APPENDIX

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

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| 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

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. | ) | |

**PRELIMINARY INJUNCTION AND STAY**

Having considered the parties' written submissions and oral arguments, and pursuant to Civil Rule 65 and 5 U.S.C. § 705, the court grants Plaintiffs' emergency motion for temporary restraining order and/or preliminary injunction or stay (Doc. 24).

The court finds and holds as follows:

1. Plaintiffs have Article III standing and their suit is ripe.

2. Plaintiffs are likely to succeed on the merits of their claim that the Department of Homeland Security's ("DHS") final rule, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pt. 103, 212-14, 245, 248), referred to herein as the "Final Rule," is unlawful.

3. Plaintiffs have no adequate remedy at law and will suffer irreparable harm if the Final Rule is not preliminarily enjoined and stayed.

4. The balance of harms and the public interest favor the grant of a preliminary injunction and a stay.

Accordingly, the court orders as follows:

1. Defendants Kevin K. McAleenan in his official capacity, the Department of Homeland Security, Kenneth T. Cuccinelli II in his official capacity, and U.S. Citizenship and Immigration Services, along with their officers, agents, servants, employees, and attorneys, and any person in active concert or participation with them, are enjoined and restrained from implementing or enforcing the Final Rule in the State of Illinois absent further order of court.

2. Implementation of the Final Rule is stayed within the State of Illinois absent further order of court.

3. Plaintiffs are not required to give security in the form of a bond or otherwise.

October 14, 2019

United States District Judge

IN THE 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.,<br><br>Plaintiffs,<br><br>-vs-<br><br>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, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; and U.S. CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency,<br><br>Defendants. | Case No. 19 C 6334<br><br>Chicago, Illinois<br>November 14, 2019<br>10:00 a.m. |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GARY FEINERMAN

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(Proceedings heard in open court:)

THE CLERK: 19 C 6334, Cook County, Illinois, versus McAleenan.

THE COURT: Good morning. So, do we have somebody on the phone?

THE CLERK: The line is open.

THE COURT: Okay. The line is open. No one's joined yet. So, who do we have on the plaintiffs' side?

MR. MORRISON: Good morning, your Honor. For Cook County, Illinois, David Morrison of Goldberg, Kohn.

MS. FLINT: Good morning, your Honor. Tacy Flint, Sidley Austin, for ICIRR.

MR. GORDON: Good morning. David Gordon, Sidley Austin, for ICIRR.

MS. PAGAN: Good morning, your Honor. Militza Pagan for ICIRR.

MS. CHAPMAN: Good morning, your Honor. Carrie Chapman on behalf of ICIRR.

MS. MILLER: Good morning, your Honor. Special Assistant State's Attorney Lauren Miller on behalf of Cook County.

MS. CARTER: Good morning, your Honor. Meghan Carter on behalf of ICIRR.

MS. SVATEK: Good morning, your Honor. Marlow Svatek from Sidley Austin on behalf of ICIRR.

THE COURT: Good morning. You're way outnumbered.

MR. CHOLERA: Good morning, your Honor. Kuntal Cholera from the Civil Division of the Federal Programs Branch, and I'm here for all defendants.

THE COURT: Good morning. Are you expecting somebody to appear by phone?

MR. CHOLERA: I will be the only one participating, your Honor. I can't guarantee nobody else will or has already dialed in to listen.

THE COURT: All right. Very good. So, we're here -- actually, we're here for a couple of reasons. One is the motion to stay the preliminary injunction pending appeal, and the second is just a regular status report.

So, why don't we do the regular status report first. Thank you for the status report. The defendants have not yet responded to the complaint, is that correct?

MR. CHOLERA: That's correct, your Honor.

THE COURT: Okay. When were you -- when would you like to do that by?

MR. CHOLERA: So, in the status report, your Honor, we had indicated it would be 45 days from the date on which we would produce the administrative record. That would put us at around January 9th, but obviously, the plaintiffs should please correct me if I'm wrong about that.

We found out recently that in the District of

Maryland case, the judge -- or at least the plaintiffs had requested a response by January 8th, which would be the day before, so we were going to request perhaps an additional week here. But obviously, if your Honor would like us to still respond by January 9th with our motion to dismiss, we can see if we can get an extension in the District of Maryland case.

THE COURT: So, when's your -- the administrative record will be filed when?

MR. CHOLERA: November 25th, sir.

THE COURT: November 25th? Okay. And then just when's -- a week here or there isn't terribly significant, so when's a realistic, but not terribly lengthy time frame for you to either move to dismiss or answer the complaint?

MR. CHOLERA: The week of January 14th, January 16th, I think, is the one we had in mind. I'm hoping that doesn't fall on a weekend. I think that's around a Wednesday, but --

THE COURT: That's a Thursday, 6 and 13 are Mondays, so the 16th would be a Thursday. Is that all right with the plaintiffs?

MR. MORRISON: Your Honor, the only thing I would note is that I believe that the defendants had 60 days from service to file their response to the complaint, so it was actually technically due in November. But we don't object to the defendants taking an additional period of time to respond to the complaint.

THE COURT: Okay. That's fine. So, why don't we say January 16th is the response to the complaint. And you're going to move to dismiss at least in part and perhaps in full?

MR. CHOLERA: Yes, your Honor, at least for the equal protection claims; but for preservation's sake, we might go ahead and just reiterate the claims that your Honor had already adjudicated.

THE COURT: That's fine. So, why don't we come in, Jackie, the following week for a presentment of the motion.

THE CLERK: How about January 22nd.

THE COURT: Only if that's good for everybody.

MR. CHOLERA: That's my birthday. I'd be happy to come in for it.

THE COURT: Are you going to be able to get back in time?

MR. CHOLERA: Fortunately, my family actually lives in Chicago, so it wouldn't be the worst thing.

THE COURT: Oh, perfect. We can pick another day if you want.

MR. CHOLERA: That's perfectly fine, your Honor. Thank you.

THE COURT: All right. So, the administrative record will be filed by November 25th. And then in terms of discovery, I saw one area where the parties disagree, and you'll tell me if there are others. The one area is whether

there ought to be discovery beyond the administrative record for purposes of the equal protection claim, is that right?

MR. MORRISON: Well, your Honor, before we address that, I just wanted to address the administrative record for a second, which was that the defendants have asserted they'll be producing a non-privileged version of the administrative record by November 25th. We would assume that they'll be producing a privilege log with the administrative record to identify those items that they are withholding on the basis of privilege.

And, you know, it will be our intention as we set further deadlines, such as dispositive motions, that we work through the opportunity to address the missing documents that are part of the record and not set a dispositive motion until after the complete record is presented to the Court resolving all issues of completeness and privilege.

THE COURT: Okay. Are -- is there going to be a privilege log served along -- or filed along -- I guess served along with the filing of the administrative record?

MR. CHOLERA: I don't think the privilege log will be ready necessarily on November 25th. We are in the process of putting the privilege log together, your Honor, especially since it's been requested in the other cases as well.

THE COURT: Okay. Do you have some sense as to when the privilege log might be ready?

MR. CHOLERA: I don't have a precise sense. We've conferred with the client in this respect, and it's a lot of an issue of getting all the ducks in a row. I can report back to your Honor my understanding was that it should be within a month of the service of the administrative record, but that's still contingent on information that they don't have yet regarding the search they'll have to conduct in order to assemble the log. So, I can't necessarily represent that it will, for sure, be within a month after the production of the administrative record.

But I can certainly come back, your Honor, with more concrete information, because I don't think we've had that conversation with plaintiffs, at least, before coming before the Court.

THE COURT: Okay. So, what they're saying is late December.

MR. MORRISON: Right. And so -- yes. I was anticipating that there would be a response to the complaint without the basis of the record to respond to the complaint, and then we would deal with any motions to dismiss. But the administrative record would go to dispositive motions with respect to the APA claim.

Certainly, if the plaintiff -- the defendants are intending to brief a motion to dismiss with respect to the APA claim based on an incomplete record, I think that would be

challenging. But if the motion to dismiss the APA claim is not based on the administrative record, then we can work through the timing of when we'll get the privilege log and get a complete record.

THE COURT: Okay. Now I'm going to reveal that I sit on the Northern District of Illinois and not the District of the District of Columbia. In an APA case, when there's a motion to dismiss, is that based solely on the pleadings, which is what normally happens in my world; or does it also include -- can you also refer outside the pleadings to the administrative record? What's your thought?

MR. CHOLERA: My understanding is at least we were going to rely on the face of the actual regulation. In terms of what is necessarily allowed, your Honor, I'm not positive. My understanding is that typically happens on a motion for summary judgment. It's just that in the typical APA case, because discovery is usually limited to the administrative record, often the parties go to the summary judgment stage; and it happens fairly quickly because it's not like this regular civil case, where you have depositions, et cetera.

THE COURT: Right. So, we're just talking about what you're going to be filing on January 16th is just a motion to dismiss under 12(b)(6)?

MR. CHOLERA: Yes, your Honor.

THE COURT: So, therefore, you're limited to the

pleadings and any judicially noticeable materials, like, of course, the regulation.

MR. CHOLERA: Yes, your Honor, and not documents we would be producing.

THE COURT: Not the administrative record. Does that alleviate your concerns?

MR. MORRISON: It does, your Honor.

THE COURT: Okay. Good. So, why don't you -- both sides stay in touch about when the privilege log will be produced. If you -- if there's no dispute, that's fine. If there comes to be a dispute, you can bring it to me.

MR. MORRISON: And then I'm sorry. I took you away from your line of questioning with respect to the equal protection claim.

THE COURT: Right. So, the scope of discovery or whether there is going to be discovery, I gather from the status report that the plaintiffs believe there ought to be discovery outside of the administrative record as to the equal protection claim, and the defendants say no?

MR. CHOLERA: Yes, your Honor.

THE COURT: Are there any other disputes regarding discovery?

MS. CHAPMAN: I think there may be a dispute about the timing of discovery, should it be ordered or permitted. I think that the defendants assert that everything should also

be -- discovery should be stayed until the dispositive motion is adjudicated, and it is our position that the case on the equal protection claim should be proceed as it normally would were it an independent claim without the APA claim.

THE COURT: Right. But the logically anterior question is whether there ought to be discovery in the first place.

MS. CHAPMAN: Indeed.

MR. MORRISON: Your Honor, I will only also note that the plaintiffs are reserving the right to identify additional expert witnesses as it relates to the APA claim.

THE COURT: The APA?

MR. MORRISON: Yes, the arbitrary and capriciousness aspect of the *Chevron II* analysis. That is subject to the affidavit that we've supplied. We might provide additional evidence, if necessary. There have been other affidavits that have been supplied in other cases. So, we wanted to reserve the right, if necessary, to provide additional expert testimony.

THE COURT: Okay.

MS. CHAPMAN: And there might indeed be expert testimony that we would like to provide on that equal protection claim as well.

THE COURT: Okay. But that would happen after fact discovery, if any.

So, how are we going to resolve whether or not there can be fact discovery regarding the equal protection claim that goes outside the administrative record?

Did Judge Furman deal with this issue in the census case?

MS. CHAPMAN: It was addressed somewhat in the census case. He permitted -- and correct me if I am misstating anything. He permitted some discovery beyond the administrative record based on an exception to that. He -- the Supreme Court then held that that was not a permissible extension of discovery, but, in fact, the trial court ruled based on the complete AR, as opposed to the initial administrative record that was submitted; and the court found that that complete AR was sufficient to make -- the Supreme Court, to make their ruling.

So, he permitted it, but then the U.S. Supreme Court said that on the APA claim, that extra discovery was not permissible. But it wasn't to a separate equal protection claim.

THE COURT: I see. So, maybe Judge Furman's decision and the Supreme Court's reversal of that decision doesn't speak to our situation, but what's your perspective?

MR. CHOLERA: That's true, your Honor. The Supreme Court held that the initial expansion of discovery was improper, but because there were different factual revelations

that came in the interim, that they could be retroactively justified; and essentially that's why the Supreme Court ended up at least considering in part the extra-administrative-record evidence.

But it is true that they did reach the antecedent conclusion that the initial expansion shouldn't have been justified.

THE COURT: But that was only for -- the discovery was for purposes of the APA claim, and there was no equal protection claim?

MR. CHOLERA: Yes, your Honor.

THE COURT: Okay. What law is there on the question whether -- in an APA case where there's also an equal protection claim, whether there can be discovery on the equal protection claim? Plaintiffs?

MS. CHAPMAN: So, we have looked, generally speaking, at law on the equal protection claim; and it's our position that because it's a separate and independent count and could have been brought separately and independently, that we are entitled to discovery on it.

We certainly think that in order to meet our factors in *Village of Arlington Heights* that we are required to meet, we have -- we need an opportunity to look at evidence and take depositions, and that we aren't restricted as a matter of law to the administrative record. We can continue to do research

on the issue and brief it if your Honor would prefer.

THE COURT: What's your perspective?

MR. CHOLERA: Our view is in light of the Supreme Court's decisions in *Overton Park versus Volpe* and also the Seventh Circuit's decision in *Fox*, essentially, the standard, in our view, is that when you're assessing agency action or a claim regarding agency action, it is held to a more confined discovery process. And the fact that, you know, you can slap the label APA on it in our view is not necessarily material, given that even this equal protection claim could have been brought under the APA because they could have been arguing that the regulation is contrary to the equal protection clause.

So, in our view, the simple fact that the plaintiffs decided to bring it as a stand-alone equal protection claim rather than an APA equal protection claim should not change the standard of discovery. And if it did, obviously, it would just invite attempts to circumvent the strictures placed on administrative discovery.

THE COURT: I don't think I can resolve this issue, not because you don't know the law, but because I don't know the law. So, maybe we ought to have briefing on this. How would you like to do it? We could have one side -- you know, opening brief, response, and reply, or we could have one or two simultaneous rounds of briefing. What would you prefer?

MR. CHOLERA: So, I guess it would -- I'd beg the threshold question is we are going to move to dismiss the equal protection claim, so would your Honor like us to go ahead and get that out of the way and then move to the second step, which is if the equal protection claim survives, we then litigate what the scope of discovery is for that, or would your Honor like us to --

THE COURT: Why don't we do it -- why don't you do the: Should there be discovery; and, if so, what's the timing? Why don't we have the briefing address both issues.

MR. CHOLERA: Okay, your Honor.

THE COURT: So, how would you prefer to do that? Just with simultaneous briefs, one round or two rounds, or one side and then the other side?

MR. CHOLERA: We have no strong preference, your Honor, but I'd have to touch base with my team to see with respect to timing what they're viewing. But as of right now, I can say, this is obviously an issue that we have briefed before, candidly, so I don't know if we have a strong preference.

THE COURT: How about the plaintiffs? What would you prefer?

MS. CHAPMAN: I think because this is the defendants' issue that they're raising, we would prefer to be able to see their points and respond to it, if it pleases the Court.

THE COURT: Okay. Then let's do this: Why don't we have -- why don't we have two rounds of simultaneous briefs? Because then you both get to see what the other side's position is, and then you get to respond.

As for timing, I don't want to make it too quick, but I also don't want to let it go for too long. So, what do you propose?

MS. CHAPMAN: Could we maybe just have one brief moment, your Honor, to talk about schedules?

THE COURT: Sure.

MS. CHAPMAN: I'm so sorry, but because we're a big group, that might help --

THE COURT: That's fine.

MS. CHAPMAN: My apologies.

(Discussion between counsel, not within hearing.)

MS. CHAPMAN: Thank you, your Honor. I apologize. We tried to do that quickly.

So, we would maybe propose that the initial briefs are due in 21 days, on December 5th, and then the mutual responses 14 days later on December 19th?

MR. CHOLERA: For the combined motion to dismiss and the --

THE COURT: No, no, just the discovery.

MR. CHOLERA: Oh, just the discovery?

THE COURT: Like should there be discovery; and if

so, what should the timing be?

MR. CHOLERA: January 5th, sure.

THE COURT: No, December 5th.

MR. CHOLERA: December 5th, excuse me.

THE COURT: And December 19th.

MR. CHOLERA: What was the date?

MR. MORRISON: 21 days to December 5th for the initial, and then the response 14 days later, December 19th.

MR. CHOLERA: Okay.

THE COURT: All right. Let's do that. And then we're already getting together on -- in late January. Why don't we also set a date, Jackie, the week of January 6th to deal with this issue.

THE CLERK: Sure. How about we set you for -- are you going to need a little bit of time?

THE COURT: Yeah, maybe 15 minutes, half hour.

THE CLERK: How about January 9th, 11:00 a.m.

THE COURT: Is that all right?

MS. CHAPMAN: My apologies, your Honor, but my co-counsel at Shriver has a court appearance on January 9th that isn't movable.

THE COURT: Okay.

THE CLERK: How about January 7th, 10:00 a.m.?

MS. CHAPMAN: Yes, that's fine with us.

MR. CHOLERA: Sure.

THE COURT: Okay. Good.

Anything else about discovery or briefing that we haven't covered that either side would like to cover? Plaintiffs?

MS. CHAPMAN: No, your Honor.

MR. CHOLERA: Nothing from us, your Honor.

THE COURT: Okay. So, let's move on to the motion to reconsider. Is there anything that either side would like -- I have some -- a couple of questions; but before I get to them, is there anything that either side would like to add to what you've already argued in the briefs, or is there anything in the briefs that you'd like to place particular emphasis on?

Why don't I start with the movant.

MR. CHOLERA: Nothing beyond what we've already stated in our initial papers, your Honor.

THE COURT: Okay.

MS. FLINT: No, your Honor. We agree this is a motion for reconsideration.

THE COURT: All right. So, excuse me.

I have a question for DHS about your interpretive methodology.

MR. CHOLERA: Yes, your Honor.

THE COURT: So, in the -- and I basically agreed with your interpretive -- your overarching interpretive methodology in my opinion, and I disagreed with the plaintiffs, although

after I ran that interpretive methodology, I came to a different conclusion than the government did.

So, in your preliminary injunction brief, you focused on the original meaning of the word "public charge" in the late 19th Century because the term entered the statutory lexicon in the 1882 act. And you said the late 19th Century was the key time to consider. And then DHS spent a few pages addressing cases and dictionaries from the late 19th and early 20th Centuries.

And then you also addressed -- the DHS also addressed the 1917 act and whether that changed things from where they stood in the 1882 and the 1907 act.

And as to the 1996 act, DHS argued that Congress left the public charge provision unchanged in the 1996 act. In the motion to reconsider, DHS argues that the 1996 act created a significantly different public charge regime.

So, which is it? Did the '96 act leave things the same, or did it change?

MR. CHOLERA: So, your Honor, with respect, I think the argument we're trying to make is that in 1996, it didn't mark a significant departure in terms of what "public charge" has meant. If I can clarify the antecedent point, which is the interpretive mechanism of why we look at the late 1800s. I think the point we were trying to make was that because that's when the term really entered the statutory edifice,

that's sort of the time period we would look at to understand the original meaning of "public charge."

Now, obviously, to the extent there's ambiguity, subsequent congressional actions might clarify what Congress at least understood "public charge" to mean. That's why when we talk about the 1917 act, what we're really trying to say, it's not so much that the definitions changed. It's just that Congress clearly disagreed with certain interpretations of the initial meaning of "public charge."

In other words, they disagreed, for example, with the Supreme Court's decision in *Gegiow*. In 1995, we're certainly not trying to say it marked a radical departure. I think the point we're trying to make there is because that's the operative provision, the ultimate statutory question is: What does it mean in the 1996 act? But it certainly is that that meaning is heavily informed by what the initial understanding was of "public charge," at least with respect to how Congress understood it.

THE COURT: Right. So, how -- but in the motion to reconsider, the Department argued that the '96 act created, quote, "a significantly different public charge regime," end quote. That's on page 6. So, what significant change did the 1996 act effect with respect to the meaning of the term -- the statutory term "public charge"?

MR. CHOLERA: So, I don't think it changed

fundamentally the underlying term or the meaning of "public charge." I think when we said "regime" what we meant to say is that marked a radical change in, for example, the underlying policy, the way it's supposed to be deployed.

For example, "public charge" could have meant something, but it could be that the overall policy is, for example, not to necessarily apply the term "public charge" aggressively or not to apply it to the full scope, to the full outer bounds of what it allows.

So, when we say it changed the regime, what we really meant to say was the term always historically was understood to mean something broad. The regime now is to go ahead and try to be expansive in how we apply it.

THE COURT: I understand. So, the '96 act added some factors that the agency has to consider in making a public charge determination and listed those statutory factors. I get that.

What else did the '96 act do that sheds light on the meaning of the term "public charge"?

MR. CHOLERA: Nothing else beyond, you know, the policy proscriptions placed not just in 1996 but in sort of the overall immigration apparatus. But as your Honor has stated, the factors we think are very significant in terms of what Congress's thinking was, especially when it comes to initial ideas of how "public charge" were conceived, ideas

that the Congress had rejected, for example, the concept that it has to be based on some type of debilitating physical ailment. Obviously, we believe that was disposed of, and Congress made clear that that is not how they interpreted "public charge" by elucidating certain factors that aren't tethered to permanent infirmities. But that's the primary one, your Honor.

THE COURT: I see. Any thoughts from the plaintiffs on that particular issue?

MS. FLINT: Well, I just wanted to add, in the motion to reconsider, the plaintiffs, after asserting that they shouldn't be held to the position they took before, that the key time was the late 19th Century, they walk through the same authorities related to *Gegiow* and how *Gegiow* doesn't -- to the extent *Gegiow* supports our interpretation of the statute, that has been changed, they argue.

The Court walked through those same authorities and the same topic. Although the Court, in your Honor's preliminary injunction opinion, accepted the premise that the 19th Century was the right time to consider, the Court's opinion walks through several cases from the 1920s addressing the very question of whether *Gegiow*'s interpretation of the statute no longer holds.

So, there's nothing new in the motion for reconsideration, which is exactly why it should be denied.

THE COURT: All right. Second question, in terms of harm. In addressing the harm to DHS of denying a stay, DHS argued that roughly 382,264 people apply for adjustment of status and are subject to a public charge inquiry each year. Is that an Illinois-only figure? And the reason I ask that is because the preliminary injunction I entered covers only Illinois.

MR. CHOLERA: Your Honor, that is not an Illinois-only figure. We did not have an Illinois-only figure that we could turn to.

THE COURT: Okay. All right. Any thoughts from the plaintiffs on that particular issue?

MS. FLINT: On the declaration in general, this, of course, is material that could have been raised in opposition to the preliminary injunction. These are the very same types of harms that the defendants were talking about in opposing the preliminary injunction. Of course, they did not file this declaration until their motion to reconsider the preliminary injunction opinion.

So, this certainly shouldn't be considered in connection with the merits of the preliminary injunction; and in any event, it doesn't add much, or really anything, to the harms that the Court already considered when it talked generally about the nature of delaying the administrative rule.

THE COURT: Any final thoughts on this issue?

MR. CHOLERA: Just as a threshold point, we certainly don't view this as a motion to reconsider, your Honor. We understand that components of it certainly push arguments that your Honor respectfully has rejected in a thoughtful opinion; but obviously, this is a motion for an interim stay pending appeal, not a motion for reconsideration.

The second point, your Honor, is we certainly made the harm argument earlier. Granted, we introduced the declaration now; but that's because of their allegations that we have no evidence of any of the actual specific harm. That's been a point that's been raised in several of these cases, and so we thought this would be a way to back up the arguments we have already made.

So, it doesn't introduce something radically new. In fact, we would submit it's a very predictable declaration that supports arguments we were already relying on; namely, that the interim harm would just be the harm that the new regulation is aimed to prevent, which is that there are significant drains on resources, given new people that would come to the United States.

THE COURT: All right. Anything further from either side? No?

MS. FLINT: No, your Honor.

MR. CHOLERA: Nothing from me, your Honor.

THE COURT: Okay. Well, thank you for your briefs. Like the briefs on the preliminary injunction, they were very, very well done and very illuminating.

I'm going to deny the motion for a stay pending appeal, and just -- because I think -- I got the sense from DHS's waiver of a reply that they'd rather have the ruling sooner rather than later, so I'm going to accommodate DHS, and I'm just going to give my reasons on the record. And we're not going to be here for a terribly long period of time, but it will be a few moments.

So, DHS -- in laying out the factors that bear on a stay pending appeal, DHS laid them out on page 2 of its motion. And those factors line up in large part, if not in whole, with the factors that the Court considers and that I did consider in deciding whether to issue a preliminary injunction. So, given that the factors overlap, I'll deny the motion for a stay based on the reasoning that's set forth in my preliminary injunction opinion.

And let me add parenthetically, in reviewing my preliminary injunction opinion yesterday, I saw that there were a couple of minor citation errors, so I may be issuing a corrected opinion; but it's going to -- I basically -- I forgot a comma in one cite, and I forgot an "Emphasis Added" in another cite. So, I just want to add those. I'm sure there are other mistakes that I did not find, but I wanted to

take care to correct the mistakes that I did find.

So, I'm basically relying on my preliminary injunction opinion for the grounds for denying the stay pending appeal, but let me add these further observations.

With respect to standing, and as to Cook County, DHS's motion didn't address *Gladstone*, which was a Supreme Court case, or *Matchmaker*, which is the Seventh Circuit case; didn't address the non-economic public health concerns arising from the anticipated decrease in people getting vaccinations that would flow from some other rule; and did not address that DHS itself, in its explanation of the final rule, acknowledged that implementing the rule would cause municipal-owned hospital systems to suffer financial losses. And I address that at page 8 of my opinion.

The DHS did distinguish that census case from last year, the Supreme Court census case, on the ground that the states in that case established at trial that the -- adding the citizenship question to the census form would cause non-parties to do something, not respond to the census form, that in turn would impact the states.

And, yes, that was a finding based on a trial, and of course, we didn't have a trial here. We just had a preliminary injunction hearing that was based on a paper record; and based on that limited record, I found the factual predicate that was sufficient for the County to have standing.

And again, we didn't have a trial, like in the census case, but that's because of the stage of the litigation.

In terms of ICIRR, the DHS's motion didn't address the Seventh Circuit's recent and significant decision in the *Common Cause Indiana* case or Judge Brennan's concurrence in that case; and that case is close to being on all fours with this case, and so I will reiterate my reliance on the *Common Cause* decision.

In terms of the zone of interests test, I didn't see that DHS's motion addressed the zone of interests standard in the particular context of the APA. The DHS did reference the San Francisco case, the San Francisco decision in another, a parallel public charge case, which held that the private organizations there did not fall within the zone of interests.

And the San Francisco -- the Northern District of California certainly made that decision; but in so doing, the court said that if the private organization had identified specific references to the role of pro bono organizations within the challenged statute itself, then that would have sufficed for purposes of the zone of interests. And ICIRR did that in this case, as I referenced on page 14 of my opinion.

On the merits, I did -- as I mentioned, I did apply the methodology that DHS urged me to apply. It's just that in looking at the historical materials, the dictionaries, the 19th Century cases, and the circumstances surrounding the

enactment of the 1917 act and how the 1917 act was interpreted by contemporary courts of the day, I just reached a conclusion different from DHS as to what "public charge" meant in 1882, what it meant in 1917.

And there was some change in 1917. It just wasn't a change that affects the particular issue that's before us today. In other words, it's not a change that helps, that advances the ball for DHS.

I examined that, and, of course, what the statute -- what "public charge" meant in 1882 and then in 1917 has a large impact and is dispositive of what it means in the present day, given the lack of any congressional indication that it meant to change the meaning of the term "public charge."

As to the 1882 act, the motion to -- for a stay of the injunction pending appeal didn't address my examination of the late 19th Century cases and dictionaries showing that "public charge" did not -- the term "public charge" did not include those who temporarily receive public benefits, let alone minor public benefits.

And the motion for a stay didn't address my conclusion that the DHS misinterpreted the three 19th Century cases from Maine and Vermont and Pennsylvania that it cited.

DHS did try to limit *Gegiow*. I've been pronouncing it wrong.

MR. CHOLERA: I've probably been pronouncing it incorrectly.

THE COURT: I'm going with you.

MS. FLINT: None of us has.

THE COURT: G-E-G-I-O-W. DHS appears to be trying to limit *Gegiow* to its facts as a case dealing only with whether an alien can be declared likely to become a public charge on the ground that the labor market in the city where the alien went is overstocked. That was certainly the factual circumstance of the case; but in deciding that issue and in deciding whether Mr. Gegiow and his co-plaintiffs were public charges, the court articulated and applied a more generally applicable principle, which is that the public charge is intended to cover -- what public charge means are those who have a more permanent personal condition that precludes them from supporting themselves.

And that's how precedent works. The Supreme Court just doesn't decide cases that are limited to the facts. The Supreme Court decides cases by, most of the time, and certainly in *Gegiow*, by announcing a general principle that it then applies to the particular circumstances of the case.

And as a lower court, I just can't say, "Well, *Gegiow* doesn't count because it involved overstocked labor markets." I have to listen to what the Supreme Court said in terms of articulating the general principle that governed its analysis

of the case.

DHS, in its motion for a stay, also said that if *Gegiow* were pertinent in the present day, then the 1999 field guidance -- which I think was issued by INS, is that right?

MS. FLINT: Yes.

THE COURT: (Continuing) -- would have relied on it. So, here we have a federal agency in 1999 that didn't use the proper methodology to interpret a governing statute. That's not shocking. I don't think it would be shocking to any commentator or judge who has looked into *Chevron* and has criticized *Chevron*. It happens. It happened here.

Now, as it happens, the field guidance did, despite itself, come to the right result in terms of what "public charge" meant, but all that illustrates is the adage that even a broken clock is right twice a day.

In terms of the 1917 act, the motion for a stay didn't address my examination of the case on which DHS heavily relied, *Ex Parte Horn*, as well as the other contemporaneous cases that my opinion cited.

And I would have wanted -- if DHS disagreed with my -- DHS said, "*Ex Parte Horn* meant X," in its preliminary injunction brief, and I said, "No, *Ex Parte Horn* does not mean X. It means Y." I would have loved for DHS to come back at me and say, "No, no, no, it really means X." And I would have given that argument serious consideration. But DHS

didn't even go there.

And what *Ex Parte Horn* and the other post-1917 cases say -- and this is in line with the commentary that DHS cited in its preliminary injunction brief -- is that the 1917 act expanded *Gegiow*'s understanding of "public charge," which was limited to only personal economic causes of being a public charge, to include non-economic causes of being deemed a public charge, such as being imprisoned.

And the courts actually disagreed on that particular issue. Does it cover -- does public charge cover people who are in prison? Does it not? And -- but that debate doesn't have anything to do with our case because even if we -- even if I agreed with the courts that held that the 1917 act expanded the term "public charge" to include folks who couldn't support themselves, who were largely, if not entirely, dependent on government assistance for their sustenance, even if that were expanded to include people who could work but who were in prison, that doesn't help DHS in this case because in order for DHS to win this case, "public charge" has to mean -- has to include people who are temporarily dependent on even a modest amount of public benefits, of government benefits.

The motion to -- for a stay did cite a new case, a case that hadn't been cited before, which is the Second Circuit's decision in 1929, *U.S., ex rel., Iorio* -- that's

I-O-R-I-O -- *versus Day*. But *Iorio* is of a piece with the cases that were cited in my opinion that held that the 1917 act expanded *Gegiow*'s conception of "public charge" to include those who are substantially, if not exclusively, dependent on public benefits for reasons not having anything to do with their ability to work.

The cases I cited dealt with people who were in prison, so even though they can work, they can't support themselves. They're entirely dependent on the government. What *Iorio* held is that the 1917 act also included those who were capable of working, but who were in an area of the country, like *Gegiow*, where there was no work.

And so what *Iorio* said is that the 1917 act expanded "public charge" to include people who, by virtue of their circumstance, for example, being in a labor market that is overstocked, couldn't support themselves, in addition to people who just couldn't support themselves wherever they were.

And the language that *Iorio* used was that the 1917 -- the amendment to the public charge provision in the 1917 act was meant to capture situations, quote, "where the occasion leads to the conclusion that the alien will become destitute, though generally capable of standing on his own feet." And, "generally capable of standing on his or her own feet" means the person would be capable of working; but the occasion of

being in an area like Portland, Oregon, in the *Gegiow* case, that had an overstocked labor market, would cause those people otherwise able to work to become destitute.

And the *Iorio* case used the word "destitute," and that's an important word because "destitute" has a meaning of you're substantially, if not exclusively, dependent on the government for your subsistence.

It doesn't mean -- so, *Iorio* did not interpret the 1917 act to include people that the final rule says that "public charge" includes, which is people who are temporarily reliant on public benefits, even to a modest extent.

As to the 1996 act, it didn't change -- in my view, it didn't change the meaning of the term "public charge." It only set forth the factors that DHS must consider in deciding whether a particular person was a public charge. And the motion for a stay said that the '96 act reiterated that DHS has considerable discretion in deciding who is likely to become a public charge.

Yes, the DHS does have that discretion, but the discretion must be exercised within the confines of the statute, within the confines of the meaning of the term "public charge." And for the reasons I set forth in my opinion, the final rule went beyond those confines by bringing in people who were just temporarily reliant on a modest amount of public benefits.

As to the balance of harms and the public interest, even if it were appropriate to consider the -- the new affidavit, the new declaration submitted by DHS, it doesn't move the needle. For one, it refers to national figures, as opposed to Illinois-only figures, so I don't know, because I haven't been told, how many public charge evaluations DHS is going to have to make or the government's going to have to make in Illinois over the next year.

And in any event, in the Seventh Circuit, preliminary injunction is a sliding scale analysis, and the plaintiffs have a strong case on the merits. So, even if the balance of harms did not tip as decisively in plaintiffs' favor as I concluded in the preliminary injunction opinion, the bottom line would still be the same, which is that preliminary injunctive relief would still be appropriate.

Finally, as to the government's request that I stay the injunction as to folks other than the plaintiffs, other than Cook County and other than ICIRR's clients, I'm not going to do that. ICIRR serves clients across the state, so implementation of the final rule will have a statewide effect on ICIRR's clients and, therefore, on ICIRR itself.

That said, the record is -- the factual record at this point has not been substantially developed, and a preliminary injunction is interlocutory. So, as the factual record develops, if DHS would like to expand the factual

record on this particular point, it can do so and then move to modify the preliminary injunction, cutting it back to Cook County and perhaps other portions of Illinois on a more complete record.

So, for those reasons, I'm going to deny the motion for a stay pending appeal. We have our next date. You can get the transcript from Chip if you want to send it upstairs.

Is there anything else that we need to address at this point?

MR. CHOLERA: I just wanted to put one item on the record for the benefit of our appellate team. It deals with the argument about the interpretive device, looking to the late 1800s. One of the other reasons we framed our argument the way we did is because we're trying to harmonize our approaches across different district courts, and not all district courts, I think, have agreed on the same methodology for how they determine it.

So, I do want to preserve that to the extent that the appellate team does decide to argue our case based on a different interpretive methodology, we would not consider that contradictory because that would have been a methodology that at least other district courts have adopted. In other words, other district courts have not necessarily just looked to the original meaning and have looked to later statutory elements. So, that was another reason why the argument was also framed

that way.

THE COURT: Right. And you'll notice how much reliance I placed on the 1999 field guidance in my opinion, which was none. I haven't read in detail -- I've obviously skimmed the other decisions, but I haven't -- I can't recall at this point the extent to which their interpretive methodologies differed from mine; but there's a reason I used the interpretive methodology I used, and that's because I believe it's the correct interpretive methodology.

So -- all right. Anything else?

MS. FLINT: No.

MR. MORRISON: No.

THE COURT: And we have two further dates. And I will get out a very slightly corrected, really just changing two -- correcting two citation errors. I'll get that out today. Okay? Thanks.

MR. MORRISON: Thank you for your time, your Honor.

MR. CHOLERA: Thank you, your Honor.

MS. FLINT: Thank you, your Honor.

MR. GORDON: Thank you, your Honor.

(Which were all the proceedings heard.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

*/s/Charles R. Zandi* *November 26, 2019*

Charles R. Zandi Date

Official Court Reporter

# 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.,<br>Plaintiffs - Appellees<br><br>v.<br><br>CHAD F. WOLF, et al.,<br>Defendants - Appellants |
| **Originating Case Information:** | |
| District Court No: 1:19-cv-06334<br>Northern District of Illinois, Eastern Division<br>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.

# UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## ORDER

February 10, 2020

*By the Court:*

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