beggars, and along with idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living, convicted felons, prostitutes, and so forth." *Id*. at 10. In light of the statutory text, the Court held that "[t]he persons enumerated … are to be excluded on the ground of *permanent personal objections accompanying them* irrespective of local conditions unless the … phrase ['public charge'] … is directed to different considerations than any other of those with which it is associated. Presumably [the phrase 'public charge'] is to be read as generically similar to the other[phrase]s mentioned before and after." *Ibid*. (emphasis added).

Gegiow teaches that "public charge" does not, as DHS maintains, encompass persons who receive benefits, whether modest or substantial, due to being temporarily unable to support themselves entirely on their own. Rather, as Cook County and ICIRR maintain, *Gegiow* holds that "public charge" encompasses only persons who—like "idiots" or persons with "a mental or physical defect of a nature to affect their ability to make a living"—would be substantially, if not entirely, dependent on government assistance on a long-term basis. That is what *Gegiow* plainly conveys—DHS does not contend otherwise—and that is how courts of that era read the decision. *See United States ex rel. De Sousa v. Day*, 22 F.2d 472, 473-74 (2d Cir. 1927) ("In the face of [*Gegiow*] it is hard to say that a healthy adult immigrant, with no previous history of pauperism, and nothing to interfere with his chances in life but lack of savings, is likely to become a public charge within the meaning of the statute."); *United States ex rel. La Reddola v. Tod*, 299 F. 592, 592-93 (2d Cir. 1924) (holding that an alien who "suffer[ed] from an insanity" from which "recovery [was] impossible … was a public charge" while institutionalized, "for he was supported by public moneys of the state of New York and nothing was paid for his maintenance by him or his relatives"); *Ng Fung Ho v. White*, 266 F. 765, 769 (9th Cir. 1920) (holding that "the words 'likely to become a public charge' are meant to exclude only those persons who are likely to become occupants of almshouses for want of means with which to support themselves in the future"), *rev'd on other grounds*, 259 U.S. 276 (1922); *Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917) (holding that "Congress meant the act to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future"); *Ex parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923) ("The record is conclusive that the petitioner was not likely to become a public charge, in the sense that

he would be a 'pauper' or an occupant of an almshouse for want of means of support, or likely to be sent to an almshouse for support at public expense.") (citations omitted).

In an attempt to evade *Gegiow*'s interpretation of "public charge," DHS argues that Congress, through amendments enacted in the Immigration Act of 1917, "negated the Court's interpretation in *Gegiow*." Doc. 73 at 30-31. That argument fails on two separate grounds. The first is that DHS maintained (correctly) that "the late 19th century [is] the key time to consider" in ascertaining the meaning of the term "public charge," *id*. at 27, and therefore cannot be heard to contend that the pertinent timeframe is, on second thought, 1917. The second is that, even putting aside DHS's arguable waiver, the 1917 Act did not change the meaning of "public charge" in the manner urged by DHS.

As relevant here, the 1917 Act moved the phrase "persons likely to become a public charge" from between the terms "paupers" and "professional beggars" to much later in the (very long) list of excludable aliens. 1917 Act, 39 Stat. at 875-76. The Senate Report states that this change was meant "to overcome recent decisions of the courts limiting the meaning of the description of the excluded class because of its position between other descriptions conceived to be of the same general and generical nature. (See especially Gegiow v. Uhl, 239 U.S., 3.)." S. Rep. No. 64-352, at 5 (1916). The value of any committee report in ascertaining a statute's meaning is questionable. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[J]udicial reliance on legislative materials like committee reports … may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text."); *Covalt v. Carey Can. Inc.*, 860 F.2d 1434, 1438 (7th Cir. 1988) ("Even the contemporaneous committee reports may be the work of

those who could not get their thoughts into the text of the bill."). And the value of this particular Senate Report is further undermined by its opacity, as it does not say in which way its author(s) believed that court decisions had incorrectly limited the statute's breadth. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019) (holding that "murky legislative history … can't overcome a statute's clear text and structure").

Later commentary on the 1917 Act—which DHS cites as authoritative, but the origin of which DHS fails to identify, Doc. 73 at 30—explained that the public charge provision "has been shifted from its position in sec. 2 of the Immigration Act of 1907 to its present position in sec. 3 of this act in order to indicate the intention of Congress that aliens shall be excluded upon said ground *for economic as well as other reasons* and with a view to overcoming the decision of the Supreme Court in Gegiow v. Uhl, 239 U.S. 3 (S. Rept. 352, 64th Cong., 1st sess.)." U.S. Dep't of Labor, Immigration Laws and Rules of January 1, 1930 with Amendments from January 1, 1930 to May 24, 1934 (1935), at 25 n.5 (emphasis added). This explanation suggests that Congress understood *Gegiow*, given its exclusive focus on an alien's economic circumstances, to have held that aliens may be deemed public charges only if there were *economic* reasons for their dependence on government support, and further that Congress wanted aliens dependent on government support for *noneconomic* reasons, like imprisonment, to be included as well.

That is precisely how many cases of the era understood the 1917 Act. *See United States ex rel. Medich v. Burmaster*, 24 F.2d 57, 59 (8th Cir. 1928) ("The fact that the appellant confessed to a crime punishable by imprisonment in the federal prison, and the very fact that he was actually incarcerated for a period of 18 months was sufficient to support the allegation in the warrant of deportation that he was likely 'to become a public charge.'"); *Ex parte Horn*, 292 F. at 457 (holding that although "the petitioner was not likely to become a public charge, in the sense

that he would be a 'pauper' or an occupant of an almshouse for want of means of support, or likely to be sent to an almshouse for support at public expense," he was, as a convicted felon, a public charge because he was "a person committed to the custody of a department of the government by due course of law") (citations omitted); *Ex parte Tsunetaro Machida*, 277 F. 239, 241 (W.D. Wash. 1921) ("[A] public charge [is] a person committed to the custody of a department of the government by due course of law."). Other cases disagreed, holding that noneconomic dependence on the government for basic subsistence did not make one a public charge. *See Browne v. Zurbrick*, 45 F.2d 931, 932-33 (6th Cir. 1930) (rejecting the proposition "that one who is guilty of crime, and therefore likely to be convicted for it and to be imprisoned at the public expense, is ipso facto likely to become a public charge"); *Coykendall v. Skrmetta*, 22 F.2d 120, 121 (5th Cir. 1927) (holding that "it cannot well be supposed that the words in question were intended to refer to anything other than a condition of dependence on the public for support," and therefore that the public charge provision did not include the public expense imposed by imprisonment); *Ex Parte Mitchell*, 256 F. 229, 232 (N.D.N.Y. 1919) ("The court holds expressly that the words 'likely to become a public charge' are meant to exclude only those 'persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future.'"). The divergence between those two lines of precedent is immaterial here, for DHS cites no case holding that the 1917 Act upended *Gegiow*'s holding that an alien could be deemed a public charge on economic grounds only if that person's dependence on public support was of a "permanent" nature. *Gegiow*, 239 U.S. at 10. Nor does DHS cite any case holding that an alien could be deemed a public charge based on the receipt, or anticipated receipt, of a modest quantum of public benefits for short periods of time.

DHS's contrary view rests upon an obvious misreading of *Ex parte Horn*. DHS cites *Ex parte Horn* for the proposition that post-1917 cases "recognized that" the 1917 Act's transfer of the public charge provision to later in the list of excludable persons "negated the Court's interpretation of *Gegiow* by underscoring that the term 'public charge' is 'not associated with paupers or professional beggars.'" Doc. 73 at 30 (quoting *Ex parte Horn*, 292 F. at 457). But *Ex parte Horn* involved not an alien whose economic circumstances were less dire than a pauper's or professional beggar's and thus who might have needed only modest government benefits for a short period of time; rather, the case involved a person who had committed crimes and was likely to be imprisoned. 292 F. at 458. Thus, in saying that "[t]he term 'likely to become a public charge' is not associated with paupers or professional beggars, idiots, and certified physical and mental defectives," *id*. at 457, *Ex parte Horn* held not that the 1917 Act ousted *Gegiow*'s view regarding the severity and duration of the economic circumstances that could result in an alien being deemed a public charge; rather, it held that the 1917 Act expanded the meaning of "public charge" to include persons who would be totally dependent on the government for noneconomic reasons like imprisonment, *see id*. at 458 ("When he was convicted he became a public charge, and a tax, duty, and trust was imposed upon the government by his conduct; and at the time of his entry he was likely to become a public charge by reason of the crime which he had committed.") (internal quotation marks omitted). *Ex parte Horn* thus faithfully implements the change that, as shown above, DHS's own historical authority suggests the amendment was intended to effect.

DHS has three other arrows in its quiver, but none hits its mark. The first is a 1929 treatise stating that "public charge" means "any maintenance, or financial assistance, rendered from public funds, or funds secured by taxation." Arthur Cook et al., *Immigration Laws of the*

United States § 285 (1929). The treatise is wrong. It does not address *Gegiow* in expressing its understanding of "public charge." And the sole authority it cites, *Ex parte Kichmiriantz*, 283 F. 697 (N.D. Cal. 1922), does not support its view. *Ex parte Kichmiriantz* concerned an alien "committed to the Stockton State Hospital for the insane" for dementia, who, without care, "would starve to death within a short time." *Id*. at 697-98. Thus, although *Ex parte Kichmiriantz* observes that "the words 'public charge,' as used in the Immigration Act, mean just what they mean ordinarily; … a money charge upon, or an expense to, the public for support and care," *id*. at 698 (citation omitted), the context in which the court made that observation shows that it had in mind a person who was totally and likely permanently dependent on the government for subsistence. The case therefore aligns with Cook County and ICIRR's understanding of the term, not DHS's.

DHS's second arrow consists of a mélange of nineteenth century dictionaries and state court cases addressing whether one municipality or another was responsible for providing public assistance to a particular person under state poor laws. Doc. 73 at 29, 32-33. Those authorities, which address the meaning of the words "public," "charge," and "chargeable" and the term "public charge," would be material to the court's interpretative enterprise but for one thing: The Supreme Court told us in *Gegiow* what the statutory term "public charge" meant in that era. The federal judiciary is hierarchical, so in deciding here whether the Final Rule faithfully implements the statutory "public charge" provision, this court must adhere to the Supreme Court's understanding of the term regardless of what nineteenth century dictionaries and state court cases might have said. *See Shields v. Ill. Dep't of Corr.*, 746 F.3d 782, 792 (7th Cir. 2014); *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004); *Ind. Prot. & Advocacy Servs. v.*

Ind. Family & Soc. Servs. Admin., 603 F.3d 365, 393 (7th Cir. 2010) (Easterbrook, J., dissenting).

As it happens, the dictionaries and state court cases do not advance DHS's cause. An 1888 dictionary cited by DHS defines "charge" as "an obligation or liability," but the only *human* example it offers of a "charge" is "a *pauper* being chargeable to the parish or town." Dictionary of American and English Law 196 (1888) (emphasis added). An 1889 dictionary defines "charge" in the context of a person as one who is "committed to another's custody, care, concern, or management," Century Dictionary of the English Language 929 (1889), and an 1887 dictionary likewise defines "charge" as "[t]he person or thing committed to the care or management of another," Webster's Condensed Dictionary of the English Language 85 (3d ed. 1887). Those definitions are consistent with *Gegiow*'s understanding of "public charge" and do nothing to support DHS's view that the term is broad enough to include those who temporarily receive modest public benefits. The same holds for state court cases from the era. *See Cicero Twp. v. Falconberry*, 42 N.E. 42, 44 (Ind. App. 1895) ("The mere fact that a person may occasionally obtain assistance from the county does not necessarily make such person a pauper or a public charge."); *City of Boston v. Capen*, 61 Mass. 116, 121-22 (Mass. 1851) (holding that "public charge" refers "not [to] merely destitute persons, who … have no visible means of support," but rather to those who "by reason of some permanent disability, are unable to maintain themselves" and "might become a heavy and long continued charge to the city, town or state"); *Overseers of Princeton Twp. v. Overseers of S. Brunswick Twp.*, 23 N.J.L. 169 (N.J. 1851) (repeatedly equating "paupers" with being "chargeable, or likely to become chargeable").

As it did with *Ex parte Horn*, DHS misreads the state court cases upon which it relies. According to DHS, *Poor District of Edenburg v. Poor District of Strattanville*, 5 Pa. Super. 516

(1897), held that a person who temporarily received "some assistance" while ill was not "chargeable to" the public solely because she was "without notice or knowledge" that her receiving the assistance would "place[] [her] on the poor book," and not because the public assistance was temporary. Doc. 73 at 32 (quoting *Edenburg*, 5 Pa. Super. at 520-24, 527-28). But it is plain that the court's holding rested in large part on the fact that the person had economic means and was only temporarily on the poor rolls. *See Edenburg*, 5 Pa. Super. at 526 (noting that the person "had for sixteen years been an inhabitant of the borough and for twelve years the undisputed owner by fee simple title of unincumbered real estate, and household goods of the value of $300 in the district," and that she "had fully perfected her settlement by the payment of taxes for two successive years"). DHS characterizes *Inhabitants of Guilford v. Inhabitants of Abbott*, 17 Me. 335 (Me. 1840), as holding that a person was "likely to become chargeable" based on his receipt of "'a small amount' of assistance" and "'his age and infirmity.'" Doc. 73 at 33 (quoting *Guilford*, 17 Me. at 335-36). To be sure, DHS's brief quotes words that appear in the decision, but as DHS fails to acknowledge, the court observed that the person "for many years had no regular or stated business, … was at one time so furiously mad, that the public security required him to be confined," had "occasionally since that time, … been deranged in mind," and at a later time "was insane, roving in great destitution." *Guilford*, 17 Me. at 335. DHS describes *Town of Hartford v. Town of Hartland*, 19 Vt. 392, 398 (Vt. 1847), as holding that a "widow and children with a house, furniture, and a likely future income of $12/year from the lease of a cow were nonetheless public charges." Doc. 73 at 32. But DHS fails to mention the court's explanation that the widow's "mother claimed to own some part of the furniture, … that her brother … claimed a lien upon the cow," and that the $12 annual lease income—which, incidentally, was for the house, not the cow—was past due for the preceding

year with no reason to expect payment in the future. *Hartford*, 19 Vt. at 394. Accordingly, contrary to DHS's treatment of those state court cases, they align with *Gegiow*'s—and Cook County and ICIRR's—conception of what it means to be a public charge.

DHS's third arrow is an 1894 floor speech in which Representative Warner, objecting to a bill to support "industrial paupers" or "deadbeat industries"—what today might be called corporate welfare—drew a rhetorical comparison with his constituents' view that, because the immigration laws would bar admission of an alien who "earn[s] half his living or three-quarters of it," they had "no sympathy … with the capitalist who offers to condescend to do business in this country provided this country will tax itself in order to enable him to make profits." 26 Cong. Rec. 657 (1894) (statement of Rep. Warner) (cited at Doc. 73 at 29). Representative Warner's remarks have no value. They only obliquely reference the immigration laws, and he had every incentive to exaggerate the harshness of immigration law to support his opposition to the industrial assistance under consideration.

To sum up: As DHS argues, interpretation of the statutory term "public charge" turns on its meaning in the late nineteenth century. The Supreme Court in *Gegiow* interpreted the term in a manner consistent with Cook County and ICIRR's position and contrary to DHS's position in the Final Rule. The Immigration Act of 1917 did not undermine *Gegiow*'s understanding of the severity of the economic circumstances that would lead an alien to be deemed a public charge. Contemporaneous dictionaries and state court cases are immaterial and, even if they were material, are consistent with *Gegiow*. DHS cites no case from any era holding that the public charge provision covers noncitizens who receive public benefits—let alone modest public benefits—on a temporary basis. And against that statutory and case law backdrop, Congress retained the "public charge" language in the INA of 1952 and the IIRIRA of 1996. *See Lamar,*

Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1762 (2018) (holding that Congress "presumptively was aware of the longstanding judicial interpretation of the phrase [included in a newly enacted statute] and intended for it to retain its established meaning"). It follows, based on the arguments and authorities before the court at this juncture, that Cook County and ICIRR are likely to prevail on the merits of their challenge to the Final Rule.

II. Adequacy of Legal Remedies and Irreparable Harm

Although a party seeking a preliminary injunction must show "more than a mere possibility of harm," the harm need not "actually occur before injunctive relief is warranted" or "be certain to occur before a court may grant relief on the merits." *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044-45 (7th Cir. 2017). "Rather, harm is considered irreparable if it cannot be prevented or fully rectified by the final judgment after trial." *Ibid*. (internal quotation marks omitted).

The final relief potentially available to Cook County and ICIRR is circumscribed by the APA's limited waiver of sovereign immunity: It waives the sovereign immunity of the United States only to the extent that the suit "seek[s] relief other than money damages." 5 U.S.C. § 702. Thus, if Cook County and ICIRR show that, in the absence of a preliminary injunction, they will suffer injury that would ordinarily be redressed by money damages, that will suffice to show irreparable harm, as "there is no adequate remedy at law" to rectify that injury. *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015).

Cook County and ICIRR have made the required showing. As set forth in the discussion of standing, Cook County has shown that the Rule will cause immigrants to disenroll from, or refrain from enrolling in, medical benefits, in turn leading them to forgo routine treatment and rely on more costly, uncompensated emergency care from CCH. Doc. 27-1 at pp. 330-333, 335-337, ¶¶ 25, 30-32, 41-50; *id*. at pp. 344-345, ¶¶ 19-20, 23. In addition, because uninsured

persons who forgo public medical benefits are less likely to receive immunizations or to seek diagnostic testing, the Rule increases the entire County's risk of vaccine-preventable and other communicable diseases. *Id*. at pp. 329-330, 333, ¶¶ 20-21, 33; *id*. at pp. 358-359, ¶¶ 29, 32. And as also shown above, ICIRR will have to divert resources away from its existing programs to respond to the effects of the Final Rule. *Id*. at pp. 343-347, ¶¶ 16, 18, 23-31. Given the unavailability of money damages, those injuries are irreparable, satisfying the adequacy of legal remedies and irreparable harm requirements of the preliminary injunction standard.

III. Balance of Harms and Public Interest

In balancing the harms, "the court weighs the irreparable harm that the moving party would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief." *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018) (internal quotation marks omitted). As discussed above, Cook County and ICIRR have shown that the Final Rule is likely to impose on them both financial and programmatic consequences for which there is no effective remedy at law. On the other side of the balance, DHS asserts that it has "a substantial interest in administering the national immigration system, a *solely federal* prerogative, according to the expert guidance of the responsible agencies as contained in their regulations, and that the Defendants will be harmed by an impediment to doing so." Doc. 73 at 54. A temporary delay in implementing the Rule undoubtedly would impose some harm on DHS. But absent any explanation of the practical consequences of the delay and whether those consequences are irreparable, it is clear—at least on the present record—that the balance of harms favors Cook County and ICIRR.

As for the public interest, DHS makes no argument beyond the public interest in its unimpeded administration of national immigration policy. *Id*. at 54-55. But at the same time,

"[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). Given the court's holding that Cook County and ICIRR are likely to succeed on the merits of their challenge to the Final Rule, given that the balance of harms otherwise favors preliminary relief, and bearing in mind the public health risks to Cook County if the Final Rule were allowed to take effect, entry of a preliminary injunction satisfies the public interest.

DHS raises two other equitable points. First, it argues that an ongoing challenge to the Final Rule in the Eastern District of Washington in which the State of Illinois is a party, and in which the court last Friday granted a preliminary injunction, *see Washington v. U.S. Dep't of Homeland Sec.*, No. 19-5210 (E.D. Wash. Oct. 11, 2019), ECF No. 162, renders this case duplicative. Doc. 73 at 52-53. Relatedly, DHS contends that the Eastern District of Washington's injunction, as well as a nationwide preliminary injunction issued last Friday by the Southern District of New York, *see New York v. U.S. Dep't of Homeland Sec.*, __ F. Supp. __, 2019 WL 5100372, at *8 (S.D.N.Y. Oct. 11, 2019), renders moot this court's consideration of the present motion. Doc. 82. While recognizing the federal courts' general aversion to duplicative litigation, *see Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223-24 (7th Cir. 1993), the court concludes that the pendency of those other cases and the preliminary injunction orders entered therein do not moot the present motion or otherwise counsel against its consideration.

Neither the parties nor this court have any power over or knowledge of whether and, if so, when those two preliminary injunctions will be lifted or modified. Even a temporary lag between the lifting of both injunctions and the entry of a preliminary injunction by this court would entail some irreparable harm to Cook County and ICIRR. Indeed, the federal government in other litigation earlier this year maintained, correctly, that "[t]he possibility that [a nationwide]

injunction may not persist is sufficient reason to conclude that … appeal" of an injunction entered elsewhere was "not moot." Supplemental Brief for the Federal Appellants at 152, *California v. U.S. Dep't of Health & Human Servs.*, No. 19-15072 (9th Cir. May 20, 2019), ECF No. 152.

Second, DHS argues that Cook County and ICIRR's "[l]ack of diligence, standing alone," is sufficient to "preclude the granting of preliminary injunctive relief." Doc. 73 at 53 (quoting *Majorica, S.A. v. R.H. Macy*, 762 F.2d 7, 8 (7th Cir. 1982)). Cook County and ICIRR's delay in bringing this suit relative to when the New York and Washington suits were brought, while not trivial, is not sufficiently severe to justify denying them equitable relief, particularly because any delay "goes primarily to the issue of irreparable harm," which they have otherwise amply established. *See Majorica*, 762 F.2d at 8. In any event, because DHS was already preparing substantially similar briefs in the other cases challenging the Final Rule, the effect of the delay on its ability to contest the present motion was minimal.

Finally, DHS asks that any preliminary injunction be limited "to Cook County and specific individual members of ICIRR." Doc. 73 at 55. But because the record shows that ICIRR "represent[s] nearly 100 nonprofit organizations and social and health service providers *throughout Illinois*," Doc. 27-1 at p. 341, ¶ 5 (emphasis added), it is appropriate for the preliminary injunction to cover the entire State.

Conclusion

The parties (to a lesser extent) and their *amici* (to a greater extent) appeal to various public policy concerns in urging the court to rule their way. To be sure, this case has important policy implications, and the competing policy views held by parties and their *amici* are entitled to great respect. But let there be no mistake: The court's decision today rests not one bit on

policy. The decision reflects no view whatsoever of whether the Final Rule is consistent or inconsistent with the American Dream, or whether it distorts or remains faithful to the Emma Lazarus poem inscribed on the Statue of Liberty. *Compare New York*, 2019 WL 5100372, at *8 (asserting that the Final Rule "is repugnant to the American Dream of the opportunity for prosperity and success through hard work and upward mobility"), *with* Jason Silverstein, *Trump's top immigration official reworks the words on the Statue of Liberty*, CBS News (Aug. 14, 2019, 4:25 AM), http://www.cbsnews.com/news/statue-of-liberty-poem-emma-lazarus-quote-changed-trump-immigration-official-ken-cuccinelli-after-public-charge-law (quoting the acting director of the Citizenship and Immigration Services suggesting in defense of the Final Rule that the Lazarus poem conveys this message: "Give me your tired and your poor who can stand on their own two feet, and who will not become a public charge."). The court certainly takes no position on whether, as DHS suggests, the Old Testament sheds light on the historical backdrop of Congress's enactment of the 1882 Act. Doc. 73 at 28 (citing *Deuteronomy* 15:7-15:8).

Today's decision, rather, rests exclusively on a dry and arguably bloodless examination of the authorities that precedent requires courts to examine—and the deployment of the legal tools that precedent requires courts to use—when deciding whether executive action complies with a federal statute. *See SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1357-58 (2018) ("Each side offers plausible reasons why its approach might make for the more efficient policy. But who should win that debate isn't our call to make. Policy arguments are properly addressed to Congress, not this Court. It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed."). And having undertaken that examination with the appropriate legal tools, the court holds that Cook County and ICIRR are likely to succeed on the

merits of their challenge to the Final Rule, that the other requirements for preliminary injunctive relief are met, and that the Final Rule shall not be implemented or enforced in the State of Illinois absent further order of court.

October 14, 2019

United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

December 23, 2019

Before

DIANE P. WOOD, *Chief Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*
AMY C. BARRETT, *Circuit Judge*

No. 19-3169	COOK COUNTY, et al., Plaintiffs - Appellees v. CHAD F. WOLF, et al., Defendants - Appellants
Originating Case Information:	
District Court No: 1:19-cv-06334 Northern District of Illinois, Eastern Division District Judge Gary Feinerman	

The following are before the court:

1. **APPELLANTS' MOTION FOR A STAY PENDING APPEAL**, filed on November 15, 2019, by counsel for the appellants.

2. **PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION FOR STAY PENDING APPEAL**, filed on December 3, 2019, by counsel for the appellees.

3. **APPELLANTS' REPLY IN SUPPORT OF MOTION FOR A STAY PENDING APPEAL**, filed on December 10, 2019, by counsel for the appellants.

IT IS ORDERED that the motion is **DENIED.** An expedited briefing schedule will follow.

Judge Barrett dissents and would grant the motion.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
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ORDER

February 10, 2020

By the Court:

No. 19-3169	COOK COUNTY, et al., Plaintiffs - Appellees v. CHAD F. WOLF, et al., Defendants - Appellants
Originating Case Information:	
District Court No: 1:19-cv-06334 Northern District of Illinois, Eastern Division District Judge Gary Feinerman	

The following is before the court:

1. **RENEWED MOTION FOR STAY PENDING APPEAL**, filed on January 28, 2020, by counsel for the appellants,

2. **APPELLEES OPPOSITION TO DEFENDANTS RENEWED MOTION FOR STAY PENDING APPEAL**, filed on February 5, 2020, by counsel for the appellees.

3. **REPLY IN SUPPORT OF RENEWED MOTION FOR STAY PENDING APPEAL**, filed on February 7, 2020, by counsel for the appelllants.

IT IS ORDERED that the motion is **DENIED**.

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. 19A905

CHAD WOLF, ACTING SECRETARY OF HOMELAND SECURITY, ET AL. *v.* COOK COUNTY, ILLINOIS, ET AL.

ON APPLICATION FOR STAY

[February 21, 2020]

The application for stay presented to JUSTICE KAVANAUGH and by him referred to the Court is granted, and the District Court's October 14, 2019 order granting a preliminary injunction is stayed pending disposition of the Government's appeal in the United States Court of Appeals for the Seventh Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN would deny the application.

JUSTICE SOTOMAYOR, dissenting from the grant of stay.

Today's decision follows a now-familiar pattern. The Government seeks emergency relief from this Court, asking it to grant a stay where two lower courts have not. The Government insists—even though review in a court of appeals is imminent—that it will suffer irreparable harm if this Court does not grant a stay. And the Court yields.

But this application is perhaps even more concerning than past ones. Just weeks ago, this Court granted a stay of a different decision involving the same administrative rule at issue here, after the Government professed urgency

because of the form of relief granted in the prior case—a nationwide injunction. The Government now uses that stay—of a nationwide injunction—to insist that it is entitled to one here. But the injunction in this case is limited to one State, Illinois. The Government cannot state with precision any of the supposed harm that would come from the Illinois-specific injunction, and the Court of Appeals for the Seventh Circuit has scheduled oral argument for next week. The Government's professed harm, therefore, boils down to an inability to enforce its immigration goals, possibly in only the immediate term, in one of 50 States. It is hard to say what is more troubling: that the Government would seek this extraordinary relief seemingly as a matter of course, or that the Court would grant it.

This case concerns a provision of the Immigration and Nationality Act that renders inadmissible any noncitizen who "is likely at any time to become a public charge." 8 U. S. C. §1182(a)(4)(A). The provision instructs immigration officers to consider, "at a minimum," a person's "age; health; family status; assets, resources, and financial status; and education and skills" in determining inadmissibility on this "public charge" basis. §1182(a)(4)(B). For the last 20 years, field guidance has defined "public charge" as a person "primarily dependent on the government for subsistence." 64 Fed. Reg. 28689 (1999) (internal quotation marks omitted). Per that guidance, immigration officers were not to consider non-cash public benefits in deciding whether a noncitizen met that definition.

In August 2019, the Department of Homeland Security issued a regulation that changed this longstanding definition. This new regulation (the public-charge rule) now defines a "public charge" as "an alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." 84 Fed. Reg. 41292, 41295. The regulation also

expands the type of benefits that may render a noncitizen inadmissible, including non-cash benefits such as the Supplemental Nutrition Assistance Program (formerly food stamps), most forms of Medicaid, and various forms of housing assistance. *Ibid.*

Several lawsuits followed, one of which reached this Court last month. See Application for Stay of Injunctions in *Department of Homeland Security* v. *New York*, No. 19A785 (New York cases). The Government in no small part insisted that it was entitled to a stay because of the scope of relief awarded below: The District Court in the New York cases imposed a nationwide injunction that "rendered effectively academic" the Government's successful litigation on the public-charge rule elsewhere. *Id.*, at 4. The Government's unquestionable focus was the scope of that injunction: Its stay application used the word "nationwide" 34 times.

Over the dissent of four Justices, this Court granted the Government's application for a stay. *Department of Homeland Security* v. *New York*, 589 U. S. ___ (2020). Two Justices concurred in the grant of the stay, emphasizing—as the Government did—the "equitable and constitutional questions raised by the rise of nationwide injunctions." *Id.*, at ___ (GORSUCH, J., concurring in grant of stay) (slip op., at 5). No Member of the Court discussed the application's merit apart from its challenges to the injunction's nationwide scope.

In the meantime, other courts considered the public-charge rule, and one—the District Court in this case—ruled much more narrowly. The District Court concluded that the plaintiffs in the case before it were entitled to a preliminary injunction, based on self-described "dry and arguably bloodless" legal analysis. *Cook County* v. *McAleenan*, ___ F. Supp. 3d ___, ___, 2019 WL 5110267, *14 (ND Ill., Oct. 14, 2019). But it did not award nationwide relief as the New York court had: It merely prevented the Government from

enforcing the public-charge rule in Illinois, where the "'nearly 100 nonprofit organizations and social and health service providers'" represented by one of the plaintiffs were located. *Ibid.*

After the District Court declined to stay enforcement of its injunction pending appeal, the Government asked the Seventh Circuit to intervene and stay the injunction itself. On December 23, 2019, the Seventh Circuit declined, and instead set an expedited briefing schedule to ensure prompt consideration of the issue. As part of that expedited schedule, the Seventh Circuit set oral argument for February 26, 2020—five days from now.

Notably, the Government initially chose not to appeal the Seventh Circuit's decision denying a stay. Instead, while letting the normal appellate process play out in this case, it urged this Court to review a later issued decision granting a nationwide injunction—in no small part because it was a nationwide injunction. Yet now that this Court acceded to that request, the Government wants more: It asks this Court to grant a stay of the District Court's considered—and considerably narrower—order below.

One might wonder what the trouble is with granting a stay in this case. After all, by granting a stay in the New York cases, the Court effectively has already allowed the Government to enforce the public-charge rule elsewhere—why not Illinois too? But—even putting aside the dissent of four Justices in the New York cases and the plaintiffs' weighty arguments on the merits—the Court should not forget the burden the Government must carry to obtain a stay. To warrant this "'extraordinary'" relief, *Williams* v. *Zbaraz*, 442 U. S. 1309, 1316 (1979) (Stevens, J., in chambers), it is not enough for a party to point to an important legal issue, or even one that is likely to obtain the assent of five Justices on the merits (which is far from certain here). Instead, to justify upending the normal rules of appellate

procedure, a party must also show a likelihood of irreparable harm. *Packwood* v. *Senate Select Comm. on Ethics*, 510 U. S. 1319, 1320 (1994) (Rehnquist, C. J., in chambers). And "[b]ecause this matter is pending before the Court of Appeals, and because the Court of Appeals denied" the Government's motion for a stay, the Government now bears "an especially heavy burden." *Ibid.*

The Government has not made that showing here. Its public-charge rule is set to go into effect in 49 of 50 States next week. The Seventh Circuit is set to consider the Illinois-specific injunction next week as well, with a decision to follow shortly thereafter. And the Government is unable to articulate how many cases—if any—this narrow injunction would affect in the meantime. In sum, the Government's only claimed hardship is that it must enforce an existing interpretation of an immigration rule in one State—just as it has done for the past 20 years—while an updated version of the rule takes effect in the remaining 49. The Government has not quantified or explained any burdens that would arise from this state of the world. Indeed, until this Court granted relief in the New York cases, the Government itself did not consider this Illinois-specific harm serious enough to warrant asking this Court for relief.

These facts—all of which undermine the Government's assertion of irreparable harm—show two things, one about the Government's conduct and one about this Court's own. First, the Government has come to treat "th[e] exceptional mechanism" of stay relief "as a new normal." *Barr* v. *East Bay Sanctuary Covenant*, 588 U. S. ___, ___ (2019) (SOTOMAYOR, J., dissenting from grant of stay) (slip op., at 5). Claiming one emergency after another, the Government has recently sought stays in an unprecedented number of cases, demanding immediate attention and consuming limited Court resources in each. And with each successive application, of course, its cries of urgency ring increasingly hollow. Indeed, its behavior relating to the public-charge

rule in particular shows how much its own definition of irreparable harm has shifted. Having first sought a stay in the New York cases based, in large part, on the purported harm created by a nationwide injunction, it now disclaims that rationale and insists that the harm is its temporary inability to enforce its goals in one State.

Second, this Court is partly to blame for the breakdown in the appellate process. That is because the Court—in this case, the New York cases, and many others—has been all too quick to grant the Government's "reflexiv[e]" requests. *Ibid.* But make no mistake: Such a shift in the Court's own behavior comes at a cost.

Stay applications force the Court to consider important statutory and constitutional questions that have not been ventilated fully in the lower courts, on abbreviated timetables and without oral argument. They upend the normal appellate process, putting a thumb on the scale in favor of the party that won a stay. (Here, the Government touts that in granting a stay in the New York cases, this Court "necessarily concluded that if the court of appeals were to uphold the preliminary injunctio[n], the Court likely would grant a petition for a writ of certiorari" and that "there was a fair prospect the Court would rule in favor of the government." Application 3.) They demand extensive time and resources when the Court's intervention may well be unnecessary—particularly when, as here, a court of appeals is poised to decide the issue for itself.

Perhaps most troublingly, the Court's recent behavior on stay applications has benefited one litigant over all others. This Court often permits executions—where the risk of irreparable harm is the loss of life—to proceed, justifying many of those decisions on purported failures "to raise any potentially meritorious claims in a timely manner." *Murphy* v. *Collier*, 587 U. S. ___, ___ (2019) (second statement of KAVANAUGH, J.) (slip op., at 4); see also *id.*, at ___ (ALITO, J., joined by THOMAS and GORSUCH, JJ., dissenting from

grant of stay) (slip op., at 6) ("When courts do not have adequate time to consider a claim, the decisionmaking process may be compromised"); cf. *Dunn* v. *Ray*, 586 U. S. ___ (2019) (overturning the grant of a stay of execution). Yet the Court's concerns over quick decisions wither when prodded by the Government in far less compelling circumstances—where the Government itself chose to wait to seek relief, and where its claimed harm is continuation of a 20-year status quo in one State. I fear that this disparity in treatment erodes the fair and balanced decisionmaking process that this Court must strive to protect.

I respectfully dissent.

APPENDIX H

In the

United States Court of Appeals

For the Seventh Circuit

No. 19-3169

COOK COUNTY, ILLINOIS, *et al.*,

Plaintiffs-Appellees,

v.

CHAD F. WOLF, Acting Secretary of Homeland Security, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 19 C 6334 — **Gary Feinerman**, *Judge.*

ARGUED FEBRUARY 26, 2020 — DECIDED JUNE 10, 2020

Before WOOD, *Chief Judge*, and ROVNER and BARRETT, *Circuit Judges*.

WOOD, *Chief Judge*. Like most people, immigrants to the United States would like greater prosperity for themselves and their families. Nonetheless, it can take time to achieve the American Dream, and the path is not always smooth. Recognizing this, Congress has chosen to make immigrants eligible for various public benefits; state and local governments have

done the same. Those benefits include subsidized health insurance, supplemental nutrition benefits, and housing assistance. Historically, with limited exceptions, temporary receipt of these supplemental benefits did not jeopardize an immigrant's chances of one day adjusting his status to that of a legal permanent resident or a citizen.

Recently, however, the Department of Homeland Security (DHS) issued a new rule designed to prevent immigrants whom the Executive Branch deems likely to receive public assistance in any amount, at any point in the future, from entering the country or adjusting their immigration status. The Rule purports to implement the "public-charge" provision in the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(4). States, cities, and nonprofit groups across the country have filed suits seeking to overturn the Rule.

Cook County, Illinois, and the Illinois Coalition for Immigrant and Refugee Rights, Inc. (ICIRR) brought one of those cases in the Northern District of Illinois. They immediately sought a preliminary injunction against the Rule pending the outcome of the litigation. Finding that the criteria for interim relief were satisfied, the district court granted their motion. We conclude that at least Cook County adequately established its right to bring its claim and that the district court did not abuse its discretion by granting preliminary injunctive relief. We therefore affirm.

I. The Setting

A. The Public-Charge Rule

The Immigration and Nationality Act (INA, or "the Act") provides that a noncitizen may be denied admission or ad-

justment of status if she "is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The statute does not define the term "public charge," nor has it ever done so. Instead, the Act calls for a "totality-of-the-circumstances" analysis, though it singles out several factors to be considered "at a minimum": age; health; family status; assets, resources, and financial status; education and skills; and any affidavit of support under section 1183a. *Id.* § 1182(a)(4)(B). The statute does not specify how officials should weigh the listed factors and any others that appear to be relevant.

On August 14, 2019, following a notice and comment period, DHS issued a rule interpreting this provision. In it, DHS defines as a "public charge" any noncitizen (with some exceptions) who receives certain cash and noncash government benefits for more than "12 months" in the aggregate in a 36-month period. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292–508 (Aug. 14, 2019) ("Rule"). It applies to all legally admitted immigrants; we are not concerned here with those in the country unlawfully. The Rule is not limited to federal benefits; instead, it sweeps in any federal, state, local, or tribal cash assistance for income maintenance; Supplemental Nutrition Assistance Program (SNAP) benefits; most forms of Medicaid; Section 8 Housing Assistance under the Housing Choice Voucher Program; Section 8 Project-Based Rental Assistance; and certain other forms of subsidized housing. *Id.* at 41295, 41501. Each benefit received, no matter how small, is counted separately and stacked, such that receipt of multiple benefits in one month is considered receipt of multiple months' worth of benefits. *Id.* at 41295. For example, an immigrant who receives any amount of SNAP benefits, Medicaid, and housing assistance, and nothing else for four months in a three-year period, will be considered a public

charge and likely denied adjustment of status. The stacking rule means that a person can use up her "12 months" of benefits in a far shorter time than a quick reading of the Rule would indicate.

The Rule also explains what facts DHS will consider with respect to an applicant's age, health, family status, financial status, and education and skills. *Id.* at 41502–04. "Heavily weighted negative factors" include the following: lack of current employment or reasonable prospect of future employment; previous receipt or approval for receipt of 12 months' worth of public benefits in a three-year period; diagnosis of a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the ability to provide for oneself, attend school, or work, along with lack of insurance and no prospect of obtaining private health insurance, and insufficient financial resources to pay for reasonably foreseeable medical costs related to such medical condition; and prior determination of inadmissibility or deportability on public-charge grounds. *Id.* at 41504.

The "heavily weighted positive factors" are exclusively monetary. They include the following: a household income, assets, resources, or support amounting to at least 250 percent of the Federal Poverty Guidelines for the household size; current employment with an annual income of at least 250 percent of the Federal Poverty Guidelines for the household size; and private health insurance other than subsidized insurance under the Affordable Care Act. *Id.* To put this in perspective, recall that the Federal Poverty Guideline in 2020 for a family of four is $26,200 in annual income. Poverty Guidelines, www.aspe.hhs.gov. An annual income 250 percent of that

number is $65,500, which is very close to the *median* U.S. income of $63,179 (the 2018 number reported by the U.S. Census on Sept. 10, 2019, see Income, Poverty and Health Insurance Coverage in the United States: 2018, www.census.gov).

Other factors include whether an immigrant is younger than 18 or older than 61 (bad); household size (smaller is better); whether an immigrant's household annual gross income is at least 125 percent of the Federal Poverty Guidelines; past receipt of any amount of public benefits (bad); level of education (good); English language proficiency; and credit history and credit score. *Id.* at 41502–04.

The Rule represents a striking departure from the previous administrative guidance—one with a potentially devastating impact on those to whom it applies.[1] That guidance, issued in 1999 by the Immigration and Naturalization Service (the predecessor of today's U.S. Citizenship and Immigration Services), defines as a public charge a noncitizen who is "*primarily* dependent on the government for subsistence, as demonstrated by either (i) the receipt of public *cash* assistance for income maintenance or (ii) institutionalization for *long-*

[1] The dissent emphasizes the fact that the Rule will not affect certain people, such as those for whom a sponsor has furnished an affidavit of support. But those are not the people who concern Cook County—it must deal with those who bear the brunt of the Rule. *Cf. Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 894 (1992) ("Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. … The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."). The dissent concedes, as it must, that the affected group is not the null set.

term care at government expense." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999) ("1999 Field Guidance") (emphasis added); see also Proposed Rule: Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28676 (May 26, 1999). Drawing on both dictionary definitions and the development of immigration law since the 1880s, the proposed rule accompanying the 1999 Field Guidance explained that "a person becomes a public charge when he or she is committed to the care, custody, management, or support of the public," and that the term is best understood to signify "a complete, or nearly complete, dependence on the Government rather than the mere receipt of some lesser level of financial support." 64 Fed. Reg. at 28677.

B. Procedural History

DHS's new rule was scheduled to go into effect in October 2019. Before it did so, plaintiffs filed this suit against DHS and related entities for declaratory and injunctive relief. The complaint presents several theories: (1) the Rule violates the Administrative Procedure Act (APA), 5 U.S.C. § 706, because it exceeds DHS's statutory authority; (2) the Rule violates APA section 706 because it is not in accordance with law; (3) the Rule violates APA section 706 because it is arbitrary and capricious; and (4) the Rule violates the Fifth Amendment's Equal Protection guarantee because it discriminates against non-white immigrants.

Focusing on the APA theories, plaintiffs moved for a preliminary injunction, which the district court granted on October 14, 2019. (Following plaintiffs' lead, we do not discuss the Equal Protection theory.) The injunction is geographically limited to Illinois. The district court concluded that both Cook

County and ICIRR have constitutional standing to sue—Cook County primarily because of the added costs its health and hospital system is absorbing and will have to absorb as a result of decreased immigrant enrollment in government-provided health care coverage, and ICIRR because it is expending and will continue to expend additional resources to educate immigrant communities about the Rule and ensure they are able to obtain necessary health services. The court also determined that both the County and ICIRR fall within the "zone of interests" protected by the INA, for largely the same reasons they have constitutional standing. On the merits, the court concluded that DHS's reinterpretation of the term is likely impermissible. The court found the statute to be clear and to require more substantial, sustained dependence on government assistance than the Rule demands before a noncitizen may be considered a public charge. This showed, the court held, that plaintiffs are likely to succeed on their claims. Finally, the court ruled that plaintiffs had shown a likelihood of irreparable harm and that the balance of harms favored them, such that a preliminary injunction is warranted.

DHS filed an immediate appeal and moved to stay the preliminary injunction pending resolution of its appeal. We denied the stay and a renewed motion for a stay, but on February 21, 2020, the Supreme Court granted a stay. *Chad Wolf, et al. v. Cook County, et al.*, 140 S. Ct. 681 (2020).

As we write, parallel cases are being litigated in New York, Maryland, California, and Washington. *New York v. U.S. Dep't of Homeland Sec.*, No. 19-cv-7777 (S.D.N.Y.); *Make the Road New York v. Cuccinelli*, No. 19-cv-7993 (S.D.N.Y.); *Casa de Maryland, Inc. v. Trump*, No. 19-cv-2715 (D. Md.); *California v.*

U.S. Dep't of Homeland Sec., No. 19-cv-4975 (N.D. Cal.); *La Clinica De La Raza v. Trump*, No. 19-cv-4980 (N.D. Cal.); *Washington v. U.S. Dep't of Homeland Sec.*, No. 19-cv-5210 (E.D. Wash.). The district courts in each of those cases also issued preliminary injunctions, though with nationwide effect. DHS appealed the preliminary injunctions and requested stays pending appeal. The Ninth and Fourth Circuits granted DHS's stay requests. *City and Cnty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773 (9th Cir. 2019); *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir. Dec. 9, 2019). The Second Circuit declined to issue a stay, but the Supreme Court granted one pending further proceedings. *Dep't of Homeland Sec., et al., v. New York, et al.*, 140 S. Ct. 599 (2020).

Rather than discussing these opinions point-by-point, we think it better to spell out our own analysis of these issues.

II. Right To Sue

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331 for their claims under the APA. DHS responds that they lack standing to sue under Article III of the Constitution. The district court rejected that argument. It also concluded that plaintiffs had adequately raised a claim within the "zone of interests" of the INA. We review the legal question of standing *de novo* and the factual findings underlying the district court's determination of standing for clear error. *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008).

A. Article III Standing

Article III of the Constitution limits the federal judicial power to the adjudication of "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. For there to be a justiciable case or controversy, the party invoking the power of the court must

have standing to sue. *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013). To assert standing for injunctive relief, a plaintiff must show that it is under an actual or imminent threat of suffering a concrete and particularized injury-in-fact; that this injury is fairly traceable to the defendant's conduct; and that it is likely that a favorable judicial decision will prevent or redress the injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

Municipalities generally have standing to challenge laws that result (or immediately threaten to result) in substantial financial burdens and other concrete harms. See, *e.g.*, *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) ("diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources" were sufficient to give states and municipalities standing to sue over the proposed inclusion of a citizenship question on the 2020 census); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110–11 (1979) (municipality had standing based on the effect of racial steering in housing on the municipality's tax base and social stability).

The district court found that Cook County has standing based on the financial harms the County will incur if and when the Rule goes into effect. The Rule is likely to cause immigrants to forgo routine treatment, immunizations, and diagnostic testing, resulting in more costly, uncompensated emergency care and an increased risk of communicable diseases spreading to the general public. Indeed, DHS conceded this harm in its commentary on the Rule, acknowledging "that increased use of emergency rooms and emergent care as a method of primary healthcare due to delayed treatment is possible and there is a potential for increases in uncompensated care in which a treatment or service is not paid for by an

insurer or patient." 84 Fed. Reg. at 41384. The district court determined that "[b]oth the costs of community health epidemics and of uncompensated care are likely to fall particularly hard on [the Cook County health system], which already provides approximately half of all charity care in Cook County, including to noncitizens regardless of their immigration status." The district court found that these financial and health burdens were sufficient.

The district court also concluded that ICIRR has Article III standing based on the effect of the Rule on its ability to perform its core mission and operate its existing programs. The court found that the Rule would impair the organization's ability to achieve its mission of increasing access to care, improving health literacy, and reducing reliance on emergency room care in immigrant communities. The Rule already has caused ICIRR to divert resources from its core programs to new efforts designed to educate immigrants and staff about the Rule's effects and to mitigate the Rule's chilling impact on immigrants who are not covered by the Rule but who nonetheless fear immigration consequences based on their receipt of public benefits.

Under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019), this is enough. In *Havens*, the Supreme Court found that a nonprofit organization focused on equal housing access had standing to sue an apartment owner under the Fair Housing Act for racial discrimination, based on the negative impact of the defendant's racial steering practices on the organization's ability to provide counseling and referral services for low-and moderate-income home-seekers. 455 U.S. at 379. And in *Common Cause*, we relied on *Havens* in concluding that the plaintiff

voting rights organizations had standing to challenge an Indiana law designed to remove certain people from the voter rolls, because the law caused the organizations to divert their limited resources from core programs to ameliorating the effects of the law. 937 F.3d at 950–52.

We agree with the district court that Cook County and ICIRR have established cognizable injuries. Their alleged injuries are predictable, likely, and imminent. And the Rule—not independent third-party decision-making—is the but-for cause of these injuries. Plaintiffs thus have constitutional standing to challenge the Rule.

B. Statutory Coverage

The next question is whether the interests Cook County and ICIRR assert are among those protected or regulated by the INA. A statute "ordinarily provides a cause of action only to plaintiffs whose interests fall within the zone of interests protected by the law invoked." *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1302 (2017).

The zone-of-interests test is not "especially demanding" in the APA context. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014). This is because it was "Congress's evident intent when enacting the APA to make agency action presumptively reviewable." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). The plaintiffs' interests must only *arguably* fall within the zone of interests of the statute. And the emphasis on the word "arguably" is not ours: the Supreme Court has "always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Id*. It is not necessary to demonstrate any "indication of

congressional purpose to benefit the would-be plaintiff." *Id.* Suit is foreclosed "only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.*

1. *Cook County*

The district court concluded that Cook County satisfies the zone-of-interests test based on the financial burdens the County will incur as a result of the Rule. It drew an analogy to *City of Miami*, in which the Supreme Court held that Miami's allegations of lost tax revenue and extra municipal expenses placed it within the zone of interests protected by the Fair Housing Act.

DHS takes issue with these conclusions. It argues that the County does not fall within the INA's zone of interests because its asserted interests are inconsistent with the statutory purpose. DHS sees a tension between the County's efforts to provide services to immigrants and the supposed aim of the public-charge provision, which it understands as a command to reduce and penalize immigrants' receipt of public benefits. DHS also contends that the district court misread *City of Miami*, and that the INA does not give *any* third party a judicially enforceable interest in the Executive Branch's immigration decisions.

DHS has overshot the mark. Indeed, its own arguments undermine such an absolutist position. DHS admits that one purpose of the public-charge provision is to protect taxpayer resources. In large measure, that is the same interest Cook County asserts. DHS tries to distinguish itself from Cook County by saying that it is focused on reducing the burden on

federal taxpayers, but the Rule itself covers not just federal, but also state, local, and tribal assistance. Even if the effect of the Rule is some reduction in the burden on federal taxpayers, Cook County has plausibly alleged that at the same time, the Rule will increase the burden on those same people in their capacity as state and local taxpayers, who will have to suffer the adverse effects of a substantial population with inadequate medical care, housing, and nutrition.

Furthermore, though the purpose of the public-charge provision is to screen for and promote "self-sufficiency" among immigrants, it is not obvious what self-sufficiency means. Subsidies abound in the modern world, from discounted or free transportation for seniors, to public snow removal, to school lunches, to childhood vaccinations, and much more. *Cf.* Danilo Trisi, *Administration's Public Charge Rules Would Close the Door to U.S. Immigrants Without Substantial Means*, Ctr. on Budget and Policy Priorities (Nov. 11, 2019) (noting that in a single year, one in four U.S.-born citizens, and 15 percent of all residents, receives a benefit included in the Rule's public charge definition). Ensuring that immigrants have access to affordable basic health care, for example, may promote their greater self-sufficiency in other domains, including income, housing, and nutrition. It also protects the community at large from highly contagious diseases such as COVID-19. Cook County's interest in ensuring lawful immigrants' access to authorized federal and state public benefits is not plainly inconsistent with the text of the statute. Its financial interests thus suffice to bring it within the zone of interests of the public-charge provision.

2. *ICIRR*

The court also found that ICIRR fits within the INA's zone of interests, explaining that there is "ample evidence that ICIRR's interests are not merely marginal to those of the aliens more directly impacted by the public charge provision" and that "ICIRR [is] precisely the type of organization that would reasonably be expected to 'police the interests that the statute protects.'"

Because only one plaintiff need demonstrate that it has stated a claim within the zone of interests of the statute, we elect to pass over ICIRR without much comment. We recognize that it asserts that it has suffered a financial burden directly attributable to the Rule. And we accept that ICIRR helps immigrants navigate the INA's various requirements, including the public-charge rule, and it has an interest in ensuring that immigrants are not improperly denied adjustment of status or removed from the country because of confusion over DHS's Rule. But the link between these injuries and the purpose of the public-charge part of the statute is more attenuated, and thus it is harder to say that the injury ICIRR has asserted meets the "zone-of-interests" test.

Given Cook County's presence in the case, we need not resolve ICIRR's status definitively, and so we limit our discussion in the remainder of the opinion to Cook County. The central question is whether the district court abused its discretion in preliminarily enjoining the Rule for the State of Illinois?

III. The Preliminary Injunction

To obtain a preliminary injunction, a plaintiff must establish that: (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary

relief; and (3) legal remedies are inadequate. See *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381 (7th Cir. 2018). "If the moving party makes this showing, the court balances the harms to the moving party, other parties, and the public." *Eli Lilly*, 893 F.3d at 381. The standard is the same for an application for a stay under section 705 of the APA. *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 446 (7th Cir. 1990).

The district court concluded that Cook County is likely to succeed on the merits and that the other requirements for preliminary injunctive relief have been met. We review the issuance of a preliminary injunction under the deferential abuse-of-discretion standard, reviewing legal issues *de novo* and factual findings for clear error. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017).

A. Likelihood of Success

The pivotal question in this case, as in many involving preliminary relief, is likelihood of success on the merits. We therefore devote the bulk of our analysis to this issue, understanding that the litigation is still in an early stage and anything we say may change as the record develops further.

The APA provides for judicial review of final agency decisions. 5 U.S.C. §§ 702, 706. The overriding question is whether the agency's interpretation of the relevant statute is one the text will permit. We approach this inquiry through the two-step framework set forth in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The first issue is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress has done so unambiguously, then that is the end of it: the agency and courts alike are bound by what

Congress wrote. *Id.* at 842–43. If Congress has not spoken clearly, then we move on to step two, in which we consider whether the agency's interpretation reflects a permissible construction of the statute. *Id.* at 843. We defer to the agency's reading "unless it appears from the statute or its legislative history that the accommodation [of conflicting policies] is not one that Congress would have sanctioned." *Id.* at 845; see also *Indiana v. EPA*, 796 F.3d 803, 811 (7th Cir. 2015).

Statutory interpretation is not the end of the matter, however. We also must assess the agency's policymaking to ensure that it is not "arbitrary and capricious," as the APA uses those terms. 5 U.S.C. § 706(2)(A). This review, guided by *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), focuses not on the facial validity of the agency's interpretation, but rather on the soundness of the process by which it reached its interpretation. See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("[W]here a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation.").

1. Chevron *Step One*

We begin our analysis of DHS's Rule with an analysis of the text of the INA. In conducting this analysis, we consider the words of the public-charge provision, its place in the overall statutory scheme, the relation of the INA to other statutes, and "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000).

As we noted at the outset, the INA contains no formal definition of what it takes to be a "public charge." It merely lists several broad factors that are relevant to the determination. 8 U.S.C. § 1182(a)(4)(B). It does not provide weights for either the listed factors or any others that might exist in a given case. Instead, it relies on the discretion of the responsible consular official or the Attorney General. *Id.* § 1182(a)(4)(A). It also authorizes the Secretary of Homeland Security to promulgate rules to guide those determinations. *Id.* § 1103(a)(3).

In defense of its Rule, DHS relies heavily on the 1996 amendments to the INA. There Congress stated that "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). Congress also announced its intent 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"; and that "the availability of public benefits [should] not constitute an incentive for immigration to the United States." 8 U.S.C. § 1601(2).

Both parties also cite various other statutory provisions that they believe shed light on the meaning of the public-charge provision, including the requirement for some immigrants to obtain affidavits of support from sponsors, 8 U.S.C. § 1183a; an exception to the public-charge provision for immigrants who are victims of domestic violence and receive benefits in that capacity, *id.* §§ 1182(a)(4)(E), 1641(c); and several other statutes that extend, with varying conditions, certain benefits to immigrants, see, *e.g.*, *id.* §§ 1611, 1621. We do not find these provisions to be particularly helpful; each is susceptible to more than one reasonable reading.

Cook County argues that long-established judicial decisions, ratified by Congress, point us to only one possible interpretation—that is, the one that it urges. But in our view, the historical record is not so clear. The parties agreed in the district court that the understanding of the term "public charge" around the time it first entered federal immigration law in 1882 is particularly relevant. See *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) ("It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute."). But that is where the harmony ends.

Enter the dueling dictionaries. In Cook County's corner, we have the Century Dictionary, defining a "charge" as a person who is "*committed* to another's custody, care, concern or management," Century Dictionary 929 (William Dwight Whitney, ed., 1889) (emphasis added); and Webster's Dictionary, likewise defining a "charge" as a "person or thing *committed* to the care or management of another," Webster's Condensed Dictionary of the English Language 84 (Dorsey Gardner, ed., 1884). These suggest primary, long-term dependence. In DHS's corner, we have dictionaries defining a "charge" as "an obligation or liability," as in a "pauper being chargeable to the parish or town," Dictionary of Am. and English Law 196 (Stewart Rapalje & Robert Lawrence, eds., 1888); and as a "burden, incumbrance, or lien," Glossary of the Common Law 56 (Frederic Jesup Stimson, ed., 1881). These definitions can be read to indicate that a lesser reliance on public benefits is enough. Finding no clarity here, we move on.

Cook County contends that from the outset Congress distinguished between, on the one hand, those who were permit-

ted to "land" and receive short-term support from government agencies, and, on the other hand, those who were excluded as public charges. Under the 1882 Immigration Act, the set of people who could be prevented from landing included convicts, "lunatics," "idiots," and any other person "unable to take care of himself or herself." An Act to Regulate Immigration, ch. 376, § 2, 22 Stat. 214 (1882). The 1882 Act authorized the Secretary of the Treasury, who was responsible for supervising immigration, to enter into contracts with state entities "to provide for the support and relief of such immigrants therein landing as may fall into distress or need public aid, under the rules and regulations to be prescribed by said Secretary." *Id*. Cook County stresses this distinction between excludable *public charges* and immigrants who (less drastically) "may fall into distress or need public aid."

This argument has some intuitive merit. DHS responds however, that the general revenues were not at risk under the 1882 Act for immigrants who were not self-sufficient upon arrival. The 1882 Act directed the Secretary of the Treasury to levy an entry tax on all noncitizens arriving by ship to cover both the cost of regulating immigration and that of temporary assistance. 1882 Act, ch. 376, § 1. It also specified that "no greater sum shall be expended for the purposes hereinbefore mentioned, at any port, than shall have been collected at such port." *Id*. In other words, federal funding was available only to the extent the funds matched collections from the vessels. This general feature is no longer part of the law (putting to one side the special case of sponsored immigrants).

Congress tinkered with the language in 1891, 1903, and 1907. See An Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens Under Contract

or Agreement to Perform Labor, ch. 551, 26 Stat. 1084, 1086 (1891); An Act to Regulate the Immigration of Aliens into the United States, ch. 1012, 32 Stat. 1213, 1213–1214 (1903); An Act to Regulate the Immigration of Aliens into the United States, ch. 1134, 34 Stat. 898, 898–899, 904–905 (1907). Never, however, did it define "public charge" or explain what degree of reliance on government aid brands someone as such a person.

Federal district court and state-court cases from this period point in different directions. For example, in *In re Feinknopf*, 47 F. 447 (E.D.N.Y. 1891), a district court distinguished between the primary dependence of persons who live in almshouses and the lesser dependence of those who merely receive public support. Around the same time, a North Dakota court indicated that temporary aid is actually a means of averting public dependence, insofar as it can keep those "destitute of means and credit from becoming a public charge." *Yeatman v. King*, 2 N.D. 421 (1892). On the other hand, the question in *Yeatman* was whether an obligation to repay the county the value of received temporary public assistance counted as a tax, and so the decision is of limited value.

The district court did not find these and other early decisions to be dispositive. Instead, it thought that the Supreme Court's decision in *Gegiow v. Uhl*, 239 U.S. 3 (1915), resolved the issue. But there, too, the question presented was a narrow one. The Court said that it was addressing the "single question … whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked." *Id.* at 9–10. It answered in the negative, saying that "[t]he persons enumerated, in short, are to be excluded on the ground of permanent personal objections accompanying them irrespective of local

conditions … .” *Id.* at 10. The district court in our case understood *Gegiow* as holding that the term “public charge” encompasses only persons who are substantially, if not entirely, dependent on government assistance on a long-term basis.

While there is language in *Gegiow* that supports that reading, we are not persuaded that the Supreme Court necessarily ruled so broadly. The Court went out of its way to say that the question presented was the one we noted above. The Acting Commissioner of Immigration, in deciding to deport the persons at issue, mentioned in addition to local labor conditions “the amount of money possessed and ignorance of our language.” But the Court brushed off these considerations as mere “makeweights.” *Id.* at 9. It thus had no need to address directly the immigrants’ financial resources and education.

In context, the Court’s reference to “permanent personal objections” might have simply reflected a distinction between the individualized characteristics of an immigrant and external factors such as a local labor market. The terse opinion is silent about any distinction between people whose need for public assistance is temporary and minimal, and those whose need is likely to be substantial or permanent. We thus agree with DHS that the case before us cannot be resolved exclusively by reference to *Gegiow*.

Circuit court decisions in the aftermath of *Gegiow* add little clarity to this picture. For example, in *Wallis v. United States ex rel. Mannara*, 273 F. 509 (2d Cir. 1921), the Second Circuit defined a person likely to become a public charge as “one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty.” *Id.* at 511. It did so in a case in which the immi-

grant family's primary breadwinner was "certified for senility" and thus would never be "capable of continued self-support." *Id.* at 510. The court noted that the family had "insufficient [means] to provide for their necessary wants any reasonable length of time" and no private sources of support. *Id.* On the other hand, in *Ex parte Hosaye Sakaguchi*, 277 F. 913 (9th Cir. 1922), the Ninth Circuit held that an immigrant woman with the skills to support herself was *not* likely to become a public charge. *Id.* at 916. It ruled that the government had to present evidence of "mental or physical disability or any fact tending to show that the burden of supporting the [immigrant] is likely to be cast upon the public." *Id.* How much of a burden was left undefined. See also *United States ex rel. De Sousa v. Day*, 22 F.2d 472, 473–74 (2d Cir. 1927) ("In the face of [*Gegiow*] it is hard to say that a healthy adult immigrant, with no previous history of pauperism, and nothing to interfere with his chances in life but lack of savings, is likely to become a public charge within the meaning of the statute.").

The parties and *amici* also call our attention to later actions by the Executive Branch, but we find these also to be inconclusive. See, *e.g.*, *Matter of B-*, 3 I. & N. Dec. 323, 326 (BIA & AG 1948) (stating that the longstanding test for whether an immigrant could be deemed a public charge had three components: (1) the state must charge for the service it renders; (2) it must make a demand for payment; and (3) the immigrant must fail to pay).

What we can say is that in 1952 Congress amended the Act in a way that uses the language of discretion: it deems inadmissible immigrants "who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission,

are likely *at any time* to become public charges." An Act to Revise the Laws Relating to Immigration, Naturalization, and Nationality; and for Other Purposes, Pub. L. No. 414, § 212, 66 Stat. 163, 183 (1952) (emphasis added). This language clarifies the temporal dimension of the public-charge determination, but it says nothing about the degree or duration of assistance. The Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, also lacks a clear definition of "public charge."

In the 1996 Immigration Act, Congress for the first time provided guidance on what the Executive Branch must consider when determining whether an immigrant is likely to become a public charge. As we noted earlier, immigration officials were instructed "at a minimum" to look at age, health, family status, financial situation, and education and skills. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 531, 110 Stat. 3009 (1996). They also could consider whether an immigrant had an affidavit of support from a third party. *Id.* Congress rejected a proposal to define "public charge" to cover "any alien who receives [means-tested public benefits] for an aggregate of at least 12 months." 142 Cong. Rec. 24313, 24425 (1996).

Contemporaneously, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (1996), commonly known as the "Welfare Reform Act." DHS places great weight on language in that statute's expression of Congress's desire that immigrants be self-sufficient and not come to the United States with the purpose of benefitting from public welfare programs. See 8 U.S.C. § 1601(1). The INA (with that amendment) pursues that goal by restricting most noncitizens from eligibility for many federal and state public benefits. It grants

lawful permanent residents access to means-tested public benefits only after they have spent five years as a lawful permanent resident. *Id.* §§ 1611, 1613, 1621. But the exclusions are not absolute. Congress specified instead that immigrants may at any time receive emergency medical assistance; immunizations and testing for communicable diseases; short-term, in-kind emergency disaster relief; various in-kind services such as short-term shelter and crisis counseling; and certain housing and community development assistance. *Id.*

The INS summarized its understanding of the 1996 legal regime in the 1999 Field Guidance, which defined as a public charge those who are "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." 64 Fed. Reg. at 28689. Following an earlier 1987 interpretive rule, see Adjustment of Status for Certain Aliens, 52 Fed. Reg. 16205, 16211–12, 16216 (May 1, 1987), the 1999 Field Guidance said that "officers should not initiate or pursue public charge deportation cases against aliens who have not received public cash benefits for income maintenance or who have not been institutionalized for long-term care." 64 Fed. Reg. at 28689. It directed officers "not [to] place any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance with respect to determinations of admissibility or eligibility for adjustment on public charge grounds." *Id.*

Later enactments lightened some of the statutory restrictions, in order to allow additional categories of immigrants to qualify for certain benefits without a five-year waiting period. See Farm Security and Rural Investment Act of

2002, Pub. L. 107-171, § 4401, 116 Stat. 134 (2002); Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. 11-3, § 214, 123 Stat. 8 (2009).

This is where things stood when DHS developed the Rule. What should we make of this historical record? As the district court recognized, there is abundant evidence supporting Cook County's interpretation of the public-charge provision as being triggered only by long-term, primary dependence. But the question before us is not whether Cook County has offered *a* reasonable interpretation of the law. It is whether the statutory language unambiguously leads us to that interpretation. We cannot say that it does. As our quick and admittedly incomplete overview of this byzantine law has shown, the meaning of "public charge" has evolved over time as immigration priorities have changed and as the nature of public assistance has shifted from institutionalization of the destitute and sick, to a wide variety of cash and in-kind welfare programs. What has been consistent is the delegation from Congress to the Executive Branch of discretion, within bounds, to make public-charge determinations.

Thus, this case cannot be resolved at *Chevron* step one. But that does not end the analysis, because we may affirm the district court's issuance of a preliminary injunction on any basis in the record. See *Valencia v. City of Springfield, Ill.*, 883 F.3d 959, 967 (7th Cir. 2018). We therefore proceed to step two.

2. Chevron *Step Two*

At step two of the *Chevron* analysis, we consider "whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. Our review is deferential; we accord "considerable weight … to an executive department's

construction of a statutory scheme it is entrusted to administer." *Id.* at 844; see also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

A court may strike down an agency's interpretation of a law if, for example, the agency's reading disregards the statutory context, see, *e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015); its rule is based on an unreasonable interpretation of legislative history, see, *e.g.*, *Council for Urological Interests v. Burwell*, 790 F.3d 212, 223 (D.C. Cir. 2015); or its new position "would bring about an enormous and transformative expansion in [the agency's] regulatory authority without clear congressional authorization, *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

Cook County offers several reasons why DHS's interpretation founders here. First, it contends that the Rule conflicts with at least two statutes: the SNAP statute and the Rehabilitation Act of 1973. Second, it urges that the DHS position creates internal inconsistencies in the immigration laws themselves. We address these points in turn.

The SNAP statute prohibits the government from considering SNAP benefits as "income or resources for any purpose under any Federal, State, or local laws." 7 U.S.C. § 2017(b). But DHS is not trying to characterize these benefits as income or resources held by the immigrant in question. The Rule merely notes that receipt of the benefits is an indicium of a lack of self-sufficiency. Whatever else one might say about that position, it is not one that the SNAP law forbids.

The Rehabilitation Act of 1973 prohibits the government from excluding from participation in, denying the benefits of, or subjecting to discrimination under any federally funded

program or activity, a person with a disability "solely by reason of her or his disability." 29 U.S.C. § 794(a). An agency violates the Act if it (1) intentionally acts on the basis of the disability; (2) refuses to provide a reasonable modification; or (3) takes an action or adopts a rule that disproportionately affects disabled people. *A.H. ex rel. Holzmueller v. Ill. High Sch. Ass'n*, 881 F.3d 587, 592–93 (7th Cir. 2018). An aggrieved person must demonstrate that "but for" her disability, she would have been able to access the desired benefits. *Id.* at 593.

DHS frankly acknowledges that it takes disability into account in its public-charge analysis, and it does so in an unfavorable way. 84 Fed. Reg. at 41383 ("DHS considers any disability or other medical condition in the public charge inadmissibility determination to the extent the alien's health makes the alien more likely than not to become a public charge at any time in the future."). Indeed, the Rule brands as a *heavily* weighted negative factor a medical condition that is likely to require extensive medical treatment or interfere with the person's ability to provide for herself, attend school, or work. *Id.* at 41504. DHS does not say what amounts to "extensive medical treatment" or what it means for a condition to "interfere with [an immigrant's] ability to provide for herself, attend school, or work." The Rule leaves the interpretation of these terms to immigration officials. It is therefore unclear what sorts of disabilities DHS will place into this category.

As several *amici curiae* point out, the Rule ignores the fact that private insurers do not cover many home- and community-based services, and so denial of benefits is effectively denial of access to programs or activities. See *id.* at 41382. DHS responded to this criticism, as it applies to Medicaid Buy-in for those with disabilities, with the comment that "[a]liens

should be obtaining private health insurance other than Medicaid in order to establish self-sufficiency." *Id.* But that is chimerical. Private insurance in the United States typically excludes these benefits, and so persons with disabilities are able to obtain essential services, including personal-care services, specialized therapies and treatment, habilitative and rehabilitative services, and medical equipment, *only* by participating in the Medicaid Buy-in program. With this assistance, they are *able* to work and thus can *avoid* becoming a public charge, which is DHS's purported goal.

The conclusion is inescapable that the Rule penalizes disabled persons in contravention of the Rehabilitation Act. All else being equal—education and skills, work history and potential, health besides disability, etc.—the disabled are saddled with at least two heavily weighted negative factors directly as a result of their disability. Even while DHS purports to follow the statutorily-required totality of the circumstances test, the Rule disproportionately burdens disabled people and in many instances makes it all but inevitable that a person's disability will be the but-for cause of her being deemed likely to become a public charge.

We do not mean to suggest that the Rehabilitation Act repealed the "health" criterion in the public-charge provision by implication. There is no need to do that, if the two statutes can be reconciled—and it is our duty to see if that can be accomplished. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("[T]his Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both."). And they can live together comfortably, as long as we understand the "health" criterion in the INA as referring to things such as contagious disease and conditions

requiring long-term institutionalization, but *not* disability per se. That interpretation is also historically grounded.

DHS's interpretation also creates serious tensions, if not outright inconsistencies, within the statutory scheme. It conflicts with Congress's affirmative authorization for designated immigrants to receive the benefits the Rule targets. See 8 U.S.C. §§ 1611, 1621 (allowing immigrants to receive emergency medical assistance, immunizations and contagious disease testing, and some public housing assistance); Farm Security and Rural Investment Act of 2002, Pub. L. No. 107–171, § 4401, 116 Stat. 134 (authorizing supplemental nutrition benefits for certain categories of immigrants, and Medicaid and children's health insurance for noncitizen children and pregnant women). Cook County is largely correct when it accuses the Rule of "set[ting] a trap for the unwary" by penalizing people for accepting benefits Congress made available to them. Although the Rule does not punish immigrants for using the designated benefits, in the sense of imposing a fine, its heavily negative consideration of such use is an even worse penalty for someone seeking a lawful path to staying in the United States. Furthermore, the preliminary injunction record shows that many immigrants are not sophisticated enough to know which benefits they may safely accept and which not.

Congress drew the balance between acceptance of benefits and preference for self-sufficiency in the statutes, and it is DHS's duty to respect that outer boundary. The Welfare Reform Act achieved its stated goal of reducing immigrant reliance on public assistance by barring receipt of any benefits by some classes of noncitizens and authorizing receipt by other classes only after a five-year waiting period. The statute did not create a regime that permitted self-sufficiency to trump all

other goals, nor did it modify the public-charge provision to penalize receipt of non-cash as well as cash assistance. DHS is correct that its Rule is not worded as an outright prohibition against an immigrant's receipt of benefits to which Congress has entitled him. The latter would exceed DHS's authority. But the record before us indicates that it may have the same effect.

Our concerns are heightened by the fact that DHS's interpretation of its statutory authority has no natural limitation. Although it chose a rule that quantified the benefits used to 12 months' worth over a 36-month period, nothing in its interpretation requires even that limit. There is nothing in the text of the statute, as DHS sees it, that would prevent the agency from imposing a zero-tolerance rule under which the receipt of even a single benefit on one occasion would result in denial of entry or adjustment of status.

We see no warrant in the Act for this sweeping view. Even assuming that the term "public charge" is ambiguous and thus might encompass more than institutionalization or primary, long-term dependence on cash benefits, it does violence to the English language and the statutory context to say that it covers a person who receives only *de minimis* benefits for a *de minimis* period of time. There is a floor inherent in the words "public charge," backed up by the weight of history. The term requires a degree of dependence that goes beyond temporary receipt of supplemental in-kind benefits from any type of public agency.

DHS also runs into trouble as a result of its decision to stack benefits and disregard monetary value. Under its Rule, the receipt of multiple benefits in one month, no matter how

slight, counts as multiple months of benefits. DHS acknowledges that the Rule's 12-months-in-36 tolerance would actually run out in four months if an immigrant received non-emergency Medicaid, any SNAP benefit, and housing assistance, or even sooner if she additionally received *any* amount of cash income assistance through a federal, state, local, or tribal program. Paradoxically, the Rule provides no opportunity for an immigrant to repay the value of the benefits received once she is back on her feet. This is another way in which it unreasonably imposes substantially disproportionate consequences for immigrants, compared to the supposed drain on the public fisc they cause.

The ambiguity in the public-charge provision does not provide DHS unfettered discretion to redefine "public charge." We find that the interpretation reflected in the Rule falls outside the boundaries set by the statute.

3. *Arbitrary and Capricious Review*

Our conclusion that the Rule likely does not meet the standards of *Chevron* step two is enough to require us to move on to the remainder of the preliminary-injunction analysis. But even if we are wrong about step two, one more inquiry remains: whether the Rule is arbitrary and capricious, as the APA uses those terms. See 5 U.S.C. § 706(2)(A). That requires an examination of DHS's policymaking process.

When conducting rulemaking, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. at 43. It may not "rel[y] on factors which Congress has not intended it to consider, entirely fail[] to consider

an important aspect of the problem, [or] offer[] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* Furthermore, when an agency changes course, as DHS did here when it adopted a radically different understanding of the term "public charge" compared to the 1999 Field Guidance, it "must show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In explaining a change in policy, "an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Encino Motorcars*, 136 S. Ct. at 2126. This is because a "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress." *State Farm*, 463 U.S. at 41–42. Thus, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, 556 U.S. at 516.

The review called for by *State Farm* is narrow in scope and does not permit us to substitute our own policy judgment for that of the agency. We ask only whether the agency's "decision was based on a consideration of the relevant factors" and was not "a clear error of judgment." 463 U.S. at 43.

In response to its notice of proposed rulemaking, DHS received a whopping 266,077 comments, the vast majority of which opposed the proposed rule. In the preamble to the final rule, DHS summarized significant issues raised by the comments and changes it made in the final rule. We assess the validity of DHS's decision-making process based on this record.

Cook County urges that the Rule is arbitrary and capricious in a number of ways: (1) DHS failed meaningfully to evaluate and address significant potential harms from the Rule, including its substantial chilling effect on immigrants not covered by the Rule; (2) DHS failed to give a logical rationale for the duration-based standard; and (3) DHS added factors to the totality-of-the-circumstances analysis that are "unsupported, irrational and at odds with the Final Rule's purported purpose." Numerous *amici* underscored these points and explained how the Rule will lead to arbitrary results, cause both direct and indirect economic harms, burden states and localities that have to manage fallout from the Rule, and disproportionately harm the disabled and children.

We look first at DHS's dismissal of concerns about the Rule's chilling effect on legal immigrants and family members who fall outside its scope. DHS acknowledged a "plausible connection" between the Rule and needless disenrollment by exempt noncitizens (including refugees, asylees, and victims of domestic violence) in covered public benefits, and by covered immigrants in noncovered benefit programs. 84 Fed. Reg. at 41313. DHS also said that it "appreciates … the potential nexus between public benefit enrollment reduction and food insecurity, housing scarcity, public health and vaccinations … and increased costs to states and localities." *Id.* Nonetheless, it brushed off these impacts as "difficult to predict" and refused to "alter this rule to account for such unwarranted choices." *Id*. Even though these consequences are foreseeable, the Rule does not literally compel them, and so DHS asserted that they could be addressed through additional public guidance.

DHS may think that these responses are unwarranted, but it does not deny that they are taking place and will continue to do so. Moreover, the record indicates that the target population is responding rationally. DHS's system of counting and stacking benefits is hardly transparent, and so a rational person might err on the side of caution and refrain from seeking medical care, or food, or housing, even from a city, state, or tribe rather than the federal government. And the risk that the Rule may become more stringent at any time and operate retroactively against the use of benefits already used is a real one. DHS trumpets its view that the Rule stops short of its lawful authority and that it could promulgate a more restrictive rule if it so chooses. In response to comments on the proposed rule, DHS used discretionary language: "DHS believes it is a reasonable approach to only designate Medicaid *at this time*," *id.* at 41381 (emphasis added); and "DHS will not consider [Healthy Start] benefits *at this time*," *id.* at 41390 (emphasis added). It warned that it may "updat[e] the list of benefits through future regulatory action." *Id.* at 41387. Immigrants thus reasonably anticipate that their receipt of benefits that are currently not covered could eventually hurt them if DHS alters the Rule in the future.

It was not enough for DHS simply to nod at this argument; it called for a serious explanation. The importance of the chilling effect is not the number of disenrollments in the abstract, but the collateral consequences of such disenrollments. DHS failed adequately to grapple with the latter. For example, commenters predicted that disenrollment and under-enrollment in Medicaid, including by immigrants not covered by the Rule, would reduce access to vaccines and other medical care, resulting in an increased risk of an outbreak of infectious disease among the general public. To recognize the truth in

that prediction, one need only consider the current outbreak of COVID-19—a pandemic that does not respect the differences between citizens and noncitizens.

There is also the added burden on states and local governments, which must disentangle their purely state-funded programs from covered federal programs. The federal government has no interest in the way that states and localities choose to spend their money. There is no reason why immigrants should not continue to benefit from the state programs without being penalized at the federal level. The Rule will force states to make their own public welfare programs more robust to compensate for a reduction in the availability of federal programs. DHS touts the savings to the federal government from the Rule, primarily through a significant reduction in transfer payments to the states (including, it should be noted, for persons who disenroll unnecessarily because of the chilling effect), but at the same time it expects the states to fill the gaps and continue to provide critical services such as preventive healthcare. See, *e.g.*, *id.* at 41385 ("In addition, local health centers and state health departments provide preventive services that include vaccines that may be offered on a sliding scale fee based on income. Therefore, DHS believes that vaccines would still be available for children and adults even if they disenroll from Medicaid."). It assumes this while simultaneously denying that the Rule will have "substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government." *Id.* at 41481.

Cook County also asserts that DHS failed to give a logical rationale for its chosen durational threshold. In its notice of

proposed rulemaking, DHS proposed an array of thresholds that would apply before benefits can be counted against a noncitizen in the public charge analysis. Those lines came under sharp criticism for being arbitrary, confusing, and an unacceptable proxy for undue reliance on public support. *Id.* at 41357–58.

In the final Rule, DHS opted for the single threshold for both monetizable and nonmonetizable benefits of 12 months (stacked) over a 36-month period. It touted this approach as "particularly responsive to public comments that communicated concerns about the complexity of the bifurcated standard and lack of certainty." *Id.* at 41358. It also asserted that the 12/36 standard "is consistent with DHS's interpretation of the term 'public charge.'" *Id.* at 41359. DHS equates the term "public charge" with a lack of "self-sufficiency" and it regards anyone who fails its test as not self-sufficient. *Id.* It defends its stacking mandate on the theory that it "ensures that aliens who receive more than one public benefit (which may be more indicative of a lack of self-sufficiency, with respect to the fulfillment of multiple types of basic needs) reach the 12-month limit faster." *Id.* at 41361. DHS concluded that the bright-line rule "provides meaningful guidance to aliens and adjudicators, … accommodates meaningful short-term and intermittent access to public benefits, and … does not excuse continuous or consistent public benefit receipt that denotes a lack of self-sufficiency." *Id.*

This explains how DHS incorporated its understanding of "self-sufficiency" into the Rule. But we still have a textual problem. The INA does not call for total self-sufficiency at every moment; it uses the words "public charge." DHS sees "lack of complete self-sufficiency" and "public charge" as

synonyms: in its view, receipt of any public benefit, particularly one related to core needs such as health care, housing, and nutrition, shows that a person is not self-sufficient. See *id.* at 41356. This is an absolutist sense of self-sufficiency that no person in a modern society could satisfy; everyone relies on nonmonetary governmental programs, such as food safety, police protection, and emergency services. DHS does not offer any justification for its extreme view, which has no basis in the text or history of the INA. As we explained earlier, since the first federal immigration law in 1882, Congress has assumed that immigrants (like others) might face economic insecurity at some point. Instead of penalizing immigrants by denying them entry or the right to adjust status, Congress built into the law accommodations for that reality. Also, as numerous commenters on the Rule pointed out, the benefits it covers are largely *supplemental* and not intended to be, or relied upon as, a primary resource for recipients. Many recipients could get by without them, though as a result they would face greater health, nutrition, and housing insecurity, which in turn would likely harm their work or educational attainment (and hence their ability to be self-sufficient).

Finally, Cook County contends that the Rule adds irrational factors into the public-charge assessment, including family size, mere application for benefits, English-language proficiency, lack of disability, and good credit history. With respect to language, we note the obvious: someone whose English is limited on the date of entry may be entirely competent five years later, when the person first becomes eligible for benefits under the Welfare Reform Act and related laws. In almost all cases, an immigration official making a determination about whether someone is likely to become a public

charge will be speculating about that person's family size, linguistic abilities, credit score, and the like no fewer than five years in the future.

Even if we grant that these new factors carry some minimal probative value, it is unclear to us, and DHS nowhere explains, how immigration officials are supposed to make these predictions in a nonarbitrary way. Worse, for many people the relevant time is not five years—it is eternity, because the Rule calls for officials to guess whether an immigrant will become a public charge *at any time*. There is a great risk that officials will make their determination based on stereotype or unsupported assumptions, rather than on the type of objective facts called for by the Act (age, present health, family status, financial situation, and education or skills).

DHS also never explains why it chose not to take into account the possibility that an immigrant might, at some point in the future, be able to repay the value of public benefits received. Someone who seeks to adjust status will be penalized for having previously received public benefits without being given the opportunity to refund the government the cost of those benefits. This is new: the regulations governing deportation on public-charge grounds require a demand and a failure to pay. See 64 Fed. Reg. at 28691.

All of this convinces us that this Rule is likely to fail the "arbitrary and capricious" standard. The Rule has numerous unexplained serious flaws: DHS did not adequately consider the reliance interests of state and local governments; did not acknowledge or address the significant, predictable collateral consequences of the Rule; incorporated into the term "public charge" an understanding of self-sufficiency that has no basis in the statute it supposedly interprets; and failed to address

critical issues such as the relevance of the five-year waiting period for immigrant eligibility for most federal benefits.

B. Other Criteria for Preliminary Injunction

We have spent most of our time on likelihood of success on the merits, because that is the critical factor here. We add only a few words about the other requirements for preliminary relief. Cook County had to show that it is likely to suffer irreparable harm in the absence of preliminary relief; that legal remedies are inadequate; and that the balance of equities tips in their favor. The district court found that it did so.

As we noted earlier, Cook County has shown that the Rule will cause immigrants, including those not covered by the Rule, to disenroll from, or refrain from enrolling in, federal Medicaid and state-level public health programs. This already has led to reduction in rates of preventive medicine and caused immigrants to rely on uncompensated emergency care from Cook County's hospital system; the record supports the prediction that those harms will only get worse. The result for the County will be a significant increase in costs it must bear and a higher county-wide risk of vaccine-preventable and other communicable diseases for its population as a whole. The record also supports the district court's finding that Cook County will have to divert resources away from existing programs to respond to the effects of the Rule.

The district court was also on solid ground in finding that Cook County lacks adequate legal remedies for the injuries imposed by the Rule. The APA provides a limited waiver of the United States' sovereign immunity and supports a claim for a challenge to agency action, but only to the extent that the plaintiffs "seek relief other than money damages." 5 U.S.C.

§ 702. There is thus no post-hoc legal remedy available to Cook County to redress the financial harms it stands to suffer as a result of the Rule. It is injunctive relief or nothing.

With respect to the balance of harms, we must take account of the Supreme Court's decision to stay the preliminary injunction entered by the district court. The Court's stay decision was not a merits ruling. To succeed in obtaining a stay from the Supreme Court, an applicant "must demonstrate (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). Stays, the Court tells us, are "granted only in extraordinary cases." *Id.* We do not know why the Court granted this stay, because it did so by summary order, but we assume that it abided by the normal standards. Consequently, the stay provides an indication that the Court thinks that there is at least a fair prospect that DHS should prevail and faces a greater threat of irreparable harm than the plaintiffs.

The stay thus preserves the status quo while this case and others percolate up from courts around the country. There would be no point in the merits stage if an issuance of a stay must be understood as a *sub silentio* disposition of the underlying dispute. With the benefit of more time for consideration and the complete preliminary injunction record, we believe that it is our duty to evaluate each of the preliminary injunction factors, including the balance of equities. In so doing, we apply a "sliding scale" approach in which "the more likely the

plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." *Valencia v. City of Springfield*, 883 F.3d at 966. We also consider effects that granting or denying the preliminary injunction would have on the public. *Id.*

In our view, Cook County has shown that it is likely to suffer (and has already begun to suffer) irreparable harm caused by the Rule. Given the dramatic shift in policy the Rule reflects and the potentially dire public health consequences of the Rule, we agree with the district court that the public interest is better served for the time being by preliminarily enjoining the Rule.

IV. Conclusion

While we disagree with the district court that this case can be resolved at step one of the *Chevron* analysis, we agree that at least Cook County has standing to sue. We make no ruling on ICIRR's standing, and so we have based the remainder of our opinion on Cook County's situation only. The district court did not abuse its discretion or err as a matter of law when it concluded that Cook County is likely to succeed on the merits of its APA claims against DHS. Nor did the district court's handling of the balance of harms and lack of alternative legal remedies represent an abuse of discretion. We therefore AFFIRM the district court's order entering a preliminary injunction.

BARRETT, *Circuit Judge*, dissenting.

The plaintiffs have worked hard to show that the statutory term "public charge" is a very narrow one, excluding only those green card applicants likely to be primarily and permanently dependent on public assistance. That argument is belied by the term's historical meaning—but even more importantly, it is belied by the text of the current statute, which was amended in 1996 to increase the bite of the public charge determination. When the use of "public charge" in the Immigration and Nationality Act (INA) is viewed in the context of these amendments, it becomes very difficult to maintain that the definition adopted by the Department of Homeland Security (DHS) is unreasonable. Recognizing this, the plaintiffs try to cast the 1996 amendments as irrelevant to the meaning of "public charge." That argument, however, flies in the face of the statute—which means that despite their best efforts, the plaintiffs' interpretive challenge is an uphill battle that they are unlikely to win.

I therefore disagree with the majority's conclusion that the plaintiffs' challenge to DHS's definition of "public charge" is likely to succeed at *Chevron* step two. I express no view, however, on the majority's analysis of the plaintiffs' other challenges to the rule under the Administrative Procedure Act. The district court did not reach them, and the plaintiffs barely briefed them. The preliminary injunction was based solely on the district court's interpretation of the term "public charge." Because its analysis was flawed, I would vacate the injunction and remand the case to the district court, where the plaintiffs would be free to develop their other arguments.

I.

There is a lot of confusion surrounding the public charge rule, so I'll start by addressing who it affects and how it works. The plaintiffs emphasize that the rule will prompt many noncitizens to drop or forgo public assistance, lest their use of benefits jeopardize their immigration status. That's happening already, and it's why Cook County has standing: noncitizens who give up government-funded healthcare are likely to rely on the county-funded emergency room. But it's important to recognize that immigrants are dropping or foregoing aid out of misunderstanding or fear because, with very rare exceptions, those entitled to receive public benefits will never be subject to the public charge rule. Contrary to popular perception, the force of the rule does *not* fall on immigrants who have received benefits in the past. Rather, it falls on nonimmigrant visa holders who, if granted a green card, would become eligible for benefits in the future.

To see why, one must be clear-eyed about the fact that federal law is not particularly generous about extending public assistance to noncitizens. That is not a function of the public charge rule; it is a function of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), commonly referred to as the "Welfare Reform Act." Under the Act, undocumented noncitizens are ineligible for benefits. So are nonimmigrant visa holders, a category that encompasses noncitizens granted permission to be in the United States for a defined period—think of tourists, students, and temporary workers. *See* 8 U.S.C. §§ 1611(a), 1621(a), 1641(b) (excluding undocumented noncitizens and nonimmigrant visa holders from the list of

noncitizens "qualified" for government benefits).[1] Because of these restrictions, many noncitizens are altogether ineligible for the benefits relevant to a public charge determination.

Only two major groups are statutorily eligible to receive the benefits that the public charge rule addresses, and the rule has little to no effect on either. The first group is certain especially vulnerable populations—refugees and asylees, among others. Congress has entitled these vulnerable noncitizens to public assistance, 8 U.S.C. § 1641(b), and exempted them from the public charge exclusion, *id.* §§ 1157(c)(3), 1159(c). That means that their need for aid is not considered when they are admitted to the United States, nor is their actual receipt of aid considered in any later adjustment-of-status proceeding. The

[1] There are some narrow exceptions, but they are irrelevant to the "public charge" determination. All noncitizens, including the undocumented, are eligible to receive short-term, in-kind emergency disaster relief; certain forms of emergency medical assistance; public-health assistance for immunization, as well as treatment for the symptoms of communicable disease; other in-kind services such as soup kitchens and crisis counseling; and housing benefits to the extent that the noncitizen was receiving public housing prior to 1996. 8 U.S.C. §§ 1611(b), 1621(b). Other than the housing benefits, none of this aid counts under the rule's definition of a "public benefit," so none has any effect on any future adjustment-of-status proceeding. *See* 8 C.F.R. § 212.21; *see also* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,313 (Aug. 14, 2019) (noting that the rule's "definition does not include benefits related exclusively to emergency response, immunization, education, or social services"); *id.* at 41,482 (explaining that the rule's definition "does not include emergency aid, emergency medical assistance, or disaster relief"). And while housing benefits are covered by the public charge rule, 8 C.F.R. § 212.21, they are largely irrelevant because the number of noncitizens still within the grandfathering provision has presumably dwindled dramatically in the quarter century since the Welfare Reform Act was passed.

public charge rule is entirely irrelevant to the most vulnerable.

The second group eligible for benefits is lawful permanent residents, often referred to as green card holders, and the rule is almost entirely irrelevant to them too. Here's why: The public charge exclusion applies to noncitizens at the admission stage or an adjustment-of-status proceeding. *Id.* § 1182(a)(4)(A). ("Admission" is a term of art referring to "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A).) Lawful permanent residents have already been admitted to the United States, and they already possess the most protected immigrant status. They are therefore not subject to the public charge exclusion unless they jeopardize their lawful permanent residency. *See id.* § 1101(a)(13)(C) (describing the narrow circumstances in which lawful permanent residents are considered to be "seeking an admission"). Most relevant here, a green card holder who leaves the country for more than 180 days puts her residency in question and might need to "seek[] an admission" upon returning to the United States. *Id.* § 1011(a)(13)(C)(iii). If she used benefits prior to her departure, then her use of those benefits might count against her at reentry. But this consequence is easy to avoid by keeping trips abroad shorter than six months. It's also worth noting that a lawful permanent resident is eligible to receive very few benefits until she has been here for five years—which is the point at which she is eligible for citizenship. *Id.* § 1427(a). Naturalization eliminates even the small risk that a lawful permanent resident would ever face the admission process again. Notably, the rule doesn't apply at the naturalization stage. *See id.* § 1429.

The upshot is that the public charge rule will rarely apply to a noncitizen who has received benefits in the past.[2] Indeed, in the Second Circuit case challenging this same rule, both the government and the plaintiffs conceded as much. When pressed to identify who could be penalized under the public charge rule for using benefits, neither side identified any example other than the 180-day departure of a lawful permanent resident. *See* Oral Argument at 36:06–38:47, 1:03:45–1:04:40, *New York v. U.S. Dep't of Homeland Sec.*, Nos. 19-3591, 19-3595 (2d Cir. Mar. 2, 2020), https://www.c-span.org/video/?469804-1/oral-argument-trump-administration-public-charge.

Notwithstanding all of this, many lawful permanent residents, refugees, asylees, and even naturalized citizens have disenrolled from government-benefit programs since the public charge rule was announced. Given the complexity of immigration law, it is unsurprising that many are confused or fearful about how the rule might apply to them. Still, the pattern of disenrollment does not reflect the rule's actual scope. Focusing on the source of Cook County's injury can therefore be misleading.

That does not mean, however, that the rule has no effect. Even though it is almost entirely inapplicable to those currently eligible for benefits, it significantly affects a different group: nonimmigrant visa holders applying for green cards.

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[2] Hence the majority is wrong to treat the rule as unreasonable because it "set[s] a trap for the unwary." Maj. Op. at 29. Because those eligible for the designated benefits are not subject to the rule—except in very rare circumstances—it does not "penaliz[e] people for accepting benefits Congress made available to them." *Id.*

Recall that nonimmigrant visa holders, unlike lawful permanent residents and those holding humanitarian-based visas, are ineligible for the relevant benefits in their current immigration status. If granted lawful permanent residency, though, they would become eligible for these benefits in the future. The public charge rule is concerned with what use a green card applicant would make of this future eligibility. As a leading treatise puts it, the public charge determination is a "prophetic" one. 5 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 63.05[3] (2019). If DHS predicts that an applicant is likely to rely too heavily on government assistance, it will deny her lawful permanent residency on the ground that she is likely to become a public charge. This case is about whether DHS has defined "public charge" too expansively and is therefore turning too many noncitizens away.

There are four major routes to obtaining the status of lawful permanent resident: humanitarian protection (refugees and asylees), the sponsorship of a family member, employment, and winning what is known as the green card lottery.[3] *See* U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT: LAWFUL PERMANENT RESIDENTS 3–4 (2018), https://www.dhs.gov/sites/default/files/publications/Lawful_Permanent_Residents_2017.pdf. Those seeking humanitarian protection are not subject to the statutory provision rendering inadmissible any "alien who … is likely at any time to become a public charge," 8 U.S.C. § 1182(a)(4)(A), and only a subset of those in the remaining three categories will be subject to the DHS rule.

[3] The diversity visa, commonly referred to as the green card lottery, is awarded to foreign nationals from underrepresented countries in an effort to increase diversity within the United States. *See* 8 U.S.C. § 1153(c).

That is because DHS only handles the applications of noncitizens who apply from within the United States; the State Department processes the applications of noncitizens who apply from abroad.[4] This division of authority means that, as a practical matter, the regulation applies to those present in the United States on nonimmigrant visas who seek to adjust their status to that of lawful permanent residents. And because the green card lottery is processed almost entirely by the State Department, the DHS rule applies primarily to employment-based applicants and family-based applicants (by far the larger of these two groups).[5]

As nonimmigrant visa holders, these applicants have not previously been eligible for the benefits designated by DHS's rule—so the determination is not a backward-looking inquiry into whether they have used such benefits in the past. Instead, it is a forward-looking inquiry into whether they are likely to use such benefits in the future. The rule guides this forward-looking inquiry. Under the 1999 Guidance, an applicant was

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[4] The State Department has adopted the interpretation set forth in this rule, but its implementation of the public charge exclusion is not at issue in this case. *See* Visas: Ineligibility on Public Charge Grounds, 84 Fed. Reg. 54,996, 55,000 (Oct. 11, 2019).

[5] In 2019, approximately 572,000 noncitizens adjusted their status to that of lawful permanent residents. The largest group—roughly 330,000—were family based, and the majority of those (over 217,000) were spouses of U.S. citizens. About 111,000 were employment based, and only about 1,000 were lottery winners. The vast majority of the remaining 130,000 noncitizens—refugees and asylees, among others—were exempt from the public charge rule. *See Legal Immigration and Adjustment of Status Report Data Tables: FY 2019*, U.S. DEP'T HOMELAND SECURITY tbl.1B (Jan. 15, 2020), https://www.dhs.gov/immigration-statistics/readingroom/special/LIASR#.

excluded only if she was likely to be institutionalized or primarily dependent on government cash assistance for the long term. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689 (Mar. 26, 1999). Now, DHS considers the applicant's potential usage not only of cash assistance for income maintenance (including Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), and state cash assistance), but also of the Supplemental Nutrition Assistance Program (SNAP), the Section 8 Housing Choice Voucher Program, Section 8 project-based rental assistance, housing benefits under Section 9, and Medicaid (with some explicit exceptions). 8 C.F.R. § 212.21. And if DHS concludes that an applicant is likely to use more than 12 months' worth of these benefits—with the use of 2 benefits in 1 month counting as 2 months—it will deem her "likely to become a public charge" and deny the green card. *Id.*

This heightened standard for admissibility is a significant change—but it's not the one that the plaintiffs' emphasis on disenrollment suggests. Evaluating the rule requires a clear view of what it actually does; so, with the rule's scope in mind, I turn to the merits.

II.

While I agree with the majority's bottom-line conclusion at *Chevron* step one that "public charge" does not refer exclusively to one who is primarily and permanently dependent on government assistance, I have a little to add to the history and a lot to add to the statutory analysis. In my view, the majority takes several wrong turns in analyzing the statute that skew its thinking about *Chevron* step two. For purposes of this Part, the most significant is that the majority accepts the plaintiffs'

view that the 1996 amendments to the public charge provision were irrelevant. In what follows, I'll lay out my own analysis of the plaintiffs' arguments, which will explain why I wind up in a different place than the majority does on the reasonableness of DHS's interpretation of the statute.

The plaintiffs advance three basic arguments as to why the term "public charge" refers exclusively to one who is "primarily and permanently" dependent on government assistance. First, they say that the term had that meaning when it first appeared in the 1882 federal statute. Second, they contend that even if the term was unsettled in the late nineteenth century, subsequent judicial and administrative decisions narrowed it, and later amendments to the statute ratified these interpretations. Third, they argue that interpreting the term "public charge" to encompass anything short of primary and permanent dependence conflicts with Congress's choice to make supplemental government benefits available to immigrants. I'll take these arguments in turn.

A.

The plaintiffs first argue that in the late nineteenth century, "public charge" meant primary and permanent dependence. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) ("[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary … meaning … at the time Congress enacted the statute.'" (citation omitted)). Evaluating this argument requires careful consideration of a term with a long history. The term "public charge" was borrowed from state "poor laws," which were in turn modeled on their English counterparts. HIDETAKA HIROTA, EXPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN

IMMIGRATION POLICY 43–47 (2017). Early poor laws used "public charge" synonymously with "public expense," referring to any burden on the public fisc. Thus, when someone sought assistance from a city or county overseer of the poor, the cost of the relief provided was entered on the overseer's books as a public charge—that is, an expense properly chargeable to, and therefore funded by, the public. Over time, the term "public charge" came to refer (at least in the context of poor relief and immigration laws) not only to expenditures made under the poor laws, but also to the people who depended on these expenditures.[6]

State legislatures, worried about the burden that destitute immigrants might place on programs to aid the needy, co-opted the poor-law language into immigration legislation. In 1847, New York created an administrative apparatus for dealing with the influx of immigrants. The new "Commissioners of Emigration" were tasked with examining incoming passengers to determine if "there shall be found among such passengers, any lunatic, idiot, deaf and dumb, blind or infirm persons … who, from attending circumstances, are likely to become permanently a public charge"—language, incidentally, that suggests that one could be a public charge either temporarily or permanently. Act of May 5, 1847, ch. 195, § 3, 1847 N.Y. Laws 182, 184. These individuals were permitted to land in the state upon payment of a bond by the vessel's master "to indemnify … each and every city, town and county within

[6] This is why nineteenth-century dictionary definitions of "charge" are unhelpful. The words "public" and "charge" comprise a unit that must be understood in the context of the laws that used the phrase. *Cf. Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) ("[A]lthough dictionary definitions of the words 'tangible' and 'object' bear consideration, they are not dispositive of the meaning of 'tangible object' ….").

this state, from any cost or charge … for the maintenance or support of the person … within five years." *Id.* The bonds paid for the landing of these immigrants were then used to pay for the state immigration infrastructure, including the provision of some temporary aid to new arrivals. Two years later, the state expanded the category of people for whom a bond was required. Still excluded were those "likely to become permanently a public charge" but also those "who have been paupers in any other country, or who from sickness or disease, existing at the time of departing from the foreign port, are or are likely to soon become a public charge." Act of Apr. 11, 1849, ch. 350, § 3, 1849 N.Y. Laws 504, 506. By 1851, the New York statute contained the language which would be included in both the 1882 and 1891 federal statutes. Gone was the reference to those "likely to become permanently a public charge," replaced by phrases referring to someone "unable to take care of himself or herself without becoming a public charge" and someone "likely to become a public charge." Act of July 11, 1851, ch. 523, § 4, 1851 N.Y. Laws 969, 971. In the event that a bond was unpaid, New York—and Massachusetts, which enacted a substantially similar law—ordered the exclusion of those immigrants deemed "likely to soon become a public charge." HIROTA, *supra*, at 71–72.

The bond system was held unconstitutional by the U.S. Supreme Court on the ground that that the power to tax incoming foreign passengers "has been confided to Congress by the Constitution." *Henderson v. Mayor of New York*, 92 U.S. 259, 274 (1876). The decision threw the state systems into uncertainty and created demand for federal legislation, largely to reenact the defunct state policies and to replace the lost funding. Since the states could no longer fund their immigration systems using state bonds, the 1882 federal statute levied "a duty of fifty

cents for each and every passenger not a citizen of the United States" arriving by sea; this was to "constitute a fund … to defray the expense of regulating immigration … and for the care of immigrants arriving in the United States, for the relief of such as are in distress." Act of Aug. 3, 1882, ch. 376, § 1, 22 Stat. 214, 214. The first federal statute therefore filled the space left by the now-ineffective state laws: it used funds raised from the immigrants or their carriers to provide some care for the newly arrived, while describing criteria for excluding those likely to financially burden state and local governments. Because the term "public charge" had been pulled directly from the state statutes, it presumably had the same meaning that it had come to have under the state laws: someone who depended, or would likely depend, on poor-relief programs.

But when the term "public charge" was imported into federal law, it was unclear how much state aid qualified someone as a "public charge." Neither state poor laws nor state immigration laws defined "public charge," and no clear definition emerged in judicial opinions or secondary sources, either. Early efforts to enforce the 1882 statute bear out the uncertainty surrounding the term. In 1884, an association of ten steamship companies asked the Secretary of the Treasury, on whom responsibility for immigration fell at the time, to "specifically define … the circumstances which shall constitute 'a person unable to take care of himself or herself without becoming a public charge,' and who shall not be permitted to land under … the [1882] act." SYNOPSIS OF THE DECISIONS OF THE TREASURY DEPARTMENT ON THE CONSTRUCTION OF THE TARIFF, NAVIGATION, AND OTHER LAWS FOR THE YEAR ENDED DECEMBER 31, 1884, at 365 (1885). (The steamship companies had a stake because they were on the hook for the noncitizen's return ticket if she was rejected as a likely public charge.) The

Secretary demurred, answering that "the determination of the liability of arriving immigrants to become public charges is vested … in the commissioners of immigration appointed by the State in which such immigrants arrive," and thus "this Department must decline to interfere in the matter." *Id.* One year later, Treasury continued to recognize that "difficulties have arisen in regard to the construction of so much of section 2 of [the 1882 act] … as refers to the landing of convicts, lunatics, idiots, or persons unable to take care of themselves without becoming a public charge," though it still refused to offer clarification. SYNOPSIS OF THE DECISIONS OF THE TREASURY DEPARTMENT ON THE CONSTRUCTION OF THE TARIFF, NAVIGATION, AND OTHER LAWS FOR THE YEAR ENDING DECEMBER 31, 1885, at 359 (1886).

The term was not necessarily clarified in 1891, when immigration-enforcement authority was placed directly in the hands of federal officials. (From 1882 until Congress enacted the Immigration Act of 1891, states had continued to administer immigration enforcement, albeit under authority conferred by the federal statute.) With the change in administration, the steamship companies continued to express confusion, informing Treasury officials that the phrase "was somewhat indefinite and [that they] desired to have a more specific explanation of its meaning." 1 LETTER FROM THE SECRETARY OF THE TREASURY, TRANSMITTING A REPORT OF THE COMMISSIONERS OF IMMIGRATION UPON THE CAUSES WHICH INCITE IMMIGRATION TO THE UNITED STATES 109 (1892). At this point, Treasury offered an answer, but it was hardly clarifying. Pressed by Congress to describe the standards used by officials to determine whether an immigrant was "likely to become a public charge," the Assistant Secretary in 1892 responded that "written instructions and an inflexible standard

would be inapplicable and impracticable … and the sound discretion of the inspection officer, subject to appeal as prescribed by law, must be the chief reliance." H.R. REP. NO. 52-2090, at 4 (1892).

Rather than conveying something narrow and definite, the term "public charge" seemed to refer in an imprecise way to someone who lacked self-sufficiency and therefore burdened taxpayers. Explanations of the term offered in a congressional hearing by John Weber, the first commissioner of immigration at Ellis Island, illustrate the point. He explained that "[t]he appearance of the man, his vocation, his willingness to work, his apparent industry, and the demand for the kind of work that he is ready to give, is what governs" whether an individual was likely to become a public charge. *Id.* at 359. When asked whether an immigrant would be considered likely to become a public charge if "it is necessary that a private charity shall furnish food and lodging … for a period long or short after landing," Weber responded that such a person would likely be considered a public charge, but that it would not violate the statute to allow him to land so long as it was obvious that he would be "supported on private charity only up to the time when [he got] employment, which may only be until the next day." *Id.* at 425.

The repeated requests for clarification from steamship operators and Congress, coupled with Treasury's reluctance to provide a concrete answer, indicate that the term did not have a definite and fixed meaning. That is unsurprising in the context of the time: it would have been difficult to have a one-size-fits-all definition of how much aid was too much, because there was not a one-size-fits-all system of welfare. Poor relief was largely handled by towns and counties, which

made their own choices about how to deliver aid. Most localities deployed "outdoor relief"—in-kind and cash support without institutionalization. *See* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 37 (1986) ("[P]oorhouses did not end public outdoor relief. With a few exceptions, most towns, cities, and counties helped more people outside of poorhouses than within them."). Other areas were more reliant on "indoor" relief in the form of poorhouses. *Id.* at 16–18. Some used a mixed system, adjusting the provision of indoor and outdoor relief as poorhouse populations ebbed and flowed. *Id.* at 39. And while the plaintiffs treat residence in a poorhouse as a proxy for primary and permanent dependence, that's not how poorhouses worked—they housed a mix of the permanently and temporarily dependent, serving as "both a short-term refuge for people in trouble and a home for the helpless and elderly." *Id.* at 90.

The bottom line is that in the closing decades of the nineteenth century, several different forms of public relief existed contiguously. And when nineteenth-century immigration officials determined whether someone was "likely to become a public charge," dependence on a particular kind or amount of relief does not appear to have been dispositive. Rather than serving as shorthand for a certain type or duration of aid, the term "public charge" referred to a lack of self-sufficiency that officials had broad discretion to estimate. Neither state legislatures nor Congress pinned down the term any more than that.

B.

The plaintiffs have a backup argument: even if the term was unsettled in the late nineteenth century, they claim that it

became settled in the twentieth. According to the plaintiffs, courts and administrative agencies repeatedly held that "public charge" meant one who is "primarily and permanently dependent" on the government, and Congress ratified this settled meaning in its many reenactments of the public charge provision. *See* WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION app. at 421 (2016) ("When Congress reenacts a statute, it incorporates settled interpretations of the reenacted statute."). Thus, the plaintiffs say, whatever uncertainty may have surrounded the term in 1882, there was no uncertainty when Congress reenacted the provision. And because Congress reenacted the provision many times—in 1891, 1907, 1917, 1952, 1990, and 1996—the plaintiffs canvass a century's worth of judicial and administrative precedent in an effort to show that a consensus existed before at least one of these reenactments.

The bar for establishing a settled interpretation is high: at the time of reenactment, the judicial consensus must have been "so broad and unquestioned that we must presume Congress knew of and endorsed it." *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 349 (2005). The plaintiffs rely heavily on *Gegiow v. Uhl*, 239 U.S. 3 (1915), to establish this consensus, but I share the majority's view that *Gegiow* doesn't do the work that the plaintiffs want it to. In that case, the Court did not define "public charge" other than to say that it cannot be defined with reference to labor conditions in the city in which an immigrant intends to settle. The Court concluded that immigrant arrivals "are to be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions unless the one phrase before us [public charge] is directed to different considerations than any other

of those with which it is associated." *Id.* at 10. In other words, classifying someone as a likely "public charge" does not depend on whether he is bound for Portland or St. Paul. The Court did not define the degree of reliance that renders someone a "public charge," because that was not the question before it. Thus, *Gegiow* neither binds us nor offers a definition that Congress could have ratified.[7]

Without *Gegiow*, the plaintiffs face an uphill battle because satisfying the requirements of the reenactment canon typically requires at least one Supreme Court decision. *See, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699 (1979). And for the reasons that the majority gives, this is not the rare case in which lower court and administrative decisions are enough to demonstrate a consensus. *See* Maj. Op. at 21–22; *see also* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 83 (1988) ("[T]he Court often will not incorporate lower court decisions into a statute through the reenactment rule."); *cf. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys.*

[7] It is worth noting that even after *Gegiow*, state and local governments took varied positions on what it meant for an immigrant to be a public charge. For instance, in the 1920s, Los Angeles worked closely with charitable institutions to report as public charges immigrants who were receiving outdoor relief. Cybelle Fox, The Boundaries of Social Citizenship: Race, Immigration and the American Welfare State, 1900–1950, at 266–67 (May 7, 2007) (unpublished Ph.D. dissertation, Harvard University). But other jurisdictions rarely reported immigrants who were receiving only outdoor relief—for example, as early as the 1920s, Cook County developed its own local policy to not "deport when the necessity for public care [was] only temporary." *Id.* at 278.

Project, Inc., 135 S. Ct. 2507, 2520 (2015) (applying the reenactment canon in light of "the *unanimous* holdings of the Courts of Appeals") (emphasis added).

In any event, the reenactment canon requires more than a judicial consensus—it applies only if Congress reenacted the provision without making material changes. *Jama*, 543 U.S. at 349; *see also Holder v. Martinez Gutierrez*, 566 U.S. 583, 593 (2012) ("[T]he doctrine of congressional ratification applies only when Congress reenacts a statute without relevant change."). Whatever one thinks of earlier changes to the public charge provision, there can be no doubt that the 1996 amendments were material.

The INA is notoriously complex, and these amendments are no exception. Making matters worse, the amendments came from two separate acts, themselves incredibly complex, that were passed a month apart: the Welfare Reform Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996), and the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (IIRIRA). But because the plaintiffs challenge the materiality of these amendments to the meaning of the term "public charge," it is necessary to step through them at a level of detail that is, unfortunately, excruciating.

Congress enacted IIRIRA, which made sweeping changes to the INA, in September of 1996. Among its changes were several material amendments to the public charge provision. For the first time in the provision's 114-year history, Congress required the Executive to consider an itemized list of factors in making the public charge determination, thereby ensuring that the inquiry was searching rather than superficial. *See* 8 U.S.C. § 1182(a)(4)(B)(i) (providing that "the consular officer

or the Attorney General shall at a minimum consider" the noncitizen's age; health; family status; assets, resources, and financial status; and education and skills). Even more significantly, it added a subsection to the public charge provision rendering most family-sponsored applicants automatically inadmissible on public charge grounds unless they obtained an enforceable affidavit of support from a sponsor (usually the family member petitioning for their admission). *Id.* § 1182(a)(4)(C) (rendering a family-sponsored noncitizen "inadmissible under this paragraph" unless the sponsor executes an "affidavit of support described in [8 U.S.C. § 1183a] with respect to such alien").[8] The affidavit provision had been inserted into the INA weeks earlier by the Welfare Reform Act. *See* Welfare Reform Act § 423. In addition to making the affidavit of support mandatory under the public charge provision, IIRIRA significantly expanded 8 U.S.C. § 1183a by spelling out what the affidavit of support requires.

The affidavit provision is meant to establish that the applicant "is not excludable as a public charge." 8 U.S.C. § 1183a(a)(1). To that end, it empowers the federal government, as well as state and local governments, to demand reimbursement from the sponsor for any means-tested public benefit received by the sponsored noncitizen.[9] *Id.* § 1183a(b)(1)(A). A "means-tested public benefit" is one

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[8] IIRIRA originally provided that a family-based applicant was "excludable" without the affidavit. IIRIRA § 531(a). A subsequent amendment to the INA changed the terminology from "excludable" to "inadmissible."

[9] It also requires the sponsor "to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line." 8 U.S.C. § 1183a(a)(1)(A).

available to those whose income falls below a certain level. The provision explicitly excludes certain benefits, regardless of whether they are means tested, from the sponsor's reimbursement obligation; by implication, receipt of every other means-tested benefit is included. *See id.* § 1183a note.[10] If the sponsor doesn't pay upon request, the government can sue the sponsor. *Id.* § 1183a(b)(2). If the sponsor doesn't keep "the Attorney General and the State in which the sponsored alien is currently a resident" apprised of any change in the sponsor's address, she is subject to a civil penalty—and that penalty is higher if she fails to update her address "with knowledge that the sponsored alien has received any means-tested public benefits" other than those described in three cross-referenced provisions of the Welfare Reform Act. *Id.* § 1183a(d).[11] The affidavit is generally enforceable for ten years or until the sponsored noncitizen is naturalized. *Id.* § 1183a(a)(2).[12]

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[10] I discuss these exemptions, which are narrow, in my analysis at *Chevron* step two.

[11] This list of exempted benefits in the change-of-address penalty section largely track those in the "benefits subject to reimbursement" section.

[12] IIRIRA contained another provision relevant to the "public charge" ground of inadmissibility: section 564 of the Act directed the Attorney General to establish a pilot program "to require aliens to post a bond in addition to the affidavit requirements under [8 U.S.C. § 1183a]." IIRIRA § 564(a)(1). The bond covered the cost of benefits described in the affidavit provision—that is, any means-tested benefit other than those described in three cross-referenced provisions of the Welfare Reform Act. *Id.* Congress instructed the Attorney General to set the bond at "an amount that is not less than the cost of providing [the relevant benefits] for the alien and the alien's dependents for 6 months." *Id.* § 564(b)(2). If an admitted noncitizen used a covered benefit, the government could bring suit either on the bond

Notwithstanding IIRIRA's obvious—and obviously significant—amendments to the public charge provision, the plaintiffs insist, and the majority agrees, that its amendments reveal nothing about the scope of the term "public charge." Yet as I will explain below, the 1996 amendments were not only material, but they also increased the bite of the public charge exclusion.

The plaintiffs characterize the affidavit provision as having nothing to do with admissibility; as they see it, the provision merely reinforces restrictions on government benefits for lawful permanent residents. They offer two basic arguments in support of that position: first, that the supporting-affidavit requirement appears in a different provision than does the public charge exclusion (8 U.S.C. § 1183a, as opposed to § 1182(a)(4)), and second, that the supporting-affidavit requirement doesn't apply to everyone who is subject to the public charge exclusion.

The first argument is totally unpersuasive. The public charge provision explicitly cross-references the affidavit provision, thereby tying the two together, and it makes obtaining an affidavit of support *a condition of admissibility*. *Id.* § 1182(a)(4)(C)(ii). What's more, the affidavit provision expressly states that the point of the affidavit is "to establish that an alien is not excludable as a public charge under section 1182(a)(4)." *Id.* § 1183a(a)(1). Because a family-sponsored applicant is inadmissible as a public charge without the affidavit, the coverage of the affidavit is very strong evidence of the

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or against the sponsor pursuant to 8 U.S.C. § 1183a. IIRIRA § 564(a)(2). Congress allowed this pilot program to sunset after three years. *Id.* § 564(e).

nature of the burden with which the public charge exclusion is concerned.[13]

The plaintiffs' second argument fails too. As an initial matter, the affidavit provision—which, it bears repeating, is tied by cross-reference to the public charge exclusion—uses the term "public charge," and we "do[] not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (explaining that as a general rule, "identical words used in different parts of the same act are intended to have the same meaning" (citation omitted)). The plaintiffs don't specify what different meaning the term "public charge" might have in the affidavit provision; they just vaguely assert that the provision is getting at something else. They presumably don't want to embrace the logical implication of their position: that the term "public charge" means something more stringent for family-based immigrants, who need to produce an affidavit, than it does for the others, who don't.

In any event, this argument assumes that if the affidavit were tied to the standard of admissibility, Congress would have required one from everyone subject to the exclusion. Its choice to require an affidavit only from family-based immigrants, the logic goes, means that the affidavit provision can't

[13] The same is true of IIRIRA's pilot bond program. The required bond protected the government against the risk that the noncitizen would become a public charge, so the scope of its coverage is a window into the meaning of the term at the time of the 1996 amendments.

shed any light on the admissibility provision, which is more generally applicable.

This argument is misguided. There is an obvious explanation for why Congress required supporting affidavits from family-based immigrants and not from employment-based immigrants or green card lottery winners: that is the only context in which it makes sense to demand this assurance. A connection to a citizen or lawful permanent resident is the basis for a family-based green card. 8 U.S.C. §§ 1151(b)(2), 1153(a). The same is not true for immigrants who obtain diversity or employment-based green cards, neither of which is based on a personal relationship—much less a relationship close enough that someone would be willing to take on ten years' worth of potentially significant liability. Moreover, in the context of an employment-based green card, a supporting affidavit would add little. The affidavit is a means of providing the Executive with assurance that the green card applicant will not become a public charge if admitted. The stringent criteria for an employment-based green card provide similar assurance. Employment-based green cards are reserved largely for those with "extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim"; "outstanding professors and researchers" who are "recognized internationally"; "multinational executives and managers"; those who hold advanced degrees and have job offers; and entrepreneurs prepared to invest a minimum of $1,000,000 in a venture that will benefit the United States economy and employ "not fewer than 10 United States citizens or [lawful permanent residents]." *Id.* § 1153(b)(1)–(5). Someone who meets these criteria is unlikely to have trouble supporting herself in the future. That said, if an employment-based applicant will

be working for a relative, and therefore has a family connection, the statute still requires her to obtain a supporting affidavit—demonstrating that the affidavit is not uniquely applicable to those applying for family-based green cards. *See id.* § 1182(a)(4)(D).

Despite the plaintiffs' effort to show otherwise, it doesn't make sense to treat the affidavit provision as an anomalous carve-out rather than compelling evidence of the scope of the public charge inquiry. In fact, trying to categorize the supporting affidavit as limited by virtue of its application to family-based immigrants is a sleight of hand, because, as the plaintiffs surely know, the family-based category is not simply one among several to which the public charge exclusion applies. As a practical matter, it is the category for which the exclusion matters most. The number of lottery winners is considerably smaller than the number of family-based immigrants, and employment-based immigrants—also a smaller category than the family based—have other means of demonstrating self-sufficiency.

In short, the 1996 amendments to the public charge provision—most notably, the addition of factors to guide the public charge determination and the insertion of the affidavit requirement—were material. What's more, the affidavit provision reflects Congress's view that the term "public charge" encompasses supplemental as well as primary dependence on public assistance. To establish that a family-based applicant is not excludable as a public charge, a sponsor must promise to pay for the noncitizen's use of any means-tested benefit outside the itemized exclusions. Without such an affidavit, the noncitizen is inadmissible. Congress's attempt to aggressively

protect the public fisc through the supporting-affidavit requirement is at odds with the view that it used the term "public charge" to refer exclusively to primary and permanent dependence.

C.

Switching gears, the plaintiffs—with the support of the House of Representatives, appearing as amicus curiae—advance a creative structural argument for why the term "public charge" must be interpreted narrowly: they say that interpreting the term to include the receipt of supplemental benefits is inconsistent with Congress's choice in the Welfare Reform Act to make such benefits available to lawful permanent residents. According to the plaintiffs, Congress would not have authorized lawful permanent residents to receive supplemental benefits if it did not expect them to use those benefits. And it is inconsistent with Congress's generosity to deny someone a green card because she is likely to take advantage of benefits for which Congress has made her eligible. The statutory scheme therefore forecloses the possibility of interpreting "public charge" to mean anything other than primary and permanent dependence.

There are several problems with this argument. To begin with, its logic would read the public charge provision out of the statute. The premise of the public charge inquiry has always been that immigrants in need of assistance would have access to it after their arrival—initially through state poor laws and later through modern state and federal welfare systems. Indeed, it is difficult to imagine how someone could become a public charge under any conception of the term if it were impossible to receive public aid. For example, on the plaintiffs' logic, DHS could not exclude an applicant even if it

predicted that the applicant would eventually become permanently reliant on government benefits, because the future use of those benefits would, after all, be authorized. Barring the Executive from considering a green card applicant's potential use of authorized benefits would render the statutory public charge exclusion a dead letter.

Moreover, the plaintiffs' position assumes that tension exists between the public charge exclusion and the availability of benefits to lawful permanent residents—and that this tension can be resolved only by limiting the scope of the exclusion. In fact, the public charge exclusion and the availability of benefits are easily reconcilable. Immigration law has long distinguished between one who becomes a public charge because of a condition preexisting her arrival and one who becomes a public charge because of something that has happened since. *See*, *e.g.*, *id.* § 1227(a)(5) ("Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable."); Act of Mar. 3, 1891, ch. 551, § 11, 26 Stat. 1084, 1086 ("[A]ny alien who becomes a public charge within one year after his arrival in the United States from causes existing prior to his landing therein shall be deemed to have come in violation of law and shall be returned as aforesaid."). Providing benefits to immigrants who have been here for a designated period of time—generally five years under current law—takes care of immigrants in the latter situation. Life contains the unexpected: for instance, a pandemic may strike, leaving illness, death, and job loss in its wake. A lawful permanent resident who falls on hard times can rely on public assistance to get back on her feet. Congress's willingness to authorize funds to help immigrants who encounter unex-

pected trouble is perfectly consistent with its reluctance to admit immigrants whose need for help is predictable upon arrival.

In any event, the plaintiffs' argument is inconsistent not only with the statutory exclusion, but also with the Welfare Reform Act. As the plaintiffs tell it, Congress has generously supported noncitizens, thereby implicitly instructing the Executive to ignore a green card applicant's potential usage of supplemental benefits in the admissibility determination. But that is a totally implausible description of the Welfare Reform Act. The stated purpose of the Act is to ensure that noncitizens "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 that "the availability of public benefits not constitute an incentive for immigration to the United States." 8 U.S.C. § 1601(2). To this end, the Act renders lawful permanent residents ineligible for most benefits until they have lived in the United States for at least five years. *Id.* § 1613(a). The Act's dramatic rollback of benefits for noncitizens sparked vociferous criticism. *See* Isabel Sawhill et al., *Problems and Issues for Reauthorization*, *in* WELFARE REFORM AND BEYOND: THE FUTURE OF THE SAFETY NET 20, 27 (Isabel Sawhill et al. eds., 2002) (referring to the five-year aid eligibility restriction as one of the Act's "most contentious features"). It blinks reality to describe the Welfare Reform Act as a "grant" of benefits, as the plaintiffs do, or to say that the Act

took an immigrant's potential use of supplemental benefits off the table for purposes of the admissibility determination.[14]

* * *

Given the length and complexity of my analysis of the plaintiffs' arguments at *Chevron* step one, a summary may be helpful. In my view, the plaintiffs can't show that the term "public charge" refers narrowly to someone who is primarily and permanently dependent on government assistance. The term "public charge" was broad when it entered federal immigration law in 1882, and it has not been pinned down since. IIRIRA, Congress's latest word on the public charge provision, cuts in the opposite direction of the plaintiffs' argument, as does the Welfare Reform Act, which, contrary to the plaintiffs' argument, hardly reflects a congressional desire that immigrants take advantage of available public assistance. In fact, the amendments that IIRIRA and the Welfare Reform Act together made to the INA reflect more than Congress's view that the term "public charge" is capacious enough to include supplemental dependence on public assistance. They reflect

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[14] As the plaintiffs point out, Congress softened some of these restrictions in subsequent legislation. Perhaps most notably, in 2002 Congress passed the Farm Security and Rural Investment Act, which made adults eligible for SNAP after 5 years of residency (it had previously been 10) and children eligible for SNAP immediately after becoming lawful permanent residents. Pub. L. No. 107-171, § 4401, 116 Stat. 134, 333 (2002) (codified as amended at 8 U.S.C. § 1612(a)(2)). Yet these minor adjustments, even if slightly more generous than the original restrictions, did not overhaul immigration policy—nor, as I have already explained, is it unreasonable in any event for the Executive to consider whether a green card applicant is likely to use benefits if she is permitted to stay. That's the point of the public charge determination.

its preference that the Executive consider even supplemental dependence in enforcing the public charge exclusion.

III.

While the term "public charge" is indeterminate enough to leave room for interpretation, DHS can prevail only if its definition is reasonable. The majority holds that DHS is likely to lose on the merits of that argument; I disagree. My dissent from the majority on this score is inevitable, given how differently we analyze the statute at *Chevron* step one. The majority seems to understand "public charge" to mean something only slightly broader than "primarily and permanently dependent," but I understand it to be a much more capacious term—not only as a matter of history, but also by virtue of the 1996 amendments to the public charge provision. On my reading, in contrast to the majority's, the statute gives DHS relatively wide discretion to specify the degree of benefit usage that renders someone a "public charge." Thus, the majority and I approach *Chevron* step two from different starting points.

The plaintiffs challenge the reasonableness of the rule's definition in two respects. First, they object to the particular benefits that DHS has chosen to designate in its definition of "public charge." According to the plaintiffs, DHS has unreasonably interpreted the statute insofar as the rule counts in-kind aid. Second, they argue that DHS has set the relevant benefit usage so low that the definition captures people who cannot reasonably be characterized as "public charges." I will address these arguments in turn.

A.

The plaintiffs don't contest DHS's authority to account for the receipt of state and federal cash assistance (like SSI and

TANF) in the definition of "public charge." But they insist that in-kind benefits (like SNAP, public housing, and Medicaid) are off-limits. Their argument in support of that position is difficult to grasp. In their brief, the plaintiffs vaguely assert that in-kind benefits shouldn't be counted because they are categorically different from cash payments; they imply that the term "public charge" does not encompass someone who relies on in-kind public assistance. At oral argument, the plaintiffs wisely abandoned that position. For one thing, they could not articulate why it mattered whether the government chose to give someone $500 for groceries or $500 worth of food. For another, that argument is inconsistent with history: everyone agrees that someone living permanently in a late nineteenth-century poorhouse qualified as a public charge, and shelter in a poorhouse is in-kind relief.

At least rhetorically, a great deal of the plaintiffs' argument involves their repeated emphasis on the fact that the 1999 Guidance directed officers "not [to] place any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance." 1999 Guidance, 64 Fed. Reg. at 28,689. The implication is that the 1999 Guidance reflects the only reasonable interpretation of the statute.

Of course, the fact that a prior administration interpreted a statute differently does not establish that the new interpretation is unreasonable—the premise of *Chevron* step two is that more than one reasonable interpretation of the statute exists. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to

engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."). Moreover, the focus on cash benefits in the 1999 Guidance flowed from the Immigration and Naturalization Service's decision to interpret "public charge" to mean "primarily dependent on the government for subsistence." 1999 Guidance, 64 Fed. Reg. at 28,692. As the Guidance explained, INS had decided "that the best evidence of whether an alien is primarily dependent on the government for subsistence is either (i) the receipt of public cash assistance for income maintenance, or (ii) institutionalization for long-term care at government expense." *Id.* DHS has now taken a different approach—it has decided that projected reliance on government benefits need not be primary to trigger the public charge exclusion. And once DHS made that baseline choice, a broader range of benefits became relevant. Thus, the plaintiffs' fundamental objection to the counting of benefits like Medicaid, housing, and SNAP—that they are supplemental—is really just a repackaging of their argument under *Chevron* step one.

The plaintiffs also advance a legislative-inaction argument: in 2013—twenty years after Congress enacted IIRIRA—the Senate Judiciary Committee, while debating the Border Security, Economic Opportunity, and Immigration Modernization Act, voted down a proposal to require applicants for lawful permanent resident status "to show they were not likely to qualify even for non-cash employment supports such as Medicaid, the SNAP program, or the Children's Health Insurance Program (CHIP)." S. REP. NO. 113-40, at 42 (2013). But the failure of this proposal is neither here nor there. As the Supreme Court has cautioned, "Congressional inaction lacks 'persuasive significance' because 'several equally tenable in-

ferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (citation omitted). This rejected proposal—which would have overridden the 1999 Guidance—is a case in point: the rejection is as consistent with the choice to leave the matter within the Executive's discretion as it is with the choice to force the Executive's hand. The plaintiffs' argument has other problems too. Why should the views of the 2013 Senate Judiciary Committee be attributed to Congress as a whole? *See Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in the judgment) ("Committee reports, floor speeches, and even colloquies between Congressmen, are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." (citation omitted)). And how could the unenacted views of the 2013 Congress settle the meaning of language chosen by a different Congress at a different time? *See United States v. Price*, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").

Thus, the plaintiffs are wrong to insist that DHS is barred from considering the receipt of a particular benefit simply because the benefit is in-kind rather than cash. There is no such bar. Rather, the list of designated benefits is reasonable if receiving them is consistent with the lack of self-sufficiency conveyed by the term "public charge."

Answering this question requires fleshing out what it means to lack self-sufficiency for purposes of the public charge exclusion. As the majority observes, no one is self-sufficient in an "absolutist" sense because everyone relies on

some nonmonetary government services—for example, public snow removal and emergency services. Maj. Op. at 13, 37. Importantly, the term "public charge" does not implicate self-sufficiency in this absolutist sense. Throughout its centuries-long history, "public charge" has always been associated with dependence on a particular category of government programs: those available based on financial need. In the nineteenth and early twentieth centuries, these were "poor relief" programs; now, they are the need-based programs of the modern welfare system. And what has always been implicit in the term "public charge" was made explicit by the 1996 amendments. The statutory exclusion requires the Executive to consider the noncitizen's age; health; family status; assets, resources, and financial status; and education and skills—factors plainly designed to determine whether a noncitizen will be able to support herself, not whether she will use generally available services like snow removal. In the same vein, the sponsor's reimbursement obligation covers only those benefits that are "means tested"—that is, available to those whose income falls below a certain threshold. As a matter of both history and text, a "public charge" lacks self-sufficiency in the sense that she lacks the financial resources to provide for herself.

The benefits designated in DHS's definition are all consistent with this concept of self-sufficiency. Recall that DHS has designated the following benefits: cash assistance for income maintenance (including SSI, TANF, and state cash assistance), SNAP, the Section 8 Housing Choice Voucher Program, Section 8 project-based rental assistance, housing benefits under Section 9, and Medicaid (with some explicit exceptions). 8 C.F.R. § 212.21. These benefits are all means tested;

they are also squarely within the Welfare Reform Act's definition of "public benefit." 8 U.S.C. §§ 1611(c), 1621(c) (defining "public benefit" to include welfare, food, health, and public-housing benefits funded by the federal, state, or local governments). It is consistent with the term "public charge" to consider the potential receipt of cash, food, housing, and healthcare benefits—all of which fulfill fundamental needs—in evaluating whether someone is likely to depend on public assistance to get by.

It is also worth noting some of the benefits that the rule does *not* include: significantly, the rule's definition accommodates the reimbursement limitations in the affidavit provision. Under the affidavit provision, the following benefits, even if means tested, are not subject to reimbursement: certain forms of emergency medical assistance; short-term, in-kind emergency disaster relief; school-lunch benefits; benefits under the Child Nutrition Act of 1966; public-health assistance for immunization, as well as treatment for the symptoms of communicable disease; certain foster-care and adoption payments; certain in-kind services such as soup kitchens and crisis counseling; student assistance for higher education; benefits under the Head Start Act; means-tested programs under the Elementary and Secondary Education Act of 1965; and certain job-training benefits. *Id.* § 1183a note.[15]

These exemptions under the affidavit provision are excluded from the rule too. The rule's definition provides "an

[15] By virtue of a notice issued by the Department of Housing and Urban Development, housing benefits are excluded from the reimbursement obligation. *See* 8 C.F.R. § 213a.1; Eligibility Restrictions on Noncitizens, 65 Fed. Reg. 49,994 (Aug. 16, 2000). But that exemption is not statutory, and here, I'm concerned only with DHS's interpretation of the statute.

exhaustive list of public benefits," Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,296, so any benefit not mentioned in the list is by implication excluded from the definition. And the list does not mention any of the benefits exempted in the affidavit provision of the statute. 8 C.F.R. § 212.21; *see also* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,312 (noting that the rule's "definition does not include benefits related exclusively to emergency response, immunization, education, or social services"); *id.* at 41,482 (explaining that the rule's definition "does not include emergency aid, emergency medical assistance, or disaster relief"); *id.* at 41,389 (excluding benefits under the National School Lunch Act, the Child Nutrition Act, and the Head Start Act). Indeed, to highlight just how carefully the rule tracks the statutory exemptions to the affidavit of support, consider the rule's exclusion of Medicaid for those under the age of 21 and pregnant women. *Id.* at 41,367. These benefits do not appear in the list of exemptions to the affidavit of support, but they are exempted from the sponsor's reimbursement obligations under a different statutory provision. 42 U.S.C. § 1396b(v)(4)(B). The rule captures that exclusion even though it appears elsewhere; in other words, DHS did not simply copy and paste the statutory note.

In sum, the designated benefits are not only consistent with the term "public charge," but they also fit neatly within the statutory structure. Considering the potential receipt of these benefits to gauge the likelihood that a noncitizen will become a public charge is therefore not an unreasonable interpretation of the statute.

B.

The closer question is whether DHS's benefit-usage threshold stretches the meaning of "public charge" beyond the breaking point. The rule defines "public charge" to mean a noncitizen who receives one or more of the designated benefits "for more than twelve months in the aggregate within any 36-month period." One month of one benefit counts toward the twelve. As a result, an applicant expected to live in Section 8 housing for a year would be denied admission as someone who is likely to become a public charge, as would an applicant who is expected to receive three months' worth of housing, TANF, Medicaid, and SNAP.

The plaintiffs have a legislative-inaction argument for this feature of the rule too. They point out that during the enactment of IIRIRA, the Senate Judiciary Committee, while negotiating the House-passed version of the bill, dropped language that "would have clarified the definition of 'public charge'" in the deportation provision to provide for deportation if a noncitizen "received Federal public benefits for an aggregate of 12 months over a period of 7 years." 142 Cong. Rec. S11,872, S11,882 (daily ed. Sept. 30, 1996) (statement of Sen. Kyl). Thus, they say, Congress has foreclosed the possibility that 12 months' worth of benefit usage renders someone a public charge. Whatever the statutory floor is, it must be higher than that.

I've already identified some of the problems with legislative-inaction arguments, so I won't belabor them here. It's worth noting, though, that this legislative-inaction argument is even worse than the plaintiffs' other. So far as the plaintiffs' citation reveals, the proposal dropped out of the statute in the course of committee negotiations, not by a vote, and there is

no explanation for why it did. *See Thompson*, 484 U.S. at 191 (Scalia, J., concurring in the judgment) ("An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed."). Moreover, the dropped proposal involved the public charge *deportation* provision, not the public charge *admissibility* provision. *See* 8 U.S.C. § 1227(a)(5). Drawing general conclusions from a committee's decision to drop this language in a context with much higher stakes is a particularly dubious proposition. Despite the plaintiffs' effort to demonstrate otherwise, the statute doesn't draw a bright line requiring something more than 12 months of benefit usage to meet the definition of "public charge."

At oral argument, DHS declined to identify any limit to its discretion, implying that it could define public charge to include someone who took any amount of benefits, no matter how small. It may have been grounding its theory in the affidavit provision, which triggers the sponsor's liability once the noncitizen receives "*any* means-tested public benefit" that falls within the sponsor's reimbursement obligation. *Id.* § 1183a(b)(1)(A) (emphasis added).

That may well overread the affidavit provision, which does not purport to define "public charge." Enforcement of the public charge exclusion has waxed and waned over time in response to economic conditions, immigration policy, and changes in the programs available to support the poor. The amendments made by IIRIRA and the Welfare Reform Act, including the affidavit provision, reflect Congress's interest in vigorous enforcement. Yet Congress left the centuries-old term in the statute, and that term has always been associated

with a lack of self-sufficiency. So that's the principle that governs here: if it's reasonable to describe someone who takes one or more of the designated benefits "for more than twelve months in the aggregate within any 36-month period" as lacking in self-sufficiency, then DHS's definition falls within the permissible range.

In deciding this question, it is wrong to focus exclusively on the durational requirement—duration must be viewed in the context of the benefits measured. Three features are particularly important in this regard: the designated benefits are means tested, satisfy basic necessities, and are major welfare grants. To see the importance of these features, consider how different the durational threshold would look without them—for example, if the rule measured the usage of benefits that are not means tested (e.g., public education), that are means tested but don't satisfy a basic necessity (e.g., Pell grants), or that satisfy a basic necessity but are not major welfare grants (e.g., need-based emergency food assistance). Relying on the government to provide a year's worth of a basic necessity (food, shelter, medicine, or cash assistance for income maintenance) implicates self-sufficiency in a way that funding a year of college with the help of a Pell grant does not.

The plaintiffs particularly object to the rule's stacking mechanism, which can reduce the durational requirement from 12 months to as little as 3 months. But here, too, the context matters: all of the designated benefits supply basic necessities, and the reduction is triggered in proportion to the degree of reliance on the government. The more supplemental the reliance, the longer it can go on before crossing the "public charge" threshold. The briefest durational threshold—three

months of benefit usage—meets the definition only when the recipient relies on the government for *all* basic necessities (food, shelter, medicine, and cash assistance for income maintenance). In other words, such short-term reliance only counts if it's virtually total. The rule measures self-sufficiency along a sliding scale rather than by time alone.

It is not unreasonable to describe someone who relies on the government to satisfy a basic necessity for a year, or multiple basic necessities for a period of months, as falling within the definition of a term that denotes a lack of self-sufficiency. To be sure, the rule reaches dependence that is supplemental and temporary rather than primary and permanent. But the definition of "public charge" is elastic enough to permit that. The rule's definition is exacting, and DHS could have exercised its discretion differently. The line that DHS chose to draw, however, does not exceed what the statutory term will bear.

IV.

This case involves more than the definition of "public charge." The plaintiffs raised a host of objections to the rule in their complaint, and the majority addresses some of them. It concludes that the plaintiffs are likely to succeed in their challenge to the factors that DHS uses to implement its definition (the list of factors includes health, family size, and English proficiency), as well as in their argument that the rule is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that the agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" (citation omitted)).

I wouldn't reach these issues. The district court didn't address them, and on appeal, the parties devoted their briefs almost entirely to the definition of "public charge." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *see also Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 111 (D.C. Cir. 2012) (remanding to the district court for arbitrary-and-capricious review when the district court resolved a case at *Chevron* step one without reaching the issue and when the agency's position was not well developed). And while it's generally prudent to refrain from deciding difficult issues without the benefit of arguments from the parties, the procedural posture of this case offers a particularly good reason to stop where the parties did. We are reviewing the issuance of the "extraordinary remedy" of a preliminary injunction. *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017). Based on the record developed thus far, the plaintiffs have not shown that they are entitled to this extraordinary remedy. I would remand so that the district court can assess whether the plaintiffs' remaining challenges to the rule are likely to succeed.

* * *

The many critics of the "public charge" definition characterize it as too harsh. But the same can be said—and has been said—of IIRIRA and the Welfare Reform Act. The latter dramatically rolled back the availability of aid to noncitizens, and both statutes linked those cuts to the public charge provision by making the affidavit of support a condition of admissibility. The definition in the 1999 Guidance tried to blunt the force of these changes; now, DHS has chosen to exercise the leeway

that Congress gave it. At bottom, the plaintiffs' objections reflect disagreement with this policy choice and even the statutory exclusion itself. Litigation is not the vehicle for resolving policy disputes. Because I think that DHS's definition is a reasonable interpretation of the statutory term "public charge," I respectfully dissent.

APPENDIX I

No. 20-3150

In the United States Court of Appeals for the Seventh Circuit

COOK COUNTY, ILLINOIS, AND ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS,
Plaintiffs-Appellees,

v.

CHAD F. WOLF, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

MOTION TO RECALL THE MANDATE TO PERMIT INTERVENTION AS APPELLANT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

No. 20-3150

COOK COUNTY, ILLINOIS, and Illinois Coalition for Immigrant and Refugee Rights,

Plaintiffs-Appellees,

v.

CHAD F. WOLF, ET AL.,

Defendants-Appellants.

Pursuant to Circuit Rule 26.1, I represent that the following parties seek to leave to intervene, and that the following attorneys represent, have represented, or expected to represent the State in this matter.

Intervenors:
State of Texas
State of Alabama
State of Arizona
State of Arkansas
State of Indiana
State of Kansas
State of Kentucky
State of Louisiana
State of Mississippi
State of Montana
State of Ohio
State of Oklahoma
State of South Carolina
State of West Virginia

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INTRODUCTION

The States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia seek to intervene in this case to defend a duly promulgated rule interpreting the Immigration and Nationality Act's prohibition against immigration by those who would become a public charge (the "Rule"). Two days ago, the named defendants, who are agents or agencies of the United States, filed a stipulated motion to dismiss this appeal. The Court granted that stipulated motion and immediately issued its mandate without offering affected parties, including the States, an opportunity to seek to defend the Rule.

The Rule directly implicates the States' obligations in providing Medicaid and other social services to indigent and low-income individuals. Moreover, the States, especially the border States, have strong interests in enforcing the Rule, which properly interpreted and implemented Congress's long-held policy of immigrant self-sufficiency. This request is timely: until two days ago, the United States and associated federal defendants defended the Rule's legality.

Because the Court issued its mandate within hours of the United States' announcement that it would no longer defend the Rule, interested parties had no ability to intervene before it did so. And because the United States did not inform the States that it intended to cease defending the Rule before abandoning numerous cases supporting the Rule nationwide, the States did not have an opportunity to intervene at an earlier point. The Court should not allow the federal government to use litigation stipulations to evade the Administrative Procedure Act's strictures on modifying

rules a new Administration finds uncongenial without at least allowing interested parties the opportunity to defend the case.

BACKGROUND

Since the late Nineteenth Century, Congress has prohibited immigration by individuals who are likely to become a "public charge." Immigrant Fund Act, Act of Aug. 3, 1882, ch. 376, §§ 1-2, 22 Stat. 214. Congress has not defined that term, stating only that the Executive "shall at a minimum consider the alien's (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; (V) education and skills." 8 U.S.C. § 1182(a)(4)(B)(i).

In 1999, the Clinton Administration recognized that the definition of "public charge" was ambiguous and proposed a rule that would have defined "public charge" to include any alien:

> who is likely to become *primarily dependent* on the Government for subsistence as demonstrated by either: (i) [t]he receipt of *public cash assistance* for income maintenance purposes, or (ii) [i]nstitutionalization for long-term care at Government expense.

64 Fed. Reg. 28,676, 28,681 (1999) (emphases added). At the same time, it issued an informal guidance document that would apply the proposed definition pending the issuance of a final rule. 64 Fed. Reg. 28,689 (1999). That rulemaking process was never completed, leaving the 1999 informal guidance in place. 84 Fed. Reg. at 41,292, 41,348 n.295 (2019).

In 2018, the Trump Administration proposed, and in 2019 promulgated, a new rule that defined "public charge" in a way that accounted for a broader range of government benefits. The Rule now considers not just cash aid for purposes of

discovering whether an immigrant is likely to become a public charge, but also valuable non-cash benefits such as Medicaid, food stamps, and federal housing assistance. *Id.* at 41,501. Officials now look at the totality of an alien's circumstances to determine whether that alien is likely to "receive[] one or more" of the specified public benefits "for more than 12 months in the aggregate within any 36-month period." *Id.*; *id.* at 41,369. These circumstances include an alien's age, financial resources, family size, education, and health, *id.* at 41,501-04.

This case is one of several related challenges to the Rule. Plaintiffs are a County and the Illinois Coalition for Immigrant and Refugee Rights, a non-profit organization providing benefits for aliens. They brought this action challenging the Rule under the Administrative Procedure Act and sought a preliminary injunction. *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1013-14 (N.D. Ill. 2019). Purporting to apply *Gegiow v. Uhl*, 239 U.S. 3 (1915), the district court concluded that the term "'public charge' encompasses only persons who—like 'idiots' or persons with 'a mental or physical defect of a nature to affect their ability to make a living'—would be substantially, if not entirely, dependent on government assistance on a long-term basis." *Id.* at 1023. Because the Rule extends beyond that narrow definition to cover individuals who depend on supplemental, often non-cash benefits, the district court held the rule invalid. Thus, the district court issued a preliminary injunction blocking the Defendants from enforcing the rule across the State of Illinois. *Id.* at 1030.

The Defendants immediately appealed and moved to stay the preliminary injunction. This Court denied the stay, but the Supreme Court ultimately granted one.

Cook County v. Wolf, 962 F.3d 208, 217 (7th Cir. 2020); *Wolf v. Cook County,* 140 S. Ct. 681 (2020).

This Court then considered the Defendants' appeal. A divided panel affirmed the district court's preliminary injunction. *Cook County*, 962 F.3d at 324. The Supreme Court's stay remained in place, and the Defendants filed a petition for a writ of certiorari. *Mayorkas v. Cook County*, No. 20-450 (U.S. Oct 7, 2020). That petition remained pending while the Supreme Court granted certiorari in another case about the validity of DHS's Rule. *See Department of Homeland Security v. New York*, No. 20-449, 2021 WL 666376 (U.S. Feb. 22, 2021).

Meanwhile, litigation in this case continued in the district court. The Plaintiffs moved for partial summary judgment on their APA claims. *See Cook County v. Wolf*, No. 1:19-cv-06334, ECF 222 at 2. The district court granted the motion, vacated the Rule, and entered a partial final judgment under Rule 54(b). *Id.* at 14. Unlike the district court's preliminary injunction, the vacatur was explicitly "not limited to the State of Illinois." *Id.* at 8. In other words, the district court's ruling applied nationwide. The Defendants appealed that ruling to this Court and had been litigating that appeal for over three months.

Following the change in the Administration, the United States decided not to defend the Rule. On March 9, 2021, the Defendants filed nearly simultaneous motions to dismiss all cases challenging the Rule. *See, e.g.*, ECF 23 at 1 (this court). This Court granted that motion. ECF 24-1 at 1. It also issued its mandate immediately and without allowing any potentially interested parties to seek leave to intervene and

defend the rule. ECF 24-2 at 2. As a result, the public charge rule will become (absent intervention and a stay) unenforceable in any State.

Because the Defendants will no longer defend a rule directly implicating the States' interests, the States now move this Court to recall its mandate, to reconsider its dismissal, and for leave to intervene in defense of the Rule.

I. The Court Should Recall the Mandate.

The Court should recall the mandate and has the "inherent power" to do so. *Calderon v. Thompson*, 523 U.S. 538, 549 (1998); *see also United States v. Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997) ("Our authority to recall our own mandate is clear."). Recalling the mandate is appropriate in "extraordinary circumstances" and to prevent injustice. *Calderon*, 523 U.S. at 550.

As described below, extraordinary circumstances justify recalling the mandate where State Intervenors were presented no opportunity to preserve their interests in this litigation. Until March 9, State Intervenors' interests were represented by the United States. The United States did not inform the State Intervenors that it intended to withdraw its defense of the Rule, depriving the States of an opportunity to seek leave to intervene prior to its seeking dismissal of this appeal. Likewise, the Court's immediate issuance of the mandate following the motion to dismiss prevented the States from seeking leave to intervene prior to dismissal once the intentions of the United States not to defend the Rule became public.

The harms to State Intervenors—who include multiple border States—from allowing the district court's order vacating the Rule nationwide to take effect are

severe and will hamper state officials' ability to act in a period of great budgetary uncertainty. The mandate should be recalled.

II. The Court Should Stay the Mandate Pending Resolution of Any Petition for a Writ of Certiorari.

Once recalled, the Court should stay further issuance of the mandate until Intervenors have been able to seek review of the district court's order in this Court and, if necessary, on a petition for certiorari.

A motion to stay the mandate pending the filing of a petition for writ of certiorari "must show that the petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). Under this standard, there must be (1) "a reasonable probability that four members of the [Supreme] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari," (2) "a significant possibility of reversal of the lower court's decision," and (3) "a likelihood that irreparable harm will result if that decision is not stayed." *Baldwin v. Maggio*, 715 F.2d 152, 153 (5th Cir. 1983). This case easily meets that standard.

A. The Supreme Court is likely to grant certiorari.

The Supreme Court is not only likely to grant certiorari—it had already done so. *Dep't of Homeland Sec.*, 2021 WL 666376, at *1. Moreover, the Supreme Court has identified several considerations governing its exercise of discretion in granting certiorari: conflict with another circuit's decision on an important matter, the decision of an important federal question in a way that conflicts with Supreme Court decisions, and the decision of an important question of federal law that has not been but

should be settled by the Supreme Court. Sup. Ct. R. 10. This case meets each criterion.

1. At the time the Administration decided to abandon the Rule, there was a well-defined split among federal courts over the rule's legality. Over the dissent of then-Judge Barrett, this Court had concluded it was likely to be held improper. *Wolf*, 962 F.3d at 228. The Second Circuit had similarly found the rule to exceed the scope of DHS's delegated power. *New York v. U.S. Dep't of Homeland Security*, 969 F.3d 42, 74-75 (2d Cir. 2020).

By contrast, a panel of the Fourth Circuit, reversed a preliminary injunction against enforcement of the Rule based on the conclusion that "[t]he DHS Rule . . . comports with the best reading of the INA." *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 250, *vacated for rehearing en banc*, 981 F.3d 311 (4th Cir. 2020) (dismissed Mar. 11, 2021). Indeed, the Fourth Circuit went so far as to say that "[t]o invalidate the Rule would . . . entail the disregard of the plain text of a duly enacted statute," and would "visit palpable harm upon the Constitution's structure and the circumscribed function of the federal courts that document prescribes." *Id.* at 229. Similarly, in entering a stay pending appeal of preliminary injunctions against the Rule, the Ninth Circuit issued a lengthy published opinion concluding that "[t]he Final Rule's definition of 'public charge' is consistent with the relevant statutes, and DHS's action was not arbitrary or capricious." *City & County of San Francisco v. USCIS*, 944 F.3d 773, 790 (9th Cir. 2019).

2. This question is vitally important. Decisions about whether and under what conditions to admit immigrants implicate a "fundamental sovereign attribute

exercised by the Government's political departments." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). As the Second Circuit noted, making these decisions correctly is essential "[b]ecause there is no apparent means by which DHS could revisit adjustment determinations" once made. 969 F.3d at 86-87.

Congress explicitly directed the Executive Branch to deny admission or adjustment of status to aliens who, "in the opinion of the [Secretary of Homeland Security]," are "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The Rule provides key guidance in doing so, issuing formal, objective standards by which that determination will be made. The propriety of the Rule is a question of national importance which the Supreme Court has already once determined merits its attention. *Dep't of Homeland Sec.*, 2021 WL 666376, at *1.

B. There is a significant possibility of reversal.

State Intervenors are likely to prevail on the merits following a petition for certiorari because the Rule is lawful. For more than a century, it has been "the immigration policy of the United States that . . . (A) aliens within the Nation's borders not depend on public resources to meet their needs, . . . and (B) the availability of public benefits not constitute an incentive for immigration to the United States," 8 U.S.C. § 1601(2). That long-held policy formed the basis of the public-charge rule. Congress never defined the term "public charge," but "[t]he ordinary meaning of 'public charge' . . . was 'one who produces a money charge upon, or an expense to, the public for support and care.'" *CASA de Maryland*, 971 F.3d at 242 (quoting BLACK'S LAW DICTIONARY 295 (4th ed. 1951)). The Rule reflects that ordinary meaning by defining as public charges those individuals who rely on individual

benefits for a prolonged period, or multiple benefits for a shorter period of time. 84 Fed. Reg. at 41,501; *id.* at 41,294-95.

That the Rule represents the best—or, at least, a reasonable—reading of the public-charge provision of the INA is confirmed by reading that provision within its larger statutory context. *See CASA de Maryland*, 971 F.3d at 243-44. For example, Congress required that an alien seeking admission or adjustment of status to submit "affidavit[s] of support" from sponsors. *See* 8 U.S.C. § 1182(a)(4)(C)-(D). Those sponsors must, in turn, agree "to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line." *Id.* § 1183a(a)(1)(A). Congress reinforced this requirement for self-sufficiency by allowing federal and state governments to seek reimbursement from the sponsor for "any means-tested public benefit" the government provides to the alien during the period the support obligation remains in effect, *Id.* § 1183a(a)(1)(B). That provision is not limited to cash support. Aliens who fail to obtain the required affidavit are treated by operation of law as inadmissible on the public-charge ground, regardless of individual circumstances. *Id.* § 1182(a)(4).

Taken together, these provisions of the INA demonstrate that Congress did not mandate the narrow reading of "public charge" insisted on by the district court. Instead, "[t]his sponsor-and-affidavit scheme" shows "that the public charge provision is naturally read as extending beyond only those who may become 'primarily dependent' on public support." *CASA de Maryland*, 971 F.3d at 243; *see also Cook County*, 962 F.3d at 246 (Barrett, J., dissenting) ("[T]he affidavit provision reflects

Congress's view that the term 'public charge' encompasses supplemental as well as primary dependence on public assistance.").

Further, the larger statutory context demonstrates why the Executive Branch could—and indeed should—take non-cash benefits into account in making public-charge determinations. The current public-charge provision was adopted in 1996. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. V, § 531, 110 Stat. 3009-674. In contemporaneous legislation, Congress stressed the government's "compelling" interest in ensuring "that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601(5); *see also id.* § 1601(4) (emphasizing the government's strong interest in "assuring that individual aliens not burden the public benefits system"). Congress equated a lack of "self-sufficiency" with the receipt of "public benefits" by aliens, *id.* § 1601(3), which it defined broadly to include any "welfare, health, disability, public or assisted housing . . . or *any other similar benefit*," *id.* § 1611(c)(1)(B) (emphasis added). That is, Congress adopted a broad, plain meaning of the statutory phrase "public charge" as one who receives public benefits, and Congress's statutory policy of ensuring that aliens do "not burden the public benefits system" programs to be "an incentive for immigration to the United States." *Id.* § 1601(2)(B), (4).

Given these statutory provisions, the Supreme Court is likely to agree with the Fourth Circuit's panel decision and the Ninth Circuit's stay decision: The Rule "easily" qualifies as a "permissible construction of the INA." *City & County of San Francisco*, 944 F.3d at 799; *see CASA de Maryland*, 971 F.3d at 251 (holding that the Rule is "unquestionably lawful"). In applying *Chevron*, the Supreme Court has

repeatedly emphasized that the federal courts "may not substitute [their] judgment for that of the [Executive], but instead must confine [themselves] to ensuring that he remained "'within the bounds of reasoned decisionmaking.'" *Dep't of Com. v. New York,* 139 S. Ct. 2551, 2569 (2019) (citation omitted) (quoting *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983)). Administrative rules passed regarding immigration are given particular deference because "Congress has expressly and specifically delegated power to the executive in an area that overlaps with the executive's traditional constitutional function." *CASA de Maryland*, 971 F.3d at 251 & n.6; (citing *United States v. Curtiss-Wright Export* Corp., 299 U.S. 304, 319-320 (1936)). The public-charge Rule easily passes muster.

To be clear, State Intervenors do not maintain that the Executive may not *change* the definition of "public charge." But the requirements of APA rulemaking apply with equal force whether the Executive is *creating* a rule or *modifying* it. *E.g.*, *Dep't of Comm,* 139 S. Ct. at 2569-71 Because the public-charge Rule was made through formal notice-and-comment procedures, it can only be unmade the same way. *Cf. Motor Vehicle Mfr's Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S 29, 41, 46-47 (1983). As part of that process, State Intervenors would have had the right to submit input and to protect their interests before the agency. 5 U.S.C. § 553(c). If unsatisfied with the ultimate result, they would have been permitted to challenge whether the Executive "articulated 'a satisfactory explanation' for [its] decision, 'including a rational connection between the facts found and the choice made." *Dep't of Comm.*, 139 S. Ct. at 2569 (quoting *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43). The Administration improperly seeks to short-circuit that process by using early court decisions to "set

aside" the Rule under 5 U.S.C. § 706(2). Accordingly, State Intervenors are likely to prevail in showing that the order under review was improper.

C. There is a likelihood of irreparable harm absent a stay.

Allowing the mandate to issue and permitting the district court to vacate the rule will cause State Intervenors irreparable harm. As an initial matter, a State suffers an "institutional injury" from the "inversion of . . . federalism principles." *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016); *see Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App'x 389, 399 (5th Cir. 2013) (per curiam) (finding that a State suffers irreparable harm when an injunction "would frustrate the State's program"). The district court's judgment reverses a formal rulemaking process upon which States have relied in setting law enforcement and budgetary policies, without allowing them input into the process or the time to adjust that normally follows from a formal rescission process. And it interferes with traditional state prerogatives for the reasons described in the accompanying motion to intervene.

As the Court is undoubtedly aware, this is a time of considerable financial strain on all States, given the unprecedented COVID-19 pandemic and associated economic downturn. Immigration can be a driver of cultural and economic growth. But as Congress has recognized for over a century, it can also significantly strain the public fisc. 8 U.S.C. § 1601(1) ("Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes."). By definition, the individuals whose receipt of benefits depends on the definition of "public charge" are among the poorest in our society. Because such benefits can never be

recouped, State Intervenors will be irreparably harmed if the Rule cannot be enforced while its legality is resolved here and elsewhere.

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Conclusion

The Court should recall and stay issuance of the mandate, reconsider its dismissal of the appeal, and permit the States to intervene as Defendant-Appellants.

Respectfully submitted.

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On March 11, 2021, counsel for the State of Texas conferred with counsel for plaintiffs and for the United States, who advised that they are opposed to this motion.

/s/ Judd E. Stone II
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CERTIFICATE OF SERVICE

On March 11, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,348 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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No. 20-3150

In the United States Court of Appeals for the Seventh Circuit

COOK COUNTY, ILLINOIS AND ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS,
Plaintiff-Appellees,

v.

CHAD WOLF, ET AL.,
Defendant-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

OPPOSED MOTION TO RECONSIDER, OR IN THE ALTERNATIVE TO REHEAR, THE MOTION TO DISMISS

The States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia respectfully ask this Court to reconsider its order dismissing this appeal so that they may intervene as Defendants-Appellants to challenge the district court's order. The district court vacated a final Rule interpreting the Immigration and Nationality Act's prohibition against immigration by those would become a public charge—the public charge rule ("Rule"). Until two days ago, the federal defendants, agents or agencies of the United States (collectively the "United States"), defended this Rule in multiple courts, including the United States Supreme Court.

Two days ago, the named defendants changed tack. Abandoning its typical practice of asking courts to abey appeals of actions it no longer supports while it formally reverses those actions, the federal defendants filed stipulated motions to dismiss numerous appeals defending the Rule across the country, including in this case. Following it normal practice, this Court granted that motion and immediately issued its mandate. Seventh Cir. R. 41.

Under these circumstances, this Court should have rejected that stipulation. The nationwide injunction implicates the interests of countless parties who, until the stipulation was filed, had no notice that they needed to intervene in order to protect those interests. Indeed, the federal defendants here did not notify the States that they intended to withdraw support of the Rule prior to these stipulations becoming common knowledge. Allowing Federal Rule of Appellate Procedure 42(a) to be used in this fashion permits the federal government effectively to rescind rules by litigation rather than through the Administrative Procedure Act's requirements, vitiating numerous procedural protections for adversely impacted parties.

This novel practice will not end here. If permitted to stand, the federal government's repeal-by-stipulation will simultaneously stifle public participation in major policy initiatives at the federal level, encourage ever-more-complex procedural gamesmanship, and will encourage even potentially impacted parties to intervene aggressively into cases to prevent this tactic's future use. The Court should not countenance these results and should reconsider its dismissal.

BACKGROUND

The background of this case is explored in the accompanying motions to withdraw the mandate and to intervene. To avoid burdening the Court, State Intervenors point supply only a truncated background here.

Since the late Nineteenth Century, Congress has prohibited immigration by individuals who are likely to become a "public charge." Immigrant Fund Act, 47th Cong. ch. 376, §§ 1-2, 22 Stat. 214 (1882). Congress has never attempted to define that term, providing only a list of factors that the Executive is to consider. 8 U.S.C. § 1182(a)(4)(B).

In 2018, following an extensive notice-and-comment period, the Trump Administration finalized the first formal rule defining "public charge." This Rule required federal officials to look at non-cash public assistance as well as cash public assistance when determining whether an alien is likely to be a public charge, and therefore inadmissible. Inadmissibility on Public Charge Grounds 84 Fed. Reg. 41,292 (Aug. 14, 2019). Various States, municipalities, and private interest groups immediately filed suit to challenge this Rule in courts across the country. These cases led sometimes overlapping, and sometimes conflicting, orders and injunctions, which are fully described in the federal government's petition for certiorari out of a companion case regarding the Rule in the Second Circuit. Petition for a Writ of Certiorari, *Department of Homeland Security v. New York*, No. 20-449 (U.S. Feb. 22, 2021) (U.S. Oct. 7, 2020).

In November of last year, the district court issued a partial final judgment that vacated the public-charge rule nationwide, Mem. Op. At 14, *Cook County v. Wolf*,

No. 1:19-cv-06334 (N.D. Ill. 2, 2020) (ECF No. 222), which the United States appealed. After a variety of opinions issued by four courts of appeals (including this one), the United States successfully petitioned the U.S. Supreme Court to take up the question of the validity of the public-charge rule. *Dep't of Homeland Sec. v. New York*, No. 20-449, 2021 WL 666376 (U.S. Feb. 22, 2021).

On March 9, 2021, the United States revealed that it no longer intended to defend the Rule, filing nearly simultaneous motions to dismiss litigation pending in the Supreme Court, this Court, and the Fourth Circuit. This Court immediately granted that motion under Federal Rule of Appellate Procedure 42, without offering the opportunity for other parties whose interests would be affected by the nationwide injunction to intervene to defend those interests.

ARGUMENT

The Court should reconsider its ruling on the Motion to Dismiss under Federal Rule of Appellate Procedure 42(b).[1] Motions for reconsideration are appropriate where, through no fault of the movant, a court has committed an error of fact or law in deciding on a motion. *Cf. Lightspeed Media Corp. v. Smith*, 830 F.3d 500, 505-506 (7th Cir. 2016) (collecting cases); *Keene Corp. v. Int'l Fid. Ins. Co.*, 561 F. Supp. 656, 656 (N.D. Ill. 1982) (mem. op.), *aff'd*, 736 F.2d 388 (7th Cir.1984) ("Motions for reconsideration serve a limited function; to correct manifest errors of law or fact or

[1] To the extent that the Court determines that this motion should have been brought as a petition for rehearing, State Intervenors request the Court to construe it as such. The standards for relief are similar, and such rehearing would be appropriate for the same reasons. *See* Fed. R. App. P. 40(a)(2).

to present newly discovered evidence."). State Intervenors respectfully suggest that the Court made such an error here by allowing the parties—who are now aligned—to voluntarily dismiss an appeal of a ruling vacating a final Rule without allowing nonparties whose interests are affected by the Rule the opportunity to intervene to protect those interests.

Federal Rule of Appellate Procedure 42 is an inappropriate mechanism to seek dismissal of an appeal of a nationwide injunction affecting numerous non-parties—particularly when accompanied by the immediate issuance of the court's mandate. Rule 42(b) allows the "circuit clerk [to] dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due." This rule typically serves a salutary purpose in that it allows appeals where there is no longer a controversy to dismiss the case rather than incur additional costs. "Normally such stipulations are accepted and the appeal dismissed." *Alvarado v. Corp. Cleaning Servs., Inc.*, 782 F.3d 365, 372 (7th Cir. 2015). This Court has, however, stated that it will "decline to do so if necessary to avoid an injustice, and especially to 'protect the rights of anyone who did not consent to the dismissal.'" *Id.* (quoting *Safeco Ins. Co. of Am. v. Am. Int'l Grp., Inc.,* 710 F.3d 754, 755 (7th Cir.2013)).

Though the nominal parties to this appeal approved the dismissal, the injunction that has now become final affects numerous parties who have not had the opportunity either to consent or deny their consent to the dismissal. Indeed, many States whose interests are directly implicated were not so much as notified about the federal government's intentions before it acted to dismiss these cases. This Rule was

promulgated following a notice-and-comment period that lasted nearly a year. 84 Fed. Reg. at 41,501 (Aug. 2019); Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (Oct. 10, 2018). The final Rule balanced a multitude of concerns and addressed numerous comments, and the federal government, as it typically does, was charged with defending that rule against the litigation that inevitably followed. And though the district court ordered the rule vacated in November of last year, Mem. Op. at 14, *supra* (ECF No. 222), the United States nonetheless continued to fulfill its duties until it filed the motion of March 9, 2021.

The Court should not allow parties to voluntarily dismiss an appeal under these circumstances. Ordinarily, a Rule adopted through notice-and-comment rulemaking can only be rescinded through notice-and-comment rulemaking. *Cf. Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S 29, 36-37, 41 (1983). As part of that process, parties whose interests would be negatively impacted by the rescission of the Rule would have had the right to submit input, 5 U.S.C. § 503, and ultimately to challenge the final outcome in court, *Dep't of Com. v. New York,* 139 S. Ct. 2551, 2569-70 (2019). But this Administration has effectively rescinded the public-charge rule by agreeing to dismiss the case with an adversary in name only under Rule 42(b). That is not what voluntary dismissal under Rule 42(b) was designed to do.

To permit Rule 42(b) to be used as a route around the Administrative Procedure Act would lead to severe adverse consequences. Because rulemaking rarely satisfies everyone, APA challenges are both commonplace and often complex, potentially involving numerous issues and parties. In the early stages of this case, it was

not clear that parties who were aligned with the United States could have become involved. In particular, during preliminary proceedings, the district court only "enjoined [DHS] from implementing the Rule in the State of Illinois." *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1014 (N.D. Ill. 2019) (mem. op.), *aff'd on other grounds sub nom. Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020). Like all Americans, Intervenor States have an interest in uniform application of our immigration laws. It initially appeared, however, that the United States planned to defend those interests. Now, though vacatur of the Rule would impose direct costs on the States in the form of increased benefit payments to otherwise ineligible immigrants, *see generally* Mot. to Intervene, the States cannot vindicate their interests absent this Court's action because the United States has agreed to dismiss the appeal and allow the district court's order to become final.

If the Court permits Rule 42 to be used to dismiss a case in circumstances like this, nonparties like State Intervenors will be forced to intervene at the first sign of litigation that may affect their interests. Indeed, it would paradoxically require States to more hastily intervene when the federal government already *supports* their interests precisely to avoid the sudden switch-and-dismissal performed here. That is precisely the opposite of what the federal rules are intended to work—namely "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

Conclusion

The Court reconsider the motion to dismiss to allow State Intervenors to intervene and prosecute this appeal as Defendant-Appellants.

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

On March 11, 2021, counsel for the State of Texas conferred with counsel for plaintiffs and for the United States, who advised that they are opposed to this motion.

/s/ Judd E. Stone II
JUDD E. STONE II

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No. 20-3150

In the United States Court of Appeals for the Seventh Circuit

COOK COUNTY, ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS,

Plaintiffs-Appellees,

v.

CHAD F. WOLFE, *ET AL.*

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

OPPOSED MOTION TO INTERVENE AS DEFENDANT-APPELLANTS

The States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia move under Federal Rule of Appellate Procedure 27 to intervene as a Defendant-Appellants to challenge the district court's order, which applies nationwide, vacating a rule interpreting the Immigration and Nationality Act's prohibition against immigration by those who would become a public charge ("Rule"). Two days ago, Defendants, who are agents or agencies of the United States (collectively, the "United States"), filed a stipulated motion to dismiss this appeal. The Court granted that stipulated motion and immediately issued its mandate without offering affected parties an opportunity to seek to defend the Rule. Because the Rule at issue

directly implicates the States' obligations in providing Medicaid and other services, they seek leave to defend the suit.

The States timely seek to intervene. Until two days ago, the United States defended the Rule, so that the States' intervention prior to that point would have unnecessarily complicated this suit. But now that the federal government has abandoned that defense—and, by extension, has evaded the Administrative Procedure Act's strictures for modifying a rule it no longer finds genial—no one is left to represent the States' interests in defending the Rule.

Counsel for Texas contacted counsel for all parties regarding this motion. Counsel for Plaintiffs indicated that they opposed this motion. Counsel for the federal governmental agents and agencies likewise indicated that they opposed this motion.

BACKGROUND

This immigration case concerns the hotly contested Public Charge Rule. Under the INA, "any alien who . . . in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A).

In 2019, following extensive notice and comment, the Department of Homeland Security issued a final rule adopting new definition of "public charge" for purposes of this statute. *See Casa de Maryland, Inc. v. Trump*, 971 F.3d 220, 234, *reh'g granted*, 981 F.3d 311, 314 (4th Cir. 2020) (dismissed March 11, 2021). The new rule defines "public charge" as "'an alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period.'" *Id.* at 234 (quoting

Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019)). The Rule further explains that "public benefits" include non-cash benefits that are funded in part by the States, including certain Medicaid benefits. *Id.*

This case is one of several related challenges to the Rule. Plaintiffs are a County and the Illinois Coalition for Immigrant Refugee Rights, a non-profit organization providing benefits for aliens. They brought this action challenging the Rule under the Administrative Procedure Act and sought a preliminary injunction. *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1013-14 (N.D. Ill. 2019). Purporting to apply *Gegiow v. Uhl*, 239 U.S. 3 (1915), the district court concluded that the term "'public charge' encompasses only persons who—like 'idiots' or persons with 'a mental or physical defect of a nature to affect their ability to make a living'—would be substantially, if not entirely, dependent on government assistance on a long-term basis." *Id.* at 1023. Because the Rule extends beyond that narrow definition to cover individuals who depend on supplemental, often non-cash benefits, the district court held the rule invalid. Thus, the district court issued a preliminary injunction blocking the United States from enforcing the rule across the State of Illinois. *Id.* at 1030.

The United States immediately appealed and moved to stay the preliminary injunction. This Court denied the stay, but the Supreme Court ultimately granted one. *Cook County v. Wolf*, 962 F.3d 208, 217 (7th Cir. 2020); *Wolf v. Cook County*, 140 S. Ct. 681 (2020).

This Court then considered the United States's appeal. A divided panel affirmed the district court's preliminary injunction. *Cook County*, 962 F.3d at 234. The Supreme Court's stay remained in place, and the United States filed a petition for a

writ of certiorari. *Mayorkas v. Cook County*, No. 20-450. That petition remained pending while the Supreme Court granted certiorari in another case about the validity of DHS's Rule. *See Dep't of Homeland Sec. v. New York*, No. 20-449, 2021 WL 666376 (U.S. Feb. 22, 2021).

Meanwhile, litigation in this case continued in the district court. The Plaintiffs moved for partial summary judgment on their APA claims. *See* Memorandum Opinion & Order at 2, *Cook County v. Wolf*, No. 1:19-cv-06334 (N.D. Ill. Nov. 2, 2020) (ECF No. 222). The district court granted the motion, vacated the Rule, and entered a partial final judgment under Rule 54(b). *Id.* at 14. Unlike the district court's preliminary injunction, the vacatur was explicitly "not limited to the State of Illinois." *Id.* at 8. In other words, the district court's ruling applied nationwide. The United States appealed that ruling to this Court and have been litigating that appeal for over three months.

Following the change in Administration, the United States decided not to defend the Rule. On March 9, 2021, the United States filed nearly simultaneous motions to dismiss all cases challenging the Rule. *See, e.g.*, Unopposed Motion to Dismiss Appeal at 1, *Cook County v. Wolf*, No. 20-3150 (ECF No. 23). This Court granted that motion. Order, *Cook County v. Wolf*, No. 20-3150 (ECF No. 24-1). It also issued its mandate immediately and without allowing any potentially interested parties to seek leave to intervene and defend the rule. Notice of Issuance of Mandate at 2, *Cook County v. Wolf*, No. 20-3150 (ECF No. 24-2). As a result, the public charge rule will become (absent intervention and a stay) unenforceable in any State—including the State-Intervenors.

Because the United States will no longer defend a rule directly implicating the States' interests, these States now move this Court to withdraw its mandate, and to reconsider its dismissal, and for leave to intervene in defense of the Rule.

ARGUMENT

Although the Federal Rules of Civil Procedure do not apply directly in appellate proceedings, multiple courts (including this one) have recognized that the rules controlling district court intervention may serve as useful guidance regarding whether to permit intervention in other contexts. *E.g.*, *Int'l Union v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 517-18 (7th Cir. 2004); *Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985). The States meet Rule 24's standards for intervention both as of right and as a permissive matter.

I. The States are entitled to intervene as of right.

To intervene as of right under Rule 24(a), an intervenor must show: "(1) [a] timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action." *Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019) (internal quotation marks omitted). The States easily meet that standard.

First, this motion is timely. "We look to four factors to determine whether a motion is timely: (1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay;

(3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances." *Id.* (internal quotation marks omitted).

Although the States have been aware of their interests in the Rule for some time, this case clearly presents "unusual circumstances" warranting intervention. The previous Administration and former federal defendants in this case defended the Rule for years across multiple courts, and the States' interests were appropriately represented in this defense. The States therefore relied on the United States to defend the Rule in lieu of burdening the courts with additional briefing reiterating that defense. It was not until two days ago, on March 9, when the United States voluntarily moved to dismiss this case that the States learned that the new Administration intended to withdraw its defense of the Rule in courts across the country and, in essence, repeal the Rule by stipulation in litigation. On learning of that decision, the States immediately moved to intervene.

Further, the Plaintiffs will not be prejudiced by the States' intervention. Plaintiffs faced the possibility of protracted litigation until two days ago; they suffer no prejudice by litigating the same issues in the same forum against the States rather than the United States. In contrast, the States will suffer great prejudice if they cannot intervene. As discussed in detail below, this is so because the States spend billions of dollars on Medicaid services and other public benefits to indigent individuals, including individuals who would be inadmissible under the Rule. These costs have steadily increased over the past several years, and the Rule would have helped to reduce such expenditures by efficiently and effectively implementing Congress's long-held policy of limiting the immigration of individuals who are not self-sufficient.

Thus, if the States cannot defend the Rule against the district court's nationwide vacatur, their Medicaid and other social-welfare expenditures will be higher than they would if the Rule were enforced. This motion is therefore timely.

Second, the States have important interests relating to the subject matter of this action, specifically their interests in conserving their Medicaid and related social-welfare budgets. Providing for the healthcare needs of economically disadvantaged individuals represents a substantial portion of the States' budgets. For example, in Texas in 2015, approximately 4 million Texans relied on Medicaid. Tex. Health & Human Servs. Comm'n, Texas Medicaid and Chip in Perspective 1-2 (11th ed. 2017), https://hhs.texas.gov/reports/2017/02/texas-medicaid-chip-perspective-eleventh-edition. Medicaid is jointly financed by the federal government and the States. *Id.* at 4. In 2015, total Texas expenditures for Medicaid represented approximately 28% of the State's budget. *Id.* at 4. In the past several years, the federal government has paid for approximately 56-58% of Texas's Medicaid expenditures. *Id.* at 183. Although the exact amount of Texas's Medicaid budget spent on immigrants who would otherwise be inadmissible under the DHS Rule has varied, the total budget is always measured in billions of dollars. *Id.* at 179. And from 2000 to 2015, Medicaid expenses increased from 20% to 28% of the state's budget. *Id.* at 179.

This Court can and should infer that invalidating the Rule will have a disproportionate impact on the States, particularly on border States. For example, Texas and Montana have among the largest international borders in the Union and provide Medicaid services to many immigrants. The Rule would reduce that burden. Under the relevant statute, "[a]ny alien who . . . in the opinion of the Attorney General at

the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A). DHS's rule defines "public charge" as "'an alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period.'" 84 Fed. Reg. at 41,501. "Public benefits" specifically includes, among other forms of public assistance, Medicaid services with some exceptions. *Id.* Thus, if the Attorney General determined that an alien applying for admission to the United States would likely require Medicaid services for more than 12 months in a 36-month period, then that alien would be inadmissible. Accordingly, fewer aliens requiring Medicaid and other public services would be admitted to the United States, including into Texas and Montana, thus reducing the States' Medicaid budgets. Accordingly, each State Intervenor has a state interest in the subject matter of this action.

Third, the States' interests in conserving their increasing Medicaid and related social-welfare budgets will be impaired by the disposition of this case absent intervention. As explained above, the district court's vacatur order was explicitly "not limited to the State of Illinois." *See* Memorandum Opinion & Order at 8, *supra* (ECF 222). In other words, though this case has been litigated by one county and one interest group, the district court's ruling applies nationwide. Now that the United States has voluntarily dismissed this appeal, nothing will stop the district court's nationwide vacatur from taking effect and adversely impacting the States' budgets, including their Medicaid expenditures.

Fourth, no party now adequately represents the States' interests because no party is left to defend the Rule. Absent the States' intervention, all States will be

affected by the invalidation of the Rule without Texas and other similarly situated States having the ability to defend those interests. For these reasons, the States are entitled to intervene as of right.

II. The States also meet the criteria for permissive intervention.

For similar reasons, even if the Court concludes that the States do not meet the standard to intervene as of right, it should use its discretion to allow the States to do so. Under Rule 24(b), a movant seeking permissive intervention must show: (1) that there exists an independent ground of subject matter jurisdiction; (2) that the motion is timely; (3) that the movant's claims or defenses share with the main action a common question of law or fact; and (4) that intervention will not result in undue delay or prejudice to the existing parties. Fed R. Civ. P. 24(b)(1), 24(b)(1)(B), 24(b)(2), 24(b)(3); *Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). Again, the States easily meet that standard.

Here, the requirements of an independent ground of subject-matter jurisdiction and shared claims or defenses are not strictly applicable, as plaintiffs must demonstrate subject-matter jurisdiction, and the States seek to intervene as defendants by stepping into the shoes of the United States. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). But this Court would retain subject-matter jurisdiction over this federal question, and the States intend to present similar defenses of the Rule to those that were (until two days ago) presented by the federal government. *Cook County*, 962 F.3d at 217. The States likewise enjoy an actual controversy against the plaintiffs: they will be tangibly, economically affected by an adverse judgment redressable by this Court, and thus this Court would retain Article III jurisdiction.

The timeliness and prejudice analyses discussed above apply equally to the States' ability to intervene permissively. The States filed this motion promptly after they learned on March 9 that the United States would no longer defend the Rule, and Plaintiffs will suffer no prejudice by this intervention because they were already expected to continue to litigate this case until mere days ago.

This Court should exercise its discretion to permit the States to intervene to defend their interests in avoiding increased costs by the invalidation of the Rule that will otherwise go unprotected. The States have enormous financial obligations in providing Medicaid and other public services and, until quite recently, had no need to intervene to defend those interests. That need has changed due to unexpected litigation tactics by the United States. This Court should not countenance this unprecedented turn.

[Remainder of case intentionally left back.]

Conclusion

This Court should grant the States leave to intervene as Defendant-Appellants.

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

On March 11, 2021, counsel for the State of Texas conferred with counsel for plaintiffs and for the United States, who advised that they are opposed to this motion.

/s/ Judd E. Stone II
JUDD E. STONE II

CERTIFICATE OF SERVICE

On March 11, 2021, this motion was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with local rules; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Judd E. Stone II
JUDD E. STONE II

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27 because it contains 2,527 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Judd E. Stone II
Judd E. Stone II

APPENDIX J

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-449

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.,
PETITIONERS
v.

STATE OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT STIPULATION TO DISMISS

Pursuant to Rule 46.1 of the Rules of this Court, all parties respectfully request that this case be dismissed. No fees are due to the Clerk, and each party will bear its own costs.

Respectfully submitted.

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MARCH 9, 2021

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APPENDIX K

U.S. Department of Justice
Civil Division, Federal Programs Branch

Keri Berman
Trial Attorney

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March 10, 2021

Hon. George B. Daniels
United States District Court
Southern District of New York
500 Pearl Street, Room 1310
New York, NY 10007

Re: Agency Action Pertinent to *New York v. U.S. Department of Homeland Security*, No. 19-7777, and *Make the Road New York v. Renaud*[1], No. 19-7993

Dear Judge Daniels:

I represent the defendants in the above-captioned case. As Defendants reported previously, on February 2, 2021, the President issued an Executive Order addressing issues pertinent to this action, titled Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans. The Executive Order directs heads of relevant agencies, including the Secretary of Homeland Security, to review agency actions related to implementation of the public charge ground of inadmissibility, 8 U.S.C. § 1182(a)(4)(A), in light of the policy set forth in the Executive Order and certain other considerations.

Defendants hereby notify the Court that, yesterday (March 9, 2021), DHS released a statement indicating that (i) it "has determined that continuing to defend the final rule, Inadmissibility on Public Charge Grounds . . . is neither in the public interest nor an efficient use of limited government resources," (ii) the Department of Justice is no longer "pursu[ing] appellate review of judicial decisions invalidating or enjoining enforcement of the 2019 Rule," and (iii) "[o]nce the previously entered judicial invalidation of the 2019 Rule becomes final, the 1999

[1] Tracy Renaud, Senior Official Performing the Duties of the Director of USCIS, is substituted as defendant under Rule 25(d) of the Federal Rules of Civil Procedure.

interim field guidance on the public charge inadmissibility provision (i.e., the policy that was in place before the 2019 Rule) will apply." Ex. A.

Consistent with DHS's statement, Defendants in another action related to the Final Rule, *ICIRR v. Mayorkas*, 19-cv-6334 (N.D. Ill.), filed a motion to voluntarily dismiss their appeal of the Court's Order granting Plaintiffs' Motion for Summary Judgment (ECF No. 221). *See* Unopposed Motion to Voluntarily Dismiss, No. 20-3150, ECF No. 23 (7th Cir. March 9, 2021). The Seventh Circuit promptly granted this motion, and concurrently issued its mandate. *See* Order Dismissing Appeal, No. 20-3150, ECF No. 24-1 (7th Cir. March 9, 2021); Notice of Issuance of Mandate, No. 20-3150, ECF No. 24-2 (7th Cir. March 9, 2021).

Shortly afterwards, DHS issued another statement, confirming that "[f]ollowing the Seventh Circuit dismissal," the "final judgment from the Northern District of Illinois, which vacated the 2019 public charge rule, went into effect" and, "[a]s a result, the 1999 interim field guidance on the public charge inadmissibility provision (i.e., the policy that was in place before the 2019 public charge rule) is now in effect." Ex. B.

Pursuant to the vacatur of the Final Rule, the condition of this Court's February 22, 2021 Order, *New York v. DHS*, 19-cv-7777, ECF No. 276, entering a stay of proceedings for up to 90 days upon agreement that "no agency action will be taken during that period of time to enforce or apply the public charge rule at issue in this litigation," has been met.

Respectfully submitted,

/s/
Keri L. Berman

CC: All Counsel of record via ECF.

Exhibit A

U.S. Department of Homeland Security

DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility

Release Date: March 9, 2021

On February 2, 2021, the President issued Executive Order 14,012, directing the Secretary of Homeland Security to review the actions of the Department of Homeland Security (DHS or Department) related to the implementation of the public charge ground of inadmissibility. Consistent with the Executive Order, DHS has begun its review, as well as its consultation with other relevant agencies.

As part of its review, DHS has determined that continuing to defend the final rule, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (2019 Rule), is neither in the public interest nor an efficient use of limited government resources. Consistent with that decision, the Department of Justice will no longer pursue appellate review of judicial decisions invalidating or enjoining enforcement of the 2019 Rule.

Once the previously entered judicial invalidation of the 2019 Rule becomes final, the 1999 interim field guidance (https://www.federalregister.gov/documents/1999/05/26/99-13202/field-guidance-on-deportability-and-inadmissibility-on-public-charge-grounds) on the public charge inadmissibility provision (i.e., the policy that was in place before the 2019 Rule) will apply. Under the 1999 interim field guidance, DHS will not consider a person's receipt of Medicaid (except for Medicaid for long-term institutionalization), public housing, or Supplemental Nutrition Assistance Program (SNAP) benefits as part of the public charge inadmissibility determination. In addition, medical treatment or preventive services for COVID-19, including vaccines, will not be considered for public charge purposes.

DHS and USCIS will provide additional updates regarding the administration of the public charge ground of inadmissibility, including announcing when DHS will cease applying the 2019 Rule.

For more information on equal access to vaccines and vaccine distribution sites specifically, please see DHS's February 1 statement (https://www.dhs.gov/news/2021/02/01/dhs-statement-equal-access-covid-19-vaccines-and-vaccine-distribution-sites) on that subject.

Keywords: Immigration Reform (/keywords/immigration-reform)

Last Published Date: March 9, 2021

Exhibit B

U.S. Department of
Homeland Security

DHS Secretary Statement on the 2019 Public Charge Rule

Release Date: March 9, 2021

Today, DHS Secretary Alejandro N. Mayorkas announced that the government will no longer defend the 2019 public charge rule as doing so is neither in the public interest nor an efficient use of limited government resources.

“The 2019 public charge rule was not in keeping with our nation’s values. It penalized those who access health benefits and other government services available to them,” said Secretary of Homeland Security Alejandro N. Mayorkas. “Consistent with the President’s vision, we will continue to implement reforms that improve our legal immigration system.”

President Biden’s Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans called for an immediate review of agency actions on public charge inadmissibility and deportability. DHS’s review, in consultation with the Departments of Justice and State and the federal benefits-granting agencies, is ongoing.

As discussed in DHS’s litigation statement (http://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility) , and consistent with the government’s decision not to defend the rule, the Department of Justice is no longer pursuing appellate review of judicial decisions invalidating or enjoining enforcement of the 2019 public charge rule. Today, the Department of Justice dismissed its pending appeals in the Supreme Court and Seventh Circuit, and is in the process of doing so in the Fourth Circuit. Following the Seventh Circuit dismissal this afternoon, the final judgment from the Northern District of Illinois, which vacated the 2019 public charge rule, went into effect. As a result, the 1999 interim field guidance on the public charge inadmissibility provision (i.e., the policy that was in place before the 2019 public charge rule) is now in effect.

Topics: Citizenship and Immigration Services (/topics/immigration-and-citizenship-services) , Citizenship and Immigration Services Ombudsman (/topics/citizenship-and-immigration-services-ombudsman) , Homeland Security Enterprise

(/topics/homeland-security-enterprise), Secretary of Homeland Security (/topics/secretary-homeland-security)

Keywords: Immigration (/keywords/immigration)

Last Published Date: March 9, 2021

APPENDIX L

No. 19-17213, 19-17214, 19-35914

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SANTA CLARA,
Plaintiffs-Appellees,
v.
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,
Defendants-Appellants,
and
STATE OF ARIZONA,
Proposed Intervenor-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. 4:19-cv-04975-PJH

MOTION TO INTERVENE BY THE STATES OF ARIZONA, ALABAMA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MONTANA, OKLAHOMA, TEXAS, AND WEST VIRGINIA.

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Dated: March 10, 2021

(additional counsel listed on signature page)

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INTRODUCTION

The States of Arizona, Alabama, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Montana, Oklahoma, Texas, and West Virginia (the "States") respectfully move to intervene in this action, both as of right and permissively. The States seek intervention so that they can file a petition for certiorari seeking review of this Court's December 2, 2020 decision, which considered the validity of a 2019 Rule, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("Public Charge Rule"). *See generally City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs. ("San Francisco")*, 981 F.3d 742 (9th Cir. 2020). Because invalidation of the Public Charge Rule will impose injury on the States—estimated at $1.01 billion in foregone savings in transfer payments for all states annually—and all of the requirements for intervention are met, this Court should grant this motion.[1]

The "cert. worthiness" of the States' potential petition is already apparent: the Supreme Court *already granted review* in a case involving identical issues. *See Dep't of Homeland Sec. v. New York*, No. 20-449, __ S. Ct. __, 2021 WL 666376, at *1 (Feb. 22, 2021). And this Court specifically stayed the mandate in this action "pending the Supreme Court's final disposition"

[1] The Plaintiffs in the three cases and the Federal Defendants oppose this motion.

of that petition and a petition in "*Wolf v. Cook County*, Illinois, petition for cert. pending, No. 20-450 (filed Oct. 7, 2020)." Doc. 139 at 3 (No. 19-17213).

But despite successfully convincing the Supreme Court to grant certiorari on February 22, Defendants suddenly shifted course and filed a joint stipulation of voluntary dismissal of their petitions on March 9, which was granted the same day by the Clerk of the Supreme Court. In essence, Federal Defendants have now effectively abandoned defense of the Public Charge Rule.

Because invalidation of the Public Charge Rule will directly harm the States, they now seek to intervene to offer a defense of the rule so that its validity can be resolved on the merits, rather than through strategic surrender. This motion is plainly timely, filed a *single day* after the Federal Defendants' *volte-face*, which made plain that the States' interests were no longer being adequately represented.

BACKGROUND

These appeals involve challenges to the 2019 final rule that defined "public charge" for purposes of federal immigration law, specifically 8 U.S.C. § 1182(a)(4)(A). Given this Court's familiarity with the background of this case, as evident from its 47-page slip opinion, the States will not belabor it here.

A few important facts are particularly salient for the instant motion,

however. As this Court noted, "The Rule itself predicts a 2.5 percent decrease in enrollment in public benefit programs[.]" *San Francisco*, 981 F.3d at 754 (citing Public Charge Rule, 84 Fed. Reg. at 41,302, 41,463). In addition, the federal government only pays a portion of the costs involved in the public benefit programs at issue:

> For example, the Federal Government funds all SNAP food expenses, but *only 50 percent of allowable administrative costs* for regular operating expenses. Similarly, Federal Medical Assistance Percentages (FMAP) in some U.S. Department of Health and Human Services (HHS) programs, like Medicaid, *can vary from between 50 percent to an enhanced rate of 100 percent in some cases*. Since the state share of federal financial participation (FFP) varies from state to state, DHS uses the average FMAP across all states and U.S. territories of *59 percent to estimate the amount of state transfer payments*.

Public Charge Rule, 84 Fed. Reg. at 41,301 (emphases added). DHS thus estimated that the Public Charge Rule would save all of the states "about *$1.01 billion annually*" in direct payments. *Id.* (emphasis added).

More generally, the Public Charge Rule will reduce demand on States' already over-stretched assistance programs. For example:

- In FY 2019, Arizona spent $3,059,000,000 on Medicaid benefits and $104,000,000 on administrative costs for Medicaid (as well as the Children's Health Insurance Program).[2] Increasing the

[2] Medicaid and CHIP Payment and Access Commission, *MACStats: Medicaid and CHIP Data Book* 45 (2020), https://www.macpac.gov/wp-

number of Medicaid participants would increase the State's spending on Medicaid (the costs of which typically exceed State general fund growth) and would require the State to make budget adjustments elsewhere.[3]

- In 2019, Arizona paid $85 million in maintenance-of-effort costs for the Temporary Assistance for Needy Families program ("TANF").[4] Because TANF resources are limited—in 2016, less than a quarter of impoverished families received this assistance[5]—admitting aliens into the United States who are not likely to utilize this resource will make this program more accessible to others who are in need.
- States incur administrative costs for each SNAP recipient.[6] For FY 2016, Arizona paid $77,730,088 in administrative costs for

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content/uploads/2020/12/MACStats-Medicaid-and-CHIP-Data-Book-December-2020.pdf

[3] Robin Rudowitz et al., *Medicaid Enrollment & Spending Growth: FY 2018 & 2019* 5 (2018), http://files.kff.org/attachment/Issue-Brief-Medicaid-Enrollment-and-Spending-Growth-FY-2018-2019

[4] Center on Budget and Policy Priorities, *Arizona TANF Spending*, (2019), https://www.cbpp.org/sites/default/files/atoms/files/tanf_spending_az.pdf

[5] Center on Budget and Policy Priorities, *Policy Basics: An Introduction to TANF* (2018), https://www.cbpp.org/sites/default/files/atoms/files/7-22-10tanf2.pdf

[6] Daniel Geller et al., AG-3198-D-17-0106, *Exploring the Causes of State Variation in SNAP Administrative Costs* 18–19 (2019), https://fns-

administering this program.[7] By admitting aliens who are unlikely to depend on this resource, the State will save money that would have otherwise gone to fund administrative costs for aliens who would depend on the program.

LEGAL STANDARD

This Court's consideration of a motion to intervene is governed by Federal Rule of Civil Procedure 24. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of America, AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007); *see also Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004) ("[A]ppellate courts have turned to ... Fed. R. Civ. P. 24."); *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (same).

Rule 24(a) authorizes anyone to intervene in an action as of right when the applicant demonstrates that

> (1) the intervention application is timely; (2) the applicant has a "significant protectable interest relating to the property or transaction that is the subject of the action"; (3) "the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect

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prod.azureedge.net/sites/default/files/media/file/SNAP-State-Variation-Admin-Costs-FullReport.pdf

[7] Food and Nutrition Service, *Supplemental Nutrition Assistance Program State Activity Report Fiscal Year 2016* 12 (2017), https://fns-prod.azureedge.net/sites/default/files/snap/FY16-State-Activity-Report.pdf

> its interest"; and (4) "the existing parties may not adequately represent the applicant's interest."

Prete v. Bradbury, 438 F.3d 949, 954 (9th Cir. 2006); *see also* Fed. R. Civ. P. 24(a)(2). Rule 24(a) is to construed "'broadly in favor of proposed intervenors.'" *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011).

This Court's intervention analysis is "'guided primarily by practical considerations,' not technical distinctions." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001); *see also Wilderness Soc'y*, 630 F.3d at 1179 (reiterating importance of "'practical and equitable considerations'" as part of judicial policy favoring intervention). Courts are "required to accept as true the non-conclusory allegations made in support of an intervention motion." *Berg*, 268 F.3d at 819.

ARGUMENT

I. THIS COURT SHOULD GRANT THE STATES INTERVENTION AS OF RIGHT

A. The States' Motion To Intervene Is Timely

This Court has repeatedly explained that "the 'general rule is that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal.'" *U.S. ex rel McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992) (quoting *Yniguez v. Arizona*, 939 F.2d 727, 734 (9th Cir. 1991) (alteration omitted)). The

Supreme Court has similarly held that where a party "filed [its] motion within the time period in which the named plaintiffs could have taken an appeal … the [party's] motion to intervene was timely filed[.]" *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977).

Under 28 U.S.C. § 2101(c), parties generally have 90 days to file a petition for certiorari. That period has now been extended to 150 days as a matter of course during the coronavirus pandemic.[8] The deadline to file a petition for seek Supreme Court review here is thus May 1, 2021 (150 days after this Court's December 2, 2020 Opinion). This motion is filed *more than a month* before that deadline, and is therefore timely.

More generally, this motion presents no prejudice to the other parties. *See Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (holding that the "requirement of timeliness is ... a guard against prejudicing the original parties"). Intervention here only ensures that these cases and others will be resolved on *the merits*, rather than through abdication. Denying the parties a potential opportunity to obtain their desired ends through the contrivance of surrender inflicts no cognizable prejudice. Instead, the parties' positions will be "essentially the same as it would have

[8] March 19, 2020 Order, *available at* https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf.

been" had the State intervened earlier in the proceedings. *McGough*, 967 F.2d at 1395.

B. The State Has A Significant Protectable Interest In The Subject Matter Of This Action, Which Would Be Affected By Any Adverse Ruling That Stands.

As set forth above, the States' have a protectable interest in the continuing validity of the Public Charge Rule. It is estimated that the rule will save all of the states cumulatively $1.01 billion annually, and the moving States here would save a share of that amount. *Supra* at 2-5. And invalidating the Public Charge Rule[9] will deprive the States of those savings, thereby injuring them. More generally, the Public Charge Rule would reduce demands on States' already overstretched assistance programs and invalidating it will harm them accordingly.

In addition, the States have "quasi-sovereign interest[s] in the health and well-being—both physical and economic—of [their] residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). The Public Charge Rule serves that interest by promoting self-reliance of their residents and encouraging immigration of non-citizens

[9] Although the preliminary injunctions at issue no longer directly apply in the States following this Court's vacatur of the nationwide injunction, *San Francisco*, 981 F.3d at 763, this Court outright held that the Public Charge Rule violates the Administrative Procedure Act. *San Francisco*, 981 F.3d at 762. As such, absent Supreme Court review, the district courts on remand will be required to enter judgment in favor of Plaintiffs on the merits, and vacatur of the Public Charge Rule is at least likely.

(including into the States) who are not dependent upon public resources. 84 Fed. Reg. 41,305. But invalidating the rule will injure the States by depriving them of these beneficial impacts.

C. Intervention By The State Now Will Ensure That The State's Interests Will Be Adequately Represented.

This Court has held that the "burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can demonstrate that representation of its interests 'may be' inadequate." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). The Court considers several factors, including

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 952 (9th Cir. 2009).

Here, Federal Defendants have essentially abandoned their defense of the Public Charge Rule, and it is doubtful that they will make *any* further arguments in support of it, let alone willing to make "all of a proposed intervenor's arguments." *Id.* The States' protectable interests in the continued validity of the Public Charge Rule are thus not adequately represented by the Federal Defendants.

II. PERMISSIVE INTERVENTION IS WARRANTED HERE

Even if the Court declines to grant the States' timely motion to intervene as of right, this is precisely the type of case where permissive intervention is warranted. Federal courts may permit intervention by litigants who have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Where a litigant "timely presents such an interest in intervention," the Court should consider:

> [T]he nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case[,] whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Perry v. Schwarzenegger, 630 F.3d 898, 905 (9th Cir. 2011).

As set forth above, this motion is timely and the States have a compelling stake in the outcome of these actions.

Moreover, the issues presented here are exceptionally important and hotly debated—as evidenced by the splits among four circuit courts and the Supreme Court granting certiorari. Those important issues should be

decided on the merits, rather than through surrender. The State's participation will "significantly contribute to ... the just and equitable adjudication of the legal questions presented." *Schwarzenegger*, 630 F.3d at 905. Moreover, a central issue in these cases was the costs imposed on the states. *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773, 801-04 (9th Cir. Dec. 2019); *San Francisco*, 981 F.3d at 759-60. The presence of the moving States here will ensure that the broad perspective of the several states is represented.

A favorable exercise of discretion is therefore warranted.

CONCLUSION

For the foregoing reasons, the States' motion to intervene should be granted.

Respectfully submitted this March 10, 2020.

MARK BRNOVICH
ATTORNEY GENERAL

s/ *Drew C. Ensign*
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2020, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

s/ Drew C. Ensign
Drew C. Ensign

APPENDIX M

No. 19-2222

In the United States Court of Appeals for the Fourth Circuit

CASA DE MARYLAND, *ET AL.*,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, *ET AL.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland

MOTION TO RECALL THE MANDATE TO PERMIT INTERVENTION AS APPELLANT

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Local Rule 26.1 Disclosure Statement

No. 19-2222

Casa de Maryland, *et al.*,
Plaintiffs-Appellees,

v.

Joseph R. Biden, in his official capacity as President of the United States, *et al.*,
Defendants-Appellants.

Pursuant to Local Rule 26.1, I am not aware of any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of this litigation by reason of a franchise, lease, other profit-sharing agreement, insurance, or indemnity agreement. I am also not aware of any similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded. I represent that the following parties seek to leave to intervene, and that the following attorneys represent, have represented, or expected to represent the States in this matter.

Intervenors:
State of Texas
State of Alabama
State of Arizona
State of Arkansas
State of Indiana
State of Kansas
State of Kentucky
State of Louisiana
State of Mississippi
State of Montana
State of Ohio
State of Oklahoma

State of South Carolina
State of West Virginia

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INTRODUCTION

The States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia seek to intervene in this case to defend a duly promulgated rule interpreting the Immigration and Nationality Act's prohibition against immigration by those who would become a public charge (the "Rule"). Two days ago, the named defendants, who are agents or agencies of the United States, filed a stipulated motion to dismiss this appeal. The Court granted that stipulated motion and issued its mandate without offering affected parties, including the States, an opportunity to seek to defend the Rule.

The Rule directly implicates the States' obligations in providing Medicaid and other social services to indigent and low-income individuals. Moreover, the States, especially the border States, have strong interests in enforcing the Rule, which properly interpreted and implemented Congress's long-held policy of immigrant self-sufficiency. This request is timely: until two days ago, the United States and associated federal defendants defended the Rule's legality.

Because the Court issued its mandate just two days after the United States announced that it would no longer defend the Rule, interested parties had no ability to intervene before it did so. And because the United States did not inform the States that it intended to cease defending the Rule before abandoning numerous cases supporting the Rule nationwide, the States did not have an opportunity to intervene at an earlier point. The Court should not allow the federal government to use litigation stipulations to evade the Administrative Procedure Act's strictures on modifying

rules a new Administration finds uncongenial without at least allowing interested parties the opportunity to defend the case.

BACKGROUND

This immigration case concerns the hotly contested public charge rule. Under federal law, "any alien who . . . in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A).

In 2019, following extensive notice and comment, the Department of Homeland Security issued a final rule adopting a new definition of "public charge" for purposes of this statute. *Casa de Maryland, Inc. v. Trump*, 971 F.3d 220, 234 (4th Cir. 2020), *vacated for rehearing en banc*, 981 F.3d 311, 314. The new rule defines "public charge" as "'an alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period.'" *Id.* at 234 (quoting 84 Fed. Reg. at 41,501). The rule further explains that "public benefits" include non-cash benefits that are partially funded by the States, including certain Medicaid benefits. *Id.*

The plaintiffs, CASA de Maryland, Inc. and two individuals, filed this action in the United States District Court for the District of Maryland against the President, the Secretary of Homeland Security, and other Federal Defendants in their official capacities. The plaintiffs alleged that the Rule violates both the APA and the Fifth Amendment. *Id.* at 236. They moved for a preliminary injunction to block the rule from taking effect. *Id.* The district court granted the motion and entered a nation-wide injunction preventing the federal defendants from enforcing the rule anywhere. *Id.*

A panel of this court reversed. It held that that the rule "rests on an interpretation of 'public charge' that comports with a straightforward reading of the [statute]." *Id.* at 242. The panel further ruled that the district court "erred in its choice of remedy" by issuing a "plainly overbroad" nationwide injunction. *Id.* at 255-56.

The plaintiffs moved for rehearing en banc, which the court granted. *Casa de Maryland, Inc. v. Trump*, 981 F.3d 311, 314 (4th Cir. 2020). The court called for supplemental briefing "to address relevant developments concerning the Public Charge Rule." ECF 158 at 2. The defendants responded that on February 2, 2021, President Biden issued an Executive Order directing a review of the DHS rule, so the Defendants suggested that the court postpone en banc oral argument until that review is complete. ECF 188 at 3. The court agreed and removed the case from the oral argument calendar. ECF 208 at 2-3.

On March 9, 2021, without beginning the process to rescind the Rule or providing notice to parties who would normally be entitled to participate in notice-and-comment rulemaking, the defendants filed an unopposed motion to dismiss the appeal. ECF 210 at 1. This Court granted that motion. It also issued its mandate without allowing any potentially interested parties to seek leave to intervene and defend the rule. As a result, the public charge rule will become (absent intervention and a stay) unenforceable in any State.

Because the defendants will no longer defend a rule directly implicating the States' interests, the States now move this Court to withdraw its mandate, to reconsider its dismissal, and for leave to intervene in defense of the Rule.

I. The Court Should Recall the Mandate.

The Court should recall the mandate and has the "inherent power" to do so. *Calderon v. Thompson*, 523 U.S. 538, 549 (1998); *see also United States v. Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997) ("Our authority to recall our own mandate is clear."). Recalling the mandate is appropriate in "extraordinary circumstances" and to prevent injustice. *Calderon*, 523 U.S. at 550.

As described below, extraordinary circumstances justify recalling the mandate where the State Intervenors were presented no opportunity to preserve their interests in this litigation. Until March 9, the State Intervenors' interests were represented by the United States. The United States did not inform the State Intervenors that it intended to withdraw its defense of the Rule, depriving the States of an opportunity to seek leave to intervene prior to its seeking dismissal of this appeal. Likewise, this Court's almost immediate issuance of the mandate following the motion to dismiss prevented the States from seeking leave to intervene prior to dismissal once the intentions of the United States not to defend the Rule became public.

The harms to the State Intervenors—who include multiple border States—from allowing the district court's nationwide injunction to take effect are severe and will hamper state officials' ability to act in a period of great budgetary uncertainty. The mandate should be recalled.

II. The Court Should Stay the Mandate Pending Resolution of Any Petition for a Writ of Certiorari.

Once recalled, the Court should stay further issuance of the mandate until the States obtain review in this Court and, if necessary, on a petition for certiorari.

A motion to stay the mandate pending the filing of a petition for writ of certiorari "must show that the petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). Under this standard, there must be (1) "a reasonable probability that four members of the [Supreme] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari," (2) "a significant possibility of reversal of the lower court's decision," and (3) "a likelihood that irreparable harm will result if that decision is not stayed." *Baldwin v. Maggio*, 715 F.2d 152, 153 (5th Cir. 1983). This case easily meets that standard.

A. The Supreme Court is likely to grant certiorari.

The Supreme Court is not only likely to grant certiorari—it had already done so. *Dep't of Homeland Sec.*, 2021 WL 666376, at *1. Moreover, the Supreme Court has identified several considerations governing its exercise of discretion in granting certiorari: a conflict among courts on an important matter, the decision of an important federal question in a way that conflicts with Supreme Court decisions, and the decision of an important question of federal law that has not been but should be settled by the Supreme Court. Sup. Ct. R. 10. This case meets each criterion.

1. At the time the Administration decided to abandon the Rule, there was a well-defined split among federal courts over the rule's legality. Over the dissent of then-Judge Barrett, the Seventh Court had concluded it was likely to be held improper. *Wolf*, 962 F.3d at 228. The Second Circuit had similarly found the rule to exceed the scope of DHS's delegated power. *New York v. U.S. Dep't of Homeland Security*, 969 F.3d 42, 74-75 (2d Cir. 2020).

By contrast, a panel of this Court reversed the district court's preliminary injunction against enforcement of the Rule based on the conclusion that "[t]he DHS Rule . . . comports with the best reading of the INA." *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 250, *vacated for rehearing en banc*, 981 F.3d 311 (4th Cir. 2020) (dismissed Mar. 11, 2021). Indeed, the panel went so far as to say that "[t]o invalidate the Rule would . . . entail the disregard of the plain text of a duly enacted statute," and would "visit palpable harm upon the Constitution's structure and the circumscribed function of the federal courts that document prescribes." *Id.* at 229. Similarly, in entering a stay pending appeal of preliminary injunctions against the Rule, the Ninth Circuit issued a lengthy published opinion concluding that "[t]he Final Rule's definition of 'public charge' is consistent with the relevant statutes, and DHS's action was not arbitrary or capricious." *City & County of San Francisco v. USCIS*, 944 F.3d 773, 790 (9th Cir. 2019).

2. This question is vitally important. Decisions about whether and under what conditions to admit immigrants implicate a "fundamental sovereign attribute exercised by the Government's political departments." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). As the Second Circuit noted, making these decisions correctly is essential "[b]ecause there is no apparent means by which DHS could revisit adjustment determinations" once made. 969 F.3d at 86-87.

Congress explicitly directed the Executive Branch to deny admission or adjustment of status to aliens who, "in the opinion of the [Secretary of Homeland Security]," are "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The Rule provides key guidance in doing so, issuing formal, objective standards by

which that determination will be made. The propriety of the Rule is a question of national importance which the Supreme Court has already once determined merits its attention. *Dep't of Homeland Sec.*, 2021 WL 666376, at *1.

B. There is a significant possibility of reversal.

The State Intervenors are likely to prevail on the merits following a petition for certiorari because the Rule is lawful. For more than a century, it has been "the immigration policy of the United States that . . . (A) aliens within the Nation's borders not depend on public resources to meet their needs, . . . and (B) the availability of public benefits not constitute an incentive for immigration to the United States." 8 U.S.C. § 1601(2). That long-held policy formed the basis of the public-charge Rule. Congress never defined the term "public charge," but "[t]he ordinary meaning of 'public charge' . . . was 'one who produces a money charge upon, or an expense to, the public for support and care.'" *CASA de Maryland*, 971 F.3d at 242 (quoting BLACK'S LAW DICTIONARY 295 (4th ed. 1951)). The Rule reflects that ordinary meaning by defining as public charges those individuals who rely on individual benefits for a prolonged period, or multiple benefits for a shorter period of time. 84 Fed. Reg. at 41,501; *id.* at 41,294-95.

That the Rule represents the best—or, at least, a reasonable—reading of the public-charge provision of the INA is confirmed by reading that provision within its larger statutory context. *See CASA de Maryland*, 971 F.3d at 243-44. For example, Congress required that an alien seeking admission or adjustment of status to submit "affidavit[s] of support" from sponsors. *See* 8 U.S.C. § 1182(a)(4)(C)-(D). Those sponsors must, in turn, agree "to maintain the sponsored alien at an annual income

that is not less than 125 percent of the Federal poverty line." *Id.* § 1183a(a)(1)(A). Congress reinforced this requirement for self-sufficiency by allowing federal and state governments to seek reimbursement from the sponsor for "any means-tested public benefit" the government provides to the alien during the period the support obligation remains in effect, *Id.* § 1183a(a)(1)(B). That provision is not limited to cash support. Aliens who fail to obtain the required affidavit are treated by operation of law as inadmissible on the public-charge ground, regardless of individual circumstances. *Id.* § 1182(a)(4).

Taken together, these provisions of the INA demonstrate that Congress did not mandate a narrow reading of "public charge." Instead, "[t]his sponsor-and-affidavit scheme" shows "that the public charge provision is naturally read as extending beyond only those who may become 'primarily dependent' on public support." *CASA de Maryland*, 971 F.3d at 243; *see also Cook County*, 962 F.3d at 246 (Barrett, J., dissenting) ("[T]he affidavit provision reflects Congress's view that the term 'public charge' encompasses supplemental as well as primary dependence on public assistance.").

Further, the larger statutory context demonstrates why the Executive Branch could—and indeed should—take non-cash benefits into account in making public-charge determinations. The current public-charge provision was adopted in 1996. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. V, § 531, 110 Stat. 3009-674. In contemporaneous legislation, Congress stressed the government's "compelling" interest in ensuring "that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601(5);

see also id. § 1601(4) (emphasizing the government's strong interest in "assuring that individual aliens not burden the public benefits system"). Congress equated a lack of "self-sufficiency" with the receipt of "public benefits" by aliens, *id.* § 1601(3), which it defined broadly to include any "welfare, health, disability, public or assisted housing . . . or *any other similar benefit*." *Id.* § 1611(c)(1)(B) (emphasis added). That is, Congress adopted a broad, plain meaning of the statutory phrase "public charge" as one who receives public benefits, and Congress's statutory policy of ensuring that aliens do "not burden the public benefits system" programs to be "an incentive for immigration to the United States," *Id.* § 1601(2)(B), (4).

Given these statutory provisions, the Supreme Court is likely to agree with this Court's panel decision and the Ninth Circuit's stay decision: The Rule "easily" qualifies as a "permissible construction of the INA." *City & County of San Francisco*, 944 F.3d at 799; *see CASA de Maryland*, 971 F.3d at 251 (holding that the Rule is "unquestionably lawful"). In applying *Chevron*, the Supreme Court has repeatedly emphasized that the federal courts "may not substitute [their] judgment for that of the [Executive], but instead must confine [themselves] to ensuring that he remained "'within the bounds of reasoned decisionmaking.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (citation omitted) (quoting *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983)). Administrative rules passed regarding immigration are given particular deference because "Congress has expressly and specifically delegated power to the executive in an area that overlaps with the executive's traditional constitutional function." *CASA de Maryland*, 971

F.3d at 251 & n.6 (citing *United States v. Curtiss-Wright Export* Corp., 299 U.S. 304, 319-20 (1936)). The public-charge Rule easily passes muster.

To be clear, State Intervenors do not maintain that the Executive may not *change* the definition of "public charge." But the requirements of APA rulemaking apply with equal force whether the Executive is *creating* a rule or *modifying* it. *E.g.*, *Dep't of Comm,* 139 S. Ct. at 2569-71. Because the public-charge Rule was made through formal notice-and-comment procedures, it can only be unmade the same way. *Cf. Motor Vehicle Mfr's Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S 29, 41, 46-47 (1983). As part of that process, State Intervenors would have had the right to submit input and to protect their interests before the agency. 5 U.S.C. § 553(c). If unsatisfied with the ultimate result, they would have been permitted to challenge whether the Executive "articulated 'a satisfactory explanation' for [its] decision, 'including a rational connection between the facts found and the choice made.'" *Dep't of Comm.*, 139 S. Ct. at 2569 (quoting *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43). The Administration improperly seeks to short-circuit that process by using early court decisions to "set aside" the Rule under 5 U.S.C. § 706(2). Accordingly, State Intervenors are likely to prevail in showing that the order under review was improper.

C. There is a likelihood of irreparable harm absent a stay.

Allowing the mandate to issue and permitting the district court to vacate the rule will cause State Intervenors irreparable harm. As an initial matter, a State suffers an "institutional injury" from the "inversion of . . . federalism principles." *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016); *see Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App'x 389, 399 (5th Cir. 2013) (per curiam) (finding that a State suffers irreparable

harm when an injunction "would frustrate the State's program"). The district court's judgment reverses a formal rulemaking process upon which States have relied in setting law enforcement and budgetary policies, without allowing them input into the process or the time to adjust that normally follows from a formal rescission process. And it interferes with traditional state prerogatives for the reasons described in the accompanying motion to intervene.

As the Court is undoubtedly aware, this is a time of considerable financial strain on all States, given the unprecedented COVID-19 pandemic and associated economic downturn. Immigration can be a driver of cultural and economic growth. But as Congress has recognized for over a century, it can also significantly strain the public fisc. 8 U.S.C. § 1601(1) ("Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes."). By definition, the individuals whose receipt of benefits depends on the definition of "public charge" are among the poorest in our society. Because such benefits can never be recouped, State Intervenors will be irreparably harmed if the Rule cannot be enforced while its legality is resolved here and elsewhere.

Conclusion

The Court should recall and stay issuance of the mandate, reconsider its dismissal of the appeal, and permit the States to intervene as Defendant-Appellants.

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

On March 11, 2021, counsel for the State of Texas conferred with counsel for plaintiffs and for the United States, who advised that they are opposed to this motion.

/s/ Judd E. Stone II
JUDD E. STONE II

CERTIFICATE OF SERVICE

On March 11, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Judd E. Stone II
JUDD E. STONE II

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,009 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Judd E. Stone II
Judd E. Stone II

APPENDIX N

No. 19-2222

In the United States Court of Appeals for the Fourth Circuit

CASA DE MARYLAND, *ET AL.*,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, *ET AL.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland

OPPOSED MOTION TO RECONSIDER, OR IN THE ALTERNATIVE TO REHEAR, THE MOTION TO DISMISS

The States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Ohio, Oklahoma, Mississippi, Montana, South Carolina, and West Virginia respectfully ask this Court to reconsider its order dismissing this appeal so that they may intervene as Defendant-Appellants to challenge the district court's nationwide injunction. The district court preliminarily enjoined a final rule interpreting the Immigration and Nationality Act's prohibition against immigration by those would become a public charge—the public charge rule. Until two days ago, the federal defendants, agents or agencies of the United States (collectively "United States"), defended this rule in multiple courts, including the United States Supreme Court.

Two days ago, the United States changed tack. Abandoning its typical practice of asking courts to abey appeals of actions it no longer supports while it formally reverses those actions, the United States filed stipulated motions to dismiss numerous appeals defending the Rule across the country, including in this case. This Court granted that motion and immediately issued its mandate.

Under these circumstances, this Court should have rejected that stipulation. The nationwide injunction implicates the interests of countless parties who, until the stipulation was filed, had no notice that they needed to intervene in order to protect those interests. Indeed, the federal defendants here did not notify the States that they intended to withdraw support of the Rule prior to these stipulations becoming common knowledge. Allowing Federal Rule of Appellate Procedure 42(a) to be used in this fashion permits the federal government effectively to rescind rules by litigation rather than through the Administrative Procedure Act's requirements, vitiating numerous procedural protections for adversely impacted parties.

This novel practice will not end here. If permitted to stand, the federal government's repeal-by-stipulation tactic will simultaneously stifle public participation in major policy initiatives at the federal level, encourage ever-more-complex procedural gamesmanship, and will encourage even potentially affected parties to intervene aggressively into cases to prevent this tactic's future use. The Court should not countenance these results and should reconsider its dismissal.

BACKGROUND

The background of this case is explored in the accompanying motions to withdraw the mandate and to intervene. To avoid burdening the Court, State Intervenors supply only a truncated background here.

Since the late Nineteenth Century, Congress has prohibited immigration by individuals who are likely to become a "public charge." Immigrant Fund Act, 47th Cong. ch. 376, §§ 1-2, 22 Stat. 214 (1882). Congress has never attempted to define that term, providing only a list of factors that the Executive is to consider. 8 U.S.C. § 1182(a)(4)(B).

In 2019, following an extensive notice-and-comment period, the Trump Administration finalized the first formal rule defining a "public charge." This rule required federal officials assess an alien's likely reliance on non-cash public assistance as well as cash public assistance when determining whether an alien is likely to be a public charge, and therefore inadmissible. Inadmissibility of Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019). Various states, municipalities, and private interest groups immediately filed suit to challenge this rule in courts across the country. These cases led to sometimes overlapping and sometimes conflicting orders and injunctions, which are fully described in the United States's petition for certiorari arising from a companion case regarding the Rule in the Second Circuit. Petition for a Writ of Certiorari, *Department of Homeland Security v. New York*, No. 20-449 (U.S. Oct. 7, 2020).

The plaintiffs, CASA de Maryland, Inc. and two individuals, filed this action in the United States District Court for the District of Maryland against the President,

the Secretary of Homeland Security, and other federal defendants in their official capacities. The plaintiffs alleged that the Rule violates both the APA and the Fifth Amendment. *Id.* at 236. They moved for a preliminary injunction to block the rule from taking effect. *Id.* The district court granted the motion and entered a nationwide injunction preventing the United States from enforcing the rule anywhere. *Id.*

A panel of this Court reversed. It held that that the Rule "rests on an interpretation of 'public charge' that comports with a straightforward reading of the [statute]." *Id.* at 242. The panel further ruled that the district court "erred in its choice of remedy" by issuing a "plainly overbroad" nationwide injunction. *Id.* at 255-56.

The plaintiffs moved for rehearing en banc, which the Court granted. *Casa de Maryland, Inc. v. Trump*, 981 F.3d 311, 314 (4th Cir. 2020). The Court called for supplemental briefing "to address relevant developments concerning the Public Charge Rule." Order of Dec. 12, 2020 at 2, *Casa De Maryland, Inc v. Joseph Biden, Jr.*, No. 19-2222 (ECF 158). The United States responded that on February 2, 2021, President Biden issued an Executive Order directing a review of the DHS rule, and suggested that the Court postpone en banc oral argument until that review is complete. ECF 188 at 3. The Court agreed and removed the case from the oral argument calendar. ECF 208 at 2-3.

On March 9, 2021, the United States revealed that it no longer intended to defend the Rule, filing nearly simultaneous motions to dismiss litigation pending in the Supreme Court, this Court, and the Seventh Circuit. This morning, the Court granted that motion under Federal Rule of Appellate Procedure 42, without offering

the opportunity for other parties whose interests would be affected by the nationwide injunction to intervene to defend those interests.

ARGUMENT

The Court should reconsider its ruling on the Motion to Dismiss under Federal Rule of Appellate Procedure 42(b).[1] Motions for reconsideration are appropriate where, through no fault of the movant, a court has committed an error of fact or law in deciding on a motion. *Cf. Lightspeed Media Corp. v. Smith*, 830 F.3d 500, 505-506 (7th Cir. 2016) (collecting cases); *Keene Corp. v. Int'l Fidelity Insurance Co.*, 561 F. Supp. 656, 656 (N.D. Ill. 1982), *aff'd*, 736 F.2d 388 (7th Cir.1984) ("Motions for reconsideration serve a limited function; to correct manifest errors of law or fact or to present newly discovered evidence."). State Intervenors respectfully suggest that the Court made such an error here by allowing the parties—who are now aligned—to voluntarily dismiss an appeal of a ruling vacating a final rule without allowing non-parties whose interests are affected by the Rule the opportunity to intervene to protect those interests.

Federal Rule of Appellate Procedure 42 is an inappropriate mechanism to seek dismissal of an appeal of a nationwide injunction affecting numerous non-parties—particularly when accompanied by the immediate issuance of the court's mandate. Rule 42(b) allows the "circuit clerk [to] dismiss a docketed appeal if the parties file

[1] To the extent that the Court determines that this motion should have been brought as a petition for rehearing, State Intervenor request the Court to construe it as such. The standards for relief are similar, and such rehearing would be appropriate for the same reasons. *See* Fed. R. App. P. 40(a)(2).

a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due." This rule typically serves a salutary purpose in that it allows appeals where there is no longer a controversy to dismiss the case rather than incur additional costs. "Normally such stipulations are accepted and the appeal dismissed." *Alvarado v. Corp. Cleaning Servs., Inc.*, 782 F.3d 365, 372 (7th Cir. 2015). This Court has, however, stated that it will "decline to do so if necessary to avoid an injustice, and especially to 'protect the rights of anyone who did not consent to the dismissal.'" *Id.* (quoting *Safeco Ins. Co. of Am. v. Am. Int'l Grp., Inc.,* 710 F.3d 754, 755 (7th Cir.2013)).

Though the nominal parties to this appeal approved the dismissal, the injunction in this case affects numerous parties who have not had the opportunity either to consent or deny their consent to the dismissal. Indeed, many States whose interests are directly implicated were not so much as notified about the United States's intentions before it acted to dismiss these cases. This Rule was promulgated following a notice-and-comment period that lasted nearly a year. 84 Fed. Reg. at 41,501 (Aug. 2019); Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (Oct. 10, 2018). The final Rule balanced a multitude of concerns and addressed numerous comments, and the federal government, as it typically does, was charged with defending that rule against the litigation that inevitably followed. The federal government fulfilled those duties until it filed the motions of March 9, 2021.

The Court should not allow parties to voluntarily dismiss an appeal under these circumstances. Ordinarily, a rule adopted through notice-and-comment rulemaking can only be rescinded through notice-and-comment rulemaking. *Cf. Motor Vehicle*

Mfrs. Ass'n of U.S., Inc.v. State Farm Mutual Auto. Ins. Co., 463 U.S 29, 36-37, 41 (1983). As part of that process, parties whose interests would be negatively impacted by the rescission of the rule would have had the right to submit input, 5 U.S.C. § 503, and ultimately to challenge the final outcome in court, *Dep't of Com. v. New York,* 139 S. Ct. 2551, 2569 (2019). But this Administration has effectively rescinded the public-charge rule by agreeing to dismiss the case with an adversary in name only under Rule 42(b). That is not what voluntary dismissal under Rule 42(b) was designed to do.

To permit Rule 42(b) to be used as a route around the Administrative Procedure Act would lead to severe adverse consequences. Because rulemaking rarely satisfies everyone, APA challenges are both commonplace and often complex, potentially involving numerous issues and parties. In the early stages of this case, it was not clear that parties who were aligned with the United States could have become involved. Like all Americans, State Intervenors have an interest in uniform application of our immigration laws. It initially appeared, however, that the federal government planned to defend those interests. Now, the United States's dismissal of various appeals would impose direct costs on the States in the form of increased benefit payments to otherwise ineligible immigrants, *see generally* Mot. to Intervene, the States cannot vindicate their interests absent this Court's action because the United States have agreed to dismiss the appeal and allow the district court's order to become final.

If the Court permits Rule 42 to be used to dismiss a case in circumstances like this, nonparties like State Intervenors will be forced to intervene at the first sign of

litigation that may affect their interests. Indeed, it would paradoxically require States to more hastily intervene when the federal government already *supports* their interests precisely to avoid the sudden switch-and-dismissal performed here. That is precisely the opposite of what the federal rules are intended to work—namely "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

[Remainder of page intentionally left blank.]

Conclusion

The Court reconsider the motion to dismiss to allow State Intervenors to intervene and prosecute this appeal as Defendant-Appellants.

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

On March 11, 2021, counsel for the State of Texas conferred with counsel for plaintiffs and for the United States, who advised that they are opposed to this motion.

/s/ Judd E. Stone II
JUDD E. STONE II

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/s/ Judd E. Stone II

JUDD E. STONE II

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/s/ Judd E. Stone II
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APPENDIX O

No. 19-2222

In the United States Court of Appeals for the Fourth Circuit

CASA DE MARYLAND, *ET AL.*,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, *ET AL.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland

OPPOSED MOTION FOR LEAVE TO INTERVENE AS DEFENDANT-APPELLANTS

The States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia move under Federal Rule of Appellate Procedure 27 to intervene as Defendant-Appellants to appeal the district court's nationwide injunction against enforcement of the public charge rule (the "Rule"). The Rule implements the Immigration and Nationality Act's prohibition against immigration by those who are likely to become a public charge. Two days ago, the Defendants, who are agents or agencies of the United States (collectively the "United States"), filed a stipulated motion to dismiss this appeal. This morning, the Court granted that stipulated motion and issued its mandate without offering affected parties an opportunity to seek to defend the Rule.

Because the Rule at issue that directly implicates the States' obligations in providing Medicaid and other services, they seek leave to defend the suit.

The States timely seek to intervene. Until two days ago, the United States defended the Rule, so that the States' intervention prior to that point would have unnecessarily complicated this suit. But now that the federal government has abandoned that defense—and, by extension, has evaded the Administrative Procedure Act's strictures for modifying a rule it no longer finds genial—no one is left to represent the States' interests in defending the Rule.

Counsel for Texas contacted counsel for all parties regarding this motion and the accompanying ones. Counsel for Casa de Maryland indicated that it opposes them. Counsel for the United States indicated that it opposes them.

BACKGROUND

This immigration case concerns the hotly contested public charge rule. Under federal law, "any alien who . . . in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A).

In 2019, following extensive notice and comment, the Department of Homeland Security issued a final rule adopting a new definition of "public charge" for purposes of this statute. *Casa de Maryland, Inc. v. Trump*, 971 F.3d 220, 234, *reh'g granted*, 981 F.3d 311, 314(4th Cir. 2020) (dismissed March 11, 2021). The Rule defines a "public charge" as "'an alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period.'" *Id.* at 234 (quoting Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41, 292 41,501). The Rule further

explains that the term "public benefits" includes non-cash benefits that are partially funded by the States, including certain Medicaid benefits. *Id.*

The Plaintiffs, CASA de Maryland, Inc. and two individuals, filed this action in the United States District Court for the District of Maryland against the President, the Secretary of Homeland Security, and other federal defendants in their official capacities. The Plaintiffs alleged that the Rule violates both the APA and the Fifth Amendment. *Id.* at 236. They moved for a preliminary injunction to block the rule from taking effect. *Id.* The district court granted the motion and entered a nationwide injunction preventing the United States from enforcing the rule anywhere. *Id.*

A panel of this Court reversed. It held that that the Rule "rests on an interpretation of 'public charge' that comports with a straightforward reading of the [statute]." *Id.* at 242. The panel further ruled that the district court "erred in its choice of remedy" by issuing a "plainly overbroad" nationwide injunction. *Id.* at 255-56.

The Plaintiffs moved for rehearing en banc, which the Court granted. *Casa de Maryland, Inc. v. Trump*, 981 F.3d 311, 314 (4th Cir. 2020). The Court called for supplemental briefing "to address relevant developments concerning the Public Charge Rule." Order of Dec. 14, 2020 at 2, *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir.) (ECF No. 158). The United States responded that on February 2, 2021, President Biden issued an Executive Order directing a review of the DHS rule, and suggested that the Court postpone en banc oral argument until that review is complete. Supplemental Reply Brief for Appellants at 3, *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir.) (ECF No. 188). The Court agreed and removed the case from

the oral argument calendar. Order of February 24, 2021, *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir.) (ECF No. 208).

Then, on March 9, 2021, without beginning the process to rescind the Rule or providing notice to parties who would normally be entitled to participate in notice-and-comment rulemaking, the United States filed an unopposed motion to dismiss the appeal. Unopposed Motion to Voluntarily Dismiss Appeal at 1, *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir.) (ECF No. 210). This Court granted that motion earlier today. It also issued its mandate without allowing any potentially interested parties to seek leave to intervene and defend the rule. As a result, the public charge rule will become (absent intervention and a stay) unenforceable in any State.

Because the United States will no longer defend a rule directly implicating the States' interests, the States now move this Court to withdraw its mandate, to reconsider its dismissal, and for leave to intervene in defense of the Rule.

ARGUMENT

Although the Federal Rules of Civil Procedure do not apply directly in appellate proceedings, multiple courts have recognized that the rules controlling district court intervention may serve as useful guidance regarding whether to permit intervention in other contexts. *E.g.*, *Int'l Union v. Scofield*, 382 U.S. 205, 217, 86 S. Ct. 373, 381 n.10 (1965); *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 517-18 (7th Cir. 2004); *Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985). The States meet Rule 24's standards for intervention both as of right and as a permissive matter.

I. The States are entitled to intervene as of right.

"[T]o intervene as a matter of right under Rule 24(a) a movant generally must satisfy four criteria: (1) timeliness, (2) an interest in the litigation, (3) a risk that the interest will be impaired absent intervention, and (4) inadequate representation of the interest by the existing parties." *Scott v. Bond*, 734 F. App'x 188, 191 (4th Cir. 2018); *In re Brewer*, 863 F.3d 861, 872 (D.C. Cir. 2017). The States easily meet this standard.

First, this motion is timely. "In order to properly determine whether a motion to intervene in a civil action is sufficiently timely, a trial court in this Circuit is obliged to assess three factors: first, how far the underlying suit has progressed, second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion." *Alt. v. U.S. E.P.A.*, 758 F.3d 588, 591 (4th Cir. 2014). Here, although the case is now at the en banc stage, the States are not "tardy" in filing this motion. The Defendants announced that they would no longer defend the Rule on March 9, and the States filed this motion on March 11, immediately after it learned that the United States intended to regulate by stipulation. Before that, the United States had defended the Rule in this and similar litigation in multiple fora over a period of years, and the United States gave the States no prior notice of its intention to withdraw that defense. Rather than further complicating these procedures and burdening the courts with duplicative briefing, the States relied on the United States to defend its own Rule.

Further, the Plaintiffs will not be prejudiced by the States' intervention. Plaintiffs faced the possibility of protracted litigation until two days ago, even if en banc

oral argument had been postponed; they suffer no prejudice by litigating the same issues in the same forum against the States rather than the United States. The absence of prejudice likewise indicates this motion is timely.

Second, the States have important interests in this litigation, specifically their interests in conserving their Medicaid and related social-welfare budgets. Providing for the healthcare needs of economically disadvantaged individuals represents a substantial portion of the States' budgets. For example, in Texas in 2015, approximately 4 million Texans relied on Medicaid. Tex. health. & Human servs. comm'n, Texas medicaid and Chip in Perspective 1-2 (11th ed. 2017), https://hhs.texas.gov/reports/2017/02/texas-medicaid-chip-perspective-eleventh-edition. Medicaid is jointly financed by the federal government and the States. *Id.* at 4. In 2015, total Texas expenditures for Medicaid represented approximately 28% of the State's budget. *Id.* at 4. In the past several years, the Federal Government has paid for approximately 56-58% of Texas's Medicaid expenditures. *Id.* at 183. Although the exact amount of Texas's Medicaid budget spent on immigrants who would otherwise be inadmissible under the DHS Rule has varied, the total budget is always measured in billions of dollars. *Id.* at 179. And from 2000 to 2015, Medicaid expenses increased from 20% to 28% of the state's budget. *Id.* at 179.

The Court can and should infer that invalidating the Rule will have a disproportionate impact on the States, particularly on border States. For example, Texas and Montana have among the largest international borders in the Union and provide Medicaid services to many immigrants. The Rule would reduce that burden. Under the relevant statute, "[a]ny alien who . . . in the opinion of the Attorney General at

the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A). DHS's rule defines "public charge" as "'an alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period.'" 84 Fed. Reg. at 41,501. "Public benefits" specifically includes, among other forms of public assistance, Medicaid services with some exceptions. *Id.* Thus, if the Attorney General determined that an alien applying for admission to the United States would likely require Medicaid services for more than 12 months in a 36-month period, then that alien would be inadmissible. Accordingly, fewer aliens requiring Medicaid and other public services would be admitted to the United States, including into the State Intervenors, thus reducing the States' Medicaid budgets. Accordingly, each Intervenor has a strong fiscal interest in this litigation.

Third, the States' interests in conserving their increasing Medicaid and related social-welfare budgets will be impaired absent intervention. As explained above, the district court entered a nationwide injunction preventing the federal defendants from enforcing DHS's rule anywhere. *CASA de Maryland*, 971 F.3d at 236. A panel of this Court reversed, but the Court vacated the panel's opinion for rehearing en banc. Now that the United States has voluntarily dismissed this appeal, nothing will stop the district court's nationwide injunction from taking effect and adversely impacting the States' budgets, including their Medicaid expenditures.

Fourth, no party now adequately represents the States' interests because no party is left to defend the Rule. Absent the States' intervention, all States will be

affected by the invalidation of the Rule without having the ability to defend those interests. For these reasons, the States are entitled to intervene as of right.

II. The States also meet the criteria for permissive intervention.

For similar reasons, even if the Court concludes that the States do not meet the standard to intervene as of right, it should use its discretion to allow the States to do so permissively. Under Rule 24(b), a movant seeking permissive intervention must show: (1) that there exists an independent ground of subject matter jurisdiction; (2) that the motion is timely; (3) that the movant's claims or defenses share with the main action a common question of law or fact; and (4) that intervention will not result in undue delay or prejudice to the existing parties. Fed R. Civ. P. 24(b)(1), 24(b)(2), 24(b)(1)(B), 24(b)(3); *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013); *League of Women Voters of Virginia v. Virginia State Bd. of Elections*, 458 F. Supp. 3d 460, 463–64 (W.D. Va. 2020); *Shanghai Meihao Elec., Inc. v. Leviton Mfg. Co., Inc.*, 223 F.R.D. 386, 387 (D. Md. 2004). Again, the States easily meet this standard.

Here, the requirements of an independent ground of subject-matter jurisdiction and shared claims or defenses are not strictly applicable, as plaintiffs must demonstrate subject-matter jurisdiction, and the States seek to intervene as defendants by stepping into the shoes of the former defendants. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). But this Court would retain subject-matter jurisdiction over this federal question, and the States intend to present similar defenses of the Rule to those that were (until two days ago) presented by the federal government. The States likewise enjoy an actual controversy against the plaintiffs: they will be

tangibly, economically affected by an adverse judgment redressable by this Court, and thus this Court would retain Article III jurisdiction.

The timeliness and prejudice analyses used in permissive intervention essentially mirror the analogous intervention as of right analysis discussed above. *See Alt*, 758 F.3d at 591. The States filed this motion promptly after they learned on March 9 that the United States would no longer defend the Rule, and Plaintiffs will suffer no prejudice by this intervention because they were already expected to continue to litigate this case until mere days ago.

This Court should exercise its discretion to permit the States to intervene to defend their interests in avoiding increased costs by the invalidation of the Rule that will otherwise go unprotected. The States have enormous financial obligations in providing Medicaid and other public services and, until quite recently, had no need to intervene to defend those interests. That need has changed due to unexpected litigation tactics by the federal defendants. This Court should not countenance this unprecedented turn.

Conclusion

The Court should grant the States leave to intervene as a Defendant-Appellants.

Respectfully submitted.

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Attorney General of Arizona

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On March 11, 2021, counsel for the State of Texas conferred with counsel for plaintiffs and for the United States, who advised that they are opposed to this motion.

/s/ Judd E. Stone II
JUDD E. STONE II

CERTIFICATE OF SERVICE

On March 11, 2021, this motion was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

/s/ Judd E. Stone II
JUDD E. STONE II

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27 because it contains 2,289 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Judd E. Stone II
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APPENDIX P

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

COOK COUNTY, ILL., *et al.*,
Plaintiffs-Appellees,

v.

ALEJANDRO MAYORKAS, SECRETARY, DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants-Appellants.

No. 20-3150

UNOPPOSED MOTION TO VOLUNTARILY DISMISS APPEAL

Pursuant to Federal Rule of Appellate Procedure 42(b), Defendants-Appellants hereby move to dismiss this appeal, with each party to bear its own fees and costs. Counsel for Plaintiffs-Appellees have authorized us to state that they do not oppose this motion.

Respectfully submitted,

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/ s/ Gerard Sinzdak
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 40 words, according to the count of Microsoft Word.

/s/ Gerard Sinzdak

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2021, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

s/ *Gerard Sinzdak*
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