No. 19A905

IN THE

Supreme Court of the United States

CHAD F. WOLF, ET AL.,

Applicants,

v.

COOK COUNTY, ET AL.

Respondents.

On Application to Stay Injunction of
the United States District Court for the Northern District of Illinois

OPPOSITION TO DEFENDANTS' APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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INTRODUCTION

This case does not present the "extraordinary circumstances" necessary to justify a stay. *See Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). Respondents challenged DHS's Inadmissibility on Public Charge Grounds rule, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (the "Final Rule") under the Administrative Procedure Act. The district court conducted "a dry and arguably bloodless examination of the authorities that precedent requires courts to examine" when interpreting the governing statute, and, using only "the legal tools that precedent requires courts to use," concluded that the Final Rule failed the first step of *Chevron*. App. 32a. Based on that conclusion, as well as its review of the parties' evidentiary submissions concerning harms, the district court issued a narrow injunction applicable only within Illinois, tailored to preventing irreparable harm to the parties before the court.

DHS does not identify anything extraordinary in Judge Feinerman's preliminary order. It points to nothing suggesting a need for this Court to abandon its standard practices and grant extraordinary relief even before the Seventh Circuit has the opportunity to complete its expedited review of the injunction. DHS does not, for example, identify any national security concern implicated—nor could it, as the effect of the injunction is solely to allow individuals who have already entered the United States, and who have satisfied all security-related and other requirements, to adjust to lawful permanent resident status. Indeed, Judge Feinerman's preliminary order maintains the status quo that existed between the parties before DHS introduced the Final Rule. DHS has never presented any evidence of Illinois-focused

harm from the limited injunction the court entered. Instead, DHS's arguments with respect to the district court's order are more standard fare: the court supposedly erred in applying well-established law to the facts before it. DHS is wrong, but even if this were true, it would hardly be extraordinary.

Instead of identifying extraordinary circumstances in this case, DHS asks the Court to stay the injunction because the Court stayed injunctions entered in another case, *DHS v. New York*, 140 S. Ct. 599 (2020) (No. 19A785). Appl. 2–3. DHS declares *New York* to be "materially indistinguishable" from this case, and asserts that when it stayed the *New York* injunctions, this Court "necessarily concluded" that the requirements for a stay were met here too. *Id.* at 3–4. Not so. While it is true that both cases involve APA challenges to the Final Rule, the injunctions entered in *New York* are nationwide in scope—whereas the injunction here is narrowly tailored to the harm alleged by the parties before the court.

Contrary to its argument here, this distinction is plainly meaningful to DHS. DHS promptly sought relief in this Court when the Second Circuit denied a stay of the *New York* injunctions in January, but delayed seeking a stay of the limited injunction entered in this case for nearly two months. DHS also argued to this Court that the *New York* injunctions' nationwide scope presented an independent ground on which to grant certiorari, an additional reason why this Court might reverse, and a factor that exacerbated the harm of the *New York* injunctions. And in an opinion concurring in the stay, Justice Gorsuch largely agreed, explaining that far from being an immaterial distinction, the nationwide scope was "[t]he real problem" with the

New York injunctions, presenting an issue that this Court "must, at some point, confront." 140 S. Ct. at 600. Having prevailed before by emphasizing the differences between the two cases, DHS cannot now be heard to ask that they be treated as identical.

Setting aside the *New York* case, DHS's arguments for a stay in *this* case do not support extraordinary relief. First, it is too early to say whether this Court is likely to grant certiorari, because no court of appeals has yet ruled on the merits of the APA claim. Although DHS points to interim stay rulings, it cannot carry its heavy burden to establish entitlement to a stay without either a Seventh Circuit ruling or any conflicting appellate ruling to establish a need for this Court's review of the merits. Second, DHS cannot establish a fair prospect that this Court will reverse any (not-yet-existent) Seventh Circuit decision, should that court affirm the injunction. The district court's decision represents a straightforward analysis of the statutory text, using the tools of interpretation that this Court has prescribed, and is likely to be upheld. Finally, DHS cannot establish any irreparable harm from the preliminary injunction, particularly during the limited time period that remains before the Seventh Circuit issues its expedited decision.

This Court should adhere to its longstanding historical practice of allowing the lower courts to reach a final decision before this Court steps in. It should deny DHS's application and allow the judicial review process to run its course.

STATEMENT

I. The Immigration And Nationality Act And The Public Charge Rule

The INA provides the means for lawful immigration to the United States. It excludes limited categories of "inadmissible" individuals—terrorists, human traffickers, serious criminals, and individuals who threaten foreign policy interests. 8 U.S.C. § 1182. This same provision also excludes individuals "likely at any time to become a public charge." *Id.* § 1182(a)(4)(A). The phrase "public charge" first entered the statutory lexicon in 1882, *see* Immigration Act of 1882, ch. 37 §§ 1–2, 22 Stat. 214, 214, and Congress has retained the term, without altering it, ever since.[1] In light of this statutory history, DHS argued—and the district court accepted—"that, given the 'unbroken line of predecessor statutes going back to at least 1882 [that] have contained a similar inadmissibility ground for public charges,' 'the late 19th century [is] the key time to consider' for determining the meaning of the term public charge.'" App. 18a (alterations in original) (internal citations omitted) (quoting DHS brief opposing preliminary injunction). As Judge Feinerman explained, from 1882 through today, courts and agency officials have defined an individual as a "public charge" *only* when an applicant was deemed likely to become primarily dependent on the government for long-term support and subsistence. App. 17a–22a; *see Gegiow v. Uhl*,

[1] *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; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, ch. 477, § 212(a)(15), 66 Stat. 163, 183; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 531(a), 110 Stat. 3009-546, 3009-674–75; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 804, 127 Stat. 54, 111.

239 U.S. 3, 10 (1915) ("[T]he persons enumerated [as a public charge] … are to be excluded on the ground of *permanent personal objections accompanying them* irrespective of local conditions …." (emphasis added)).[2]

On August 14, 2019, DHS issued the Final Rule in order to "redefine 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. The Final Rule also expands the definition of "public benefit" to include non-cash benefits such as SNAP (formerly food stamps), most forms of Medicaid, and various forms of housing assistance. *Id*. This redefinition is entirely novel—DHS seeks to dislodge the meaning of "public charge" from its well-established statutory mooring and to redefine it to encompass any immigrant who receives even modest and temporary in-kind government benefits. By providing a duration-based standard, the Final Rule abandons the well-established understanding that "public charge" encompasses only those who depend on government benefits on a long-term basis, instead redefining it to capture even those who temporarily access *de minimis* public benefits for the requisite time. *Id.* And additionally, the Final Rule discards the long-held consensus that "public charge" requires primary dependence on the government for subsistence by including within its reach even those immigrants who receive a

[2] *See also, e.g.*, *Ex parte Mitchell*, 256 F. 229, 234 (N.D.N.Y. 1919); *Ex parte Tsunetaro Machida*, 277 F. 239, 241 (W.D. Wash. 1921); *United States ex rel. La Reddola v. Tod*, 299 F. 592, 592–93 (2d Cir. 1924); *United States ex rel. De Sousa v. Day*, 22 F.2d 472, 473–74 (2d Cir. 1927).

modicum of in-kind benefits with little cash value. *Id.* Both changes impermissibly construe that statute and usurp Congress's legislative authority.

II. Prior Proceedings

On October 14, 2019, the district court granted Plaintiffs'—Cook County and the Illinois Coalition for Immigrant and Refugee Rights ("ICIRR")—motion for a preliminary injunction and enjoined the Final Rule's application within Illinois. App. 34a–35a; *see also id.* at 1a (corrected opinion). In concluding that Plaintiffs were likely to succeed on the merits of their challenge, the district court concluded that the Final Rule's expansive redefinition of the term "public charge" is inconsistent with the plain statutory meaning of that term as it had been understood for almost 150 years. App. 15a–28a. It therefore invalidated the Final Rule at step one of the *Chevron* analysis. *Id.* (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)).

On November 14, 2019, the district court denied Defendants' motion to stay the proceedings pending appeal because DHS had failed to call into question the reasons provided in its order enjoining enforcement of the Final Rule. App. 60a–70a. DHS subsequently filed a motion for stay pending appeal at the Seventh Circuit, and on December 23, 2020, the Seventh Circuit denied DHS's motion and set an expedited briefing schedule for oral argument, scheduled for February 26, 2020. DHS, apparently content to let the judicial process play out, did not then ask the Supreme Court to stay enforcement of the preliminary injunction pending appeal.

Instead, DHS waited so that this Court *first* would consider an application to stay one of the *nationwide* injunctions issued by one of the several other district courts to enjoin the Final Rule. Sure enough, on January 13, 2020, DHS applied for

a stay of the District Court for the Southern District of New York's nationwide injunctions of the Final Rule. After this Court issued a stay on January 27, 2020, DHS again asked the Seventh Circuit to stay the Illinois injunction pending appeal. The Seventh Circuit denied DHS's renewed motion for a stay on February 10. App. 73a. Only then, just two weeks before oral argument at the Seventh Circuit, did DHS ask this Court to stay the Illinois injunction. Oral argument is now one week away.

ARGUMENT

Where, as here, the matter is pending before the court of appeals and the court of appeals denied a motion for a stay, DHS faces "an especially heavy burden" to obtain the extraordinary relief of a stay from this Court. *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers). This Court should grant a stay only "upon the weightiest considerations." *Id.* (quoting *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (mem.) (O'Connor, J., concurring in denial of stay application)). As is well established, DHS must demonstrate: "(1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed." *Id.* at 1319.

No basis exists for this Court to intervene here. Contrary to DHS's repeated assertion, the Court's decision to stay the *New York* injunctions does not control. The Southern District of New York enjoined the Final Rule nationwide; here, by contrast, the Northern District of Illinois issued a limited injunction narrowly tailored to address the harms to Plaintiffs before the court. Additionally, with oral argument

just one week away, this Court has no reason to step in now. DHS's own willingness to wait makes clear there is no urgency, and this is not an "extraordinary case[]" warranting this Court's intervention. *See Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., Circuit Justice) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980)).

I. The Stay Of The Nationwide Injunctions Entered In *New York* Does Not Support A Stay Here.

A. The Nationwide *New York* Injunctions Are Materially Distinguishable From The Limited Injunction Entered Here.

DHS's lead argument has nothing to do with the decision in this case, but rests instead on its assertion—repeated in various forms throughout its Application—that "this Court already determined" the outcome here "when it issued a stay in *DHS v. New York*." Appl. 15. But the two cases present materially different questions, and the stay granted in *New York* does not predetermine this case.

Most glaringly, the nationwide scope of the *New York* injunctions sets that case apart. DHS plainly recognizes this key difference: it made a strategic decision not to pursue relief in this Court when the Seventh Circuit declined to stay the narrowly tailored Illinois injunction nearly two months ago, on December 23, 2019. App. 72a. Instead, DHS waited to seek relief in this Court when the Second Circuit denied a stay of the *New York* injunctions on January 8—thereby ensuring that this Court's first review of a case challenging the Final Rule would be of a case also presenting the independent question of whether nationwide injunctions could be sustained.

Furthering this strategy, DHS in its application to stay the *New York* injunctions repeatedly directed the Court's attention to their nationwide scope,

arguing that it tilted each of the three stay factors in DHS's favor. First, DHS argued that the scope of the *New York* injunctions presented an independent ground for certiorari, separate and apart from the merits of the APA analysis. DHS said the *New York* case would "squarely present the question of whether nationwide injunctions are consistent with the federal courts' targeted authority to redress the concrete injuries shown by the parties before them in specific cases and controversies," which DHS characterized as an "important federal question warranting a writ of certiorari." Application for Stay at 16, *U.S. Dep't of Homeland Security v. State of New York*, No. 19A785 (S. Ct.) (filed Jan. 13, 2020) *("New York* Stay Appl."). And DHS quoted Justice Thomas's concurrence in *Trump v. Hawaii*, in which Justice Thomas opined that "'[i]f federal courts continue to issue [universal injunctions], this Court is duty-bound to adjudicate their authority to do so.'" *New York* Stay Appl. at 16–17 (alteration in original) (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring)). Of course, because the district court in this case did not issue a nationwide injunction, but narrowly tailored its injunction to address harms to the parties before the court, this "important federal question" is not presented here.

Second, DHS argued that the *New York* injunctions' "overly broad" scope would present an "additional ground" for reversal of "any decision of the court of appeals upholding the district court's nationwide injunctions." *Id.* at 32. DHS stated that "[n]ationwide injunctions like the ones [in that case] transgress both Article III and longstanding equitable principles by affording relief that is not necessary to redress any cognizable, irreparable injury to the parties in the case." *Id.* Here, by contrast,

the scope of the injunction does not support reversal, because it is limited based on the district court's factual findings as to what harms the Plaintiffs here would suffer. App. 31a. Indeed, unlike the *New York* case, DHS has not challenged the scope of the injunction entered here, either in its pending appeal to the Seventh Circuit or in its stay application to this Court.

Third, DHS leaned on the "overbroad" nature of the *New York* injunctions in arguing that it would suffer irreparable harm without a stay. *New York* Stay Appl. at 4. Again, the distinction between the *New York* case and this one is stark. By definition, any harms DHS might suffer from delaying implementation of the Final Rule would be significantly greater if an injunction applied in fifty states rather than one. Indeed, with only Judge Feinerman's limited injunction remaining in place, DHS has announced that the Final Rule will go into effect throughout the rest of the country on February 24, 2020[3]—making clear that the Illinois injunction has not delayed enforcement of the Final Rule elsewhere. And the disparity of harms is all the greater because DHS has presented *no* evidence of *any* harms that will flow from the district court's narrowly tailored injunction. *See* App. 58a (acknowledgment that DHS did not submit evidence of harms based on an injunction within Illinois alone, because it "did not have an Illinois-only figure"); *id.* at 69a (statement by Judge Feinerman that "I don't know, because I haven't been told, how many public charge

[3] *See* U.S. Citizenship & Immigration Servs., Dep't of Homeland Sec., *USCIS Announces Public Charge Rule Implementation Following Supreme Court Stay of Nationwide Injunctions* (Jan. 30, 2020), https://www.uscis.gov/news/news-releases/uscis-announces-public-charge-rule-implementation-following-supreme-court-stay-nationwide-injunctions.

evaluations DHS is going to have to make or the government's going to have to make in Illinois over the next year").

Further demonstrating the materiality of this difference between the two cases, Justice Gorsuch's opinion concurring in the *New York* stay order focused exclusively on the *New York* injunctions' nationwide scope. 140 S. Ct. at 600–01. "The real problem here," Justice Gorsuch wrote, "is the increasingly common practice of trial courts ordering relief that transcends the cases before them." *Id.* at 600. "Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit. … But when a court goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies." *Id.* Thus, in Justice Gorsuch's view, nationwide injunctions "raise serious questions about the scope of courts' equitable powers under Article III," and "this Court must, at some point, confront these important objections to this increasingly widespread practice." *Id.*

Omitting any reference to Justice Gorsuch's concurring opinion, DHS attempts to downplay the importance of the nationwide scope of the *New York* injunctions to the Court's stay order in that case. According to DHS, if the Court had been focused on the injunctions' scope, it would have granted DHS's requested alternative relief of "a stay of the nationwide effect of the injunctions." Appl. 2. Because the Court instead stayed the *New York* injunctions in their entirety, DHS infers that the Court

"necessarily determin[ed] that there was a fair prospect the Court would agree with the government … that challenges to the Rule will be unsuccessful and that even a more limited injunction would impose irreparable harm on the government." *Id.* at 4.

But this argument misstates the alternative relief DHS requested, and ignores the impracticability of what it actually proposed. DHS did not ask the Court alternatively to stay the effect of the injunction beyond, for example, a specified region in which plaintiffs operate, or outside a defined category of subjects. *Compare with Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088–89 (2017) (per curiam) (staying injunction in part, such that executive order could be enforced as to the category of foreign nationals who lacked "a credible claim of a bona fide relationship with a person or entity in the United States"). Instead, DHS asked the Court to stay the injunctions "such that they apply only to aliens whom the government and non-governmental respondents identify as receiving services in the jurisdictions in which they operate." *New York* Stay Appl. at 40. In other words, DHS's requested alternative relief would have required the identification of all individual immigrants receiving covered services in and around the state of New York. DHS did not offer any suggestion of how such a stay could feasibly be crafted, and it is hardly surprising that the Court declined to craft one itself. The Court's election not to grant the alternative relief DHS requested in *New York* cannot bear the weight DHS seeks to hang on it now.

B. Allowing The Seventh Circuit To Review The Injunction In The Ordinary Course Will Benefit The Judicial Process.

Allowing the Seventh Circuit to complete its review of the injunction on the merits, without intervention from this Court, will enhance the percolation of the questions presented. The impact of nationwide injunctions on appellate court percolation is among the principal reasons such orders have been criticized. As Justice Gorsuch noted in his opinion concurring in the stay of the nationwide *New York* injunctions, there can be value in "encourag[ing] multiple judges and multiple circuits to weigh in only after careful deliberation, a process that permits the airing of competing views that aids this Court's own decisionmaking process"—even where doing so may "require litigants and courts to tolerate interim uncertainty about a rule's final fate and proceed more slowly until this Court speaks in a case of its own." 140 S. Ct. at 600 (Gorsuch, J., concurring); *see also id.* (citing Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 420 (2017) (stating that the issuance of limited injunctions by lower courts permits "the percolation of legal questions through different courts of appeals, allowing each circuit to reach its own conclusion pending resolution by the Supreme Court")).

This case illustrates Justice Gorsuch's point. The district court here looked to the meaning of the term "public charge" as it was understood when it first entered the statutory lexicon in 1882, and concluded that that original meaning foreclosed DHS's interpretation in the Final Rule. App. 17a–18a. The court relied solely on long-accepted tools of textual interpretation, and—distinguishing the Southern District of New York's analysis—emphasized that its opinion "rest[ed] not one bit on policy." *Id.*;

id. at 32a–33a. Crafting a limited injunction, the court addressed the harms it found the Plaintiffs before it would suffer, but did not restrict DHS's ability to move forward with the Final Rule elsewhere, in a manner that would impact only third parties not before the court. To the extent this Court reviews the Final Rule in the future, it will be aided by Judge Feinerman's careful statutory analysis and review of the factual record in support of its injunction.

Moreover, when the Seventh Circuit hears argument next week, it will be the first federal court of appeals to issue an opinion deciding the merits of a preliminary injunction against DHS's rule on full briefing and argument. Intervention by this Court now, based solely on stay papers, risks disrupting the Seventh Circuit's independent review—depriving this Court of another "airing of competing views" to "aid[] this Court's own decisionmaking process." *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring). And it does so to little effect, given that an expedited ruling can be expected shortly after argument occurs on February 26. Indeed, DHS was evidently content to wait for the Seventh Circuit's expedited ruling when it chose to forgo an application to this Court promptly after the Seventh Circuit's denial of a stay in December. This Court should reject DHS's belated change of heart, which is an apparent effort to capitalize on this Court's stay of the materially distinguishable nationwide injunctions in *New York*, and allow the Seventh Circuit to complete its work. If, as DHS says, the statute authorizes its redefinition of "public charge," the Seventh Circuit will reverse, and DHS's stay application will be moot. And if the

Seventh circuit affirms, DHS can file a new stay application in this Court, which the Court can review with the benefit of further percolation.

II. Nothing About This Case Supports A Stay.

Because the *New York* stay does not a support a stay here, DHS must carry the "especially heavy burden" of establishing each of the stay factors with respect to this case alone. *Packwood*, 510 U.S. at 1320 (Rehnquist, C.J., in chambers). But DHS cannot carry that burden.

A. With No Appellate Court Ruling From Any Circuit, DHS Cannot Establish A Reasonable Probability That This Court Would Grant Certiorari.

DHS makes an extraordinary request: it asks this Court to intervene in ongoing appellate proceedings when there is no opinion of the Seventh Circuit to review; no other appellate opinion to consider, much less a split among the circuits; and no petition for certiorari on file. In these circumstances, DHS cannot establish a reasonable likelihood that this Court will agree to hear this case.

Beyond its faulty contention that the *New York* stay order is sufficient, DHS's sole argument is that a Seventh Circuit decision upholding the Illinois injunction would "likely 'conflict'" with stay orders issued by the Ninth and Fourth Circuit. Appl. 16 (quoting Sup. Ct. R. 10(a)). But no appellate court has had the opportunity to review the preliminary relief issued by any district court following full briefing and argument. Rather, they have issued only interim stay decisions following limited briefing. *See City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773 (9th Cir. 2019) (reviewing the issue of a stay order pending appeal); Order, *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir. Dec. 9, 2019)

(declining to issue an opinion as to the merits of a stay order pending appeal). What is more, each of those orders has been issued over a dissent. These divided interim orders cannot establish any reasonable probability as to how the appellate courts will ultimately rule after full briefing, oral argument, and deliberation—much less whether this Court will conclude that its review is warranted.

DHS's argument merely highlights the need for the Seventh Circuit to weigh in, following oral argument next week, without the interference of a stay. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (the Court exists as "a court of review, not of first view"). Absent an appellate ruling on threshold issues such as standing and zone of interests, or on the merits of the APA, or scope of relief, Defendants can at best only speculate as to whether four Justices will grant certiorari to review a not-yet-issued Seventh Circuit decision. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

B. Applicants Fail To Present A Fair Prospect That The Court Would Reverse The Judgment Below.

1. Plaintiffs Have Established Article III Standing And Fall Within The INA's Zone Of Interests.

Nor has DHS established any fair prospect of success on the merits. First, its arguments as to standing find no support. Every single court that has addressed the Article III standing issue—including the Ninth Circuit—has held that both governmental and institutional plaintiffs have Article III standing to challenge the Final Rule. *See City & Cty. of San Francisco*, 944 F.3d at 787 (holding that plaintiff states had standing to challenge the Final Rule because "[a]s more individuals disenroll from Medicaid, the States will no longer receive reimbursements from the

federal government for treating them"); *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 408 F. Supp. 3d 1057, 1121–26 (N.D. Cal. 2019) (noting states and counties would lose federal Medicaid reimbursement funds due to disenrollment caused by the Final Rule, and that the Final Rule would frustrate non-profit healthcare and legal organizations' missions and divert their resources), *appeal docketed*, No. 19-17483 (9th Cir. Dec. 11, 2019); *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 343 (S.D.N.Y. 2019) (holding that Final Rule would harm states' and city's "proprietary interests as operators of hospitals and healthcare systems," reduce Medicaid revenue, and "shift[] costs of providing emergency healthcare … from the federal government to Plaintiffs"); *Make the Rd. N.Y. v. Cuccinelli*, No. 19 CIV. 7993 (GBD), 2019 WL 5484638, at *4–5 (S.D.N.Y. Oct. 11, 2019) ("This case falls squarely in the category of those where the plaintiff [immigrant advocacy organization] was forced to divert its resources from its usual mission-related activities because of the defendant's conduct."); *Washington v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 1191, 1203–09 (E.D. Wash. 2019) (noting disenrollment would cause decrease in Medicaid reimbursement funds and decrease immunization rate, thus increasing spread of communicable diseases); *Casa de Maryland, Inc. v. Trump*, No. PWG-19-2715, 2019 WL 5190689, at *7 (D. Md. Oct. 14, 2019) (holding that non-profit organization serving immigrant communities had standing to challenge the Final Rule), *appeal docketed*, No. 19-2222 (4th Cir. Nov. 4, 2019). Defendants provide no reason to conclude that this Court would disturb the uniform conclusion of the lower courts.

To the contrary, the evidence presented here plainly establishes Plaintiffs' standing. First, with respect to Cook County, DHS *itself* predicted that local governments like Cook County would suffer financial harm as a result of the Final Rule. *See* 84 Fed. Reg. at 41,469 ("DHS agrees that some entities, such as State and local governments … would incur costs related to the changes …."); *id.* at 41,313 (recognizing "the potential nexus between public benefit enrollment reduction … and increased costs to states and localities"). Specifically, DHS conceded that the Rule would cause immigrants to disenroll from public benefits—or not to seek benefits in the first place—out of fear of being deemed a public charge (otherwise known as the Rule's "chilling effect"). *Id.* 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). In turn, DHS predicted that these "reductions in federal and state transfers under Federal benefit programs may have downstream impacts on state and local economies," including that "the rule might result in reduced revenues for healthcare providers participating in Medicaid." *Id.* at 41,486; *see also id.* at 41,469–70 ("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). In fact, DHS estimated 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." *Id.* at 41,300–01. And in this case, Cook County submitted evidence that

Cook County Health and Hospitals System ("CCH")—one of the largest public hospital systems in the nation and the provider of approximately half of all charity care in Cook County—stands to lose $30 million annually in Medicaid reimbursement as a result of the Rule. Add. 3a–4a, 12a–13a. This financial harm to Cook County is more than enough to constitute a cognizable injury for standing purposes. *See Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110–11 (1979) (reduction in property values sufficed as a cognizable injury to plaintiff municipality by diminishing its tax base and threatening its ability to bear costs and provide services).[4] Moreover, as the Ninth Circuit pointed out, "[i]t is disingenuous for DHS to claim that [these costs] are too attenuated at this point when it acknowledged these costs in its own rulemaking process." *City & Cty. of San Francisco*, 944 F.3d at 787.

DHS attempts to evade the district court's factual findings by suggesting that the Rule's emergency Medicaid exemption might offset some undetermined portion of the $30 million CCH stands to lose annually as a result of the Rule. Appl. 17–18. But DHS offers no reason to suggest that, in light of the Rule's chilling effect, individuals who disenroll from or forgo Medicaid will *reenroll* specifically for emergency services.

[4] In addition to direct losses in Medicaid reimbursements, the district court relied upon the County's evidence to find that where individuals lack access to health care coverage, they are likely to forgo routine treatment, resulting in: (1) more costly, uncompensated emergency care that CCH will have to cover; and (2) a heightened risk of vaccine-preventable and other communicable diseases throughout Cook County—a burden that CCH will have to bear. App. 7a–8a. DHS similarly predicted these harms in the Final Rule. *See* 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 ...."); *id.* at 41,313 (acknowledging "the potential nexus between public benefit enrollment reduction and ... public health and vaccinations").

See 84 Fed. Reg. at 41,463 (conceding that the Rule will cause "some individuals [to] disenroll or forego enrollment in public benefits even though they are not directly regulated by this rule"). Similarly, DHS fails to articulate—in light of the County's detailed affidavits to the contrary, *see, e.g.*, Add. 6a–7a, 10a, ¶¶ 20–21, 33; *id*. at 33a–34a, ¶¶ 29, 32—how its claims of harm from an increased risk of communicable disease depend only upon an "attenuated chain of possibilities." Appl. 18 (internal quotations omitted).

As to ICIRR, the Rule's predicted effect—*i.e.*, "reductions in overall alien enrollment in certain public benefit programs"—has already caused ICIRR and its members to lose important revenue they receive by helping immigrants enroll in public benefits. 84 Fed. Reg. at 41,305. That is because ICIRR's member organizations are paid by the Illinois Department of Human Services depending on the number of clients they enroll in benefits, and ICIRR in turn receives a percentage of the overall grant for administration. *See* Add. 23a–24a (noting that "declines in immigrant public benefits enrollment have already occurred," and that "[t]hese declines have, in turn, strained the resources of [ICIRR's Immigrant Family Resource Project ("IFRP")] because it is funded on a reimbursement model").

In addition to decreased revenues, the district court properly found that the Rule would force (and already has forced) ICIRR to "expend[ ] 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." App. 10a. Here, DHS argues

that these injuries constitute "self-inflicted injuries" to ICIRR's "abstract social interests," and thus cannot confer standing. Appl. 18 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) and *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013)). But ICIRR's existing programming effort, which focuses on increasing access to healthcare and other public benefits, is not an "abstract social interest." Rather, it remains central to ICIRR's mission to help Illinois immigrants receive health and social services. Add. 17a, ¶ 6. As such, ICIRR's harms constitute precisely the "concrete and demonstrable injury … with the consequent drain on [its] resources" that this Court has found to confer organizational standing. *Havens*, 455 U.S. at 379 (holding that, if a private organization shows that a defendant's "practices have perceptibly impaired" its ability to undertake existing programs, "there can be no question that the organization has suffered injury in fact").

Finally, both Cook County and ICIRR satisfy the APA's zone-of-interests test. 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 of Pottawatomi Indians v. Patchak* ("*Match-E-Be*"), 567 U.S. 209, 225 (2012) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). The INA aims to prevent immigrants from imposing a severe burden on governmental entities through primary dependence on government benefits; to that end, Section 1183 of the INA specifically entitles "the proper law officers" of "any State, territory, district, county, town, or municipality in which [an] alien becomes a public charge" to

bring a lawsuit for recoupment of the costs associated with an immigrant's use of benefits against any individual who sponsored an immigrant's visa to enforce the Affidavit of Support. 8 U.S.C. § 1183. CCH challenges the Final Rule precisely because it will increase immigrants' reliance on charity care benefits that CCH provides and, in turn, increase costs to CCH, rather than allowing CCH to recoup from the sponsor the cost of an immigrant's use of benefits. As a result, the County falls squarely within the INA's zone of interests. Similarly, the INA expressly contemplates that organizations like ICIRR will play a role in helping eligible immigrants navigate complicated immigration systems and public benefits programs. *See* App. 14a (listing five INA provisions that give "organizations like ICIRR a role in helping immigrants" and noting that "[t]here is ample evidence that ICIRR's interests are not merely marginal to those of the aliens more directly impacted by the public charge provision"). Given the APA's "generous review provisions," *Clarke*, 479 U.S. at 395, Plaintiffs' interests are at the least "arguably within the zone of interests to be protected or regulated by the [INA]." *Match-E-Be*, 567 U.S. at 224 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

2. The Rule's New Public Charge Definition Deviates From The Plain Meaning Of The Statutory Language And Congress's Clear Intent.

In its arguments on the merits, DHS again attempts to group the district court's opinion together with those at issue in the Southern District of New York cases. Appl. 19. But here, the district court directly distinguished its "bloodless examination of the authorities that precedent requires courts to examine" from the Southern District of New York's broader consideration of "policy concerns." App. 31a–

32a. Accordingly, to the extent this Court harbored any unstated concerns about plaintiffs' likelihood of success on the merits in the New York cases, it does not follow that those same concerns would apply to the district court's detailed analysis, discussed below, in this case.

a. "Public Charge" Has, Since The Term Was Enacted In 1882, Referred To Primary Dependence On The Government For Subsistence.

The district court commenced its *Chevron* step one analysis by noting the "fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary … meaning … at the time Congress enacted the statute." App. 17a–18a (quoting *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019)); *see also MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) ("the most relevant time for determining a statutory term's meaning" is "when the [Act] became law"), *superseded by statute on other grounds*, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Here, although the operative enactment occurred in 1996, the term "public charge" dates back to the Immigration Act of 1882 and "has been included in nearly identical inadmissibility provisions ever since." App. 18a; *see also*, Immigration Act of 1882, ch. 376, §§ 1–2, 22 Stat. 214, 214 (refusing entry to "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge"). In adopting this temporal lens, the district court "agreed with [DHS's] … overarching interpretive methodology."" App. 53a; *see also id.* at 18a ("[T]he 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,' 'the late 19th century

[is] the key time to consider' for determining the meaning of the term 'public charge.'") (citations omitted) (quoting Add. 54a, 65a).

Both the district court in this case and the Ninth Circuit agree about what the term meant in 1882: Then, as now, "public charge" means an individual who is primarily dependent on the state for subsistence. *See* App. 19a (holding that "'public charge' does not … encompass persons who receive benefits, whether modest or substantial, due to being temporarily unable to support themselves entirely on their own," but rather "encompasses only persons who … would be substantially, if not entirely, dependent on government assistance on a long-term basis"); *City & Cty. of San Francisco*, 944 F.3d at 793 ("The 1882 Act did not consider an alien a 'public charge' if the alien received merely some form of public assistance."). This is clear from the original statute, which refused entry to "any person unable to take care of himself or herself without becoming a public charge," 1882 Act, ch. 376 § 1, while simultaneously establishing "an 'immigrant fund' that was designed to provide 'for the care of immigrants arriving in the United States.'" *City & Cty. of San Francisco*, 944 F.3d at 793 (quoting Act of Mar. 26, 1910, ch. 376, § 1, 22 Stat. 214). As the Ninth Circuit explained, "Congress thus accepted that providing some assistance to recent immigrants would not make those immigrants public charges." *Id.*

Contemporary dictionaries likewise confirm this common-sense reading of the statutory text. *See* App. 25a; *City & Cty. of San Francisco*, 944 F.3d at 793 (relying on late-nineteenth-century dictionary definitions in concluding that "public charge" did not refer to any alien who "received merely some form of public assistance"); *see*

also Oliveira, 139 S. Ct at 539–40 (looking to dictionaries to understand the historical meaning of a statutory term). The 1889 Century Dictionary, for example, defined a "public charge" as an individual who was so dependent upon the government as to be "committed" to its "custody, care, concern, or management." Century Dictionary of the English Language 929 (William Dwight Whitney ed., 1889); *see also*, *e.g.*, Webster's Condensed Dictionary of the English Language 84 (Dorsey Gardner ed., 1884) (defining "charge" as a "person or thing committed to the care or management of another"). That plain meaning persists through the present day. *See Public charge*, Oxford English Dictionary (3d ed. 2007) (defining "public charge" as "a thing which is the responsibility of the State; a person who is dependent upon the State for care or support").

This definition of the term "public charge" was also reflected in nineteenth-century judicial opinions interpreting the phrase. *See, e.g.*, *City of Boston v. Capen*, 61 Mass. (7 Cush.) 116, 121–22 (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"); *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."); *In re Day*, 27 F. 678, 681 (C.C.S.D.N.Y. 1886) ("The law intends those only that are likely to 'become a public charge,' because they can neither take care of themselves, nor are under the charge

or protection of any other person ….”); *State v. The S.S. “Constitution”*, 42 Cal. 578, 583–87 (1872) (holding that the term “public charge” did not apply to persons who were “neither paupers, vagabonds, or criminals, or affected with any mental or bodily infirmity, but on the contrary [were] perfectly sound in body and mind, and in every way fitted to earn a support”).

b. This Court’s Ruling In *Gegiow v. Uhl* Supports The Injunction Here.

Consistent with the statutory text and this common meaning, “the Supreme Court told us just over a century ago what ‘public charge’ meant in the relevant era, and thus what it means today.” App. 18a. In *Gegiow*, 239 U.S. 3, several Russian nationals brought suit after they were denied admission to the United States on public charge grounds. *Id.* at 8–9. The immigration authorities claimed that their exclusion was justified because they: (1) were “illiterate”; (2) “arrived here with very little money”; (3) “ha[d] no one legally obligated here to assist them”; and (4) were “bound for Portland, Oregon, where the reports of industrial conditions show[ed] that it would be impossible for [them] to obtain employment.” *Id.* at 8. In holding that the aliens could not be excluded on that ground, the Supreme Court interpreted the term “public charge” in context of the terms surrounding it, noting that the term was “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. The Court explained that each of these categories refers to immigrants “excluded on the ground of *permanent personal objections*

accompanying them irrespective of local conditions." *Id.* (emphasis added). Applying the *noscitur a sociis* canon of construction, the Court held that, "[p]resumably [the phrase 'public charge'] is to be read as generically similar to the other[] [phrases] mentioned before and after." *Id.* Thus, *Gegiow* "plainly conveys" that "'public charge' does not … encompass persons who receive benefits, whether modest or substantial, due to being temporarily unable to support themselves entirely on their own." App. 19a.

Defendants' stay opposition cannot counter *Gegiow*. Defendants argue that *Gegiow* was limited to its facts and stands only for the proposition that public charge determinations must "be based on the characteristics of the alien, not his place of destination." Appl. 28. But the *Gegiow* Court's reasoning is not so limited: the Court held, based on the statutory text, that a public charge finding requires a "*permanent*" condition. 239 U.S. at 10 (emphasis added). When the Court applied that principle to the facts, it concluded that the petitioners could not be deemed "public charges" based solely on temporary and remediable circumstances like an overstocked labor market in "the city of [their] immediate destination." *Id.* at 9–10. Contrary to DHS's assertion, that principle applies with equal force to individuals who temporarily receive public benefits on a short-term basis, but are otherwise generally able to support themselves. And that is exactly "how courts of that era read the decision." App. 19a (citing cases).[5]

[5] Notably, the Ninth Circuit agreed with this interpretation of *Gegiow*. *See City & Cty. of San Francisco*, 944 F.3d at 793–94. Moreover, as the Ninth Circuit noted, five years after the *Gegiow* decision, it "followed the Supreme Court's lead, holding that

As relevant here, this Court's interpretation of the unambiguous statutory text in *Gegiow* has not been overturned, narrowed, or legislatively amended. In particular, contrary to DHS's claim, the 1917 Amendment did not purport to redefine the term "public charge." *See* Appl. 28. Rather, that amendment simply moved the reference to "public charge" from between the terms "paupers" and "professional beggars" to the end of a long list of examples of those likely to require long-term government care. *See* Immigration Act of 1917, ch. 29 § 3, 39 Stat. 874; *see also* App. 20a (discussing the 1917 change in statutory text). DHS fails to explain how this relocation of the term "public charge"—without any change to the definition of "public charge" itself—supports excluding those who receive temporary, non-cash benefits. If anything, this relocation of the term suggests that the preceding list provides examples for the larger umbrella term of "persons likely to become a public charge." *See Howe v. United States*, 247 F. 292, 294 (2d Cir. 1917) (stating that numerous categories listed in the 1907 Act "might all be regarded as likely to become a public charge"); *United States ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929) (noting that "the [public charge] clause, however construed, overlaps other provisions; e.g., paupers, vagrants, and the like").

Defendants rely on a Senate report stating that the amendment was intended "'to overcome recent decisions of the courts limiting the meaning of the description of

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'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.'" *Id.* at 794 (quoting *Ng Fung Ho v. White*, 266 F. 765, 769 (9th Cir. 1920)).

the excluded class.'" Appl. 28 (quoting S. Rep. No. 352, 64th Cong., 1st Sess. 5 (1916)). Such legislative history materials are generally not a reliable indicator of a statute's meaning. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[J]udicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, 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."). In any event, the Senate report does not support Defendants' position because "it does not say in which way its author(s) believed that court decisions had incorrectly limited the statute's breadth." App. 21a (citing *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019) ("[M]urky legislative history … can't overcome a statute's clear text and structure.")). And subsequent judicial interpretations of "public charge" following the 1917 Amendment confirm that "this change of location of the words does not change the meaning that should be given them." *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922); *Coykendall v. Skrmetta*, 22 F.2d 120, 121 (5th Cir. 1927) (holding that, even after the 1917 Amendment, "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"). To the extent the 1917 Amendment changed anything, it expanded the *types* of conditions that could render an applicant a public charge—from solely "sanitary" conditions to economic ones as well—but did not disturb the *Gegiow* Court's conclusion that the statute defined "public charges" as individuals who were

"largely, if not entirely, dependent on government assistance for their sustenance." App. 66a.[6]

c. DHS's "Change Over Time" Theory Cannot Succeed On The Merits.

Relying on the Ninth Circuit's stay order, DHS argues that "public charge" has no fixed meaning, and the only "common thread through Congress's enactment of various public-charge provisions has been an intent to preserve Executive Branch flexibility to 'adapt' public-charge provisions to 'change[s] over time' in 'the way in which federal, state, and local governments have cared for our most vulnerable populations.'" Appl. 24 (quoting *City & Cty. of San Francisco*, 944 F.3d at 792–98). Indeed, the Ninth Circuit relied heavily on the shift away from institutionalization of dependent individuals, "[t]he movement towards social welfare," and changes to "the way in which we regarded the poor and mentally infirm" as evidence that there was no "fixed understanding of 'public charge' that has endured" since the provision was enacted. *City & Cty. of San Francisco*, 944 F.3d at 794–96. But "every statute's *meaning* is fixed at the time of enactment." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). To be sure, "new *applications* may arise in light of changes in

[6] Defendants also argue, for the first time, that the 1952 enactment of the INA somehow abrogated the *Gegiow* Court's interpretation of "public charge." Appl. 28–29. That is wrong. Although Congress removed certain antiquated terms like "pauper," it reenacted the term "public charge" and did not give any indication that it was adopting a new definition that deviated either from its longstanding common meaning or the Supreme Court's interpretation. *See* Pub. L. No. 82-414, 66 Stat. 163; *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 589–90 (2010) ("We have often observed that when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its … judicial interpretations as well.'") (omission in original).

the world," but such changes do not give an agency license to rewrite the text: "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Id.* Although our societal approaches to poverty relief have broadened over the past century, the term "public charge" has retained the meaning fixed at the time of its enactment, to require primary dependence on government support for subsistence.

DHS's historical adaptation argument cannot survive based upon the sources to which it points. DHS maintains that both the 1933 and 1951 editions of *Black's Law Dictionary*, along with a 1929 treatise, indicate that the term "public charge" means "one who produces a money charge upon, or an expense to, the public for support and care." Appl. 25 (citing Arthur Cook et al., *Immigration Laws of the United States* § 285 (1929)). But as the district court explained, to the extent these sources are read to mean that *any* government support turns an individual into a public charge, "[t]he treatise is wrong." App. 23a–24a. Indeed, neither the dictionary entries nor the treatise purport to define the *statutory* term "public charge," as they fail to address this Court's decision in *Gegiow* expressing its understanding of "public charge." *Id*.

Nor does the Board of Immigration Appeal's decision in *In re B-*, 3 I. & N. Dec. 323, 324 (BIA 1948), support Defendants' assertion that the longstanding definition of "public charge" has changed over time. As the Ninth Circuit acknowledged, in that

case "the BIA recognized that mere 'acceptance by an alien of services provided by' the government '*does not in and of itself make the alien a public charge*.'" *City & Cty. of San Francisco*, 944 F.3d at 795 (emphasis added) (quoting *In re B-*, 3 I & N Dec. at 324). The decision goes on to cite numerous examples of public benefits that do not trigger a public charge determination, including "an alien who participates, without cost to him, in an adult education program sponsored by the State," "an alien child who attends public school, or alien child who takes advantage of the free-lunch program offered by schools." *Id.* This case thus refutes DHS's assertion that the statutory definition is broad enough to encompass any immigrant who accepts any public benefits without reference to amount or duration.[7]

Defendants proceed to examine "related statutory provisions" in the 1996 statutory regime, arguing that these provisions demonstrate Congress meant to exclude immigrants from receipt of public benefits. Appl. 21–24. As a threshold matter, Defendants have repeatedly acknowledged that in 1996 Congress reenacted the term "public charge" without change from its many prior versions. *See* App. 55a–56a (statement by DHS counsel: "I don't think [the 1996 statute] changed

[7] Subsequent agency decisions similarly reject the statutory interpretation embodied in the Final Rule. *See In re Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (BIA 1962) (noting that the "public charge" provision "has been the subject of extensive judicial interpretation" and that "[t]he general tenor of the holdings is that the statute requires more than a showing of a possibility that the alien will require public support"); *In re Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974) (having been "on welfare does not, by itself, establish that he or she is likely to become a public charge"); *In re A*, 19 I. & N. Dec. 867, 870 (BIA 1988) (petitioner was not likely to become a public charge even though she received cash assistance because she was "young," employed, and able to earn a living). Both the Defendants and the Ninth Circuit fail to address any of these decisions.

fundamentally the underlying term or the meaning of 'public charge'"); Add. 74a (arguing in opposition to Plaintiffs' motion for preliminary injunction that "in 1996 and 2013, … Congress left the public charge provision unchanged"); *see also* App. 68a (conclusion by Judge Feinerman that the 1996 statute "didn't change the meaning of the term 'public charge'"). In any event, none of the statutory provisions that Defendants rely on support the Final Rule's redefinition of "public charge." To the contrary, the separate provisions upon which DHS relies undercut its reading of the text, and thus cannot support its application for stay.

DHS argues, for example, that the affidavit-of-support provision shows that Congress believed "the mere possibility that an alien might obtain unreimbursed, means-tested public benefits in the future would in some circumstances be sufficient to render that alien likely to become a public charge." Appl. 22. But as the Final Rule acknowledges, the statute only requires certain categories of immigrants—*i.e.*, some family-sponsored immigrants and a narrow category of employment-based immigrants who are employed by their relatives—to obtain affidavits of support from sponsors. 8 U.S.C. § 1182(a)(4)(C)–(D); 84 Fed. Reg. at 41,448 ("Not all aliens are required to submit the affidavit of support."). Aside from these explicit exceptions, the "public charge" provision does not require an affidavit of support and does not automatically render immigrants inadmissible as a public charge if they fail to obtain one. *See* 84 Fed. Reg. at 41,448 ("Congress … did not establish submission of the affidavit of support as a mandatory factor in all public charge inadmissibility determinations."). If anything, the affidavit-of-support provision suggests Congress

knew how to impose this heightened requirement on all immigrants if it wanted to, yet intentionally omitted such a requirement from the general "public charge" provision. *Kucana v. Holder*, 558 U.S. 233, 248–49 (2010) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quoting *Nken v. Holder*, 556 U.S. 418, 430 (2009))).

Similarly, DHS invokes a provision in the INA that expressly prohibits DHS from considering past receipt of benefits when determining whether a domestic violence victim is inadmissible as a "public charge." Appl. 22–23. According to DHS, this provision "presupposes that DHS generally can consider the past receipt of non-cash benefits such as public housing and food assistance in making public-charge inadmissibility determinations for other aliens." *Id.* at 23. But as "qualified" aliens under 8 U.S.C. § 1641(c), domestic violence victims are not subject to exclusion under the "public charge" provision. *See* 8 U.S.C. § 1182(a)(4)(E) ("Subparagraph[] (A) [the public charge provision] … *shall not apply to an alien who … is a qualified alien described in* section 1641(c).") (emphasis added). The Final Rule concedes as much. 84 Fed. Reg. at 41,328 (recognizing that "victims of domestic violence … are generally exempted by statute from public charge inadmissibility determinations."). Given this exemption, and because the "public charge" provision does not require an affidavit of support, neither statutory provision can stand for the principle that Congress

specifically authorized the use of temporary, non-cash benefits as a basis for excluding immigrants as public charges.

Lacking support in the statutory text, DHS resorts to legislative history in support of its historical adaptation argument. Appl. 26–28. "But legislative history is not the law." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) ("It is the business of Congress to sum up its own debates in its legislation, and once it enacts a statute we do not inquire what the legislature meant; we ask only what the statute means.") (internal quotation marks and brackets omitted) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396, 397 (1951) (Jackson, J., concurring)). If the Court looks beyond the statutory text—which it should not—the legislative history demonstrates that Congress has repeatedly *rejected* almost the exact same definition of public charge now advanced in the Final Rule. See H.R. Rep. No. 104-469, pt. 1, at 266–67 (1996) (rejecting definition of "public charge" that would have encompassed those who received almost any public benefits for more than one year, including non-cash benefits); 142 Cong. Rec. S11872 (daily ed. Sept. 30, 1996) (statement of Sen. Kyl) (considering and rejecting a proposed definition of "public charge" that would have covered those who received "Federal public benefits for an aggregate of 12 months over a period of 7 years"); S. Rep. No. 113-40, at 42 (2013) (rejecting attempt to broaden the definition of "public charge" to exclude immigrants who were likely to qualify "even for non-cash employment supports").

Lastly, Defendants argue that Congress's reference to the "opinion" of agency officials gives DHS discretion to redefine the term "public charge." Appl. 19–21

(discussing *City & Cty. of San Francisco*, 944 F.3d at 791). If Defendants are correct, then the statute would raise serious nondelegation concerns. *See Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting). It would give DHS "free rein" to pick and choose from the myriad forms of government goods and services (*e.g.*, public benefits or tax breaks) conferred or allegedly likely to be conferred, for any duration, and in any amount, and declare on that basis that an applicant is disqualified from adjusting status or gaining admission to the United States. *Id.* at 2132. This version of the statute would allow DHS not only to adjudicate public charge determinations, but also to declare the legislative policy of the United States in defining the class of immigrants subject to the public charge statute. This expansive delegation would go far beyond ordinary agency authority to engage in "executive fact-finding," "fill up the details," or exercise authority over an area like "foreign affairs" that is traditionally vested in the executive branch *Id.* at 2136–37.[8] And the non-delegation principle applies with even greater force where, as here, "[t]hese unbounded policy choices have profound consequences for the people they affect." *Id.* at 2133; *see also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (holding that question presented was "of deep 'economic and political significance,'" and thus "had Congress wished to assign that question to an agency, it surely would have done so expressly").

[8] The Final Rule does not implicate foreign affairs because all of the individuals who are subject to DHS's public charge rule have already entered the United States. Nor has DHS ever invoked a national security rationale for the Final Rule—either in the text of the Final Rule itself or in this litigation. Rather, DHS's purported concern is to conserve the public fisc domestically.

In addition, Defendants ignore the full text of the provision, which defers to the opinion of agency officials only "at the time of application for a visa" and "at the time of application for admission or adjustment of status." 8 U.S.C. § 1182(a)(4)(A). By referring to the agency's "opinion" only in connection with specified "times" in which individual immigrants' applications are evaluated, the statute makes clear that it confers discretion on DHS to *apply* the statutory term in individual cases—not to *define* it in the first instance. *Compare with*, *e.g.*, *Rush Univ. Med. Ctr. v. Burwell*, 763 F.3d 754, 760 (7th Cir. 2014) (holding that Congress expressly delegated to the agency the power to define the key term at issue where it included the word "define[]" in the statutory text).

C. The Balance Of Harms Tips Decisively Against A Stay.

Finally, DHS utterly fails to substantiate its assertion that it will suffer irreparable harm by delaying application of the Final Rule within Illinois pending the Seventh Circuit's expedited review. As discussed, by declining for weeks to take further action in this case, DHS itself has demonstrated that it faces no imminent threat of harm. *See Ruckelshaus*, 463 U.S. at 1318 (Blackmun, J., in chambers) (stay applicant's "failure to act with greater dispatch tends to blunt his claim of urgency and counsels against the grant of a stay"); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers) ("The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm."). DHS's excuse for delay—that it did not care to seek a stay while the nationwide injunction remained in effect—cannot now save its belated request; if

DHS truly faced an imminent threat of harm in delaying implementation in Illinois, it would have sought a stay immediately.

It is not surprising that DHS failed to do so. The only harm DHS cites is that some number of individuals (DHS has never said how many, App. 69a) who would be deemed likely to become a public charge under the Final Rule might receive lawful permanent resident status while the injunction is in place, and DHS asserts that it cannot revisit that determination if the Final Rule is later upheld. Appl. 29–30. So what? To obtain legal permanent resident status, any such individuals necessarily satisfied all of the other statutory and administrative requirements—including all public safety and residency requirements—to adjust their status, and many provided an affidavit of support that allows the value of any benefits received to be recouped. There is no safety or national security risk at issue; indeed, delaying implementation of the Final Rule simply amounts to leaving the decades-old administrative guidance in place, and DHS has never invoked a national security rationale for the Final Rule—either in the text of the Final Rule or in this litigation. The only risk, then, is that some unidentified number of individuals in Illinois might become lawful permanent residents even though they might, sometime in the future, use 12 months of benefits in a 36-month period. This risk is far too speculative, and far too trifling, to support the extraordinary relief that DHS seeks here.

On the other hand, Plaintiffs presented ample evidence that the Rule has already and will continue to cause them irreparable harm. By promulgating the Final Rule, DHS concedes that it will create a fundamental shift in longstanding federal

policy. *See, e.g.*, 84 Fed. Reg. at 41,292, 41,295, 41,297, 41,333 (explaining that DHS is "redefin[ing]" the term "public charge" and adopting a "new definition" of "public benefit" that would be "broader" than before). This shift will, in turn, cause immigrants to disenroll from, or refrain from enrolling in, medical benefits, thus leading them to forgo routine treatment and ultimately rely upon more costly, uncompensated emergency care from CCH. At the very least, CCH anticipates this chilling effect to create an annual loss of $30 million in Medicaid reimbursements. Add. 12a–13a. And this figure does not take into account the long-term increases in cost that CCH and the County will incur as Cook County's vaccine-preventable and other communicable diseases spread. *Id.* at 10a. Similarly, ICIRR has and will continue to suffer irreparable harm through its current and projected diversion of resources away from its existing programs. App. 29a.

CONCLUSION

In sum, Defendants have failed to "show[] cause so extraordinary as to justify this Court's intervention in advance of the expeditious determination of the merits toward which the [Seventh] Circuit is swiftly proceeding." *Doe v. Gonzales*, 546 U.S. 1301, 1309 (2005) (Ginsburg, J., in chambers). This Court should deny the Application.

Respectfully submitted,

/s/ Tacy F. Flint

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ADDENDUM

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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.,** **Plaintiffs,** 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.**	Civ. Action No.

Pursuant to Title 28 U.S.C. Section 1746, I, Katharine Chan, hereby declare and state as follows:

1. I am over 18 years of age. I have personal knowledge of the facts set forth herein, and I am competent to testify thereto.

2. I submit this Declaration in support of Cook County's litigation against the United States Department of Homeland Security regarding the recently issued rule entitled Inadmissibility on Public Charge Grounds (the "Final Rule"). I have compiled the information in the statements set forth below either through personal knowledge, through the Cook County Health ("CCH") personnel who have assisted me in gathering this information, or on the basis of documents kept in the regular course of CCH's business that I have reviewed. I am very familiar with the proposed and Final Rule. I was the principle author of Cook County's comments to the

proposed rule. As part of my role at CCH, I also familiarized myself with the Final Rule in order to understand its immediate and long-term impacts on CCH.

3. I am the Director of Policy for CCH, and have served in this capacity since 2013. As Director of Policy, I provide leadership on policy activities and initiatives, including monitoring and analyzing state and federal health care policies, developing and implementing short- and long-term advocacy efforts, and initiating and strengthening relationships with a variety of external stakeholders, including elected officials, government agency staff, advocates, and community-based partners. I also play a role in several projects and partnerships that seek to identify and address social determinants among CCH, including food insecurity and a medical-legal partnership that responds to health-harming legal needs. I earned my bachelor's degree from Northwestern University and was trained as an organizer with Green Corps immediately following college graduation. I worked for the Illinois Maternal and Child Health Coalition (now known as EverThrive Illinois) from May 2002 through June 2006 on a project that sought to maximize enrollment of children and parents into Medicaid and other public health insurance programs.

4. I served as Associate Director and Director of Policy at EverThrive Illinois from 2007-2013, where I helped develop and carry out state, local, and national policy priorities. Prior to that, I worked at the Illinois Department of Healthcare and Family Services to help implement the All Kids health insurance program and other special projects related to Medicaid. For four years (March 2014-March 2018), I served as the elected Chair of the Medicaid Advisory Committee (MAC); I was also a general member of the MAC for four years prior to serving as Chair. I have served as the Chair of the MAC Public Education Subcommittee for nearly a decade, and was appointed Chair of the MAC Opioid Use Disorder Withdrawal Management

Subcommittee in May 2019. Additionally, I have served as a general member of the MAC Quality Care Subcommittee since June 2011. I am a co-chair of the Benefits Access Working Group of the Illinois Commission to End Hunger and a co-chair of the Health Subcommittee of the Integration and Alignment Committee, which is part of the Governor's Early Learning Council. I was recently appointed to the Board of Directors of the Michael Reese Health Trust and also serve on the boards of the Midwest Access Project and the Alliance to End Homelessness in Suburban Cook County.

5. CCH is one of the largest public hospital systems in the nation, serving the residents of the second most populous county in America. For over 180 years, Cook County and its health system have provided care to all Cook County residents, regardless of their ability to pay, insured status, or immigration status.

6. Pursuant to the "Ordinance Establishing the Cook County Health and Hospital Systems" (the "Enabling Ordinance"), CCH "*shall*: (1) Provide integrated health services with dignity and respect, regardless of a patient's ability to pay…" Ord. No. 08-O-35, 5-20-2008, Sec. 38-71(a)(1) (emphasis added).

7. While CCH receives public funding in connection with its correctional health and public health functions, its hospitals and ambulatory clinics rely on patients who present with insurance to sustain our operations, with Medicaid serving as the dominant payor source for CCH patients who have insurance. Therefore, a decrease in Medicaid reimbursement and an increase in uncompensated care expenses caused by the Final Rule's chilling effect on Cook County's residents that CCH serves would be devastating to the financial viability of the CCH

system. Indeed, as I describe below, CCH is anticipating an annual loss of $30 million in Medicaid reimbursement alone as a result of the Final Rule.

8. CCH delivers its patient services at a number of different locations, including hospitals, regional outpatient centers, community-based health centers, a comprehensive HIV and infectious disease center, and the Cook County Jail and Juvenile Temporary Detention Center. CCH also includes the Cook County Department of Public Health, which serves most of suburban Cook County, and CountyCare, the largest Medicaid managed care plan serving Cook County Medicaid beneficiaries.

9. Based on self-reported data, CCH serves a diverse population: 51% are African-America/Black, 12% are White, 3% are Asian, 2% are American Indian/Native Alaskan, and 32% are Other/Unable to Determine. Additionally, 32% of our patents self-report as Hispanic/Latino.

10. CCH is the largest safety-net provider of health care in the region, providing care for hundreds of thousands of patients. In fiscal year 2018, patient volumes at CCH included 142,735 Emergency Department visits; 29,117 inpatient observation visits; 873,822 outpatient registrations, including 217,152 primary care visits and 334,901 specialty care/diagnostic/procedure visits; and 93,435 correctional health visits.

11. As part of CCH's obligation and commitment to serve all who need care, regardless of their ability to pay, insurance status, or immigration status, CCH serves a substantial number of uninsured and underinsured patients, including hundreds of millions of dollars per year in charity care.

12. In fiscal year 2018, 42.5% of our patients were uninsured, while only 4.4% of our patients were commercially insured. Another 35.4% of our patients were covered by Medicaid and 15.9% were covered by Medicare, with another 1.8% covered by other sources.

13. Since 2013, CCH has operated CountyCare, the largest Medicaid Managed Care program in Cook County, with 330,782 enrollees in 2018. While CountyCare has allowed CCH to reduce its rate of uncompensated care, CCH still provides upwards of $500 million dollars of uncompensated care, including nearly half of all charity care provided in Cook County.

14. CCH also operates CareLink, a financial assistance program for uninsured or underinsured Cook County residents who do not have access to affordable health insurance. CareLink provides free or discounted care to qualified enrollees. CareLink is part of CCH's mission and longstanding commitment to provide care to all Cook County residents. As of June 30, 2019, CareLink had 33,037 enrollees.

15. CCH's direct experience providing health services and peer-reviewed research demonstrates that Medicaid coverage improves health outcomes. Studies have shown that states with expanded Medicaid have seen decreased mortality rates compared to those without Medicaid expansion.

16. This gap has been especially pronounced with cardiovascular deaths. One study found that counties in states that expanded Medicaid saw 4.3 fewer deaths per 100,000 residents than counties in states that did not expand Medicaid.[1]

[1] Khatana, Sameed; et al. "Association of Medicaid Expansion with Cardiovascular Mortality," *JAMA Cardiology*, June 2019. doi: 10.1001/jamacardio.2019.1651.

17. Additionally, Medicaid expansion has enabled a greater number of people to have stable access to care. One study found that after expanding Medicaid in Arkansas and Kentucky, residents affected by Medicaid expansion were 41% more likely to have regular access to care and 23% more likely to report excellent health.[2]

18. As CCH's Director of Policy, I am aware that the U.S. Department of Homeland Security ("DHS") issued a new regulation on the public charge ground of inadmissibility under the Immigration and Nationality Act, which I reviewed in the regular course of my role with CCH. The Final Rule would allow the federal government to expand its consideration of a person's past use of public benefits and future needs for public assistance in determining whether someone should be eligible for lawful permanent residency, a new visa, or for an extension of stay or change of stay from an existing visa. Under the Final Rule, DHS would consider the use of one of several specific benefits for a duration of 12 months within a 36 month period to be a heavily weighted negative factor in a public charge determination.

19. Critical to CCH, among the public benefits that could lead to ineligibility for legal status in the United States is Medicaid. As a result, CCH is extremely concerned about DHS's Final Rule and the resulting impact on our patients, the residents of Cook County, and of course CCH's own financial sustainability.

20. Specifically, CCH is concerned that the new public charge rule will result in fewer people being enrolled in Medicaid and decreased use of preventive and ongoing health care, both of which will negatively impact the health outcomes of immigrant families in Cook County and the public health of all communities in our service area.

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[2]Sommers, B. D., Maylone, B., Blendon, R. J., et al. Three-Year Impacts of the Affordable Care Act: Improved Medical Care and Health Among Low-Income Adults. Health Affairs, 36(6), 1119-1128; 2017. https://doi.org/10.1377/hlthaff.2017.0293.

21. A preventive approach to health care is vital to keeping someone healthy and productive through regular screenings, physicals, and immunizations, as well as doctor visits when mild symptoms first develop. In contrast, delaying care can result in higher costs and worse outcomes. When individuals are uninsured, they avoid seeking routine care and instead risk worse health outcomes and use costly emergency services.

22. Pregnant women are particularly vulnerable to the new public charge rule. While pregnant women's use of Medicaid is excluded from the new public charge test, the "chilling effect" caused by the new public charge rule is likely to result in a greater number of pregnant women who avoid applying for Medicaid.

23. At a time when there are broad-based local and national efforts trying to address the nation's unacceptably high rate of maternal and infant mortality, any rule that results in fewer women obtaining prenatal care would move Cook County in the wrong direction and lead to higher medical costs over the long term.

24. Indeed, Medicaid plays a particularly important role for pregnant women in Illinois, as nearly half of all births in Illinois are covered by Medicaid.

25. The new public charge rule threatens to damage the health and well-being of families, children, and their communities. By penalizing immigrants who receive public benefits, many Cook County residents will be put in the difficult position of having to choose between programs and services that grant them access to essential health services and their own immigration status. Rather than jeopardize their ability to live and work in this country, we expect that many of our immigrant patients will forgo, or dis-enroll from these benefits, which include Medicaid and the Supplemental Nutrition Assistance Program ("SNAP").

26. While children's use of Medicaid is also excluded from the new public charge rule, CCH expects that because of the "chilling effect" caused by the rule, many children will forgo needed medical care for fear that such care will negatively impact a family's immigration status.

27. Following the passage of federal welfare reform laws in 1996, which barred new immigrants from public benefits, participation in Medicaid by those who were eligible decreased by 3 percentage points,[3] and SNAP enrollment for households with at least one U.S. citizen child dropped by nearly 31 percent.[4]

28. We know that children's well-being is inseparable from their parents' and families' well-being. Children thrive when their parents can access needed health or mental health care and when their families have enough to eat and a roof over their heads. Conversely, a parent who cannot access health care or food may experience stress and other challenges that can affect their caregiving abilities and undermine children's development.

29. Accordingly, as a consequence of the new public charge rule, children of immigrants who live legally in the United States stand to be severely punished by this rule, with the costs borne by their health and development.

30. Providers are already witnessing the impact of the "chilling effect" brought on by confusion, fear, and misunderstanding by many in the immigrant community and by providers

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[3] Kandula, N.R., Grogan, C.M., Rathouz, P. J., Lauderdale, D. S. (2004). The Unintended Impacts of Welfare Reform on the Medicaid Enrollment of Eligible Immigrants. *Health Services Research*, 39(5), 1509-1526. doi: 10.1111/j.1475-6773.2004.00301.

[4] Fix, M.E., Passel, J.S. Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform 1994-97. (1999). Retrieved from The Urban Institute, available at https://www.urban.org/research/publication/trends-noncitizens-and-citizens-use-public-benefits-following-welfare-reform.

who cannot provide certainty about the future for immigrant families. Immigrants have already expressed concern and hesitancy to CCH staff when applying for Medicaid and other public benefit programs, including programs that are not part of the final rule, such as the Women, Infant and Children program and the AIDS Drug Assistance Program. The "chilling effect" of the Final Rule has already caused CCH to offer technical assistance and create resources to educate patients and staff about the Final Rule, and CCH anticipates devoting additional resources and training to help mitigate the negative impact of the Final Rule and its associated "chilling effect."

31. In fact, comparing the first eight months of 2018 with the same period of time in 2019:

a. there has been an across-the-board increase in ambulatory, observation, emergency and inpatient patients who are "self-pay" instead of covered by a third party payment source, such as private or public insurance;

b. there has been a corresponding increase in the percentage of uninsured patients; and

c. there has been a corresponding decrease in the percentage of Medicaid-covered patients.

32. The new public charge rule has the potential to adversely impact all residents of Cook County. Reductions in health insurance coverage will lead to increased utilization of emergency rooms by individuals who do not have access to primary care, resulting in increased uncompensated care among health care providers and longer waits in emergency departments. Public health experts foresee worsening overall health outcomes, particularly among immigrants,

as a result of delayed treatment, inability to obtain prescription medication, and lack of access to preventive and primary care.

33. Individuals with health insurance are nearly three times more likely to be vaccinated compared to those who are uninsured.[5] Lower rates of vaccination can lead to an increase in vaccine preventable diseases, raising the concern of communicable disease outbreaks that can affect everyone, regardless of immigration status.

34. CCH's Cook County Department of Public Health is responsible for communicable disease surveillance and prevention in most of suburban Cook County, a task that is tremendously complicated by the environment of fear and suspicion among the immigration community caused by the new public charge rule.

35. The past decade has witnessed an industry-wide shift in health care towards a focus on the social determinants of health, based on the intuitive observation, after multiple studies revealed that an individual's health outcomes depend more on lifestyle and environmental factors than on clinical care. The University of Wisconsin Population Health Institute has posited that perhaps only 20% of life expectancy and health status is attributable to clinical care, while social and economic factors, health behaviors, and environmental factors play a much more important role.[6]

36. CCH has devoted an increasing number of resources to identify and address social determinants. Over the past several years, CCH has formed various partnerships to address food

[5] Lu Lu, P. J., O'Halloran, A., Williams, W. W. (2015). Impact of health insurance status on vaccination coverage among adult populations. *American Journal of Preventive Medicine*, 48(6), 647-61. DOI: 10.1016/j.amepre.2014.12.008.

[6] Booske, B. C., Athens, J. K., Kindig, D. A., Park, H., Remington, P. L. (2010). Different perspectives for assigning weights to determinants of health. Retrieved from County Health Rankings and Roadmaps, available at https://www.countyhealthrankings.org/sites/default/files/differentPerspectivesForAssigningWeightsToDeterminantsOfHealth.pdf.

insecurity and housing instability, both of which have a significant impact on how well our patients can attain and maintain health.

37. As a result, CCH is also concerned about how the new public charge rule will decrease enrollment in SNAP and federal housing programs, which will negatively impact immigrant families in Cook County. Though SNAP and housing are not traditional health programs, these benefits also play an important role in ensuring the health of Cook County residents.

38. The final public charge rule will likely push many non-citizens to forgo vital public benefits that provide needed support to address health, hunger, and housing. If the link between a parent's health and a child's well-being is intuitive, it is equally obvious that when a non-citizen resident loses access to affordable housing and food, the entire family – including U.S. citizen children – suffers.

39. CCH would expect to see worse health outcomes for many of our patients due to a loss in access to health insurance, as well as lack of access to healthy food and adequate, affordable housing. Nearly 14% of CCH's adult primary care patients report food insecurity.

40. In addition to harming immigrants and their families and overall public health in Cook County, the new public charge rule could be devastating for the finances of safety net health systems like CCH. Of the CCH patients who have insurance, Medicaid is the dominant form of coverage. Medicaid expansion has provided a majority of CCH patients with insurance for the first time in their adult lives and given CCH the ability to become more financially stable. Based on an analysis that was prepared on behalf of America's Essential Hospitals and other trade associations by Manatt Health, and per CCH's subsequent discussions with America's

Essential Hospitals, the effects of a public charge rule and the accompanying chilling effects are estimated to result in an annual loss of $30 million in Medicaid reimbursement to CCH.[7] Further, it is significantly more expensive to provide health care for individuals who are housing insecure. Housing insecure individuals make more frequent use of emergency departments, have long stays when admitted and have higher rates of readmission, all of which lead to increased health care costs.[8]

41. Given CCH's historical role and our status as the largest safety-net provider in the region, we expect the new public charge rule to negatively affect us in two ways: (1) through direct losses in Medicaid reimbursements; and (2) by increasing the amount of uncompensated care CCH will be required to provide. As such, the new public charge rule represents nothing short of a transfer of the cost of caring for our nation's most vulnerable from the federal government to local governments and public safety-net systems, like Cook County and CCH.

42. CCH is by far the largest provider of charity care to the County's most vulnerable populations, and we anticipate that our share of charity care will increase and Medicaid reimbursements will decrease following implementation of the new public charge rule. CountyCare is the largest provider of Medicaid-managed care within Cook County, with its membership constituting approximately one third of all Medicaid managed care members in the County. Thus, statistically, one third of all eligible persons who disenroll or elect not to enroll in Medicaid managed care would be CountyCare members, and CCH will lose the per member/per month capitation payment from the State for those members. With respect to patients who

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[7] Mann, C., Grady, A., Orris, A. (2018). Medicaid Payments at Risk for Hospitals Under the Public Charge Proposed Rule. Retrieved from Manatt, available at https://www.manatt.com/insights/newsletters/health-update/public-charge-proposed-rule-hospital-medicaid.

[8] Kushel, M. B., Vittinghoff, E., Haas, J. S. (2001). Factors Associated with the Health Care Utilization of Homeless Persons. *Journal of the American Medical Association*, 285(2), 200-206. doi: 10.1001/jama.285.2.200.

express fear that the benefits to which they are entitled will impact their immigration status, CCH also expects to expend more time and resources convincing them to apply for, or continue, those benefits.

43. As CCH also provides approximately 50% of all charity care in Cook County, there is a 50% chance uninsured patients will seek their medical care from CCH, with no reasonable ability to pay for it. Thus, CCH will lose revenue from not being able to enroll those members, and will still wind up expending funds to treat a significant portion of those patients without having a source to reimburse it for their care.

44. CCH estimates that if 20 percent of potentially affected Medicaid enrollees were to drop their health insurance, over 7,300 individuals who receive their case from CCH or coverage from CCH would become uninsured and CCH would face a significant financial loss as a result in the first year of the Final Rule being in effect, both from a loss in Medicaid reimbursement and an increase in uncompensated care expenses.

45. By the end of the current fiscal year, which ends on November 30, 2019, CCH estimates that it will spend $544 million on uncompensated care, which is an 8% increase from the last fiscal year, a 73% increase from 2014, and the highest expenditure since early expansion of Medicaid in Cook County began in 2012/2013.

46. Cook County Health's ability to provide high-quality care to all is inextricably connected to its ability to bill patients who have insurance for services. A decrease in the number of insured patients, combined with an increase in the number of uninsured patients, will damage the financial stability Cook County Health has achieved as a result of the Affordable Care Act

and Medicaid expansion, and jeopardize the ability to continue serving its mission, including the operation of and recent enhancements to the CareLink program.

47. Because Medicaid and other health insurance programs offered through the marketplace have made health insurance more affordable, the number of uninsured residents of Cook County has decreased. In 2012, the uninsured rate was 19% percent—in 2018, the rate was 10%. The Final Rule will reverse this progress.

48. Medicaid provides families access to preventive and primary care, including prenatal care, as well as care for chronic conditions. In addition, Medicaid offers families financial protection from high medical costs. By enabling families to meet their health care needs, Medicaid supports families' ability to work and care for their children, and to remain healthy and productive residents.

49. For more than 180 years, Cook County's core mission has been to deliver health care services with dignity and respect regardless of a patient's ability to pay. As acknowledged by the DHS in the new public charge rule, the new public charge test would likely result in fewer people accessing primary and preventive care and lead to increased reliance on expensive emergency care.

50. We expect that the Final Rule will result in many of our patients declining participation in Medicaid and becoming sicker when they do ultimately come to CCH for care. CCH expects that its patients will be more likely to become dependent on public services, the very opposite of the intent of the DHS's primary objective as stated in the reason for proposing this new rule.

51. CCH will continue its mission to provide health care to all Cook County residents who need it, but the new public charge rule will lead to financial challenges for our system and other safety net systems in the region.

52. The Final Rule creates unnecessary and unwelcome tension between immigrant patients and CCH as a health care provider. It will create fear of registering for programs and reporting to appointments, thereby causing many immigrants to avoid seeking treatment for cases other than emergencies. Inspiring fear and distrust among immigrant communities will wreak havoc on one of the country's largest public hospital systems. The likely decline in preventive treatment and increase in costly emergency services will have detrimental effects on the health system for immigrants and non-immigrants alike.

I, Katharine Chan, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 23 day of September, 2019 in Chicago, Cook County, Illinois.

Katharine Chan
Director of Policy
Cook County Health

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.**, **Plaintiffs,** 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.**	Case No. 19 cv 6334

DECLARATION OF LAWRENCE BENITO IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I, Lawrence Benito, Executive Director of the Illinois Coalition for Immigrant and Refugee Rights (ICIRR), declare as follows:

Background

1. I am over the age of 18, competent to testify as to the matters herein and make this declaration based on my personal knowledge.

2. In my role as the Executive Director of ICIRR, I am responsible for running all facets of the organization including the leadership of our membership and coalitions.
3. ICIRR is a non-profit organization located in Chicago, Illinois.
4. ICIRR is dedicated to promoting the rights of immigrants and refugees to full and equal participation in the civic, cultural, social, and political life of our diverse society in Illinois and beyond.
5. ICIRR is a membership-based organization, representing nearly 100 nonprofit organizations and social and health service providers throughout Illinois, many of which provide health care, nutrition, housing, and other services for immigrants, including immigrants of color, regardless of their immigration status or financial means.
6. A core mission of ICCIR and its member organizations is to provide health and social services to immigrant Illinoisans.
7. ICIRR Member organizations include community health centers, health and nutrition programs, social service providers and other organizations that work to ensure immigrants receive the supports they need to be successful.
8. Created in 1986, ICIRR has been at the forefront of helping immigrants realize and contribute to the dream that is America. In that time, ICIRR won establishment of an Office of New Americans within the Governor's office (2005) and the Office of the Mayor of the City of Chicago (2011); created the New Americans Initiative (2005), which has helped 534,000 people gain access to citizenship and assisted 105,394 immigrants prepare applications for citizenship; created the Immigrant Family Resource Project ("IFRP") (1999), which has connected more than 500,000 individuals and

families to safety net services; and led efforts to create the Cook County Direct Access Program, which has expanded healthcare services to over 25,000 individuals.

9. ICIRR also operates the Immigrant Healthcare Access Initiative ("IHAI"), which works to increase access to care and improve health literacy for tens of thousands of low-income uninsured immigrants in Illinois, in order to reduce their reliance on emergency room care and to improve the overall public health of the community. As a part of IHAI, ICIRR leads the Illinois Alliance for Welcoming Healthcare, an alliance comprised of 25 healthcare providers, including clinics and hospitals, and 20 community-based organizations that convene to create and share best practices in the provision of healthcare services to immigrants and their families.
10. ICIRR also leads the Healthy Communities Cook County ("HC3") coalition, which seeks to address and mitigate barriers to accessing healthcare for the uninsured, regardless of immigration status, through policy and systems change.

Response to the Proposed and Final Rule

11. In spring 2018, in direct response to the threat of the Proposed and Final Rule and the growing fear and confusion within immigrant communities, ICIRR co-founded the Protecting Immigrant Families-Illinois coalition ("PIF-IL").
12. PIF-IL was created specifically to (1) resist the proposed changes to the public charge rule; and (2) provide assistance to and accurate information to immigrant communities seeking to safely make use of public benefits for which they are eligible. In addition to serving on PIF-IL's Steering and Executive Committees, ICIRR co-chairs the Outreach Subcommittee. ICIRR has dedicated substantial resources to urging units of local government to adopt resolutions that call upon the Department of Homeland Security to

immediately withdraw the proposed changes to the rule because of the harm that the proposed changes have caused, and that the Final Rule will continue to cause.

13. As a PIF-IL founding member, ICIRR has had to divert resources from other work to devote substantial resources to, among other efforts, educating individuals, service providers, elected officials, and other constituencies about the public charge test and the related rule through numerous trainings and briefings.

14. Specifically, ICIRR staff have had to redirect their work planning, budgets, and staff time—amounting to more than two hundred and thirty-five hours —away from ICIRR's proactive mission and instead towards defensive PIF-IL activities to (1) educate immigrant communities about the Proposed Final Rule and the Final Rule in an attempt to prevent immigrant households from foregoing benefits and services out of fear and misunderstanding of the Final Rule; (2) expand its outreach and education to immigrant communities to encourage people unaffected by the Final Rule to continue to enroll in TANF, SNAP and Medicaid benefits for which they are eligible; and (3) to train IFRP case managers on the changes to the public charge test so that they can provide accurate information to people concerning the potential impact of public benefits on their ability to successfully adjust to LPR status.

15. ICIRR estimates that the value of staff time and resources diverted to date to public charge activities amounts to $100,000, including the costs of paying unplanned overtime; conducting over 50 trainings; and holding other community education events.

16. ICIRR will continue to divert a comparable amount of resources in the future to mitigate the harm caused by the Final Rule once implemented.

17. ICIRR has also had to provide overtime pay to staff who give public education trainings so that the communities ICIRR serves receive sufficient and accurate information about the Proposed Final Rule and the Final Rule.
18. In this manner, the Final Rule has already forced, and will continue to force, ICIRR and its members to divert resources from planned work.

Specific Responses to the Chilling Effect

19. Immigrant families whom ICIRR and its members serve have been disenrolling from public benefit programs, such as TANF, SNAP and Medicaid, since the initial leaks about changes to the public charge test in January 2017, based on fears that using those programs will affect their future immigration relief options.
20. Individuals have refrained and will continue to refrain from seeking health services, food, and other programs for themselves and their children, based on fears that using those benefits will prevent them from adjusting status.
21. As a direct result, ICIRR staff work plans have had to change, and staff have spent considerable time developing fact sheets, slide presentations, and other materials for community members, service providers, immigration attorneys, and other constituencies. ICIRR staff have also spent significant time coordinating with partners to ensure that immigrant families and the agencies that serve them are educated about the Final Rule and have spent considerable time to responding to questions about the Final Rule and concerns about enrolling in or remaining enrolled in public benefits.
22. ICIRR has had to forego time spent on healthcare trainings that inform immigrants about their rights to health care and other public benefits such as SNAP, and ICIRR now has diminished ability to provide individualized assistance to immigrants seeking health care

and SNAP consistent with its mission. ICIRR has had to spend time and resources fundraising to support its work responding to the Proposed Final Rule and the Final Rule, and has had to reallocate existing resources to cover the costs of these new activities in response to the Proposed Final Rule and Final Rule, including paying certain staff overtime pay.

23. If the Final Rule is implemented, ICIRR expects even more immigrants to refrain from seeking Medicaid and other necessary health services, food, and other programs for themselves and its children, based on fears that using those benefits will prevent them from adjusting status. Losing access to critical health and nutrition services will have long-term harms for the clients of ICIRR and its member organizations, frustrating the mission of ICIRR and its member organizations to enable immigrants to reach their full capacity to participate in the economic, civic, cultural, social, and political life of our state.

24. To mitigate this harm, ICIRR and its members will therefore be forced to continue to divert their limited resources to address the broad chilling effect on public benefits enrollment that the Final Rule is designed to effect.

25. This work is particularly time-consuming and difficult because the Final Rule provides virtually no clear guidance on difficult decisions such as whether to pursue public benefits to meet an individual's needs; how to mitigate the Final Rule's negative view of an individual who has a medical condition and/or disability; how to mitigate the Final Rule's negative treatment of an individual of limited English proficiency; how to mitigate the Final Rule's negative treatment of an individual who, despite working full-time, has a household income of less than 125 percent of the FPG; whether to spend money on necessities or to allocate earnings to asset building; or even whether to have another child

or welcome a family member into its household since adding the financial responsibility of an additional family member under the Final Rule may jeopardize their ability to pursue a permanent place in the United States.

26. Furthermore, the contradictions between the weighted factors and the totality of the circumstances aspects of the public charge test under the Final Rule (as opposed to the test under the 1999 Field Guidance which involved only two types of benefits--cash assistance and publicly-funded institutional care---and which could be overcome with a sponsor's affidavit), make it virtually impossible for entities such as ICIRR to help our clients and members understand how the agency will apply the test and therefore how to make informed decisions about benefits use.

27. The amount of resources marshalled to this issue are and will continue to cause ICIRR and its members to serve fewer clients and work less on issues connected to its mission but instead to challenging and responding to the harmful effects of the Final Rule.

28. The Final Rule's destructive and discriminatory consequences has already detrimentally impacted the ability of ICIRR and its member organizations' missions to provide health and social services to immigrant Illinoisans.

29. For example, as indicated above,, in partnership with the Illinois Department of Human Services, ICIRR operates IFRP, working with 36 partner organizations in FY19, to educate immigrants about their public benefit eligibility, assist with interpretation at public aid offices, and manage cases of immigrant families who apply for benefits. ICIRR's IFRP partner organizations are paid through depending upon the number of clients they serve in case management and benefits enrollment. ICIRR also receives a percentage of the overall grant for administration.

30. Indeed, within ICIRR's IFRP, declines in immigrant public benefits enrollment have already occurred. These declines have, in turn, strained the resources of the IFRP because it is funded on a reimbursement model. ICIRR and the IFRP are at the same time facing an overwhelming increase in requests for assistance with disenrollment from public benefits.
31. Case managers at ICIRR and its member organizations have had to increase its outreach and education to immigrant communities to encourage them to still enroll in TANF, SNAP and Medicaid. ICIRR and its members also have had to train case managers on public charge so that they can provide accurate information to clients concerned that the receipt of public benefits will deem them a public charge.

ICIRR Member Survey and Harm

32. In June 2019, ICIRR conducted a survey of its member organizations to document the impact of the Proposed Final Rule on its organizations and the individuals they serve. From responses to that survey, ICIRR ascertained the following:
33. The Illinois Migrant Council is a member of ICIRR that works to enroll immigrants in public benefits programs. On an average monthly basis, the Illinois Migrant Council has seen 21-30 of its clients disenroll from SNAP, Medicaid, and WIC out of fear that proposed changes to the public charge doctrine will harm their immigration status and options. To deal with the fallout from the Final Rule's promulgation, the Illinois Migrant Council has had to devote three staff members to spend ten hours per week on public charge.
34. YWCA Northwestern Illinois is another member of ICIRR that has experienced and will continue to experience direct harm due to the chilling effect of the Proposed Final Rule and the Final Rule. YWCA Northwestern Illinois assists clients with public benefits such as

TANF, SNAP, and Medicaid. YWCA Northwestern Illinois has seen an average of one to five of their clients per month disenroll or choose not to enroll in benefits such as TANF, SNAP, and Medicaid as a result of proposed public charge changes. This is a significant decrease given that YWCA Northwestern Illinois historically files four new applications per month. To deal with this fallout, staff members at YWCA Northwestern Illinois have had to spend additional time explaining public charge to its clients and have faced additional difficulties when assisting immigrants who wish to access public benefits to improve their chances to gain or sustain employment.

35. Erie Neighborhood House is a member of ICIRR that has experienced and will continue to experience direct harm due to the chilling effect of the Proposed Final Rule and Final Rule. Erie Neighborhood House assists clients with public benefits such as SNAP and Medicaid and has seen on average one to five of its clients per month disenroll from or choose not to enroll in SNAP or Medicaid (for themselves and its children) as a result of proposed public charge rule changes. Erie Neighborhood House has had five staff members devote approximately five hours per week to dealing with the fallout from the Final Rule and prior proposals, for a total of about 1,000 staff hours thus far.

36. HANA Center is another member of ICIRR that has experienced and will continue to experience direct harm due to the Final Rule. HANA Center's mission is to empower Korean American, immigrant, and multi-ethnic communities through social services, education, culture, and community organizing to advance human rights. HANA Center assists clients with benefits enrollment issues including for SSI, WIC, SNAP, Medicaid, CHIP, MSP, LIS, LIHEAP, Weatherization, and Unemployment Compensation. On average, one to five such clients per month have been withdrawing from or choosing not

to enroll in benefits; this is in contrast with the typical monthly average of 34 new applications usually filed by HANA each month. Because of the Final Rule, the HANA Center has had to cut programs and services, such as its Breast Cancer Early Detection Program, so that its staff can spend more time working to address client concerns about the Proposed Final Rule and now the Final Rule. Additionally, in the HANA Center's Senior Health and Public Benefit Department, staff workloads have increased by 20% due to time spent in trainings and meetings, and answering client questions regarding the Proposed Final Rule and the Final Rule.

37. Hispanic American Community Education and Services ("HACES") is a member of ICIRR that has experienced and will continue to experience direct harm due to the promulgation of the Final Rule. HACES's mission as an organization is to assist immigrant community members with achieving their individual and collective goals and to foster their prosperity and harmony with the larger community. HACES assists clients with public benefits programs and has seen 11 to 20 clients each month disenroll from or choose not to enroll in Medicaid, SNAP, WIC, TANF, or subsidized housing due to the proposed public charge changes. To deal with the fallout from the Final Rule's promulgation, HACES has had to have at least three staff members spend extra time conducting outreach and educational sessions to inform the community about the Proposed Final Rule and the Final Rule.

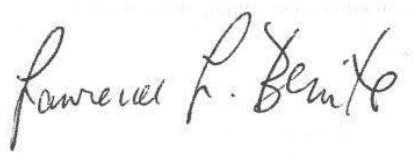
Diversion of Resources and Frustration of ICIRR's Mission

38. The Final Rule will further frustrate ICIRR's mission by directly restricting the number of immigrants from less-developed, majority non-white countries who will be able to adjust to lawful permanent resident (green card) status or maintain or change their non-immigrant immigration status due to the new public charge test, thus eliminating essential pathways

for this population to reunite with their families, pursue economic opportunity, and fully participate in the civic, cultural, social, and political life of our state.

39. Overall, the proposed and Final Rule have forced ICIRR to spend less time on its other areas of work and to reduce the overall number of projects the organization can take on.
40. As a direct result of Defendants' actions, ICIRR has had to withdraw staff resources from its Healthy Communities Cook County coalition to address the harmful effects of the Proposed Final rule and the Final Rule, reducing the progress the coalition has been able to make in expanding access to health coverage in Cook County. ICIRR expects this resource redirection to continue in the future.
41. ICIRR has also had to withdraw staff resources from the Alliance from Welcoming Healthcare in order to deploy those resources to combat the impact of the Proposed Final Rule and the Final Rule and expects this diversion to continue in the future.
42. The frustration of mission and diversion of resources experienced by ICIRR and its members and its members will only increase if the Final Rule goes into effect, forcing ICIRR and its members to spend less time on work that helps immigrant communities to become fully integrated, self-sufficient members of society and more time dealing with the fear, confusion, anxiety and other impacts of the Final Rule. Because of limited resources, ICIRR and its members will need to scale back on or eliminate projects related to its missions.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 24, 2019 in Cook County, Illinois.



Lawrence Benito

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

COOK COUNTY, ILLINOIS, an Illinois governmental entity; **ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC.**, **Plaintiffs,** 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 Director of U.S. Citizenship and Immigration Services; **U.S. CITIZENSHIP AND IMMIGRATION SERVICES,** a federal agency, **Defendants.**	Civ. Action No. 19-cv-06334

DECLARATION OF JOHN PELLER IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Title 28 U.S.C. Section 1746, I, John Peller, hereby declare and state as follows:

1. I am over 18 years of age. I have personal knowledge of the facts set forth in this declaration, except where a fact may be stated on information and belief, and, if called as a witness, could and would testify competently to the matters set forth below.
2. I submit this declaration in support of Cook County, Illinois (the "County" or "Cook County") and the Illinois Coalition for Immigrant and Refugee Rights, Inc.'s ("ICIRR") Motion for Preliminary Injunction. I have compiled the information in the statements set forth below either through personal knowledge, through AIDS Foundation of Chicago personnel who have assisted me in gathering this information, or on the basis of documents that I have reviewed.
3. In this declaration, I explain how the Notice of Proposed Rule Making on Inadmissibility on Grounds of Public Charge (83 Fed. Reg. 51114) ("Proposed Rule") and Final Rule on Inadmissibility on of Public Charge (84 Fed. Reg. 41292) ("Final Rule") have impacted and will further impact AIDS Foundation of Chicago clients in a manner that could severely tax our resources and impact our ability to serve our clients. Specifically, as a leader for effective HIV policies and a national expert on the impact of health care reform on people living with HIV, I fear that the Final Rule will cause patients to forego assistance critical to their physical health and economic wellbeing, worsening the HIV epidemic and leading to the increased transmission of a serious communicable disease in the community.

Background

4. I am John Peller of the AIDS Foundation of Chicago ("AFC").
5. I am the President and CEO of AFC.
6. For over 30 years, AFC has worked to transform the systems that contribute to HIV prevention, awareness, and access to lifesaving care and services. AFC leads the largest

coordinated HIV case management system in the country, ensuring that over 6,000 clients receive medical and supportive services every year.

7. AFC is headquartered in Cook County, Illinois, and is one of the largest AIDS service organizations in Cook County. AFC serves more than 6,000 clients annually in Cook County, with a total of 35 subcontractor clinical service and support/administrative sites and over 100 case managers.

8. I first joined AFC in 2005 and became its President and CEO in 2014. In my current capacity, I lead the organization's programs, policy, communications, strategy and fundraising work.

9. Prior to my position as President and CEO, I served as AFC's at Vice President of Policy from 2011-2014. During that time, I worked on issues across a variety of practice areas, including implementation of the Affordable Care Act nationally and in Illinois.

10. I graduated from The Johns Hopkins University in 1994 with a BS in political science and history and from the University of Chicago in 2000 with a Master's in Public Policy.

11. Over the last five years, I have supervised staff who enroll clients in benefits, such as Medicaid, SNAP, Medicare, Ryan White HIV/AIDS Program (RWHAP) and the AIDS Drug Assistance Program (ADAP). I currently oversee the network of 100 case managers funded by the RWHAP that work in over 30 agencies. These case managers also enroll clients in benefits, such as Medicaid, SNAP, Medicare, RWHAP and ADAP.

12. Over the past 15 years working at the AIDS Foundation of Chicago, I have developed a close relationship and deep knowledge of the HIV community in Cook County and an understanding of the legal and health issues facing these communities. In particular, I have developed an expertise in Medicaid and health insurance.

13. To demonstrate the way that the Proposed and Final Rules regarding public charge have impacted and will impact AFC in the future, I provide information known to me as a longtime CEO and staff member at AFC. By making this declaration, I do not waive any attorney-client privilege or client confidentiality.

AIDS Foundation of Chicago Clients

14. Through the networks AFC has built and continues to fund and lead, it helps support thousands of people living with or vulnerable to HIV along a continuum of care that includes prevention services, primary medical care, housing, emergency support and basic needs, as well as engaging individuals and organizations in vital advocacy efforts.
15. Since it was founded in 1985, AFC has delivered its services in a culturally and linguistically appropriate manner to address the needs of the diverse community it serves, regardless of its clients' immigration status or ability to pay.
16. AFC serves immigrant individuals who may seek to extend or adjust their immigration status, and whose immigration applications will be subject to the Final Rule.
17. Many AFC clients receive Illinois Medicaid, SNAP, and other public benefits.
18. A significant number of AFC's clients are low-income and have either limited skills or education. Many AFC clients also reside in large households.
19. AFC's clients are predominantly people of color. Approximately 23 percent of patients are Latino and 58 percent are African American.
20. AFC's primary client intake is through a hotline staffed by intake staff, who perform eligibility screening and provide referrals to case managers who provide advice on a wide range of issues, including matters related to Illinois Medicaid, RWHAP, ADAP, SNAP, and other programs.

21. AFC intake staff handle over 20,000 calls and 9,000 client visits per year, over 1,450 of which involve an immigrant client (including naturalized citizens) or a mixed-status household.

Expertise in Navigating Complex Health Care System

22. People living with HIV ("PLWH") face a number of challenges in accessing health care services, particularly if they are immigrants, speak limited English, or have low incomes. PLWH must navigate a complex web of safety-net programs, including Medicaid and the RWHAP and ADAP, which have different eligibility standards and requirements. RWHAP and ADAP can "wrap around" Medicaid, filling in gaps in Medicaid benefits. For example, ADAP can cover HIV medications that are not covered by a Medicaid managed care plan.
23. AFC's case managers have developed expertise in navigating these programs, including enrollment, renewing eligibility and ensuring clients get all benefits to which they are entitled that will help to maintain their health. While AFC funds over 100 case managers, they are a finite resource, and time spent helping one client is time that cannot be spent helping another.

Public Charge Rule Has a Dangerous Chilling Effect on HIV patients

24. Untreated HIV is a debilitating, life-threatening communicable disease that devastates an individual's immune system. Today, however, with early and continuous treatment, PLWH can experience near-normal lifespans. HIV medications are central to treatment and are generally easy-to-take with minimal side effects. With access to treatment, PLWH can be productive members of society.

25. In 2017, 39,842 PLWH resided in the state of Illinois, 23,835 of whom were residents of Chicago, and thus Cook County.

26. HIV/AIDS treatment, known as anti-retroviral therapy (ART), is prohibitively expensive in the United States. Many people, including AFC clients, with private insurance or certain employer-based insurance have no choice but to apply for government subsidies for the substantial portion of cost that their insurance plan does not cover.

27. Health care coverage allows AFC clients and PLWH generally to receive the care and treatment they need to stay healthy and to suppress the virus, reducing treatment costs over time and improving their individual health. PLWH whose viral load is undetectable cannot transmit HIV sexually; it is therefore essential that PLWH have uninterrupted access to appropriate HIV medications to prevent transmission of HIV to their loved ones and in the community.

28. Under the proposed rule, immigration applicants living with HIV and others with chronic health conditions would be required to purchase private, "non-subsidized medical insurance" to avoid the Final Rule's effect or rely solely on the incomplete coverage provided by the RWHAP. Thus, the Final Rule would force people living with and vulnerable to HIV to choose between life-saving services or an adjustment of immigration status.

29. Based on my experience, I believe that the public charge rule also will incentivize PLWH—even U.S. citizens or permanent residents not affected by the public charge rule—to terminate their subsidized health care, including Medicaid, out of fear of that enrollment will prevent them from adjusting their status and from petitioning for status for family

members living abroad. Disenrollment will jeopardize their own health and could result in new HIV transmissions in the community.

30. Based on my experience, I further believe the public charge rule will incentivize PLWH—even U.S. citizens or permanent residents not affected by the public charge rule—to terminate assistance or not enroll in programs that are not impacted by the public charge rule, such as RWHAP and ADAP.

31. RWHAP and ADAP provide coverage that is incomplete compared to Medicaid. RWHAP does not cover emergency department visits, surgeries and hospital stays, or specialty care not related to HIV. Thus RWHAP cannot cover treatment for common illnesses, such as cancer or heart disease not related to HIV. Without Medicaid coverage, PLWH with only RWHAP could face thousands of dollars in medical bills for treatment or go without care.

32. The confusing language of the public charge rule, as well as inadequate public education by the government about which benefits the rule includes, will cause some PLWH to be fearful of enrolling in government benefits and other non-governmental assistance programs, or caused them to disenroll altogether. This chilling effect will jeopardize the health of PLWH and could lead to increased HIV transmissions in the community as PLWH go without treatment.

33. In fact, in my experience as President and CEO, I have observed that the Proposed Rule has already caused needless fear. I and those under my supervision who handle client intake and phone calls have seen an increase in inquiries from clients, the general public, and community-based organizations concerned that the public charge rule will cause people to dis-enroll from essential health programs out of fear for their immigration status.

34. Among the sorts of public charge concerns our staff has handled are clients who are afraid to enroll in RWHAP and ADAP, hospital charity care programs, pharmaceutical company patient assistance programs, and other programs that are not affected by the Final Rule because they are confused and don't trust what case managers and doctors tell them.

35. The public charge rule has caused some of our clients living with HIV to be willing only to enroll in ADAP and not other programs. They will not enroll in any other benefits for which they are eligible, even if that enrollment will not impact their ability to later adjust their status. As a result, they are not able to receive medical care and other services paid for by the Ryan White Program of Medicaid, which could lead to debilitating and costly illness. One client will only pay for medical services with his credit card, a situation that is financially unsustainable

36. The public charge rule has also caused clients to be wary of enrolling in non-governmental programs that are not impacted by the final rule, such as hospital charity care programs and pharmaceutical manufacturer assistance programs. As a result, these clients will go without lab tests or specialty health care that will detect, prevent and treat HIV and other serious chronic conditions. Furthermore, they may go without otherwise free medications that would treat these conditions. Clients may face serious illness as a result.

37. Furthermore, access to support services and necessities for daily living improve the health outcomes of PLWH. Many PLWH rely on benefits like SNAP to tolerate medicine, stay healthy, and live productive lives. For example, PLWH are less likely to be virally suppressed if they do not have access to food. Nutritious food is also necessary for PLWH to maintain healthy weight, better absorb medication, and reduce side effects. Having adequate access to food has also been shown to decrease medical costs and increased

adherence to ARVs. Disenrollment from food-based public benefits programs could have devastating consequences for PLWH.

38. AFC has already encountered a client who is an immigrant and is afraid that SNAP benefits would impact their immigration status and refuses to apply.

39. Moreover, approximately 35 percent of AFC's HIV clients experience unstable housing. Stable housing is critical for the health and well-being of PLWH. The public charge rule's chilling effect could deter PLWH from seeking housing assistance, compromising their health. The Housing Opportunities for People with AIDS (HOPWA) program is not subject to the public charge rule, AFC expects that some clients may be unwilling to apply out of fear that the benefit will make them a public charge.

40. I and the staff working under my supervision regularly reassure many of our exempt clients that they should not be subject to the Final Rule and can receive the aid they need without fear of immigration consequences. But our clients regularly inform us that they are still afraid or unwilling to access the health benefits for which they might otherwise qualify.

Impact of Public Charge Rule on AFC

41. AFC has diverted resources since the Proposed Rule's publication in order to respond to the volume of inquiries and matters related to public charge. Our limited staff has had to juggle additional client inquiries related to public charge, while at the same time dedicating significant resources to reviewing the complex draft and final versions of the public charge rule, reviewing legal analyses of the public charge rule, and meeting the demand for trainings and technical assistance by public and private sector service providers. These staff members would otherwise have been available to assist clients with a broader array of problems. An inordinate amount of time is spent trying to convince clients that they can in

fact receive benefits, such as RWHAP or ADAP, which are not subject to the public charge rule.

42. Prior to the publication of the Proposed Rule, public charge was rarely a concern for individuals seeking out our services. But now, we are regularly receiving client inquiries about the rule.

Conclusion

43. AFC's resources have been diverted and taxed because of the upsurge in inquiries from individuals and communities afraid about the public charge rule's implications. We are regularly responding to inquiries from people who should not be directly impacted by the rule—including citizens, LPRs, and humanitarian immigrants—but who are nonetheless afraid. My direct impressions based upon the nature and type of legal inquiries we are receiving from the general public, community organizations, and from other non-profits is that the number of people who will dis-enroll from benefits is much higher than USCIs' 2.5% estimate.

44. I believe this chilling effect will cause PLWH to go without the healthcare and other forms of assistance they need to survive and live healthy lives. Without access to these public benefits, AFC clients' long-term physical and economic wellbeing will be irreparably harmed, and our community may be harmed by an increase in HIV transmissions from people who go without treatment.

I, John Peller, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 24 day of September 2019 in Chicago, Cook County, Illinois.

John Peller

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

COOK COUNTY, ILLINOIS, *et al.*,

Plaintiffs,

v.

KEVIN K. McALEENAN, in his official capacity as Acting Secretary of U.S. Department of Homeland Security, *et. al.*,

Defendants.

Civil Action No. 1:19-cv-06334

Hon. Gary S. Feinerman

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

For over 135 years, Congress has restricted the admissibility of aliens who are likely, in the judgment of the Executive Branch, to become "public charges." Congress has never defined the term "public charge," but it has long been understood to mean a person who cannot provide himself with the basic needs of subsistence, and therefore imposes a burden on the public fisc to provide him with aid in obtaining the necessities of daily life. A major purpose of the public charge ground of inadmissibility is to set the expectation for immigrants that they be self-sufficient and refrain from entering the United States with the expectation of receiving public benefits, thereby ensuring that persons unable or unwilling to provide for themselves do not impose an ongoing burden on the American public. For the past two decades, the public charge ground of inadmissibility, which applies in various ways to both applications for admission to the United States and for adjustments of status to lawful permanent resident, has been governed by interim field guidance adopted without the benefit of notice-and-comment procedures.

On August 14, 2019, the Department of Homeland Security ("DHS") published *Inadmissibility on Public Charge Grounds* ("Rule") in the Federal Register. 84 Fed. Reg. 41292. This final rule is the culmination of an extensive, multi-year process to adopt regulations that prescribe how DHS will determine whether an alien applying for admission or adjustment of status is inadmissible under section 212(a)(4) of the Immigration and Nationality Act ("INA") because he is "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4). This Rule is long overdue: in 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), "to expand the public charge ground of inadmissibility" after concluding that "only a negligible number of aliens who become public charges have been deported in the last decade." H.R. Rep. 104-828, at 240-241 (1996); *see also* IIRIRA § 531 (enumerating "minimum" factors to be considered in every public charge determination). Congress therefore provided the INS with a list of factors to consider "at a minimum" in forming an "opinion" about whether an alien is "likely at any time to become a public charge." Yet for two decades, DHS has provided its officers, current and prospective

immigrants, and the public with nothing more than an interim guidance document to specify how the factors are being implemented.

The Rule revises an anomalous definition of "public charge" set forth for the first time in that 1999 interim guidance to better reflect Congress's legislated policy making aliens who are likely to require public support to obtain their basic needs inadmissible. The Rule also reflects Congress's delegation of broad authority to the Executive Branch concerning the meaning of "public charge" and the establishment of procedures for forming an "opinion" about whether individual aliens are "likely at any time to become a public charge." The Rule is the product of a well-reasoned process that considered the plain text of the statute, legislative intent, statistical evidence, and the substance of hundreds of thousands of comments submitted by the public. In addition, the Rule has a limited scope: it does not apply to naturalization applications for lawful permanent residents ("LPRs"), or lead to public charge inadmissibility determinations based on the receipt of Emergency Medicaid, disaster assistance, school lunches, or benefits received by U.S.-born children. Nor does it apply to refugees or asylum recipients.

This Court should deny the motion. Plaintiffs, who are Cook County and Illinois Coalition for Immigrant and Refugee Rights ("ICIRR") (an organization of organizations serving immigrants), rather than aliens actually governed by the Rule, cannot meet basic jurisdictional requirements, and their claims in any event are meritless. The Rule accords with the longstanding meaning of "public charge" and complies with the APA and other relevant statutes, and Plaintiffs' disagreements are ultimately with the wisdom of the policy, a judgment allocated to the political branches. Moreover, whereas States such as Illinois and municipalities such as New York City and Santa Clara immediately filed lawsuits and served preliminary injunction motions to attempt to litigate this policy disagreement in an orderly fashion, Cook County and ICIRR stalled, delaying their filings until they could unnecessarily declare an "emergency." In short, Plaintiffs provide no basis for turning their abstract policy disagreement with the Executive Branch into emergency

relief.[1]

BACKGROUND

"Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes." 8 U.S.C. § 1601(1). "[T]he immigration policy of the United States [is] that aliens within the Nation's borders not depend on public resources to meet their needs." *Id*. § 1601(2)(A). Rather, aliens must "rely on their own capabilities and the resources of their families, their sponsors, and private organizations." *Id*. Relatedly, "the availability of public benefits [is] not [to] constitute an incentive for immigration to the United States." *Id*. § 1601(2)(B). Remarkably, Plaintiffs' 54-page memorandum in this case fails to even *mention* these important provisions of immigration law. *See generally* Pls. Mem. in Supp. of Mot. for TRO ("Mot."), ECF no. 23-1; *id.* at viii-ix (Table of Authorities).

These statutorily enumerated policies are effectuated in part through the public charge ground of inadmissibility in the INA. With certain exceptions, the INA provides that "[a]ny 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). An unbroken line of predecessor statutes going back to at least 1882 have contained a similar inadmissibility ground for public charges, and those statutes have, without exception, delegated to the Executive Branch the authority to determine who constitutes a public charge for purposes of that provision. *See* Immigration Act of 1882, 47th Cong. ch. 376, §§ 1-2, 22 Stat. 214 ("1882 Act"); 1891 Immigration Act, 51st Cong. ch. 551, 26 Stat. 1084 ("1891 Act"); Immigration Act of 1907, 59th Cong. ch. 1134, 34 Stat. 898 ("1907 Act"); Immigration Act of 1917, 64th Cong. ch. 29 § 3, 39 Stat. 874, 876 ("1917 Act"); INA of 1952, 82nd Cong. ch. 477, section 212(a)(15), 66 Stat. 163, 183. In IIRIRA, Congress added to these predecessor statutes by instructing that, in making public charge determinations, "the consular officer or the Attorney General shall at a minimum consider the

[1] This memorandum exceeds the default page limitation under the Local Rules, as permitted by the Court during the September 27, 2019 presentment hearing.

alien's: (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills," 8 U.S.C. § 1182(a)(4)(B) (Arabic numerals substituted), but otherwise left in place the broad delegation of authority to the Executive Branch to determine who constitutes a public charge.

The longstanding denial of admission of aliens believed likely to become public charges dates from the colonial era, when a principal "concern [in] provincial and state regulation of immigration was with the coming of persons who might become a burden to the community," and "colonies and states sought to protect themselves by [the] exclusion of potential public charges." E. P. Hutchinson, Legislative History of American Immigration Policy, 1798-1965 at 410 (1981). Provisions requiring the exclusion and deportation of public charges emerged in federal law in the late 19th century. *See, e.g.*, 1882 Act at 214 (excluding any immigrant "unable to take care of himself or herself without becoming a public charge"); 1891 Act § 11 (providing for deportation of "any alien who becomes a public charge within one year after his arrival in the United States from causes existing prior to his landing").

In 1996, Congress enacted immigration and welfare reform statutes that bear on the public charge determination. IIRIRA strengthened the enforcement of the public charge inadmissibility ground in several ways. Besides codifying mandatory factors for immigration officers to consider, *see supra*, it raised the standards and responsibilities for persons who must "sponsor" an alien by pledging to bear financial responsibility for that immigrant and requiring that sponsors demonstrate sufficient means to support the alien. Contemporaneously, the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996), restricted most aliens from accessing many public support programs, including Supplemental Security Income ("SSI") and nutrition programs. PRWORA also made the sponsorship requirements in IIRIRA legally enforceable against sponsors.

In light of the 1996 legislative developments, the INS attempted in 1999 to engage in formal rulemaking to guide immigration officers, aliens, and the public in understanding public charge determinations. *See Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed.

Reg. 28676 (May 26, 1999) ("1999 NPRM"). No final rule was ever issued, however. Instead, the agency adopted the 1999 NPRM interpretation on an interim basis by publishing *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999) ("Field Guidance"). The Interim Field Guidance dramatically narrowed the public charge inadmissibility ground by defining "public charge" as a person "primarily dependent on the government for subsistence," and by barring immigration officers from considering any non-cash public benefits, regardless of the value or length of receipt, as part of the public charge determination. *See id.* at 28678. Under that standard, an alien receiving Medicaid, food stamps, and public housing, but no cash assistance, would have been treated as no more likely to become a public charge than an alien who was entirely self-sufficient.

The Rule revises this approach and adopts, through notice-and-comment rulemaking, a well-reasoned definition of public charge providing practical guidance to Executive Branch officials making public charge inadmissibility determinations. DHS began by publishing a Notice of Proposed Rulemaking, comprising 182 pages of description, evidence, and analysis. *See Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114 (Oct. 10, 2018) ("NPRM"). The NPRM provided a 60-day public comment period, during which 266,077 comments were collected. *See* Rule at 41297. After considering these comments, DHS published the Rule, addressing comments, making several revisions to the proposed rule, and providing over 200 pages of analysis in support of its decision. Among the Rule's major components are provisions defining "public charge" and "public benefit" (which are not defined in the statute), an enumeration of factors to be considered in the totality of the circumstances when making a public charge determination, and a requirement that aliens seeking an extension of stay or a change of status show that they have not received public support in excess of the Rule's threshold since obtaining nonimmigrant status. The Rule supersedes the Interim Field Guidance definition of "public charge," establishing a new definition based on a minimum time threshold for the receipt of public benefits. Under this "12/36 standard," a public charge is an alien who receives designated public benefits for more than 12 months in the aggregate within a 36-month period. *Id*. at 41297. Such

"public benefits" are extended by the Rule to include many non-cash benefits: with some exceptions, an alien's participation in the Supplemental Nutrition Assistance Program ("SNAP"), Section 8 Housing Programs, Medicaid, and Public Housing may now be considered as part of the public charge inadmissibility determination. *Id*. at 41501-02. The Rule also enumerates a non-exclusive list of factors for assessing whether an alien is likely at any time to become a public charge and explains how DHS officers should apply these factors as part of a totality-of-the-circumstances determination.[2]

ARGUMENT

I. STANDARD OF REVIEW

To obtain a preliminary injunction, a plaintiff must "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008). A preliminary injunction is "never . . . awarded as of right," *Munaf v. Geren*, 553 U.S. 674, 690 (2008), and "is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 870 (7th Cir. 2006) (Wood, J., dissenting) (citing *Mazurek*). The Seventh Circuit "employs a 'sliding scale' approach in deciding whether to grant or deny preliminary relief," but that "approach is limited by the plaintiff first demonstrating 'at least' a negligible chance of success on the merits." *D.U. v. Rhoades*, 825 F.3d 331, 338 (7th Cir. 2016) (citations omitted).[3] A plaintiff cannot prevail without a showing on each of the four factors. *See Winter*,

[2] A correction to the Rule was published in the Federal Register on October 2, 2019. *See* https://www.federalregister.gov/documents/2019/10/02/2019-21561/inadmissibility-on-public-charge-grounds-correction.

[3] Other courts have called into question the appropriateness of applying this "sliding scale" approach. *See, e.g.*, *Davis v. Pension Benefit Guaranty Corp*, 571 F.3d 1288, 1295-96 (D.C. Cir. 2009) (Kavanaugh, J., concurring) ("In light of the Supreme Court's recent decisions, I tend to agree with Judge Fernandez's opinion for the Ninth Circuit that the old sliding-scale approach to preliminary injunctions—under which a very strong likelihood of success could make up for a failure to show a likelihood of irreparable harm, or vice versa—is 'no longer controlling, or even

555 U.S. at 23-24. Where, as here, there are serious questions as to the Court's jurisdiction, it is "more *unlikely*" that the plaintiff can establish a "'likelihood of success on the merits.'" *Munaf*, 553 U.S. at 690. In the alternative, Plaintiffs seek a stay of the effective date of the Rule under Section 705 of the APA. As they correctly observe, "The standard is the same whether a preliminary injunction against agency action . . . or a stay of that action is being sought." Mot. at 20 (quoting *Cronin v. USDA*, 919 F.2d 439, 446 (7th Cir. 1990)).

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. Plaintiffs Have Not Established Standing or Ripeness.

As the party invoking federal jurisdiction, Plaintiffs bear the burden of establishing standing, "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "To seek injunctive relief, a plaintiff must show that [it] is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action . . . ; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The "threatened injury must be certainly impending to constitute injury in fact"; allegations of "possible future injury do not satisfy . . . Art. III." *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990). Where, as here, "the plaintiff is not [itself] the object of the government action," standing "is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562. "When a preliminary injunction is sought, a plaintiff's burden to demonstrate standing will normally be no less than that required on a motion for summary judgment." *Cachillo v. Insmed*, 638 F.3d 401, 404 (2d Cir. 2011) (internal quotation marks omitted).

Here, the Rule governs DHS personnel and certain aliens. It "neither require[s] nor forbid[s] any action on the part of" Plaintiffs, *Summers*, 555 U.S. at 493, nor does it expressly interfere with any of their programs applicable to aliens. Plaintiffs instead largely rely on

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viable.'" (quoting *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)).

speculative injuries that rely on the independent decisions of third-parties not before the Court. Cook County, in particular, alleges that its health care system CCH will suffer an injury since aliens in Cook County will forgo public benefits, relying more on uncompensated health care from CCH, and depriving CCH of Medicaid funds. As a threshold matter, this allegation is inconsistent with Cook County's allegations that aliens will forgo health care services altogether. *See*, *e.g.*, Compl. ¶ 79, ECF No. 1 (immigrants may "fail to seek . . . treatment"); *id.* ¶ 109 (the Rule will create tension between immigrants and CCH, immigrants will not attend appointments and will "avoid seeking treatment"). Indeed, since Cook County provides a certain amount of uncompensated care now, *see id.* ¶ 88, it is plausible that the Rule will result in a *net savings* for Cook County. Cook County's allegation that it will see a net increase in uncompensated care is speculative. Additionally, this alleged harm is also speculative since it is unclear whether a material number of aliens that use *CCH* in particular will forgo Medicaid benefits and rely on uncompensated care. Cook County primarily relies on across-the-board figures concerning alien benefit use in general, not with respect to Cook County in particular. *See* Mot. at 14.

Although Plaintiffs claim that the alleged actions of "Cook County residents" in "disenroll[ing] from . . . public benefits . . . in anticipation of the implementation of the announced Final Rule," (as long ago as "January 2017," before the NPRM was even published) render the "impact of the agency action . . . more . . . certain," Mot. at 24, the opposite is true. Those who purportedly disenrolled "in anticipation," particularly those who did so anticipating the possible content of a final rule they had never seen, are *not* currently enrolled. It is pure speculation, and defies logic, to suggest that such individuals would re-enroll during the pendency of emergency or preliminary relief. Further, such individuals would logically be the most sensitive to the content of the Rule and those who most heavily value the possibility that they may someday obtain success in their pursuit of the "discretionary decision" of adjustment of status. Because Plaintiffs allege that these individuals have already disenrolled, they cannot rely on such individuals as demonstrating that *others* will disenroll absent the grant of emergency or preliminary relief.

Cook County also alludes to an organizational standing theory. It claims that the Rule will frustrate its mission and force it to divert funds towards training and education concerning the

Rule. Generally, for an organization to have standing, the challenged conduct must "perceptibly impair[]" the "organization's activities," with a "consequent drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The alleged "drain on . . . resources" must have "a clear nexus to [a] legally-protected right or interest of the organization." *Keep Chicago Livable v. City of Chicago*, 913 F.3d 618, 625 (7th Cir. 2019). The challenged policy or conduct must "disrupt[]" plaintiffs' activities, and create "additional or new burdens" that make any new expenditure "warranted" and "require[d]." *Common Cause Indiana v. Lawson*, No. 18-2491, 2019 WL 4022177, at *8 (7th Cir. Aug. 27, 2019). Additionally, a plaintiff "must point to a concrete and demonstrable injury to [its] activities; a mere setback to its abstract social interests is not sufficient." *H.O.P.E., Inc. v. Eden Mgmt. LLC*, 128 F. Supp. 3d 1066, 1077 (N.D. Ill. 2015).

Here, Cook County cannot satisfy this standard. To start, Cook County provides no authority supporting the novel extension of this theory of standing from the private organizations to whom it has always been applied to a local government entity. *See City & Cty. of San Francisco v. Whitaker*, 357 F. Supp. 3d 931, 944 (N.D. Cal. 2018) ("Government entities and private organizations are not necessarily interchangeable for standing purposes"—*e.g.*, private organizations may claim purely associational standing but governments may not—"and therefore it is unclear that a *Havens* [organizational standing] analysis is even appropriate" for the City and County of San Francisco). Additionally, Cook County fails to explain how the Rule directly disrupts any of its current activities. Thus, its decision to invest resources into countering the purported effects of the Rule was not "warranted" or "require[d]" to rectify any alleged harm to its activities. This investment is voluntary, and constituting a self-inflicted injury insufficient to establish standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("Respondents cannot manufacture standing merely by inflicting harm on themselves").

ICIRR's standing theory fails for a similar reason. It asserts that its mission is to "promote the rights of immigrants," and that it channeled resources into creating a new organization—PIF-IL—to counteract the Rule. Mot. at 15, 26-27. But ICIRR likewise does not allege that the Rule will disrupt any of its current programs, thus *requiring* a diversion of resources into PIF-IL. ICIRR alleges only that it has chosen to commit resources to educating aliens about the new regulation,

which, for ICIRR, is "business as usual." *Common Cause*, 2019 WL 4022177 at *8; *see also Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920 (D.C. Cir. 2015) ("an organization does not suffer an injury in fact where it expend[s] resources to educate its members and others unless doing so subjects the organization to operational costs beyond those normally expended"). *Common Cause*, on which Plaintiffs rely, is distinguishable. There, the plaintiffs were organizations that helped register voters. *Common Cause*, 2019 WL 4022177 at *5. They alleged that the challenged voter registration policy would result in the State improperly "removing eligible voters from the rolls without notice," which would directly inhibit plaintiffs' pre-existing voter registration efforts. *Id.* Thus, the plaintiffs were "*forced* to spend resources cleaning up the mess" allegedly created by the new State law. *Id.* (emphasis added). Here, by contrast, ICIRR does not allege that it created PIF-IL to remedy any disruption to its current programs; ICIRR was not "*require[d]* . . . to change or expand [its] activities." *Id.* at *8 (emphasis added). It simply elected to do so.[4] *Cf. Plotkin v. Ryan*, No. 99 C 53, 1999 WL 965718, at *5 (N.D. Ill. Sept. 29, 1999) (Plaintiff may have "diverted certain . . . resources into its investigative program from the other programs" in response to the challenged policy, "but it is not alleged that the defendants' actions have themselves impaired [plaintiff's] ability to perform its work. . . . [plaintiff] cannot convert its ordinary programming costs into an injury in fact."), aff'd, 239 F.3d 882 (7th Cir. 2001).

"Constitutional ripeness is a doctrine that, like standing, is a limitation on the power of the judiciary" and serves as another prerequisite of justiciability. *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 429 (2d Cir. 2013). Ripeness "prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it." *Id.* Here, the gravamen of Plaintiffs' claims is that individual aliens—not the Plaintiffs themselves—may be erroneously determined as "likely at any time to

[4] ICIRR's associational standing theory fails for a similar reason: it claims only that its members have standing because they likewise elected to expend resources in response to the Rule. *See* Mot. at 27-28. But ICIRR does not allege that its member organizations' activities were disrupted, and that a new expenditure was required to eliminate the harms caused to these pre-existing activities. ICIRR thus cannot satisfy the first requirement for associational standing. *See Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 600 (7th Cir. 1993) (an organization's "members" must "have standing to sue in their own right").

become a public charge" under the totality of the circumstances test set forth in the Rule. Plaintiffs' claims therefore present the precise circumstance in which ripeness precludes review: resolving questions about the application of "public charge" in the context of an "actual dispute" over application of that ground of inadmissibility is needed to avoid "constructing generalized legal rules" in a "vacuum." *Id*.; *see* 8 U.S.C. § 1252 (providing individuals who have a final order of removal from the United States based on a public charge determination an opportunity to file a petition for review before a federal court of appeals to contest the definition of public charge as applied to them).

Prudential ripeness also counsels against consideration of Plaintiffs' claims. This doctrine is "'an important exception to the usual rule that where jurisdiction exists a federal court must exercise it,' and allows a court to determine 'that the case will be better decided later.'" *In re MTBE Prods. Liability Litig.*, 725 F.3d 65, 110 (2d Cir. 2013). "In determining whether a claim is prudentially ripe," courts examine "whether the claim is fit for judicial resolution" and "whether and to what extent the parties will endure hardship if decision is withheld." *Id*. (cleaned up). Fitness is generally lacking where the reviewing court "would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). Here, Plaintiffs' claims are all premised on hypothesizing about the potential future applications of the Rule to individuals, speculation about the effects of the Rule on individual decision-making, and disagreement with DHS's predictions based on the available evidence. In such a context, "judicial appraisal . . . is likely to stand on a much surer footing in the context of a specific application" of the Rule, rather than "in a factual vacuum." *Derby & Co, Inc. v. Dep't of Energy*, 524 F. Supp. 398, 408 (S.D.N.Y. 1981) (internal quotations omitted).

In addition, withholding judicial consideration of Plaintiffs' claims will not cause them any significant hardship. With respect to the Plaintiffs bringing this case, the Rule "do[es] not create adverse effect of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm," and therefore cannot serve as the basis for a ripe claim. *Ohio Forestry Ass'n*, 523 U.S. at 733. Instead, the harms alleged are possible cumulative side effects of third party individuals'

decisions to take action not required by the Rule or the Plaintiffs' own decisions to spend money in response to the Rule, so they do not create a ripe facial challenge.

B. Plaintiffs Are Outside The Zone Of Interests Regulated By The Rule.

Even if Plaintiffs could meet their standing and ripeness burdens, Plaintiffs' claims would still fail because they are outside the zone of interests served by the limits of the "public charge" inadmissibility provision in § 1182(a)(4)(A) and related sections. The "zone-of-interests" requirement limits the plaintiffs who "may invoke [a] cause of action" to enforce a particular statutory provision or its limits. *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 572 U.S. 118, 129-30 (2014). Under the APA, a plaintiff falls outside this zone when its "interests are . . . marginally related to or inconsistent with the purposes implicit in the statute," *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987), and as Plaintiffs acknowledge, "the relevant statute" for this analysis "is the statute whose violation is the gravamen of the complaint." Mot. at 29 (quoting *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 529 (1991)); *see Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012).

Plaintiffs plainly fall outside the zone of interests served by the limits of the meaning of public charge in the inadmissibility statute. At issue in this litigation is whether DHS will deny admission or adjustment of status to certain aliens deemed inadmissible on public charge grounds. By using the term "public charge" rather than a broader term like "non-affluent," Congress ensured that only certain aliens could be determined inadmissible on the public charge ground. It is aliens improperly determined inadmissible, not a municipality or an organization serving other organizations, who "fall within the zone of interests protected" by any limitations implicit in § 1182(a)(4)(A) and § 1183, because they are the "reasonable—indeed, predictable—challengers" to DHS's inadmissibility decisions. *Patchak*, 567 U.S. at 227; *see* 8 U.S.C. § 1252 (providing individuals who have a final order of removal from the United States based on a public charge determination an opportunity to file a petition for review before a federal court of appeals to contest the definition of public charge as applied to them). *Cf. INS v. Legalization Assistance Proj*., 510 U.S. 1301, 1304-05 (1993) (O'Connor, J., in chambers) (concluding that relevant INA provisions

were "clearly meant to protect the interests of undocumented aliens, not the interests of organizations [that provide legal help to immigrants]," and that the fact that a "regulation may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect"); *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 899 (D.C. Cir. 1996) (dismissing under zone-of-interests test a suit challenging parole of aliens into this country, where plaintiffs relied on incidental effects of that policy on workers).

Cook County contends that it falls within the "zone of interests regulated by the . . . Rule," Mot. at 28, ignoring that the relevant zone of interests is that regulated by "the statute." *Clarke*, 479 U.S. at 399. So although the Rule discusses "administrative burden," and monetary and health impacts, Mot. at 29-30, those are merely the costs and benefits associated with changes to the interpretation of the statutory standards governing *admissibility of aliens*. Cook County's "burdens" have no relation to that question. ICIRR claims that it falls within the zone of interests because a different provision of the INA authorizes it to "broadly distribute information" about the law. Mot. at 30 (quoting 8 U.S.C. § 1443(h)). But as Justice O'Connor recognized, the zone of interests of the INA are to be construed far more narrowly: to the "interests of [the] aliens" affected by the particular provision, and not to organizations that assist the aliens with those interests. *Legalization Assistance*, 510 U.S. at 1305.

C. Plaintiffs' Substantive Claims Lack Merit.

1. The Rule Is Consistent With The Plain Meaning Of "Public Charge."

"The cardinal rule" in statutory interpretation is that "words used in statutes must be given their ordinary and plain meaning," *Sanders v. Jackson*, 209 F.3d 998, 1000 (7th Cir. 2000), and the definition of "public charge" in the Rule is consistent with the plain meaning of the statutory text. "[I]n particular," courts "look at how a phrase was defined at the time the statute was drafted and enacted." *Id.*; *see Wisc. Central, Ltd. v. U.S.*, 138 S. Ct. 2067, 2070 (2018) (a court's "job is to interpret the words consistent with their "ordinary meaning . . . at the time Congress enacted the statute"). Courts "often [] refer[] to dictionaries" as the key sources for this analysis, *id.*, and

because the court is interpreting "the meaning at the time the statute was enacted," it is dictionaries from that time on which courts rely. *See Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 863 (7th Cir. 2016) (citing *Sandifer v. U.S. Steel*, 134 S. Ct. 870, 876 (2014)). Since 1882, Congress has consistently provided for the inadmissibility (or, in the parlance of earlier versions of the statute, "exclusion") of indigent aliens determined by the Executive Branch as likely to become "public charges," as the "chief measure of protection in the law . . . intended to reach economic . . . objections to the admission" of aliens. *See* Letter from Sec. of Labor to House Comm. on Immig. and Naturalization, H.R. Doc. No. 64-886, at 3 (Mar. 11, 1916) ("1916 Letter"); NPRM at 51125. This makes the late 19th century the key time to consider. *See Sanders*, 209 F.3d at 1000.

Contemporary dictionaries from the 1880s define "charge" as "an obligation or liability," such as "a pauper being chargeable to the parish or town." Stewart Rapalje *et al.*, Dict. of Am. and English Law (1888) ("Rapalje 1888"); *accord* Frederic Jesup Stimson, Glossary of the Common Law (1881) (defining "charge" as "[a] burden, incumbrance, or lien; as when land is charged with a debt") ("Stimson 1881"). As to the term "public," such dictionaries explain the term "public" as meaning "[t]he whole body of citizens of a nation, or of a particular district or city, [or] [a]ffecting the entire community." Rapalje 1888.[5] Together, these early definitions make clear that an alien becomes a "public charge" when his inability to achieve self-sufficiency imposes an "obligation" or "liability" on "the body of the citizens" to provide for his basic necessities, as reflected in early legal sources addressing the term "public charge." *See* Arthur Cook *et al.*, Immigration Laws of the U.S., § 285 (1929) ("Public charge means any maintenance, or financial assistance, rendered from public funds"). Rather than engage these sources, Plaintiffs cite to the definition of "charge" in a present-day online dictionary, entirely ignoring that the *same dictionary* contains a definition of the full term "public charge"—"one that is supported at public expense"—that makes no reference to "primary" support or dependency and thereby supports the Rule's interpretation. *Compare* Mot. at 32 *with* http://www.merriam-webster.com/dictionary/public%20charge (last

[5] *See also* C.H. Winfield, Words and Phrases, A Collection of Adjudicated Definitions of Terms Used in the Law, with References . . ., 501 (1882) ("Winfield 1882") ("Public" means "not any corporation like a city, town, or county but the body of the people at large." (quoting *Baker v. Johnston*, 21 Mich. 319, 335 (Mich. 1870)).

visited Sept. 26, 2019).[6]

It is true, as the Court suggested at the presentment hearing, that language such as "obligation" on "the body of the citizens" and "any maintenance . . . rendered from public funds" can be read broadly, but that does not mean that the plain meaning of the statute is limitless. The 1882 Winfield dictionary provides an explanation of "obligation" as "synonymous with *duty*. . . . a tie which binds us to pay or do something agreeably to the laws or customs of the country." Winfield 1882 at 430; *see also* Rapalje 1888 (defining "liability" as the condition of being "actually or potentially subject to an obligation"). The relevant "duty" at issue is informed by the historical context. *See Menominee Indian Tribe of Wisc. v. Thompson*, 161 F.3d 449, 459 (7th Cir. 1998); *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1418 (10th Cir. 1992). In the late 19th century, as reflected in the context in which "public charge" arises in any every instance, there existed a generally-recognized moral and legal obligation to assist the poor with the basic necessities for living. *See generally* Michael Nolan, A Treatise of the Laws for the Relief and Settlement of the Poor, Vol. 1 at 1-6 (1805 ed.); J.S. Mill, Principles of Political Economy 585 (Peoples ed. 1865), as reprinted in Calvin Woodard, *Reality and Social Reform*, 72 Yale L.J. 286, 300-01 (1962) ("The state must act by general rules. It cannot undertake to discriminate between the deserving and the undeserving indigent. It owes no more than [subsistence] to the first, and can give no less to the last"); *cf. Deuteronomy* 15:7-15:8.[7]

Nothing about the plain meaning of this term suggests "primarily and permanently

[6] Other present-day dictionaries likewise support the Rule's definition of "public charge." For example, "Black's Law Dictionary (6th ed.) . . . defines public charge as 'an indigent; a person whom it is necessary to support at public expense by reason of poverty alone or illness and poverty.'" NPRM at 51158. In any event, the definitions provided by Defendants from "the time the statute was drafted and enacted" are much more probative of the meaning of the term. *Sanders*, 209 F.3d at 1000.

[7] This context—that "public charge" concerns the obligation to assist the poor—explains why many types of public benefits, particularly those that are not means-tested, have no bearing on whether a person would be considered a public charge under the statutory definition. Further, it is apparent on the face of the statute that "public charge" is intended to describe a discrete class of persons who will be inadmissible and not every applicant. This precludes a reading that would encompass public benefits afforded to *every* individual in society, as doing so would render all other classes of admissibility irrelevant. *See U.S. v. F.J. Vollmer*, 1 F.3d 1511, 1516 (7th Cir. 1993) ("[S]tatutes are to be construed so as to give meaning to every word in them").

dependent" on public benefits, as Plaintiffs contend. Mot. at 5; *see id*. at 32. When Congress originally enacted the public charge inadmissibility ground, the term "pauper," not "public charge," was in common use for a person so impoverished they would be expected to be permanently dependent on public support. *See, e.g.*, Century Dictionary & Cyclopedia (1911) (defining "pauper" as "[a] very poor person; a person entirely destitute"); *see also Overseers of Princeton Twp. v. Overseers of S. Brunswick Twp*., 23 N.J.L. 169, 172 (N.J. 1851) (treating "a pauper" and "a person likely to become chargeable" as two separate classes). In fact, although Plaintiffs assert that the "primarily dependent" standard they describe has been "a consistent understanding . . . trac[ing] back to the 1882 Act," Mot. at 32-33, they identify no source—and Defendants are aware of none—that defines "public charge" using those words or their cognates prior to 1999, when INS issued the nonbinding, interim field guidance. In contrast, there is longstanding evidence that the term "[p]ublic charge means any maintenance, or financial assistance, rendered from public funds." Cook, Immigration Laws, § 285; *see also* 26 Cong. Rec. 657 (1894) (statement of Rep. Warner) (explaining that under the public charge inadmissibility ground, "[i]t will not do for [an alien] [to] earn half his living or three-quarters of it, but that he shall presumably earn all his living . . . [to] not start out with the prospect of being a public charge").

Plaintiffs' analysis of the plain meaning of "public charge" as being equivalent to "pauper" is further undercut by Congress' decision to provide a *separate* inadmissibility ground for paupers in early versions of the statute. *See, e.g.*, 1891 Act.[8] Congress thereby made "clear that the term 'persons likely to become a public charge' is *not* limited to paupers or those liable to become such; 'paupers' are mentioned as in a separate class." *Lam Fung Yen v. Frick*, 233 F. 393, 396 (6th Cir. 1916) (emphasis added). This was a deliberate decision, moreover, as underscored by the response of the Executive Branch and Congress to a 1916 Supreme Court opinion reasoning that the term

[8] The 1891 Act provided "[t]hat the following classes of aliens shall be excluded from admission . . . : "All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome . . . disease, [those] convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another . . . unless it is affirmatively . . . shown . . . that such person does not belong to one of the forgoing excluded classes." 1891 Act at 1094.

"public charge" must be read as "generically similar" to terms "mentioned before and after" (such as "pauper"). *Gegiow v. Uhl*, 239 U.S. 3, 10 (1915). Shortly after the decision, the Secretary of Labor sent a letter to Congress, requesting that the statute be amended to supersede the Supreme Court's ruling. *See* 1916 Letter at 3-4 (Mar. 11, 1916). The Secretary defined "public charge" in accordance with its plain meaning at the time: as "a charge (an economic burden) upon the community" in which an alien intends to reside. The Secretary then explained that the Court's opinion in *Gegiow* had highlighted a never-before recognized "defect in . . . the arrangement of the wording," which, if left uncorrected, would "materially reduce[] the effect of the clause" in protecting the public fisc. Congress acted. The 1917 Act relocated the "public charge" inadmissibility provision and explained why: "The purpose of this change [is 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)." S. Rep. No. 64-352, at 5 (1916);[9] *see also* 1917 Act § 3 n.5; as reprinted in Immigration Laws and Rules of January 1, 1930 with Amendments from January 1, 1930 to May 24, 1934 (1935) (explaining that "[t]his clause . . . has been shifted . . . to indicate the intention of Congress that aliens shall be excluded upon said ground for economic as well as other reasons" and "overcoming the decision of the Supreme Court in *Gegiow*"). Subsequent authorities recognized that this alteration negated the Court's interpretation in *Gegiow* by underscoring that the term "public charge" is "not associated with paupers or professional beggars." *Ex Parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923) (explaining that "public charge" in the 1917 Act "is differentiated from the application in *Gegiow*"); *accord* Arthur Cook, *et al.*, Immigration Laws of the U.S., §§ 128-34 (1929); *but see Ex Parte Mitchell*, 256 F. 229, 232 (N.D.N.Y. 1919) (declining to give effect to relocation of "public charge" within the 1917 Act).[10]

[9] In *Gegiow*, the Court analyzed the terms adjacent to "public charge" in the statute to conclude that the "overstocked" "state of the labor market" in the plaintiffs' destination city could not serve as the basis for exclusion. 239 U.S. at 9-10. Although issued after enactment of the 1917 Act, the question before the Second Circuit in *Howe v. United States*, 247 F. 292, 294 (2d Cir. 1917)—also relied on by Plaintiffs, see Mot. at 5—involved an interpretation of the 1907 Act and the court relied on the adjacency of "pauper" and "public charge," citing *Gegiow*.

[10] The 1917 Act listed, *inter alia*, "idiots, imbeciles, feeble-minded persons, epileptics, insane persons; . . . persons with chronic alcoholism; paupers; professional beggars; vagrants; persons

For these reasons, the plain meaning of "public charge," as understood through its consistent inclusion as a ground of inadmissibility in immigration statutes dating to 1882, is that it refers to an alien who obligates the body of the people to provide for his basic needs. This interpretation of "public charge" conforms perfectly with Congress's explicit instruction that "the immigration policy of the United States [is] that . . . [a]liens within the Nation's borders [should] not depend on public resources to meet their needs." 8 U.S.C. § 1601(2)(A).

2. The Plain Meaning of Public Charge Does Not Require Permanent Receipt Of Government Benefits Or That Such Benefits Be Paid In Cash

An alien's temporary receipt of public benefits constitutes an obligation on the public to support the basic necessities of life, and is therefore encompassed by the plain meaning of public charge. Both administrative practice and the analysis in early cases confirm that the plain meaning of "public charge" is not limited to an alien who "relies . . . permanently" on "long-term" public aid, as Plaintiffs assert. *See* Mot. at 32-33.

First, as the NPRM in this case explained, short-term receipt has been "a relevant factor under the [previous] guidance with respect to covered benefits." NPRM at 51165 & n.304 ("In assessing the probative value of past receipt of public benefits, 'the length of time . . . is a significant factor'") (quoting 1999 Interim Field Guidance at 28690). In fact, the 1999 Field Guidance made no suggestion that an alien needed to receive cash benefits for an extended period for the totality of the circumstances to trigger a public charge determination and set no minimum period below which the receipt of such benefits would be less meaningful. 1999 Interim Field Guidance at 28690. Nothing in the 1999 standard would ensure that an alien who received, in the previous 36 months, 12 months of a public benefit considered relevant under that guidance (such as Supplemental Security Income) would not be treated as a public charge. And nothing in the plain meaning of "public charge" precludes DHS from clarifying the standard by adopting a

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afflicted with tuberculosis in any form or with a . . . disease; persons . . . certified by the examining surgeon as being mentally or physically defective . . . of a nature which may affect the ability . . . to earn a living; [felons]; polygamists . . . ; anarchists, or persons . . . who advocate . . . the unlawful destruction of property; prostitutes . . .; persons . . . induced, assisted, encouraged, or solicited to migrate . . . by offers . . . of employment [or] . . . advertisements for laborers . . . in a foreign country; persons likely to become a public charge; persons deported [within the previous year]; stowaways," and others. 1917 Act at 875-76

recognizable and meaningful threshold for receipt of public benefits in a given period. *Cf. Harris v. FCC*, 776 F.3d 21, 28–29 (D.C. Cir. 2015) ("An agency does not abuse its discretion by applying a bright-line rule.").

DHS's treatment of recurring, but non-permanent, receipt of public relief is also consistent with early case law. For example, a lower court in New York in the mid-nineteenth century recognized that "the modes in which the poor become chargeable upon the public" extend to "all expenses lawfully incurred," including "temporary relief." *People ex rel. Durfee v. Comm'rs of Emigration*, 27 Barb. 562, 569-70 (N.Y. Gen. Term 1858). Similarly, in *Poor Dist. of Edenburg v. Poor Dist. of Strattanville*, a Pennsylvania appellate court recognized that even a landowner with a long track record of supporting herself as a teacher, artist, and writer, could become "chargeable to" the public by temporarily receiving "some assistance" while ill, despite having "plenty of necessaries to meet her immediate wants." 5 Pa. Super. 516, 520-24 (Pa. Super. Ct. 1897). Although the court ultimately rejected the landowner's classification as a pauper, it did so not because her later earnings or payment of taxes barred this conclusion, but because, under the specific facts of the case, she was "without notice or knowledge" that receipt even of limited assistance would "place[] [her] on the poor book." *Id*. at 527-28; *see also Town of Hartford v. Town of Hartland*, 19 Vt. 392, 398 (Vt. 1847) (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 after receiving relief in "the amount of some five dollars"). The inclusion of short-term relief is also consistent with case law suggesting, in dicta, that the exclusion of public charges extended to those who, although earning a modest living, might need assistance with "the ordinary liabilities to sickness, or . . . any other additional charges . . . beyond the barest needs of existence." *U.S. v. Lipkis*, 56 F. 427, 428 (S.D.N.Y. 1893) (holding that immigration officers properly required a bond from a poor family on account of poverty, even though the ultimate reliance on public aid occurred through commitment to an insane asylum). Such individuals impose a "liability" on "the body of the people at large," even if they are not fully destitute.

Plaintiffs' reliance on *Boston v. F.W. Capen*, 61 Mass. 116 (Mass. 1851), to suggest that "public charge" requires long-term receipt of benefits is misplaced. *See* Mot. at 33. As an initial

matter, the court's analysis in *Capen* equated "paupers" with "public charges" under state law: "Secondly, for those who have been paupers in a foreign land; that is, for those who have been a public charge in another country; and not merely destitute persons, who, on their arrival here, have no visible means of support; the word 'paupers' being used . . . in its legal, technical sense." 61 Mass. at 121. Congress's separate exclusions for "paupers" and "public charges," *Frick*, 233 F. at 396, by contrast, demonstrates that Congress did not adopt a definition equating "pauper" and "public charge." Further, other contemporaneous state law cases demonstrate that "public charges" had a far broader definition than Plaintiffs' constricted view limiting it to "wards of the state" Mot. at 33. The Maine Supreme Court, for example, identified as "likely to become chargeable" to a town to which he had travelled a person who required only "a small amount" of assistance, based on his "age and infirmity." *Inhabitants of Guilford v. Inhabitants of Abbott*, 17 Me. 335, 335-36 (Me. 1840) (reaching conclusion despite recognizing that, at "the time of filing the complaint he . . . had strength to perform some labor, [] was abundantly able to travel from town to town," and had a "house provided for him" in another town").[11]

Nor does anything in the plain meaning of "public charge" suggest a distinction between non-cash benefits and services and "cash assistance," as Plaintiffs suggest. *See* Mot. at 33. Both types of assistance create an obligation on the part of the public and both equally relieve recipients from the conditions of poverty. For this reason, consideration of an alien's receipt of public benefits for "housing, food and medical care," as "examples of the obvious basic necessities of life," falls within the reasonable parameters of determining whether that person creates a liability on the body of the public. *Am. Sec. & Tr. Co. v. Utley*, 382 F.2d 451, 453 (D.C. Cir. 1967). Plaintiffs do not contest that receipt of in-kind services like food and housing should make a person a public charge when that person is "institutionaliz[ed] at government expense." Mot. at 33. But Plaintiffs fail to explain why, absent institutionalization, a person's receipt of those same in-kind

[11] *Ex Parte Sakaguchi*, 277 F. 913 (9th Cir. 1922), also relied on by Plaintiffs, provides no support to their position. That case does not discuss the length of receipt of aid at all, stating merely that immigration officials lacked "any evidence" supporting a public charge determination for a person "expected to support herself independently after a while," but needing short-term assistance from her "well-to-do" family members. *Id.* at 915-16.

services should be irrelevant.

Plaintiffs' contention that a pair of agency decisions supports their cramped view of the meaning of public charge fares no better. *See* Mot. at 6 (misleadingly characterizing Plaintiffs' *legal analysis* of various cases under the rubric of "Facts"). In *Matter of Martinez-Lopez*, for example, then-Attorney General Robert F. Kennedy explained that a "specific circumstance," which he described as any "fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public," is the standard for demonstrating a likelihood to become a public charge. 10 I. & N. Dec. 409, 421 (A.G. 1964) (rejecting argument that an alien's misrepresentation of an offer of employment was sufficient to render the alien deportable). Similarly, the agency in *Matter of Harutunian*, 14 I & N Dec. 583, 589 (BIA 1974), explained that "public charge" in the context of inadmissibility did *not* need to be construed "as narrowly as in the deportation section," a separate statutory provision codified today at 8 U.S.C. § 1227(a)(7). Although that opinion referenced a "destitute" alien, the public charge description it sets forth is broad: "a money charge upon or an expense to the public for support and care." *Id.*[12]

Finally, although the 1999 Interim Field Guidance and the 1999 NPRM adopted a different interpretation regarding non-cash benefits than the Rule, *see* Mot. at 9, those documents provide further support for DHS's determination that inclusion of such benefits in the Rule is consistent with the plain meaning of "public charge." Both documents describe the exclusion of "non-cash public benefits" at that time as "reasonable," confirming that although they did not conclude that the meaning of "public charge" required consideration of such benefits, they also did not conclude that the meaning of public charge foreclosed their consideration. 1999 NPRM at 28677; *see id*. at 28678 ("It has never been [the] policy that the receipt of any public service or benefit must be considered."). Indeed, the only examples of prior exclusion of non-cash benefits from consideration that the drafters of the interim guidance could identify were: (1) broadly-available

[12] The 1987 INS rule cited by plaintiffs interprets a different provision of law altogether, a special amnesty for aliens enacted in the Immigration Reform and Control Act of 1986 ("IRCA"). *See* 52 Fed. Reg. 16,205. That legislation reflected special "concerns for certain aliens who have been residing illegally in the United States," including by providing a "special rule for determination of public charge." *Id.* at 16205, 16216.

public benefits such as "public schools"; and (2) the exclusion of food stamps (*i.e.*, "SNAP") under State Department guidance that apparently did not exclude other forms of non-cash benefits. *See, e.g.*, 1999 Interim Field Guidance at 28692.

3. The Rule Exercises Interpretive Authority That Congress Delegated To The Executive Branch, A Delegation Congress Has Maintained.

The statutory term "public charge" has "never been [explicitly] defined by Congress in the over 100 years since the public charge inadmissibility ground first appeared in the immigration laws." Rule at 41308. Congress implicitly delegates interpretive authority to the Executive Branch when it omits definitions of key statutory terms, thereby "commit[ting] their definition in the first instance to" the agency, *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981), to be exercised within the reasonable limits of the plain meaning of the statutory term. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984). Congress has long recognized this implicit delegation of authority to interpret the meaning of "public charge." *See, e.g.*, S. Rep. No. 81-1515, at 349 (1950) (stating that because "there is no definition of the term [public charge] in the statutes, its meaning has been left to the interpretation of the administrative officials and the courts"). This delegation is reinforced by Congress's explicit directive that the determination be made "in the opinion of the Attorney General" or a "consular officer." 8 U.S.C. § 1182(a)(4)(A). The expansive delegation of authority by Congress grants DHS wide latitude to interpret "public charge" within the reasonable limits set by the broad, plain meaning of the term itself.[13]

Congress's comprehensive delegation of interpretive authority is well-established in precedent dating back to the early public charge statutes. *See, e.g.*, *Ex Parte Pugliese*, 209 F. 720, 720 (W.D.N.Y. 1913) (affirming the Secretary of Labor's authority "to determine [the] validity, weight, and sufficiency" of evidence going to whether an individual was "likely to become a public charge"); *Wallis v. U.S. ex rel. Mannara*, 273 F. 509, 510 (2d Cir. 1921) (deference required even

[13] These delegations of authority specific to the public charge ground of inadmissibility are reinforced by the explicit overall delegation of authority by Congress to the Secretary of Homeland Security the authority to "establish such regulations . . . as he deems necessary for carrying out" the INA, 8 U.S.C. § 1103(a)(3). Congress has also provided the Secretary with specific responsibility to carry out the INA and to make public charge inadmissibility decisions, as spelled out in detail in the NPRM and Rule. *See* NPRM at 51124; Rule at 41295.

if "evidence to the contrary [is] very strong"). It is also recognized in Executive Branch practice. Administrative decisions have explained that Congress's broad delegation of authority in this area was necessary because "the elements constituting likelihood of becoming a public charge are varied." *Harutunian*, 14 I. & N. Dec. at 588-90 (quoting S. Rep. No. 81-1515 at 349 (1950) (holding that alien's receipt of "old age assistance benefits" in California was sufficient to render the alien a "public charge")); *see also Matter of Vindman*, 16 I. & N. Dec. 131, 132 (BIA 1977) (citing regulations in the visa context, and explaining that the "elements constituting likelihood of an alien becoming a public charge are varied . . . [and] are determined administratively").[14]

The long history of congressional delegation of definitional authority over the meaning of "public charge" demonstrates the error in Plaintiffs' claim that Congress has, by choosing not to impose a definition of "public charge" when revising the statute, "bar[red] DHS from enacting a Final Rule" that interprets the meaning of "public charge." Mot. at 34. To the contrary, by its inaction in 1996 and 2013, the occasions Plaintiffs cite, *see id.*, Congress left the public charge provision unchanged. This inaction cannot plausibly be read to withdraw the longstanding delegation to the Executive Branch to exercise definitional authority over the "varied" elements of the meaning of "public charge." S. Rep. No. 81-1515, at 349. Certainly the INS, when it adopted the 1999 Interim Field Guidance and proposed to issue a sweeping new definition of "public charge" through notice-and-comment rulemaking in 1999, did not understand Congress's 1996 action to have altered the statute by withdrawing the long-understood delegation. *See* 1999 NPRM at 28677 ("[T]he proposed rule provides a definition for the ambiguous statutory term 'public charge'").

At a minimum, the likelihood that Congress intended to preserve the delegation means that, under the circumstances, "[c]ongressional inaction lacks persuasive significance" because competing "inferences may be drawn from such inaction." *Competitive Enter. Inst. v. U.S. Dep't*

[14] Plaintiffs themselves rely on the existence of this delegated interpretive authority when they herald the 1999 NPRM as relevant to the meaning of public charge, *see* Mot. at 9, and seek to preserve this prior exercise of delegated interpretive authority by requiring DHS "to keep in place [the] regulatory regime that has governed"—*i.e.*, the "primarily dependent" standard that appeared for the first time in the 1999 Interim Field Guidance and simultaneous 1999 NPRM. *See* Mot. at 53.

of Transp., 863 F.3d 911, 917 (D.C. Cir. 2017). And the more plausible of the competing inferences is that Congress intended for DHS to retain the authority delegated to it to analyze the "totality of the alien's circumstances" to make "a prediction" about the likelihood that an alien will become a public charge, *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974), including the delegated authority for DHS to adopt further procedures to guide its officers, aliens, and the public at large in understanding the application of the public charge ground of inadmissibility.

4. The Rule Is Not Arbitrary And Capricious.

a. The Rule Meets The Standards Required For An Agency To Change Its Position Through Notice-and-Comment Rulemaking.

There is "no basis in the Administrative Procedure Act . . . for a requirement . . . [of] more searching review" when an agency changes its position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). This is particularly true here, where the "settled course" to which the Plaintiffs seek to revert, Mot. at 36, is nonbinding guidance that could not possibly foreclose DHS from adopting a different reasonable interpretation through notice-and-comment rulemaking. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).[15] As the Supreme Court explained in *Fox*, all that DHS was required to do to permissibly change course from the 1999 Interim Field Guidance was to acknowledge that the Rule is adopting a policy change, provide a reasoned explanation for the change, and explain how it believes the new interpretation is reasonable. *See generally Fox*, 556 U.S. 514-16. The Rule readily meets these standards, and so DHS is entitled to full deference to its changed interpretations, consistent with its obligation to "consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64 (recognizing agencies receive deference to a "changed . . . interpretation of [a] term").

First, the NPRM and Rule acknowledged that DHS was changing course. In the former, DHS announced it was proposing "major changes," *see, e.g.*, NPRM at 51116, and that these

[15] As explained *supra*, the standards of "primary dependency" (or "primarily dependent") and exclusion of non-cash benefits were newly-adopted by the 1999 Interim Field Guidance, and thus, Plaintiffs are incorrect to suggest that the Rule is inconsistent with how public charge determinations were made for "over a century." Mot. at 1.

changes included "a new definition of public charge." *Id.* at 51158; *see also id.* at 51163 (describing DHS's intent to make "a change from the standard" of "primary dependence" set forth in the 1999 Interim Field Guidance). DHS also stated that it would change and "improve upon the 1999 Interim Field Guidance" by changing the treatment of non-cash benefits. *Id.* at 51123. In the Rule, DHS "agree[d] with commenters that the public charge inadmissibility rule constitutes a change in interpretation from the 1999 Interim Field Guidance," Rule at 41319, and repeatedly explained that it was "redefin[ing]" public charge, and adopting a "new definition" of "public benefit" that would be "broader" than before. *Id.* at 41295, 41297, 41333; *see also id.* at 41347 (explaining that the agency may justifiably change course).

Second, DHS explained the reasons for the change in course. DHS described how the "focus on cash benefits" in the 1999 Interim Field Guidance had proved "to be insufficiently protective of the public budget, particularly in light of significant public expenditures on non-cash benefits." NPRM at 51164. DHS quantified the "significant federal expenditure on low-income individuals" specifically associated with "benefits directed toward food, housing and healthcare." *Id*. at 51160; *see id*. at Table 10. Recognizing that these benefits are provided to citizens and aliens alike, DHS also examined the substantial participation rate among foreign-born aliens for these programs. *See id*. at 51161 & Table 11. In this analysis, DHS found that public benefits programs provide, on average, thousands of dollars of "assistance to those who are not self-sufficient" and who are aliens, *id*. at 51163, and that millions of aliens receive such benefits: 3.1 million receive Medicaid alone. *Id*. at 51161-62 & Table 12. These statistics reasonably support DHS's conclusion that, under the 1999 Interim Field Guidance, the agency was failing to carry out the principles mandated by Congress that "aliens . . . not depend on public resources to meet their needs," and instead "rely on their own capabilities" and support from families, sponsors, and private organizations. 8 U.S.C. § 1601; *see also* Rule at 41308, 41319 (explaining that the prior guidance "failed to offer meaningful guidance for purposes of considering the mandatory factors and was therefore ineffective"). Consistent with the long-understood purpose of the public charge ground of inadmissibility as the "chief measure of protection in the law" for the public fisc, *see* 1916 Letter

at 3, DHS's analysis demonstrates the reasonableness of the decision to exercise delegated authority to adopt a new definition and approach for public charge inadmissibility determinations.

DHS also adequately explained how the new approach reasonably advances the stated purposes, including by "implement[ing] the public charge ground of inadmissibility consistent with . . . [Congress's goal of] minimiz[ing] the incentive of aliens to attempt to immigrate to, or to adjust status in, the United States due to the availability of public benefits." Rule at 41305 (citing 8 U.S.C. § 1601(2)(B)). Although most aliens may face a five-year waiting period prior to eligibility for public benefits, they can be expected to base their present decisions on the availability of those future benefits. *Cf. Lewis v. Thompson*, 252 F.3d 567, 583-84 (2d Cir. 2001) (Congress could reasonably "believe that some aliens would be less likely to hazard the trip to this country if they understood that they would not receive government benefits").

Plaintiffs' only response is to brush off the Rule's "ultimate aim" of "self-sufficiency" as immaterial. *See* Mot. at 37. As noted above, Plaintiffs' brief entirely ignores the existence of 8 U.S.C. § 1601 and Congress's reminder therein that self-sufficiency has always "been a basic principle of United States immigration law" and Congress's command making "the immigration policy of the United States [be] that . . . aliens . . . not depend on public resources to meet their needs." 8 U.S.C. § 1601. Unlike Plaintiffs in their brief, DHS does not have the option of disregarding Congress's clear direction. For specific purposes of the public charge inadmissibility ground, Congress's intent is "that aliens should be self-sufficient before they seek admission or adjustment of status," not that they should someday attain self-sufficiency by drawing on public resources to improve their financial condition. Rule at 41308; *see* 8 U.S.C. § 1601.

b. DHS Adequately Responded to Comments.

Plaintiffs insist that DHS did not adequately respond to certain comments but fail to show any deficiency in DHS's responses. An agency's obligation to respond to comments on a proposed rulemaking is "not 'particularly demanding.'" *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441–42 (D.C. Cir. 2012). "[T]he agency's response to public comments need only 'enable [courts] to see what major issues of policy were ventilated . . . and why the agency reacted

to them as it did.'" *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993).

Plaintiffs first attack the Rule on that ground that the majority of the comments opposed it. Mot. at 10. Plaintiffs cite no precedent supporting this novel head-counting approach to rulemaking, and the D.C. Circuit rejected an analogous argument decades ago: "The substantial-evidence standard has never been taken to mean that an agency rulemaking is a democratic process by which the majority of commenters prevail by sheer weight of numbers." *NRDC v. EPA*, 822 F.2d 104, 122 n.17 (D.C. Cir. 1987). Plaintiffs' argument deserves a similar fate.

Plaintiffs then criticize DHS's cost-benefit analysis. *See* Mot. at 37. The APA, standing alone, does not require a detailed cost-benefit analysis. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 224 (2009) (upholding agency choice to seek "only to avoid extreme disparities between costs and benefits"); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-12 & n.30 (1981) ("Congress uses specific language when intending that an agency engage in cost-benefit analysis."); *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 670-71 (D.C. Cir. 2011) (rejecting argument that "the APA's arbitrary and capricious standard alone requires an agency to engage in cost-benefit analysis"). While the Supreme Court noted in *Michigan v. EPA* that "reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions," 135 S. Ct. 2699, 2707 (2015), it did not require the agency "to conduct a formal cost-benefit analysis," leaving it up to the agency "to decide (as always, within the limits of reasonable interpretation) how to account for cost." *Id*. at 2711.

Next, it is untrue that Defendants summarily "dismissed" comments concerning disenrollment by individuals not subject to the Rule, as Plaintiffs claim. Mot. at 38 (discussing DHS's treatment of "unwarranted choices"). DHS did consider that potential impact of the Rule and reasonably decided that it did not support abandoning the Rule. DHS correctly noted that it is "difficult to predict the rule's disenrollment impacts with respect to people who are not regulated by this rule" and explained that it would not amend the Rule because of the potential that these people might choose to disenroll. Rule at 41313. It is not "sound policy to ignore the longstanding self-sufficiency goals set forth by Congress" because of the potential for disenrollment. *Id*. at 41314. Thus, DHS did not ignore potential harms; rather, it found those harms insufficient to

override the legitimate policy goals of the Rule, such as the self-sufficiency policy mandated by Congress. *Id*. at 41312 (the "rule's overriding consideration, *i.e.*, the Government's interest [as set forth in 8 U.S.C. § 1601] . . . is a sufficient basis to move forward"). DHS's decision to move forward notwithstanding potential, unquantifiable harms is a quintessential exercise of the agency's policymaking function and is neither arbitrary nor capricious. *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003) ("When . . . an agency is obliged to make policy judgments where no factual certainties exist . . . we require only that the agency so state and go on to identify the considerations it found persuasive."). Plaintiffs may not agree with DHS's weighing of the costs and benefits, but that does not mean that DHS ignored costs or that the Rule is arbitrary and capricious.

Plaintiffs also contend that DHS did not adequately consider comments about potential negative health consequences from disenrollment in public benefits (what Plaintiffs call a "chilling effect"). *See* Mot. at 38-39. The record, however, reveals not only that DHS considered such comments, but that it modified the Rule in response. Rule at 41310-14, 41471. DHS explained why the Rule was justified despite these potential harms. The "rule's overriding consideration, i.e., the Government's interest . . . is a sufficient basis to move forward." *Id*. at 41312 (explaining that the relevant Government interests are those set forth in PRWORA and codified at 8 U.S.C. § 1601). DHS has the "authority to take past, current, and likely future receipt of public benefits into account, even where it may ultimately result in discouraging aliens from receiving public benefits." *Id*. Moreover, DHS made a number of changes to the Rule to mitigate some of the concerns raised regarding disenrollment impacts, such as excluding certain benefits from the scope of the Rule. *Id*. at 41313-14, 41471. This process—full consideration of the issues and the evidence on both sides, the adoption of changes in response, and an articulated statement of the reasons for the agency's ultimate decision—was neither arbitrary nor capricious.[16]

Nor is it the case that DHS failed to adequately consider comments about vaccinations, as

[16] *Greater Yellowstone Coal, Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011), is inapposite. *See* Mot. at 38 (citing *Servheen*). DHS did not "merely recite the terms 'substantial uncertainty' as a justification for its actions." *Servheen*, 655 F.3d at 1028. Rather, DHS explained why the Rule was justified, notwithstanding the potential disenrollment impact. Rule at 41312-14.

Plaintiffs contend. *See* Mot. at 39-40. Not only did DHS consider these comments, *see* Rule at 41471, based in part on its consideration of such comments, DHS decided to exclude receipt of Medicaid by aliens under the age of 21 or by pregnant women from the definition of public benefits. *See id*.; *id.* at 41384. DHS explained that this change alone should significantly mitigate the concern that children will forgo vaccinations as a result of the Rule. *See id.* at 41384. In addition, DHS noted that "[v]accinations obtained through public benefits programs are not considered public benefits" and "local health centers and state health departments provide preventive services that include vaccines that may be offered on a sliding scale fee based on income." *Id*. at 41384-85. For these reasons, DHS concluded "that vaccines would still be available for children and adults even if they disenroll from Medicaid." *Id*. at 41385.[17] This treatment met, and indeed, exceeded the standard governing an agency's response to comments. *See Simpson v. Young*, 854 F.2d 1429, 1435 (D.C. Cir. 1988) ("The agency need only state the main reasons for its decision and indicate it has considered the most important objections.").

Plaintiffs also take issue with the Rule's conclusions regarding overall public health, asserting that its conclusion is "bar[red]" because the 1999 Field Guidance reached a different conclusion. *See* Mot. at 40. Notably, Plaintiffs nowhere take issue with DHS's conclusion that the "primary benefit" of the Rule is to better ensure that certain aliens "will be self-sufficient, *i.e*., will rely on their own financial resources, as well as the financial resources of the family, sponsors, and private organizations." Rule at 41301. Instead, Plaintiffs question only a corollary to that conclusion – that the Rule will "ultimately strengthen public safety, health, and nutrition . . . by denying admission or adjustment of status to aliens who are not likely to be self-sufficient." *Id*. at

[17] To the extent that Plaintiffs' glancing reference to other "public health effects" at the end of its paragraph on vaccines is intended to embody a broader critique of the fact that DHS did not carry out some unspecified study of the "American public" and all components of "public health," *see* Mot. at 40, this claim also fails. The APA does not require agencies to "obtain[] the unobtainable," *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 519 (2009), or "measure the immeasurable." *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013); *Defs. of Wildlife v. Zinke*, 856 F.3d 1248, 1263 (9th Cir. 2017) (finding agency action was not arbitrary and capricious notwithstanding agency's "failure to quantify" effects). "When . . . an agency is obliged to make policy judgments where no factual certainties exist . . . we require only that the agency so state and go on to identify the considerations it found persuasive." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003).

41314. DHS's explanation makes good sense—it is reasonable to conclude that excluding aliens lacking self-sufficiency and encouraging aliens already present in the United States to become capable of funding their health care, dietary requirements, etc.—will strengthen public safety, health, and nutrition overall. Further, DHS's position is not inconsistent with the 1999 Interim Field Guidance. Just as the 1999 Guidance noted that disenrollment from public benefits can have an adverse impact on public health, the Rule similarly acknowledged that potential. Rule at 41488 (listing "adverse health effects" as potential cost).[18] But the possibility of adverse health effects from disenrollment does not negate DHS's conclusion that other aspects of the Rule will foster public health benefits.

DHS also adequately responded to comments concerning the Rule's effects on elderly and disabled individuals. As a threshold matter, the Rule's treatment of disabled individuals is not discriminatory, for the reasons discussed in Section II.D, nor does it mean that "virtually every person with any type of significant disability" will be subject to the public charge inadmissibility ground, as Plaintiffs claim. Mot. at 41. The Rule does not deny any alien admission into the United States or adjustment of status simply because he or she is disabled. Only if an alien, disabled or not, is likely to use one or more covered federal benefits for the specified period of time will that individual be found inadmissible as a public charge. DHS will consider an alien's health as one factor among many under the totality of the circumstances. *See* Rule at 41368. Plaintiffs also suggest it is somehow improper for the Rule to consider receipt of Medicaid benefits by a disabled individual because Medicaid provides "services that assist them" in attaining what Plaintiffs characterize as "self-sufficiency." Mot. at 42. But an individual who relies on Medicaid benefits for an extended period of time is not self-sufficient. Plaintiffs' argument also ignores that Congress's goal of ensuring that aliens do not rely on public resources is not identical to the goal of self-sufficiency for those enrolled in public benefit programs. For aliens, Congress's intent is

[18] The 1999 Interim Field Guidance appears not to have relied any specific data or research as the basis for identifying the "adverse impact" on public health, and made less effort to "quantify" this impact than DHS did here. *See* 1999 Interim Field Guidance at 28692. Nothing in that nonbinding guidance provides any support for Plaintiffs' assertion that it constitutes the "agency's reasoned expert position" or is "based on . . . evidence." Mot. at 40.

"that aliens should be self-sufficient before they seek admission or adjustment of status," Rule at 41308, not that they be able to work through the assistance of public benefits.

c. The Rule Reasonably Preserved The Totality of The Circumstances Analysis For Public Charge Inadmissibility Determinations And Reasonably Adopted The 12/36 Standard.

Congress required DHS to consider "at a minimum" certain specified factors in determining whether an alien is inadmissible as a public charge. 8 U.S.C. § 1182(a)(4)(B). Consistent with the statute, the Rule adopts a totality of the circumstances test that considers each of these statutorily required factors as well as other relevant information. Rule at 41295.

Plaintiffs claim that the Rule is "irrational" because a person who uses a "minimal amount" of benefits allegedly "would be judged a public charge." Mot. at 43. But Plaintiffs have misread the Rule. As the Rule plainly states, "current receipt or past receipt of more than 12 months of public benefits, in the aggregate, in any 36-month period will not necessarily be dispositive in the inadmissibility determination . . . but will be considered a heavily weighted negative factor in the totality of the alien's circumstances." Rule at 41358; *see also id.* at 41398 (describing circumstances in which positive factors might outweigh the recent receipt of public benefits). Moreover, the Rule's definition of "public charge" includes a durational requirement; only if the alien is likely to receive benefits for more than 12 months in the aggregate in a 36-month period will the public charge test be met. Rule at 41295. It was entirely reasonable for DHS to conclude that an individual who relies on public assistance for a lengthy amount of time to meet his or her basic needs should be defined as a public charge, particularly where Congress's statutory requirement that the inadmissibility ground apply to a person determined likely "at any time" to become a public charge indicates concern even with short periods of reliance on public assistance. *See* 8 U.S.C. § 1182(a)(4)(A); Rule at 41421-22.

As Plaintiffs observe, some individuals may qualify for public benefits even though they have incomes above the threshold that is considered a positive factor under the Rule (125% of federal poverty guidelines). *See* Mot. at 43. That does not make the Rule unreasonable. The fact

that an individual must rely on public assistance to support himself or herself, notwithstanding his or her income level, indicates a weakness in the alien's overall financial status. At bottom, Plaintiffs' argument reflects nothing more than the unsurprising fact that certain regions of the country, including parts of Illinois such as Cook County, have costs-of-living above the national average and that the income caps to qualify for certain benefits also may be higher in those regions. In any case, Plaintiffs' example underscores the reasonableness of DHS's retention of the totality-of-the-circumstances test, under which the fact that the alien has such an income is taken into account as a positive factor alongside the alien's receipt of public benefits.

Plaintiffs also insist that the Rule lists "factors that are . . . directly at odds[] with the . . . Rule's . . . purpose." Mot. at 42. The examples Plaintiffs identify, however, are each highly relevant in assessing an individual's likelihood of becoming at any time a public charge. As to family size, *see* Mot. at 43, Congress has imposed an express statutory requirement that DHS consider "family status" in determining whether an alien is inadmissible on public charge grounds. 8 U.S.C. § 1182(a)(4)(B)(i)(III).[19] Likewise, an application for benefits, though "not the same as receipt," is "indicative of an alien's intent to receive such a benefit." Rule at 41422. The fact that an alien believed he or she needed public assistance to support his or her basic needs, though not dispositive on its own, is a relevant factor when considering the likelihood that that person will become a public charge. *See id.* ("The fact that an alien has in the past applied for . . . public benefits . . . would never be dispositive on its own, but would be relevant to assessing an alien's likelihood of becoming at any time in the future a public charge.").[20] DHS therefore reasonably incorporated these factors into the public charge inadmissibility analysis.

[19] The Rule also explains why the data cited by Plaintiffs, *see* Mot. at 43, is not statistically significant. *See* Rule at 41395. Other data that *was* statistically significant suggested a higher rate of non-cash benefit use as family size increases, *id.*, which supports the commonsense understanding that financial strains increase as families grow in size.

[20] Consideration of an application for public benefits is also consistent with early case law discussing the standard for identifying a person as a public charge. *See Princeton Twp.*, 23 N.J.L. at 169, 179 (Carpenter, J., concurring) ("The probability of [a person] becoming chargeable is sufficiently shown by his application for relief").

D. The Rule Does Not Violate The Rehabilitation Act, The Welfare Reform Act, or SNAP.

Plaintiffs note that the Rule requires DHS to consider an alien's "medical condition" in the public charge inquiry, and claim, incorrectly, that the Rule "violates . . . the prohibition on discrimination against disabled individuals that is set forth in Section 504 of the Rehabilitation Act." Mot. at 19, 44-45. That section provides that "[n]o otherwise qualified individual with a disability . . . shall, *solely by reason of her or his disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under . . . any program or activity conducted by any Executive agency . . . ." 29 U.S.C. § 794(a) (emphasis added); *see also* 6 C.F.R. § 15.30 (DHS implementing regulation). The Rehabilitation Act imposes a "solely by reason of" standard of causation unique to this statute, *Brumfield v. City of Chicago*, 735 F.3d 619, 630 (7th Cir. 2013), which is "meaningful . . . it means that plaintiffs must show that no other factor besides disability played a role." *Foster v. Andersen*, No. 96 C 5961, 1997 WL 802106 at *5, n.6. Plaintiffs cannot satisfy this standard.

As a threshold matter, the INA explicitly lists "health" as a factor that an officer "shall . . . consider" in making a public charge determination. 8 U.S.C. § 1182(a)(4)(B)(i). "Health" certainly includes an alien's medical conditions, and it is therefore Congress, not the Rule, that requires DHS to take this factor into account. *See*, *e.g.*, *In Re: Application for Temporary Resident Status*, USCIS AAO, 2009 WL 4983092, at *5 (Sept. 14, 2009) (considered application for disability benefits in public charge inquiry). A specific, later statutory command, such as that contained in the INA, supersedes section 504's general proscription to the extent the two are in conflict (which they are not, as explained below). *See*, *e.g.*, *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1353 (10th Cir. 1987) ("[A] general . . . statute, § 504" may not "revoke or repeal . . . a much more specific statute . . . absent express language by Congress[.]" (internal quotation marks omitted)); *Brotherhood of Maintenance of Way Employees v. CSX Transp., Inc.*, 478 F.3d 814, 817-18 (7th Cir. 2007) ("A specific statute takes precedence over a more general statute, and a later enacted statute may limit the scope of an earlier statute.").

In any event, the Rule is fully consistent with section 504 of the Rehabilitation Act. The Rule does not deny any alien admission into the United States, or adjustment of status, "solely by

reason of" disability. All covered aliens, disabled or not, are subject to the same inquiry: whether they are likely to use one or more covered federal benefits for the specified period of time. Although an alien's medical condition is one factor (among many) that may be considered, it is not dispositive, and is relevant only to the extent that an alien's particular medical condition tends to show that he is "more likely than not to become a public charge" at any time. Rule at 41368. Further, any weight assigned to this factor may be counterbalanced by other factors, including "[an] affidavit of support," "employ[ment]," "income, assets, and resources," and "private health insurance." *Id.* Thus, any public charge determination cannot be based "solely" on an applicant's disability. Moreover, to fall within the coverage of the Rehabilitation Act, an individual must be "otherwise qualified," 29 U.S.C. § 794(a), which means that the individual must be "able to meet all of a program's requirements in spite of his handicap." *Knapp v. Northwestern U.*, 101 F.3d 473, 482 (7th Cir. 1996). An alien who is likely to become a public charge because of his or her medical condition is not otherwise qualified for admission or adjustment of status. *See id.* (explaining that institutions are not required "to disregard the disabilities of disabled persons" because "the disability is not thrown out when considering if the person is qualified").

The Rule's consideration of non-cash public benefits also is not inconsistent with PRWORA's authorization of "qualified aliens" to receive certain public benefits five years after entry, contrary to Plaintiffs' brief suggestion otherwise. *See* Mot. at 45. First, there is no inconsistency because many of the "qualified aliens" to whom that authorization applies would generally not be subject to the public charge ground of inadmissibility. *See* 8 U.S.C. § 1641(b) ("qualified alien" includes, *inter alia*, lawful permanent residents, asylum recipients, and refugees). Moreover, the Rule does not *prohibit* or "disqualif[y]" anyone from receiving benefits to which they are entitled, Mot. at 46, but rather appropriately takes such receipt into consideration among many other factors in assessing an individual's likelihood of becoming a public charge. *See* Rule at 41365-66. Notably, Congress implicitly recognized that past receipt of public benefits *can* be considered in determining the likelihood of someone becoming a public charge when it prohibited consideration of past benefits for certain "battered aliens." 8 U.S.C. § 1182(s).

Congress, therefore, understood and accepted DHS's consideration of past receipt of benefits in other circumstances.

Finally, the Rule does not violate 7 U.S.C. § 2017(b), as Plaintiffs allege. *See* Mot. at 46. That statute provides that:

> The value of benefits that may be provided under [SNAP] shall not be considered income or resources for any purpose under any Federal, State, or local laws, including, but not limited to, laws relating to taxation, welfare, and public assistance programs, and no participating State or political subdivision thereof shall decrease any assistance otherwise provided an individual or individuals because of the receipt of benefits under this chapter.

7 U.S.C. 2017(b). The context of this full version, rather than the abbreviated quotation relied on by Plaintiffs, reveals the error in Plaintiffs' argument. The Rule does not consider the "value" of SNAP benefits as "income or resources," only the *fact of receipt*. *See* Rule at 41375 ("The rule explicitly excludes the value of public benefits including SNAP from the evidence of income to be considered" and "[a]ssets and resources do not include SNAP benefits"). Nothing in Section 2017(b) precludes this use of the fact of receipt of SNAP. *Compare, e.g.*, 47 C.F.R. § 54.409 (providing eligibility for consumer telephone or Internet subsidies based on fact of receipt of SNAP benefits). Moreover, Section 2017(b) predates the current version of the public charge statute "and a later enacted statute may limit the scope of an earlier statute." *Brotherhood of Maintenance*, 478 F.3d at 817-18.

III. PLAINTIFFS FAIL TO ESTABLISH IRREPARABLE HARM.

"It is not enough for the plaintiffs to show a likelihood of success on the merits . . . they must also show why they will suffer irreparable harm if the preliminary injunction they want does not issue." *Judge v. Quinn*, 612 F.3d 537, 557 (7th Cir. 2010). The Seventh Circuit employs a two-step analysis for preliminary injunctive relief. First, the moving party "must make a threshold showing that: (1) absent preliminary injunctive relief, he will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) he has a reasonable likelihood of success on the merits." *Turnell v. Centimark Corp.,* 796 F.3d 656, 661-62 (7th Cir. 2015). Second, if the threshold inquiry is satisfied, the court "considers: (4) the irreparable harm

the moving party will endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving party if it is wrongfully granted; and (5) the effects, if any, that the grant or denial of the preliminary injunction would have on nonparties (the 'public interest')." *Id.* at 662. Neither of the Plaintiffs have sufficiently demonstrated the required threshold of immediate irreparable harm and therefore their motion for preliminary injunction must be denied.

The County alleges that as a result of the Rule, it will suffer (1) increased health care costs from a loss of federal funding and an increase in emergency and uncompensated care, (2) harms to public health, and (3) harms to the county economy. None of these alleged harms satisfy the irreparable harm standard. First, some of the harms alleged by the County are not even cognizable injuries. The County has provided no support for its assertion that it is entitled to federal Medicaid reimbursements for individuals who do not use Medicaid. *See* Mot. at 48. Similarly, the County has not explained why it believes it is entitled to any economic side effects from benefits that independent third parties, the intended beneficiaries, choose not to use. *See* Mot. at 51.[21]

Second, the County's allegations of harm from increased emergency and uncompensated care and public health harms including the spread of communicable disease, are speculative. The County has alleged nothing more than a possibility that such harms will develop, as discussed in detail in Part I, *supra*, these alleged harms are founded on an attenuated chain of inferences, and contingent on the aggregate choices of independent third parties to take action not required by the Rule. Assuming the County is correct that some individuals will forgo enrollment or disenroll from federal benefits as a result of the Rule, the County must still demonstrate a likelihood that such disenrollment will occur at a sufficiently high rate and be associated with a concomitant take-up of local benefits to cause harm to local level, as opposed to individual, interests. The County has not provided any evidence of the number of disenrollments necessary to create these alleged

[21] Additionally, to the extent the County alleges that it will be irreparably harmed by a decline in the health of its individual residents as opposed to downstream effects to the County, it lacks standing to assert those claims. *See, e.g., Colorado River Indian Tribes v. Parker*, 776 F.2d 846, 848 (9th Cir. 1985) ("[P]olitical subdivisions . . . cannot sue *parens patriae* because their power is derivative and not sovereign.").

effects, nor has it meaningfully alleged harm to the interest of the County specifically. *See generally* Hou Decl., ECF No. 23-1, Ex. 2 (making all projections as to the state of Illinois as a whole).

This falls far short of the showing required to meet the irreparable harm standard. A mere possibility of future harm is insufficient to justify preliminary injunctive relief. *D.U. v. Rhoades*, 825 F.3d 331, 339 (7th Cir. 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044-45 (7th Cir. 2017); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 788 (7th Cir. 2011) ("[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury. A presently existing actual threat must be shown.") (citation omitted). Indeed, the County's own motion and supporting declarations acknowledge the speculative nature of these claims and explicitly use the language of possibility rather than probability. *See* Mot. at 50-51 ("[T]he lack of needed food assistance *could* impact reading and math skills and even the likelihood of high school graduation.") (emphasis added); Chan Decl., ECF No. 23-1, Ex. 3, ¶ 20 ("[D]elaying care *can* result in higher costs and worse outcomes.") (emphasis added); *id*. ¶ 28; *id*. ¶ 33 ("Lower rates of vaccination *can* lead to an increase in vaccine preventable diseases, raising the concern of communicable disease outbreaks.") (emphasis added).

However, even if any of the County's alleged harms were cognizable and sufficiently concrete to establish standing, the County has not met its burden to show that such injuries are irreparable nor that they are sufficiently immediate to justify preliminary relief. "The moving party must also demonstrate that he has no adequate remedy at law should the preliminary injunction not issue." *Whitaker*, 858 F.3d at 1046; *see also Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 553-54 (7th Cir. 2014) ("[I]f the harm can be fully repaired in the final judgment, there is no reason to hurry the adjudicative process.") (citation omitted). The County has made no more than conclusory assertions that any of its alleged harms are irreparable, and it has therefore failed to carry its burden to establish irreparable harm. Similarly, the County's allegations that these alleged harms will develop imminently is entirely unsupported in its brief and in the record. To satisfy the irreparable harm standard, Plaintiffs must demonstrate that in the absence of injunctive relief, they

"will suffer irreparable harm in the interim prior to a final resolution." *Turnell*, 796 F.3d at 662. The County has alleged no facts in support of its conclusory assertions that the economic and public health harms it alleges would likely develop before a decision on the merits could be rendered. Such harms, if they ever developed, would be downstream cumulative effects of the independent decisions of thousands of individual third parties over the course of many months and years. The County offers no prediction about when these harms might arise and why the Rule's effective date must be enjoined until summary judgment on the administrative record could be rendered, given that such briefing could occur in a matter of months. Nor has the County alleged any facts in support of its assumption that all of the individuals it projects will disenroll from federal benefits would do so simultaneously, that those individuals would take such steps immediately upon the Rule's effective date, or that the impact of such individuals taking such steps would be immediately felt by the County's economy or public health system. Indeed, the County's own motion and declarations acknowledge that the speculative and attenuated alleged public health impacts of the Rule, such as worse health outcomes caused by avoidance of preventative care, would necessarily develop over time. *See* Mot. at 49 ("These several consequences will each create a sicker and less productive population by reducing access to preventative care and causing delays in treatment…."); *id.* at 51 ("Children who grow up with resulting higher rates of disease and malnutrition will likely need to rely on health care provided by state governments, and thus care provided by CCH, to treat these long-term issues."); Chan Decl. ¶¶ 32, 50.

ICIRR has also failed to establish that it will suffer irreparable harm in the absence of preliminary relief. As discussed in detail *supra*, ICIRR has failed to establish ICIRR's standing, and thus by definition it has not established a sufficient injury to meet the irreparable harm standard. *See Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (To establish irreparable harm "[a] plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief."). ICIRR has established not that ICIRR has suffered a frustration of its core mission, but rather only that it has diverted resources from one set of priorities and

activities to another in service of its same core mission to provide immigration support services. *See* Benito Decl. at ¶¶ 4, 8, 14, 21. This is insufficient to establish irreparable harm. ICIRR also has not provided any support for its assertion that it has a cognizable injury because it is entitled to reimbursement funding for individuals who choose not to enroll in public benefits. Mot. at 52. Moreover, ICIRR has failed in any way to meet its burden of demonstrating how any of its alleged harms could not be "prevented or fully rectified by the final judgment after trial." *Whitaker*, 858 F.3d at 1045 (citation omitted).

IV. THE REMAINING EQUITABLE FACTORS REQUIRE DENIAL OF PLAINTIFFS' MOTION.

Even if Plaintiffs had made a sufficient showing on either likelihood of success on the merits or likelihood of irreparable injury, and they have not, they would still be obligated to make a satisfactory showing both that the balance of equities tips in their favor and that the public interest favors injunction. *Turnell*, 796 F.3d at 661-62. These two factors merge when the government is a party, *Venckiene v. United States*, 328 F. Supp. 3d 845, 858 (N.D. Ill. 2018), but Plaintiffs have not made a sufficient showing to meet the standard for either factor.

Here, multiple equitable factors counsel against an entry of injunctive relief for Plaintiffs. First, as the Court raised at the presentment hearing on this motion, Cook County's effort to obtain a statewide injunction in Illinois represents a duplicative effort by the State and one of its administrative subdivisions to obtain identical relief. *See Washington et al. v. DHS, et al.*, Case No. 4:19-cv-05210-RMP (E.D. Wash., filed Aug. 14, 2019) (including the State of Illinois as one of the Plaintiffs); Mot. for Prelim. Injunct., *id.* at ECF No. 34 (filed Sept. 5, 2019) ("*Washington* PI Mot."). The Seventh Circuit has repeatedly encouraged district courts to exercise "wise judicial administration" in rejecting efforts by parties to maintain "duplicative" litigation where "the claims, parties, and available relief do not significantly differ between the two actions." *Serlin v. Arthur Andersen*, 3 F.3d 221, 223 (7th Cir. 1993). As explained below, this standard is met here, and because it is, the equitable balance tips decisively against preliminary relief.

There is no doubt here that this action and *Washington* present nearly identical claims.

Compare Mot. *with Washington* PI Mot. The relief that Cook County seeks, moreover, is entirely subsumed in the relief Illinois has sought: although Illinois' request for a *nationwide* preliminary injunction is improper, *see, e.g.*, *East Bay Sanctuary v. Barr*, 934 F.3d 1026, 1029-30 (9th Cir. 2019), the fallback position that Illinois would no doubt seek for relief if a nationwide injunction is (properly) denied would be a statewide injunction as to Illinois. And although Illinois and Cook County are not *identical* units of government, they are surely overlapping; as to identity of parties, courts are "obligated to exalt substance over form when determining whether [an] action is duplicative." *Ridge Gold Std. Liquors, Inc. v. Seagram & Sons*, 572 F. Supp. 1210, 1214 (N.D. Ill. 1983). As in *Ridge Gold*, Cook County and all Illinoisans "are fully and effectively represented in the proceedings before" the court in Washington. Indeed, the same is true here: the Illinois legislature has authorized the State's attorney to litigate "all actions . . . in which the people of *the State* or county may be concerned," 55 ILCS 5/3-9005(a)(1), as well as to "assist the attorney general whenever it may be necessary." *Id.* 9005(a)(8).

Further tipping the equitable balance in Defendants' favor is the decision by Plaintiffs to tarry in filing their request for emergency relief, which shifts the balance in Defendants' favor. "[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). This is because "preliminary injunctions are an equitable, interlocutory form of relief," *Lawson Prods., Inc., v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986), and "[e]quity aids only the vigilant, [such that] injunctive relief will be denied to those who slumber upon their rights." *International Union, Allied Indus. Workers of America, AFL-CIO v. Local Union No. 589, Allied Indus. Workers of America, AFL-CIO* ("Local 589"), 693 F.2d 666, 674 (7th Cir. 1982). Indeed, "[l]ack of diligence, standing alone" may be sufficient to "preclude the granting of preliminary injunctive relief." *Majorica, S.A. v. R.H. Macy*, 762 F.2d 7, 8 (2d Cir. 1985); *accord Tripp v. Smart*, 2016 WL 4379876, at *9 (S.D. Ill. Aug. 17, 2016) ("diligence has considerable relevance in the preliminary injunction context"). Here, even as other cities and states raising similar claims diligently filed complaints and arranged for the orderly briefing of preliminary injunction motions, Plaintiffs sat on their hands for nearly six weeks before

rushing to this Court just three weeks before the effective date and claiming an "emergency." Mot. at 1. Plaintiffs' delay, in turn, has prejudiced both Defendants and this Court, the former in their ability to offer a careful defense of the Rule tailored to the arguments raised by Plaintiffs in their lengthy brief, and the latter in the time available for it to contemplate the parties' arguments in an orderly fashion. Plaintiffs should not be rewarded for their lethargy. Rather, because their delay "indicates a lack of need" for the "extraordinary remedy" of a temporary restraining order, Plaintiffs' motion should be denied. *Stokely-Van Camp v. Coca-Cola*, 2 U.S.P.Q.2d 1225, 1987 WL 6300, at *3 (N.D. Ill. Jan. 30, 1987) (finding delay of three months as "weigh[ing] against granting [a] preliminary injunction").

Finally, Plaintiffs' allegation that the balance of equities "tips overwhelmingly in [their] favor" is unsupported. Mot. at 53. Plaintiffs allege that the balance favors injunction because "the Final Rule is already causing serious injury to the public health and economic prosperity" and also "degrading the ability of Plaintiffs to continue offering important services," whereas a preliminary injunction "would cause no harm to Defendants" because it would maintain the previous public charge regime. *Id.*[22]

Plaintiffs' analysis is facially incorrect and self-serving. As explained in detail *supra*, Plaintiffs' purported public health and economic harms, to the extent they may be cognizable, are wholly speculative, and there is no support for their assertions that these harms will be either immediate or irreparable. Similarly, Plaintiffs have not alleged any cognizable harms to their organizational missions. Conversely, there can be no doubt that the Defendants have 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. Quite obviously, Defendants have made the assessment in their expertise that the prior regime referred to by Plaintiffs is ineffective or

[22] Plaintiffs also allege that the balance of equities favors them because it is in the public interest for government agencies to comply with the law. Mot. at 53. However, the interests of the Defendants, as federal regulators, are also served by proper APA compliance, which was undertaken in this case. Thus this factor is merely neutral in the balance.

insufficient to serve the purposes of proper immigration enforcement. Therefore, imposing the extraordinary remedy of a preliminary injunction and requiring the prior practice to continue before a determination on the merits would significantly harm Defendants.

Plaintiffs' speculative harms have no weight in the balance of hardships compared to the Defendants' interest in avoiding roadblocks to administering the national immigration system. *See Turnell*, 796 F.3d at 666. Consequently, Plaintiffs have failed to demonstrate that the balance of hardships tips in their favor or that the public interest favors injunction. On this ground alone their motion for preliminary injunction must fail. *See Winter*, 555 U.S. at 26.

V. ANY RELIEF SHOULD BE CAREFULLY TAILORED TO IRREPARABLE INJURIES DEMONSTRATED BY PLAINTIFFS.

Further, were the Court to order emergency relief or a stay of the effective date, it should be limited to redressing only any *established* injuries to Cook County and ICIRR. Under Article III, a plaintiff must "demonstrate standing . . . for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1930, 1933 (2018) ("The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."). Plaintiffs have requested either a TRO, preliminary injunction, or stay of the effective date of the regulation on a statewide basis, but equitable principles require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Here, such relief should be limited to specific irreparable harms the Court finds will occur to Cook County and specific individual members of ICIRR suffering such harms. It is settled law that "all injunctions – even ones involving national policies – must be 'narrowly tailored to remedy the specific harm shown.'" *East Bay*, 934 F.3d at 1029 (quoting *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018)).

Relief under 5 U.S.C. § 705 is similarly limited, as that provision permits a court to stay the effective date of an agency action only "to the extent necessary to prevent irreparable injury." *Id*. Although Plaintiffs have requested a stay of the effective date of the Rule without limitation,

narrower relief is both available under § 705 and required by equitable principles applicable to extraordinary forms of relief. *See Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016) (indicating that courts should consider any "brief[ing] [regarding] how [to] craft a limited stay"); 5 U.S.C. § 705 (Courts "may issue all necessary and appropriate process to postpone the effective date of an agency action *or* to preserve status or rights pending conclusion of the review process." (emphasis added)). Plaintiffs acknowledge that relief under § 705 is governed by equitable principles under the "same" standards as govern preliminary injunctions, Mot. at 20, and nothing in § 705 speaks clearly enough to work "a major departure from the long tradition of equity practice." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982).

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion.

Dated: October 8, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2019, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ *Joshua M. Kolsky*
JOSHUA M. KOLSKY

I, Daniel Renaud, declare as follows:

1. I am employed by the United States Department of Homeland Security ("DHS"), United States Citizenship and Immigration Services ("USCIS"), as Associate Director, Field Operations Directorate ("FOD"), USCIS Headquarters ("HQ"), Washington, DC. I make this declaration based on my personal knowledge, and review of official documents and records maintained by USCIS.
2. On August 14, 2019 the Department of Homeland Security published the final rule, Inadmissibility on Public Charge Grounds, which had an effective date of October 15, 2019. Litigation followed, resulting in the filing of nine federal court cases challenging the new rule in five different jurisdictions.
3. Between Friday, October 11 and Monday, October 14, 2019, federal courts in all five jurisdictions issued a collection of injunctions that halted USCIS's efforts to implement the final rule nationwide. Presently USCIS is enjoined nationwide from implementing or applying the rule, or requiring use of any new forms associated with the rule. In addition, the effective date of the rule is enjoined. These injunctions will result in uncertainty and administrative burdens on USCIS.
4. In the final rule, DHS anticipates that one effect of the rule will be "a likely increase in the number of denials for adjustment of status applicants based on public charge inadmissibility determinations due to formalizing and standardizing the criteria and process for inadmissibility determinations." 84 FR 41302. Further, as reflected in the economic analysis of the final rule, DHS estimates that 382,264 people will be subject to a public charge inadmissibility determination on an annual basis. *Id.* at 41497; *see also id.* at 41464. As a consequence of the injunctions, USCIS is prohibited from applying the new rule or using the new forms. As such, USCIS believes it will grant adjustment of status to some number of those estimated

382,264 people annually who, pursuant to the now-enjoined rule, should be denied. If the Government prevails on appeal, USCIS currently has no practical means to revisit applications that were adjudicated pursuant to the old guidance. Ultimately, if the injunctions remain in effect, more adjustment of status applications will be filed that require adjudication under the old guidance. As a result, USCIS will adjudicate more lawful permanent resident applications in favor of persons who should be denied under the now-enjoined rule, and USCIS will have no practical way through existing mechanisms to reexamine or reconsider those applications under the now-enjoined rule in the future.

5. USCIS has worked for over a year on operational planning and implementation of the Final Rule. USCIS was prepared to provide training to those performing public charge work including officers at that National Benefit Center and across 88 Field Offices. This training was halted due to the injunction. Development and delivery of agency-wide training takes months of planning, budgeting, and logistics set up. An extended injunction will require USCIS to start that process over when the injunction is lifted. Duplicative effort, as well as costs in time and the expenditure of additional funds will be necessary to fully prepare USCIS personnel to implement the new rule. In addition, USCIS had planned to host a national engagement a few weeks after the implementation of the new rule, with additional engagements under consideration. USCIS also planned to equip Community Relations Officers in District Offices with an informational toolkit to do local outreach in their communities. USCIS always maintains an active social media presence as part of all outreach efforts to share useful resources in our website, as well as online alerts to notify the public about filing changes. All outreach plans were put on hold as a result of the injunction.

6. In preparation for the new workload associated with implementing the new rule, USCIS entered into contracts to hire additional staff to enter the significant amount of data required on the Form I-944 into USCIS systems. Some training was already provided to contract representatives and will have to be repeated once the injunction is lifted. The contract specified the number of new hires required to complete the work associated with implementation of the Final Rule; however, the hiring process was halted due to the injunction. If the injunction is not immediately lifted, USCIS will face uncertainty the longer the injunction stays in place as contract employees slated to begin work will likely find other employment. This could further impede USCIS's ability to implement the rule when the injunction is lifted.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of October, 2019 at Washington, D.C.

Daniel M. Renaud
Associate Director, Field Operations Directorate
U.S. Citizenship and Immigration Services
Washington, D.C.

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.,	)	
Plaintiffs,	)	
-vs-	)	Case No. 19 C 6334
KEVIN K. McALEENAN, in his official capacity as Acting Secretary of U.S. Department of Homeland Security, and U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency,	)	Chicago, Illinois October 11, 2019
Defendants.	)	1:00 p.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 McAleen.

State your name for the record.

THE COURT: Good afternoon, everybody.

MS. FLINT: Your Honor, this is Tacy Flint of Sidley Austin for plaintiff ICIRR.

MS. SCHELLER: Good afternoon, your Honor. Assistant State's Attorney Jessica Scheller appearing on behalf of Cook County.

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

MS. WALZ: Good morning, your Honor. Katherine Walz on behalf of ICIRR.

MS. PAGAN: Good morning, your Honor. Militza Pagan on behalf of ICIRR.

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

MR. LEVY: Good afternoon, your Honor. Steve Levy of Goldberg, Kohn on behalf of plaintiff Cook County.

MS. MILLER: Special Assistant State's Attorney Lauren Miller on behalf of Cook County.

MR. GORDON: Good morning, your Honor. David Gordon on behalf of plaintiff ICIRR.

MR. ONO: Takayuki Ono of Goldberg, Kohn on behalf of

plaintiff Cook County.

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

MR. WALSH: Thomas Walsh for the United States, and we have with us some folks from the Department of Justice.

MR. KOLSKY: Good afternoon, your Honor. This is Joshua Kolsky from the Department of Justice.

MS. BERMAN: Good afternoon, your Honor. Carrie Berman from the Department of Justice.

MS. FLINT: Your Honor, this is Tacy Flint. Subject to your Honor's input, the counsel for the plaintiffs will jointly present arguments on the various topics, and I'll lead off with a discussion of *Chevron* step one.

As you know, your Honor, we're here on a claim under the APA challenging DHS's final rule interpreting the statutory term "public charge." Under the statute, an immigrant is ineligible for admission or for adjustment of status if she's likely to become a public charge, but the final rule has a new and radically different interpretation of what a public charge is and expands the group of immigrants who will be deemed public charges.

The governing standard as of today, when the final rule is not yet in effect, comes from the 1999 field guidance, which states that a public charge is someone who is primarily dependent on government assistance; and in that field

guidance, the agency said that primary dependence is reflected by receipt of cash assistance for income maintenance. Non-cash benefits, the agency said, don't indicate someone who's a public charge because non-cash benefits aren't used for basic subsistence.

THE COURT: May I interrupt for one second?

MS. FLINT: Yes.

THE COURT: Why should I care about the 1999 field guidance?

MS. FLINT: Fair question, your Honor. The field guidance sets the lay of the land. This change will have a dramatic effect which will harm not only the plaintiffs here, but immigrants and their families throughout Illinois. Given what's at stake, we think any concern that the rule is invalid would support a preliminary injunction, but there are strong, multiple strong arguments all pointing in the same direction that it's invalid.

But let's start with the definition --

THE COURT: So, you're talking about *Chevron I*, and then you're talking to me about the '99 field guidance. Are you saying that there's a one-way ratchet?

MS. FLINT: No, your Honor. I'm saying the '99 field guidance --

THE COURT: Okay. Then why are we even talking about the '99 field guidance?

MS. FLINT: Your Honor, let me talk to you about the statutory text "public charge." So, let's talk about the definition of the word "charge." A charge is someone who's committed to the care or custody of another. That's a definition that's found in dictionaries both from the 19th Century, which is when the term "public charge" first appeared in the federal statute, and from contemporary dictionaries.

Someone who is committed to the care or custody of the public is someone who is primarily dependent on the public for their care. By contrast, someone who receives *de minimis* benefits from the public cannot be said to be committed to their care.

Now, defendants have offered an alternative definition of the term "charge." They say it's an obligation or a liability. And they say what that means is a public charge is anyone who's a liability to the government, anyone who poses a drain on the public fisc. There are a lot of problems with that definition.

First, they're using a definition of the word "charge" that focuses on property, a financial term, like a charge on your credit card. But there's a definition of the word "charge" that actually commonly applies to people, and that's the definition that I said before, someone who -- a person who's committed to the custody or care of another. It doesn't make sense to use the property-focused version of the

word for this purpose.

Another problem with their definition is that it's incredibly broad. If a public charge is anyone who poses a liability on the government, then virtually everyone in America is a public charge because all of us pose some liability on the government, when we use federal roads or as your Honor said at the prior hearing, when we take a tax credit. Nobody thinks that's what public charge means. That definition is untenable.

In fact, I think the government agrees that it's untenable because they've said in their brief in this case, "It is apparent on the face of the statute that public charge is intended to describe a discrete class of persons who will be inadmissible and not every applicant." So, we agree on that.

The problem for the government is they can't point to anything in the statute that draws a line between what they appear to acknowledge is unacceptable, the definition that sweeps far too broadly, and the means-testing version of "public charge" that they want the statute to mean. If they're right that it just means anyone who has a liability -- poses a liability on the government, then it's truly limitless. So, that definition just can't work.

The surrounding terms in the statute confirm that. Let's talk about the 1891 statute. That list includes idiots,

insane persons, paupers, or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease and so on.

Each category in that statute surrounding the term "public charge" is someone who poses a serious threat or a serious concern or someone with very serious needs. That's just not consistent under the doctrine *noscitur a sociis*. It's just not consistent with the definition of "public charge" as someone who might need some temporary or *de minimis* benefits someday.

That's why the Supreme Court said in *Gegiow*, a case that both sides cited in their briefs, that persons likely to be a public charge, that term has to be interpreted, in the context of the surrounding terms, to mean people who are to be excluded on the grounds of permanent personal objections accompanying them.

Now, to return to the 1891 statute, your Honor, you asked at the prior hearing why the statute lists both paupers and persons likely to become a public charge. Does that mean that public charge and pauper are something completely different?

They're not something that's completely different. A pauper is an example of a public charge. A pauper is an example of someone who is primarily dependent on the government for their subsistence as a result of poverty.

Other people can be primarily dependent on the government as a result of other impairments, and those -- that's exactly what is reflected in the other categories of the statute. And that's why the Supreme Court reached the decision it did in *Gegiow*.

Now, in order to get around *Gegiow*, which is extremely telling on the statutory language, the government says that an amendment to the statute that led up to the 1917 version of the public statute negated *Gegiow* or changed something in a way that's meaningful here. It didn't. There was an amendment to the statute. It did change. But all it did was move the term "public charge" to a different place. It did not purport to change the definition of the statute. In fact, both sides have agreed that the definition has remained consistent from the late 1800s through today. We've cited cases in our brief that actually specifically say *Gegiow* did not change the definition of "public charge."

So, there's further confirmation, that's not it, of what "public charge" means.

THE COURT: So, what was the point of moving the term "public charge" in the 1917 version of the statute?

MS. FLINT: The term was moved as part of a broader rewrite of the statute, which added a whole bunch of different categories. And according to one congressional report, part of the reason for the move was to clarify that public charge

was different from health-based reasons for excluding immigrants, health-based reasons like mental illness or public health concerns.

And paupers fit -- paupers and public charges are both people who are excludable as a result of poverty or other conditions that make them a public charge.

THE COURT: Then why didn't the Congress also move the word "pauper" to the end of the provision, along with "public charge"?

MS. FLINT: Oh, "pauper" remains in the statute. So, if "pauper" and "public charge" are redundant, which they are not, they are both examples, then the statutory change did nothing. So, "pauper" remains in the statute. "Public charge" also remains in the statute. It follows a series of things and is a broader category that encompasses other things such as "pauper."

Now, "pauper" had a -- of course, it's an antiquated term, but in the 19th Century, it had an understanding as someone who is institutionalized as a result of poverty. Public charges were not -- did not necessarily have to be institutionalized.

THE COURT: Right. But my question was: Why did Congress move the term "public charge" but keep the term "pauper" where it was?

MS. FLINT: The concern expressed about the outcome

of *Gegiow* was that it made "public charge" be too similar to the neighboring terms. "Public charge" is meant to encompass people who are primarily dependent -- of course, these records are very old -- primary dependent as a result of economic grounds, not necessarily permanent physical -- permanent personal characteristics. I think that's the best understanding.

So, a pauper is someone who is -- is institutionalized as a result of poverty. A public charge is not necessarily institutionalized, but is someone who is primarily dependent on the public fisc; and the statute means it could be as a result of other economic conditions.

That is what the court held in *Gegiow*. It said -- in *Gegiow*, the court held that immigrants who had been -- the immigrants who had not been admitted were excluded on the ground that the place that they intended to go, which was Portland, Oregon, did not have jobs for them. And the Supreme Court said, "That's not a good enough reason. Look at all these terms. They mean something much more serious. You can't just base it on economic conditions. Public charge is exactly like idiot, imbecile, and pauper. These are permanent personal characteristics."

So, Congress said, "Well, economics should be considered, so if we just move 'public charge,' not redefine it, don't change the word, don't change what's included in the

statute, we're not changing what 'public charge' means. We're just clarifying that it can be an issue of economic considerations." It has nothing to do --

THE COURT: Is pauper a permanent condition?

MS. FLINT: As it was understood at the time, yes. Poverty would make a pauper someone who is relegated to almshouses. And to be -- I don't mean to say that there's never anyone who went from, you know, rags to riches and no pauper ever became something different; but that is how, as I understood it, the term was understood. It was a long-term condition that was not easily remedied, and certainly, that is what the Supreme Court said in *Gegiow*.

Now, there are a lot of cases that use this definition of "public charge" -- unless your Honor has further questions about that.

There are a lot of cases that use the type of definition of "public charge" that we're talking about. So, by the time --

THE COURT: Actually, let me -- may I -- I have one question. So, on page 27 -- or I'm sorry, on page 14 of its brief, although it's page 27 of docket 73, the government says, "The late 19th Century is the key time to consider."

Do you agree or disagree with that?

MS. FLINT: I disagree, and here's why. So, the statute that we're interpreting at this moment is the

1996 statute. It was enacted in 1996. So, that is the time that we have to look to for a controlling interpretation of the term.

But both sides agree in this case that the definition of the term has not changed since it was originally enacted back in the 19th Century. So, definitions from the 19th Century are certainly informative. We've used them. We think they support our side. The government has certainly used them as well, but both sides agree that the 19th century definitions are not that different from the contemporary ones.

But there is one important difference between the 1996 statute and earlier versions of the statute, and that is that in 1996, Congress was legislating against, at that point, a 100-year history of interpretations, judicial interpretations of the meaning of "public charge." That history, of course, didn't exist back in the 19th Century. So, we have to understand Congress's use of the term as reflecting that history of judicial decisions as well as administrative actions.

And the history is quite consistent in defining "public charge" to mean something that requires a lot more than what the government is saying now, something that requires primary dependence on the federal government.

Now, we've cited these cases, the history that we think is consistent in our briefs. The government has cited a

handful of cases that they say support their definition of "public charge," and we've gone through them fairly exhaustively in our reply brief. I won't belabor the point here, except to say those cases -- none of those cases is an example of a court any time in the last 100 years saying, "If you accept some form, even *de minimis* public benefits, if you accept some form of public benefits, you are becoming a public charge." There is no such case. Instead --

THE COURT: Why are we saying -- why are you calling 12 months out of 36 *de minimis*?

MS. FLINT: The point that I'm making with *de minimis*, your Honor, two answers to that.

First of all, we're interpreting the statute at this moment, and to get to their regulation, they're using an extremely broad definition of the statute which we don't think is acceptable.

But to answer the question about the regulation, the reason that it's *de minimis* is that there is no lower threshold for amount of benefits. So, 12 months is an amount of time, but they -- in the final rule, as distinct from the proposed rule, there's no lower limit on the amount of benefits.

And the briefs -- our briefs reflect that acceptance of, for example, food stamps can be a tiny amount, dollar value, very small dollar value. So, 12 months of food stamps

would qualify as public charge but reflect, you know, extremely minor, that's why we're calling it *de minimis*, number of benefits.

And there's one other area that I think really demonstrates the error in the government's interpretation of the statute and I think makes most clear that the regulation that they've promulgated is inconsistent with the statute, and that's the benefits that Congress has legislated to make available. Let me just focus on SNAP or food stamp benefits as an example.

So, by statute, Congress has provided, and this -- Congress has provided that several categories of immigrants, including what's called qualified immigrants, disabled immigrants, immigrant children are entitled to receive SNAP benefits. So, these are federal public benefits. The only people who can receive them are people that say Congress -- people who Congress says should receive them.

So, Congress has said the policy -- with this legislation, Congress has said the policy of the United States is that these groups of immigrants are entitled to receive SNAP benefits.

And on top of that, with respect to food stamps in particular, Congress said, "SNAP benefits shall not be considered income or resources for any purpose under any federal laws," and the Immigration and Naturalization Act is

not excluded.

But under the final rule, anyone who is likely -- deemed likely at some point to use SNAP benefits for 12 out of 36 months is deemed a public charge. So that means that an immigrant who takes advantage of an opportunity that exists only because Congress made it possible will be barred from adjusting her status potentially as a result of this rule.

THE COURT: But why -- I don't understand the inconsistency. The SNAP program says, "Immigrants can get food stamps," and then perhaps the immigration statute says, "But not for too long a time." Those aren't inconsistent.

MS. FLINT: The inconsistency is the statute that authorizes these SNAP benefits, it doesn't constrain time. Congress -- this is something that immigrants can do only because Congress has affirmatively made it possible. It is a *Catch 22*. It is a trap for the unwary if for -- if the statute means what the government says it means, which is to say if the statute means that Congress can with one hand make these things available without a time limit, and with the other hand say, "But if you do exactly what we just said you could do, you can no longer adjust your status."

It's imposing a penalty for an opportunity that would not exist except that Congress made it so, and that is not a reasonable interpretation of the federal statutes.

And I'd like to contrast that tension with a tension

that DHS, the defendants, claim exists, which is they -- their claim is that their reading is justified because the Welfare Reform Act, which is the same act that makes clear that immigrants can receive SNAP benefits and other benefits, certain immigrants, that same act says that as a general matter, the policy of the United States favors self-sufficiency by immigrants. And so they say this general policy in favor of self-sufficiency means that "public charge" should be interpreted in the way that they prefer.

That's just not a good reading of the statute. This is the very same statute in which Congress says that non-citizens, including at least some of the immigrants who could be subject to a public charge determination, this is the same statute where Congress says those immigrants can receive public benefits.

Now, given Congress's authorization of federal benefits to immigrants in that same statute, it's clear that Congress could not have meant that a general policy in favor of self-sufficiency means no immigrants should ever receive in-kind benefits.

And in fact, in that same statute, Congress said -- this is 8 USC Section 1601 -- that allowing the benefits that the Welfare Reform Act allowed to immigrants is a way of assuring that aliens would be self-reliant, that immigrants would be self-reliant. This type of non-cash benefit, like

food stamps and Medicaid, these non-cash benefits help people become sufficient. They don't defeat self-sufficiency. At least that is what Congress said in that statute.

If you have no further questions about the statute, your Honor, my colleague Ms. Chapman will be addressing arbitrary and capricious.

THE COURT: Actually, if you don't mind, I'd like to hear from the government on what we'll call *Chevron I*, since it's still a thing. So, why don't I hear from the government on the statutory meaning issue and whether the new rule is consistent, a permissible elaboration of the statutory term "public charge."

MR. KOLSKY: Yes, your Honor. This is Joshua Kolsky on behalf of the defendants, and I will address that issue.

The rule's definition of "public charge" is consistent with the longstanding plain meaning of the term, which is a person whose inability to achieve self-sufficiency imposes an obligation on the body of the citizens. We have cited multiple dictionaries, treatises, and other sources from around the time the statute was first enacted in 1882 and since then supporting this definition.

And we cited the 1894 statement of Representative Warner, who explained that under the public charge inadmissibility ground, it would not do for an alien to earn half his living or three-quarters of it, but that he shall

presumably earn all his living, certainly that he shall not start out with the prospect of being a public charge.

Under the notion --

THE COURT: Was he -- was that representative addressing an immigration statute or rather a corporate welfare-type statute?

MR. KOLSKY: My understanding is he was addressing the public charge inadmissibility ground.

THE COURT: What I mean is: Was Congress debating at that point an immigration statute, or was it debating a statute that would give some sort of benefit to businesses?

MR. KOLSKY: Your Honor, I'd have to look back at the -- at the document to see exactly the context. I don't -- I don't recall that at the moment.

THE COURT: Okay.

MR. KOLSKY: Would your Honor like me to -- I'd be happy to submit something later on addressing that issue.

THE COURT: That's okay. I think I can figure it out.

MR. KOLSKY: Now, plaintiffs' motion cited a modern online dictionary, Merriam Webster. What's interesting about that is that they cited the definition of "charge," even though the same dictionary contained a definition of "public charge," and it defines "public charge" as one that is supported at public expense, no suggestion of any primarily

dependent requirement. Plaintiffs' primarily dependent definition more accurately describes the term "pauper," which early sources define as someone entirely destitute.

Now, in 1891, as referred to earlier, Congress defined inadmissible aliens to include both paupers and also persons likely to become a public charge, among other inadmissible aliens. And in distinguishing between pauper and persons likely to become a public charge, Congress made clear that a person does not have to be entirely destitute in order to become a public charge.

Your Honor had some questions of plaintiffs' counsel about the *Gegiow* decision and the amendment in 1917 following that decision, and the legislative history is clear about the reasons for relocating the term "public charge" away from "paupers." We've cited to a Senate report from 1916 stating --

THE COURT: You're referring to legislative history?

MR. KOLSKY: Yes, your Honor.

THE COURT: Is that right?

MR. KOLSKY: Yes.

THE COURT: Is that a thing still?

MR. KOLSKY: I believe so. I believe it is -- it can be relevant.

THE COURT: Let's say you were arguing to Justice Gorsuch. What would he say about your indication of a Senate

report to interpret a statute?

MR. KOLSKY: I -- I'm not sure -- I'm not sure what his view would be, your Honor; but based on the way the question is phrased, I assume that he would not approve of it.

THE COURT: How about Justice Kavanaugh?

MR. KOLSKY: Probably the same -- probably the same thing.

THE COURT: All right. So, is it the Justice Department's position in 2019 that it's okay to use legislative history to interpret a statute?

MR. KOLSKY: Yes, your Honor, it is.

THE COURT: Do you take -- does the Justice Department take that position consistently across all cases in which it litigates, or only in cases where the legislative history favors it?

MR. KOLSKY: I'm not sure of what position the Justice Department has taken on this question in other cases. I know that this is the position that we have taken here and that has been approved in this case. But I really can't speak to other cases in which I haven't been involved or am not aware of, you know, the details of what arguments were made.

THE COURT: Okay. And may I ask one more question? So, I asked the plaintiffs what they thought of the government's statement on page 14, which is, "The late 19th Century is the key time to consider." Is that your

position?

MR. KOLSKY: Yes, your Honor.

THE COURT: Okay. If that's your position, then why does it matter what happened in 1917 or 1952 or 1996?

MR. KOLSKY: Well, what happened in 1917 explains Congress's reaction to the *Gegiow* decision. So, it demonstrates -- it's a response to plaintiffs' argument that the ruling in that case should be determinative of the meaning. The legislative history is relevant because it shows that Congress did not agree with the meaning of the term as defined in the *Gegiow* decision.

THE COURT: So, I'm sorry. The Department of Justice is asking me to consider post-enactment legislative history from 1917 to interpret a statutory term that was enacted in 1882?

MR. KOLSKY: Its relevance, your Honor, is to -- is to show Congress's understanding or its reaction to the *Gegiow* decision, and it showed Congress --

THE COURT: Right. But that's not the late 19th Century. That's 1917.

MR. KOLSKY: That's correct, but I think it's for a more limited purpose, and it's really just to address the issue of the *Gegiow* decision.

THE COURT: Right. But the 1917 Congress can't tell any of us what the 1882 Congress meant with the term "public

charge."

MR. KOLSKY: I think it is one piece of evidence that -- that is relevant to the question. I do agree that the most important sources are those that are contemporaneous with the passage of the original statute, and we've tried to cite sources, dictionaries from that time. There are only so many sources that are close in time to the 1882 statute, so we have looked for indications of meaning at other points in time as well.

Now, the rule --

THE COURT: Go ahead.

MR. KOLSKY: The rule's definition of "public charge" as someone who receives one or more specified public benefits for more than 12 months in the aggregate in any 36-month period is consistent with the plain meaning of the term. The rule is consistent with not only the historical definition, but also with Congress's stated immigration policy.

Specifically, in 8 USC Section 1601, Congress wrote, "Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes. It continues to be the immigration policy of the United States that aliens within the nation's borders not depend on public resources to meet their needs, but rather depend on their own capabilities and the resources of their families, their sponsors, and private organizations, and the

availability of public benefits does not constitute an incentive for immigration to the United States."

The rule is entirely consistent with those policies codified in the United States Code.

Now, plaintiffs have referred in their briefing to what they describe as Congress's express rejection of the very definition now advanced by the agency. And they refer to legislative proposals in 1996 and 2013. But importantly, those were not proposals to amend the statute that's at issue in this case. They were proposals relating to different statutes.

The 1996 proposal was to amend the statute providing that an alien who has become a public charge is deportable. That statute is currently at 8 USC Section 1227(a)(5). It reads, "Public charge: Any alien who within five years after the date of entry has become a public charge from causes not affirmatively shown to have arisen since entry is deportable."

That statute has long been interpreted differently than the public charge inadmissibility statute that's at issue here. And that's discussed in *Matter of Harutunian*, which we cite in our brief.

So, the 1996 proposal would not have amended the statute at issue here, and that proposal also was different from the rule. It would have made aliens automatically deportable if they received benefits for 12 months within five

years of admission; whereas, the rule that's prospective does not make someone automatically inadmissible in that situation.

Now, the 2013 proposal that plaintiffs referred to, that related to a bill that would have allowed certain illegal immigrants to adjust to the legal status of a registered provisional immigrant, and that bill would have required applicants to show that they were not likely to become a public charge, among other things. And the amendment that plaintiffs referred to would have expanded the criteria for public charge as applicable to those applicants. It wouldn't have changed the statute that's at issue in this case.

So, the plaintiff cannot rely on legislative proposals relating to different statutes to try and discern the meaning of the statute at issue here; and even if they could, courts such as the D.C. Circuit have held that congressional inaction lacks persuasive significance because competing inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.

Turning to plaintiffs' claim that the rule is a, quote, "change from a policy that has been in place for over 100 years," end quote, and that's just incorrect. The only prior policy was the field guidance from 1999, and DHS adequately met the standard for addressing a policy change.

The standard described in *FCC versus Fox Television*

is that there -- the Supreme Court has said there is no basis in the Administrative Procedure Act for a requirement of more searching review when an agency changes its position. All the department was required to do was to acknowledge that the rule does enact a policy change, provide a reasoned explanation for the change, and explain how it believes the new interpretation is reasonable; and DHS did each of those things.

I also want to address plaintiffs' argument that the department may not consider receipt of non-cash benefits because qualified aliens who have been in this country for at least five years are allowed to receive those benefits. The plaintiffs simply ignore the fact that qualified aliens are generally not subject to the public charge test. Qualified aliens include various categories of aliens, including lawful permanent residents, refugees, and asylees.

In addition, to the extent that anyone may be eligible to receive benefits and also subject to the rule, the rule does not prohibit anyone from actually receiving benefits. So, there's no inconsistency between the rule and the statute authorizing qualified aliens to receive benefits.

Plaintiffs' reply brief filed yesterday points to the fact that Congress has allowed states to authorize Medicaid for aliens under the age of 21 and pregnant women, but the rule specifically excludes Medicaid benefits received by those categories of persons from the definition of public benefits.

And likewise, plaintiffs argue that Congress extended the Children's Health Insurance Program to certain aliens; but again, the rule doesn't consider CHIP benefits, so I'm not sure what plaintiffs' argument is intended to be with respect to those benefits.

Now, in a similar argument in plaintiffs' reply, they observed that the 1882 act provides for public support for aliens who have arrived in the country. And so what the 1882 act did was it required a duty of 50 cents for every non-citizen, quote, "who shall come by steam or sail vessel from a foreign port to any port within the United States," end quote. And it explained that, "The duty shall be paid by the master, owner, agent, or consignee of every such vessel." That money, which was paid by the vessel owners, was to be paid into the United States Treasury and used to fund the care of immigrants who are in distress.

So, in addition to excluding persons likely to become a public charge, the 1882 act also recognized that it wouldn't be 100 percent effective at excluding such persons. Obviously, some people would end up becoming public charges, so it set up a secondary defense to make sure that public funds would not be spent on the care of aliens who became a public charge by requiring the vessel owners to pay into a fund to care for such people. And so that further supports our position that Congress did not want public money being

spent to care for non-citizens.

And I think that concludes the points that I wanted to make as far as the definition. I'd be happy to move on to other points, unless the Court wanted to hear further from plaintiffs' counsel on any matters.

THE COURT: Why don't I hear just very briefly from plaintiff on -- plaintiffs on the arbitrary and capricious, maybe five minutes, and then I'll hear five minutes from the government on arbitrary and capricious. And then we'll maybe do five minutes each on irreparable harm and public interest.

Go ahead.

MS. CHAPMAN: Good afternoon, your Honor. Sorry. I was getting up from my seat. This is Caroline Chapman from the Legal Counsel for Health Justice, representing plaintiff ICIRR, who you cannot see, but is present with us in the courtroom today.

I will try to keep my remarks to five minutes. I've got my watch with me, your Honor. I wasn't expecting quite as short a time, but of course, I will respect the Court's wishes.

I would say that on the issue of arbitrary and capricious, our primary argument is that the language of *FCC versus Fox*, which the defendants cite, that when a new policy rests upon factual findings that contradict those which underlay its prior policy or when the new policy disrupts

serious reliance interests from the prior policy, it would be arbitrary and capricious to ignore such matters, and a reasonable explanation is required.

I think Ms. Flint adequately discussed how the final rule contradicts Congressional findings and judgments that supported the historical definition, the 1996 PRWORA statute and the field guidance, which was clearly based on facts provided by the benefits-administering agencies, and focus on the reliance interest in the harms.

So, in this case, plaintiffs' commentators --

THE COURT: But didn't -- I'm sorry to interrupt, but didn't DHS acknowledge that there was going to be harm, that people were going to disenroll or not enroll in the first place?

MS. CHAPMAN: Yes.

THE COURT: And basically said, "So what? We want to save money."

MS. CHAPMAN: That is correct.

THE COURT: So, is -- that's an explanation. That's a reasoned explanation. Their values are not consistent with your values. You would have done it differently. But that's not what the APA is about. The APA is about the government telling us why it is doing certain things and giving a reason. And it seems to me that DHS did just that.

MS. CHAPMAN: Well, your Honor, I think our objection

is that stating self-sufficiency, that there's a goal of self-sufficiency isn't an adequate reasoning under the *FCC versus Fox* test because the definition of self-sufficiency that the government is using, no use of any benefit -- or any use of benefit for 12 months can make you a public charge, is contrary to the law, PRWORA, which initially defined self-sufficiency, which said some use of benefits is permissible, and if you use benefits in that permissible way, you are still self-sufficient.

THE COURT: But isn't the final rule consistent with that? You can use benefits for 11 months out of 36, and you'll be fine. That is some use of public benefits, right?

MS. CHAPMAN: Well, your Honor, I think our concern is in part how *de minimis* a level of benefits may be used in contradiction to PRWORA's definition of self-sufficiency, which set out a more expanded use of benefits.

So, our position is PRWORA and Congress have told us what self-sufficiency means, after much consideration and much input from the agencies that administer the benefits programs. And if we are going to overturn the reliance interest for 20 years of healthcare organizations, of plaintiffs, of social service organizations, and of the community on those interests, we have to have a good reason to depart from the facts and the policy.

THE COURT: And the government's good reason is, "We

want to save money. We have too many costs at home. We can't be spending money on immigrants."

And again, you may not like that. You may think that it is -- conveys the wrong values. But it's a substantive objection and not a, "They didn't explain themselves," kind of objection.

MS. CHAPMAN: Well, I think our position is under *FCC v. Fox*, the statement of their values is insufficient to overcome the contradiction with the factual findings of the prior policy and the reliance interest. And so it is -- they are not empowered to just make this policy decision, that the APA and the cases interpreting it require them to give us a reasoned explanation and not a statement that fear is unwarranted or that self-sufficiency is redefined.

THE COURT: So, how would you put it? What could DHS do to adequately explain the policy change from the 1999 field guidance?

MS. CHAPMAN: So, I think one of the things that we all feel is missing is an adequate analysis of the chilling effect and the harm that the rule will perpetrate, and that as the government has admitted, that harm is generally perpetrated against individuals who are not either the subject or the object of the rule. So, the individuals being chilled from benefits use are eligible for the benefits use and likely never subject to the public charge test.

And the commentaries to the rule have made clear that the government's methodology for calculating that harm isn't correct. We have good -- a good historical analogy, because we saw a chilling effect after PRWORA went into effect, and that that is an insufficient reasoned analysis.

And then much of the government's limited data doesn't prove their point. So, it doesn't make the connection between benefits use by these individuals, now potentially, and their use in the future, in part because they're not using benefits now. We're having to predict based on the government's totality of the circumstances test. We're having to guess whether they would use any benefits for 12 months out of 36 six years from the date they go to adjust.

And so the test, the totality of circumstances test that the government has created, they haven't shown us that there is an adequate and reasoned connection, a logical bridge between that test and making sure that we are targeting immigrants who might use benefits six years from now.

THE COURT: I think it actually would have the opposite effect in terms of the argument you're making. You're saying it's not going to be 2-1/2 percent or 3 percent. It's going to be 10 percent or 15 percent or 20, and that would make the government's rationale, its cost-saving rationale, which seems to be dispositive, even stronger, right?

MS. CHAPMAN: So, I think the issue is that the chilling is taking place among eligible immigrants who will not be subject to the public charge test. So, the concern about the chilling is eligible individuals now. So, we are harming individuals who will not be subject to the public charge test in the hopes of somehow creating a test that will predict who will be using benefits in the future.

And I think we would also argue that if -- sort of the financial interest of the government could always be dispositive, right? In welfare law, this is always our experience, that the government can always argue that it's saving money. What the APA requires is that if you are going to change a rule this dramatically, that you have to give us a reasoned explanation. And saying that the chilling fear is unwarranted and repeating over and over again that immigrants will become more self-sufficient is not an adequate explanation, particularly when your definition of self-sufficiency is contradicted by PRWORA's definition of self-sufficiency.

THE COURT: All right. Do you want to kind of close out? Any final words you want to add?

MS. CHAPMAN: Sure. Just to talk a little bit about the totality of the circumstances test, so, again, your Honor, the individuals who are subject to the public charge test are not eligible for benefits. And so when we look at the

weighted factors that the government has added to the totality of the circumstances test, so there's a statutory list of criteria, age, health, et cetera, income, et cetera; and the government has changed that totality of the circumstances test by adding weighted factors. And it's our position that those weighted factors are not reasonably related to a prediction of whether a person is going to be a public charge in the future.

And I think it reflects how untied from any commonsensical understanding of self-sufficiency or PRWORA's understanding of self-sufficiency these weighted factors in the test are.

So, you can imagine a first generation immigrant who is not eligible for and does not use any benefits now, who's working at an unskilled, low-wage job, so their income is under 125 percent of poverty. In society now, it means he won't have access to health insurance. His credit might be bad. He might be living with a large family so that they can support each other. And he might have a condition like diabetes, common based on the American diet. And maybe he was in the ER once and they accidentally put in an application for Medicaid for him thinking that he was eligible.

So, five years from the potential -- his potential adjustment of status, his minimum wage work and his family status might mean that he is eligible for benefits, but it does not mean that he is necessarily likely to use them at any

point. It's not predictive of his use of them at any point.

But even this individual described this way -- so, this is thousands of immigrants around the country. This is thousands of immigrants for hundreds of years who come and are low-wage and are not accessing benefits, he will have five negative factors and possibly a heavily-weighted negative factor on health grounds.

And this -- there's no question that this is a radical change from the landscape of the totality of the circumstances test that happened before. And to make such a substantial change to bar an individual like this, who on October 14th would not be barred, who on October 16th, with negative factors and heavily-weighted negative factors is very likely to be barred, is something that requires an additional reasoned explanation.

THE COURT: All right. Don't you think -- not to put too fine a point on it, but don't you think that's the point, that this is -- that's DHS's point. That's what DHS is trying to do. It is trying to keep out people that you think ought to be let in or at least not excluded. And again, that strikes me more as a substantive argument that the statute does not permit DHS to do that, as opposed to an APA -- remember, Administrative Procedure Act.

It strikes me not as a procedural argument, which is they didn't explain themselves. I think DHS is very clear

about what it wants to do, not only in this regulation, but across the board in immigration.

And isn't it that, the substance of what they're doing, that you have an objection to, and not the detail of the explanation that they're giving for what it is they want to do?

MS. CHAPMAN: So, I would say that *FCC versus Fox* makes it clear that they have to provide a reasoned explanation for the change. And case law in the Seventh Circuit and other places requires, under the APA, that there be a logical bridge.

And our argument is that the totality of the circumstances weighted factors do not create a logical bridge; and that the government has not provided data to support the idea that folks are going to use public benefits more down the road based on the test; and that under the APA it is their obligation to make that connection. Merely making the assertion is inadequate under both *FCC versus Fox* and current case law. They have to reckon with the law.

THE COURT: But aren't you making that assertion in connection with your standing argument, your ripeness argument, and your irreparable harm argument?

MS. CHAPMAN: So -- I'm sorry, your Honor?

THE COURT: Sorry. The argument that people are going to not use benefits that they otherwise would have used,

isn't that the premise underlying your standing argument and your ripeness argument and your irreparable harm argument?

MS. CHAPMAN: Yes. So, if the point that the government -- if what the government was trying to achieve was to reduce the benefits use of folks who will not be subject to the public charge test, then that's the rule they've created. If they said, "What we want to do is chill people here right now who are already LPRs and won't be subject to the test," then they would have designed the rule this way.

But that is not a permissible purpose, nor is it their stated purpose. Their stated purpose is to redefine the public charge test, and it is our assertion that they have not created a reasonable argument for that test.

Have they created a rule that will inflict harm on individuals who are not the subject of the test? Yes. Is it our position that that's inherently unreasonable? Yes. Under APA standards, that is inherently unreasonable.

THE COURT: I understand your argument. Thank you for clarifying that.

So, why don't I turn it over to the government to address *Chevron II*.

MR. KOLSKY: Yes. Your Honor, this is Josh Kolsky. And just before I address these issues, I wanted to let the Court know that I think minutes ago, an injunction -- apparently a nationwide injunction was entered in a similar

case pending in the Southern District of New York. I don't know the details of that, but I wanted to make your Honor aware of that --

THE COURT: Thank you.

MR. KOLSKY: -- as quickly as possible.

THE COURT: I appreciate your -- your keeping up with your colleague's argument on the other side at the same time as kind of keeping tabs on the other cases.

So, there's a nationwide injunction, and what does -- does the government have a position as to what impact, if any, that has on our case and how we ought to proceed in our case?

MR. KOLSKY: So, my preliminary view, not having had the opportunity to take a close look at the injunction, but if it is a nationwide injunction that would cover the relief that the plaintiffs in this case are seeking, then it would moot out the motion for preliminary injunction here because the -- the relief has already been obtained elsewhere.

THE COURT: Right. But I imagine if -- is the government going to move the Second Circuit to vacate the preliminary injunction in that Southern District case?

MR. KOLSKY: I would -- I think there's a strong likelihood of that. That decision will have to be made, but I do think that there's a significant chance.

THE COURT: Okay. Does that alter the calculus as to whether this Northern District of Illinois case is moot?

MR. KOLSKY: I mean, we're not taking the position that this case is moot. It would just be plaintiffs' motion. And the possibility of an appeal, I don't think that would change anything. If the Southern District of New York's order were reversed on appeal, then the plaintiff in this Cook County case could move for relief at that time.

But as of now, again, you know, my preliminary -- based on my preliminary understanding, the relief that plaintiffs are seeking has been obtained elsewhere.

THE COURT: I see. All right.

MR. KOLSKY: I'm happy to address -- continue to address these issues. I didn't want to short-circuit anything, but I just wanted to make sure that your Honor was aware of that.

THE COURT: Thank you. I really appreciate your bringing us all up to speed.

Why don't you, perhaps just for kicks, but perhaps not, give us the government's view on the arbitrary and capricious issue.

MR. GORDON: And, your Honor, this is David Gordon for the plaintiffs. I did want to let you know -- we're prepared to discuss this potential mootness, if you'd like. I don't think we need to if you don't.

But we also wanted to let you know that in the last few minutes an injunction was issued in a California case

enjoining the rule in San Francisco County, Santa Clara County, Oregon, the District of Columbia, Maine, and Pennsylvania.

And it's our position that this hearing should move forward more than just for kicks and this Court should rule. We're happy to talk about it if you like, but also happy to wait until the end if that's what you prefer, or not at all.

THE COURT: Yeah. Thank you for that further update. There ought to be a Chiron underneath wherever you guys are.

So, why don't -- you know what, why don't we just argue the case as if I'm going to make a decision, and then I'll hear from the plaintiffs on the mootness issue. And then obviously, the first thing I think about after the hearing is whether it's moot -- or at least this motion is moot; and if I answer that question no, then I'll have the benefit of everybody's thoughts on the various issues, substantive issues.

MR. GORDON: Thank you, your Honor.

MR. KOLSKY: Thank you, your Honor. This is Josh Kolsky, and I'll address the arbitrary and capricious arguments now.

Plaintiffs have argued that the DHS did not adequately address comments relating to potential harms that may result from the rule. And it's -- first of all, it's well-settled that an agency's obligation to respond to

comments is not particularly demanding. The agency's response to public comments need only enable courts to see what major issues of policy were ventilated and why the agency reacted to them as it did.

DHS responded extensively to comments about potential public health impacts caused by people disenrolling from public benefits, what plaintiffs describe as the chilling effect. And on this issue, it's not exactly clear to me what plaintiffs believe DHS was required to do but didn't do.

They argue that the department disregarded harms, which is demonstrably untrue. It spent several pages addressing these potential harms.

They argue that DHS was required to measure the harms, but we've cited cases explaining that agencies are not required to quantify every potential effect of a rule.

And on this point, plaintiffs' reply brief cites the *Department of Commerce versus New York* decision in the census case, but they cite to the portion of the decision discussing standing, which has nothing to do with this issue. And, in fact, the discussion of the APA claim in that case actually supports our position.

The court explained that the Secretary of Commerce had opted for one approach over another and said that the district court overruled that choice, quote, "But the choice between reasonable policy alternatives in the face of

uncertainty was the Secretary's to make," end quote.

And discussing another policy choice by the Secretary, the court said, quote, "The Secretary justifiably found the Bureau's analysis inconclusive. Weighing that uncertainty against the value of obtaining more complete and accurate citizenship data, he determined that reinstating a citizenship question was worth the risk of a potentially lower response rate. That position was reasonable and reasonably explained," end quote.

So, here, DHS discussed why it was difficult to predict the level of disenrollment and explained that the rule was nevertheless justified by its legitimate policy goals.

Now, I understand that plaintiffs believe that the harms outweigh the benefits, but plaintiffs don't get to decide that. The fact that DHS came to a different judgment than plaintiffs would have does not show any violation of the APA.

Moreover, DHS made changes to mitigate some of the concerns about disenrollment, such as by excluding certain benefits from the scope of the rule, and that, too, shows careful consideration of these issues.

Now, plaintiffs have argued that two of the factors considered to determine if someone is likely at any time to become a public charge are, as they put it, irrational, but these factors are highly relevant to the public charge issue.

Family size, for instance, the public charge statute specifically requires DHS to consider family status. And DHS in the rule cited data showing that the use of non-cash benefits increases as family size increases. So, it was not arbitrary or capricious for DHS to conclude that financial strains increase as families grow in size.

Plaintiffs also take issue with the rule's consideration of application for public benefits, but the statute requires DHS to consider financial status. An application for benefits is indicative of an alien's intent to receive a benefit and of his or her financial status. So, it's not arbitrary or capricious for DHS to consider an application for benefits.

Plaintiffs' reply argues that the rule, quote, "irrationally assigns the exact same negative weight to an application for benefits as to receipt of the same," end quote. That's incorrect. Although both application and receipt can be considered under the rule, only receipt can be a heavily-weighted negative factor.

Unless your Honor has questions, I will conclude my argument on the arbitrary and capricious topic.

THE COURT: All right. Thanks.

So, why don't I just hear briefly from both sides on the other factors in the preliminary injunction analysis.

MR. MORRISON: Thank you, your Honor.

MS. SCHELLER: Good afternoon, your Honor. Assistant State's Attorney Jessica Scheller. I believe that Mr. Morrison and I will quickly split the irreparable harms section.

As the parties have laid out in their briefing and as reported by the *Chicago Tribune* as recently as this morning as Cook County Board President Toni Preckwinkle put forth the proposed budget for the next fiscal year, nearly half of the $6.2 billion Cook County budget, or $2.8 billion, will be allocated to the County's Health and Hospital System, or CCH, which covers the medical costs for lower income, uninsured, or underinsured residents.

In fiscal 2018, 45 percent of CCH's patients were uninsured, 35.4 percent of CCH patients were covered by Medicaid, and 15 percent were covered by Medicare.

CCH operates County Care, which is the largest Medicaid managed care program in Cook County, with 33,782 enrollees. While County Care has allowed CCH to reduce its rate of uncompensated care, CCH still provides more than $500 million of uncompensated care annually, including nearly half of all of the charity care provided in Cook County.

The rule threatens $30 million in Medicaid reimbursement funding to the County Care program, and by the end of the current fiscal year, CCH estimates that it will spend $544 million on uncompensated care, which is an

8 percent increase from the last fiscal year, a 73 percent increase from 2014, and the highest expenditure since the early expansion of Medicaid in Cook County began in 2012 and 2013.

So, when the government argues that Cook County's interests and the interests of Cook County residents are adequately represented in other suits and this suit is duplicative, I think the government ignores the real and irreparable harm the County will faced if the rule is implemented. Generally, a suit is duplicative only if the parties' claims and available relief do not significantly differ between the two actions. And as we have set forth here, Cook County will be uniquely harmed by these actions.

There is not a lawsuit pending in the country which sets forth the allegations and the harms that will be faced here. Indeed, the lawsuit filed by the State of Illinois in Washington does not have a single Cook County-specific allegation, nor does it allege the specific harm to Illinois residents if Cook County Health and Hospitals cannot continue to fund what will ultimately result in a public health crisis if multiple residents from the immigrant community disenroll from benefits and fail to seek appropriate and preventative medical care.

We believe that this lawsuit presents the superior vehicle for resolution of these claims and that this Court is

not constrained by any restrictions under the first-to-file doctrine. Indeed, the Seventh Circuit has stated that this Court may, in its discretion, allow this lawsuit to proceed based upon the unique harms to Cook County if it determines that it is a superior vehicle to resolve these issues. And given that the Northern District has stated and has established this for quite some time that resolving litigated controversies in their locale is a desirable goal of the federal court, we believe that this lawsuit is the superior vehicle to address the irreparable harms of Cook County.

And I will turn it over to Mr. Morrison to further expound upon those issues.

MR. MORRISON: Thank you, your Honor. David Morrison on behalf of Cook County.

We're discussing a lot of the health impacts of the final rule, and indeed, I think the final rule will act like a cancer on local governments like Cook County and organizations like ICIRR, spreading and multiplying its negative impact throughout the plaintiffs' system. The only solution is to radiate the cancer that is staying or enjoining the defendants from implementing this rule.

Ms. Scheller has walked through a number of the issues. Certainly, the Miss Chan affidavit, as the director of policy for CCH, ECF 27-1, starting at page 324, walks through in great detail the harms that Cook County is facing,

many of which have been summarized for you. But in addition, she indicates the irreparable harm that's impacting the patient-provider relationship based on the distrust that is created by the rule.

The rule sows fear in the immigrant community. It necessarily wreaks havoc on the patient-provider relationships and the Cook County health system as a whole.

The defendants rely in their brief on *D.U. versus Rhoades* and *Whitaker versus Kenosha Unified School District* for the proposition that mere possibility of future harm is insufficient to justify preliminary injunctive relief. These cases support irreparable harm impacting the plaintiffs for a number of reasons.

In *Whitaker*, the Seventh Circuit held that, quote, "Harm is considered irreparable if it cannot be prevented or fully rectified by the final judgment after trial," close quote. So, in *Rhoades*, the Seventh Circuit found that money damages could make the plaintiff whole, and thus the plaintiff did not meet the standard for irreparable harm.

In *Whitaker*, a transgender student sued to enjoin the school district from permitting the student from using the boys' restroom. The district court actually granted preliminary injunctive relief, and the Seventh Circuit affirmed, finding that the student demonstrated that he was likely to suffer irreparable harm in the absence of a

preliminary injunction. There, the use of the boys' restroom was integral to the student's transition, and waiting until after trial to gain access to the restroom was deemed irreparable.

Here, the final rule's intended effect will reduce the enrollment in Medicaid for immigrants who are entitled to use the public benefit, and it will cripple CCH's healthcare system. Moreover, as Ms. Chan attests at paragraph 52 of her affidavit, the patient-provider relationship is irreparably strained. She also described immigrants without insurance naturally delaying seeking healthcare, and when they do seek healthcare, relying more heavily on emergency care services, which negatively impacts all who truly have need for emergency care relief.

So, as with the transgender student, there is substantial harm being imposed here that will accumulate and spread without injunction. Money alone will not eradicate a cancer like the final rule.

Whitaker finally is instructive in other ways. For instance, the government argued in *Whitaker* that it was the student's choice not to use a gender-neutral restroom, much like the government argues here that it is the immigrant families' choice to disenroll from Medicare. But as the Seventh Circuit found in *Whitaker*, this is truly an untenable Hobson's choice.

In *Whitaker*, the Court found it to be, quote, "An unenviable choice between using a bathroom that would further stigmatize him and cause him to miss class time or avoid using the bathroom altogether at the expense of his health," close quote.

Here, immigrant residents are forced into a similar unenviable choice between accepting government benefits to which they are entitled or jeopardizing their immigrant status. Miss Chan specifically speaks to this choice in paragraphs 25 and 52 of her declaration and its impact on CCH.

In *Whitaker* and here, there is not a single past event that has afflicted tort-like harm on a plaintiff. Instead, there is prospective harm. In *Whitaker*, the student stated that the policy caused him to contemplate suicide. Here, the sustainability of one of the country's largest public hospital systems is directly threatened.

The government knows that its final rule will result in fear, confusion, disenrollment, distrust, and distinct and irreparable harm. It simply believes that those harms are worth enduring for the benefit it contends the final rule provides. Until the final rule survives judicial review, this Court should prevent the spread of its cancer-like harms through a stay or injunction.

And then with respect to ICIRR, I'm going to turn over the microphone.

MS. PAGAN: Hello, your Honor. This is Militza Pagan for ICIRR. I'll be very brief, your Honor, just in terms of ICIRR's irreparable harm.

ICIRR has shown more than the threat of irreparable harm that is required under *Whitaker*. ICIRR has demonstrated that irreparable harm has already begun because of the rule, specifically to ICIRR's frustration of mission, its diversion of resources, and also economic harm.

ICIRR's mission, your Honor, is to promote the rights of immigrants and refugees to full and equal participation in the civic, cultural, social, and political life of Illinois's diverse society and beyond. They further their mission by signing up immigrants for public benefits, but now that is all for naught.

ICIRR has now been forced to spend exhaustive amount of hours instead educating individuals, service providers, elected officials, and other constituencies about the public charge test and final rule through numerous briefings and trainings to mitigate the fear and the confusion within the immigrant community.

Your Honor, as stated in ICIRR's declaration, it says that ICIRR has had to redirect more than 235 hours to conduct 50 trainings and hold other community education events. It's had to spend an estimated $100,000 in part to cover the cost of paying unplanned overtime to mitigate the

harm of the rule.

And ICIRR members have been forced to address -- to divert resources to address their clients' concerns. Specifically, as outlined in paragraphs 33 through 37 of Lawrence Benito's declaration, the Illinois Immigrant Council, for example, has had to devote three staff members to spend 20 hours per week to address clients' concerns regarding the final rule.

The HANA Center, for example, has had to cut its breast cancer early detection program so that its staff can spend more time working to address concerns about the final rule.

And lastly, your Honor, ICIRR has also suffered financial harm due to the final rule. Through ICIRR's immigrant family resource program, ICIRR members assist with interpretation and public aid offices and manage cases of immigrant families who apply for benefits. ICIRR and its members' funding are based upon the number of clients they're able to enroll in public benefits programs. The rule has caused a decline in immigrants enrolling in public benefits programs that has caused strained -- and strained the financial resources of ICIRR and its members.

Thank you, your Honor.

THE COURT: Thank you. So, why don't I hear from the government on irreparable harm? And obviously, there's an

overlap between the irreparable harm discussion and standing and ripeness, and I'm -- please know I'm considering both sets of issues independently, although, you know, bearing in mind the overlap in the substance of both sets of issues.

MS. BERMAN: Yes, your Honor. This is Carrie Berman for the defendants. I'll actually speak first about the equities of the case, as the plaintiffs started with.

We do believe that this litigation is duplicative of the case brought by the State of Illinois in Washington versus DHS. The substantive claims which the plaintiffs have alleged are pure questions of law are nearly identical, and the relief that the State of Illinois asks for would fully encompass the relief requested by these plaintiffs. And although that relief, which is a nationwide injunction, is not identical to the relief requested here, it would necessarily fully address the harms alleged by plaintiff if, as they claim, a narrower statewide injunction would have that effect.

Moreover, if the court were to find in favor of the State plaintiffs in Washington but determine that a nationwide injunction was not justified, it's reasonable to assume that the narrower relief granted would necessarily apply to the entire State of Illinois.

The plaintiffs allege that the State can't fully and effectively represent their interests because the parties of the two cases are not in privity with each other and they

didn't work together on these matters. They allege they have their own harms and that they're their own political unit, but the cases that the plaintiffs are relying on for that idea that there has to be an explicit legal relationship between the parties in the form of privity in preclusion cases and whether or not a case is duplicative of another ongoing case is a different inquiry from whether a claim is barred by a prior decision in another case. The standard for the question of whether cases are duplicative is much more flexible, and it gives the Court substantial discretion.

Based on the requirement of privity, the Court should look past superficial differences that the plaintiffs have identified to the similarities in the substance of the parallel cases, both in the sense of the relief that's requested and also the actual claims that are made.

THE COURT: May I interrupt for one second?

MS. BERMAN: Sure.

THE COURT: What do you make of the plaintiffs' argument, or at least as to Cook County, in the reply brief that there is no *parens patriae* authority to sue when the defendant is the federal government?

MS. BERMAN: We would certainly agree with that in a situation where the State is the plaintiff. The law is a little bit more unclear when a political subdivision is the plaintiff, but there are some cases from the Ninth Circuit

that would suggest that the political subdivision plaintiff also cannot sue *parens patriae*.

THE COURT: Right. I guess why I asked this is kind of when we were together last, I think it was last week, I said, "Well, doesn't the State have *parens patriae* authority, and doesn't that mean that the State is suing on behalf of all of the people and all the political subdivisions of the State?"

And if it turns out that my premise was wrong, that when the State sues the federal government, it does not do so under its *parens patriae* authority, doesn't that mean that the State is not representing Cook County in the Eastern District of Washington?

MS. BERMAN: Well, your Honor, it's complicated for me to answer that question because we wouldn't agree that the plaintiffs here or the plaintiffs there have standing, so it's hard to respond to who they're representing and whether they can represent those parties, but --

THE COURT: Why don't we just assume that the State of Illinois -- I know you disagree, but just assume for the sake of argument that the State of Illinois has standing in the way that Massachusetts had in *Massachusetts versus EPA* and Texas had in *Texas versus the United States*.

MS. BERMAN: Then, your Honor, I would answer your question, I think the most straightforward way to answer it

for purposes of this motion is to say that it doesn't really matter for a preliminary injunction because the State is alleging the same legal issues and would get relief that would encompass what these parties are asking for.

It wouldn't necessarily be the case if we decided that they both have standing that the substance of the underlying case would be the same; but for the preliminary injunction, it shouldn't matter because the relief that the plaintiffs in this case want could be and was sought by the State.

THE COURT: Right. But it was also sought by a different state that sought a nationwide injunction, so wouldn't your argument apply with equal force to that other case where Illinois is not a party but where the plaintiffs are seeking a nationwide injunction?

MS. BERMAN: I believe under those circumstances, your Honor, it could; but again, that would only be for the purposes of the preliminary injunction, and I wouldn't take the position that that would apply for the merits of the case substantively.

THE COURT: Understood.

MS. BERMAN: Yeah. So, the other equitable issue that we wanted to just bring to the Court's attention was that the plaintiffs in this case did prejudice the defendants and the Court by needlessly delaying the filing of their suit.

They waited to such a late date that it was not possible to establish a reasonable preliminary injunction briefing schedule or a reasonable amount of time for the Court to consider the parties' positions.

The plaintiffs don't actually contend, even in their reply, that their filing was timely, but rather state that their delay was justified by their need to investigate their harms.

The plaintiffs were aware of the effective date of the rule as of August 14th, 2019, and by their own admission were aware of the possibility of their alleged harms as early as 2017. Moreover, the plaintiffs' arguments rely substantially on the idea that their alleged harms are already occurring prior to the effective date of the rule.

And in contrast with plaintiffs' claim, there were seven other sets of plaintiffs, including states and political subdivisions and private organizations, in possession of the same information as these plaintiffs who nevertheless filed their complaints and motions for injunctive relief with sufficient time to permit full preliminary injunction briefing and, in most cases, a week or more for the court to consider the parties' arguments.

So, the plaintiffs cannot voluntarily delay the filing of their suit in an attempt to manufacture an emergency for a finding of extraordinary remedy of injunctive relief.

Finally on this point, your Honor, I would just mention that the briefs note that the plaintiffs were required to meet all of the elements of the preliminary injunction test; and because as we argued their claims are not cognizable or they're speculative or they lack standing to assert them, they don't have any weight in the balance of equities; whereas, they ignore or try to obscure the defendant's harms.

The defendants do have a clear interest in effectuating the national immigration policy in the way that their expertise has deemed to be the most efficient to satisfy that interest. But also, there's a more general concern with the invasion of an area of purely executive branch competency by the judiciary with preliminary equitable relief outside of the extraordinary situations in which it's truly necessary, in that it creates a threat to the separation of powers.

To address the point that the plaintiffs just made about irreparable harm, they're speculating that reduced enrollment in these public benefits would cause the harms that they allege immediately, essentially, because they don't address at all the requirement of the irreparable harm standard that the harm be realized before a decision can be reached on the merits.

As we note in our brief, this is an APA case; and a decision on the merits, if the case were to proceed, could be a matter of months. And there's nothing in the record to

suggest that the harms to the County that the County is alleging would be realized in that span of time.

They also --

THE COURT: So, how long would it take?

MS. BERMAN: That's a good question, your Honor. The agency has been preparing the administrative record, so it probably, as any record review case, could be done in several months. Not necessarily each particular case is completed that quickly; but it is a case that's meant to be decided on the administrative record, and that administrative record is being prepared.

THE COURT: Well, when will the harm come to pass such that a preliminary injunction, if the other requirements are satisfied, would be appropriate?

MS. BERMAN: Well, your Honor, the plaintiffs bore the burden of putting that information in the record, and they didn't put anything in the record. All of the harms that they're alleging to the County are speculative because they're cumulative harms that would be based on the decisions of these independent third parties, some of whom may or -- may disenroll from the benefit system, some of whom may not.

But the effect of that to the County would necessarily develop over time because primarily they're based on people forgoing health benefits and that eventually causing extra costs to the County.

THE COURT: Right. So, you're saying it's too early, and I'm asking you the next question, which is: All right. When is it no longer too early?

MS. BERMAN: Well, your Honor, in this scenario -- first of all, our position from a legal standpoint is that was on the plaintiffs to tell you that and not us.

THE COURT: Well, if you said it was too early, you must have something in mind when it would not be too early. So, what did you have in mind? I mean, early or late is not an absolute time. It's not like, you know, November 15th, 2022. You're saying it's too early. It's too late. It's relative. So, relative to what? When would it be okay?

MS. BERMAN: When they can actually show evidence of those types of harm having been felt by the County, that people have actually disenrolled because of the rule and it was a material number of people that actually caused a measurable financial effect or health effect to the County.

THE COURT: Right. And the Department opined on what was going to happen as a result of the rule, so what's the Department's position on when those effects, when those disenrollments, when those non-enrollments will come to pass?

MS. BERMAN: Well, your Honor, I will mention that the plaintiffs have not read the rule as accurately as perhaps they could have. The Department opines that there's a likelihood that 2.5 percent of the people and families with at

least one individual who's a non-citizen might disenroll, but they just said that there was a possibility that those disenrollments could lead to certain effects on states and organizations and facilities.

So, I don't think there's a specific answer to that question, although I can try to find out if your Honor would like.

THE COURT: All right. Anything further on irreparable harm or public interests?

MS. BERMAN: Yeah. I just wanted to note for the -- I'm sorry. I forgot what they called themselves, the organization, I.C.I.R.R. They again mentioned the frustration of their mission by diversion of resources and also economic harm. As we've pointed out, we don't take a position that those economic harms are cognizable; but nevertheless, for all of those, they're all, in effect, economic harms, and the plaintiffs have said nothing to support their claim that those harms are irreparable. They actually do have a legal remedy, which would be money damages, but they haven't made any manner of proof as to why that wouldn't be sufficient.

THE COURT: Are you saying that money damages are available in an APA case?

MS. BERMAN: I'm not necessarily saying that, your Honor. I'm saying that the plaintiffs were supposed to --

THE COURT: Why the hedge "necessarily"? Let's just

be straightforward with one another. Is it the Department of Justice's position that money damages are available in APA cases generally and this case in particular?

MS. BERMAN: No, your Honor. The reason I said not necessarily was because I'm not sure what the law is in this circuit, but typically, no.

THE COURT: All right. Anything further?

MS. SCHELLER: Your Honor, if the County may be briefly heard in response.

THE COURT: Go ahead, briefly. And then I want to hear from the plaintiffs' side on mootness, and then we'll have to wrap this up.

MS. SCHELLER: Certainly. Your Honor, as I was taking notes based on counsel's argument, I wasn't sure whether I should first respond to the contention that we filed the motion for preliminary injunction too soon or that we had filed it too late. So, I will start with too soon, and that is this.

Even if the injury to Cook County and the plaintiffs were reasonably in dispute, the County has readily demonstrated a cognizable harm as is articulated in *California versus Trump*, a 2017 case which held that governmental administrative costs caused by changes in federal policy are cognizable Article III injuries. We believe that that particular holding is outcome-determinative in this case, even

if we had not set forth a factual basis as robust as we did.

Turning to the claim that the motion for preliminary injunction was filed too late, I think that that argument is belied by the fact that the government was able to timely file a robust brief and that the Court is, in fact, holding a hearing in advance of the implementation date of the rule.

And finally, and very briefly, even if this Court were to determine that this case is duplicative, as we have alluded, the Seventh Circuit does not bind itself by the first-to-file rule. Instead, it enables this Court to use its discretion to determine whether or not this Court possesses the superior vehicle through this case to resolve the plaintiffs' concerns.

We contend that it does here, and that contention is supported by the government's argument that the State of Illinois completely lacks standing to assert its claim in the Washington case because the State of Illinois arguably proceeded under a *parens patriae* theory of standing, which is not the theory advanced by Cook County here.

Cook County has instead proceeded under a home rule authority theory, alleging specific financial and irreparable harm; and we suggest to the Court that the Court should look to that issue to determine that this is, in fact, a superior vehicle to resolve the plaintiffs' claims.

Thank you.

THE COURT: Thank you. And then from the plaintiffs on whether the two injunctions, at least one of which is nationwide, moot this particular motion?

MR. GORDON: Yes, your Honor. David Gordon for the Illinois Coalition for Immigrant and Refugee Rights. I'll start where you started, I think, which is that the New York injunction is preliminary, of course, so it could fall later in that proceedings, and also, it could be reversed on appeal.

I'd like to quote for the Court a brief that the Department of Justice filed in May of 2019 in a case *State of California versus Department of Health and Human Services*. This is in the Ninth Circuit. I'm trying to read it. My eyes are going. 19-15072. And in that case, there was an injunction in the Ninth Circuit followed by an injunction by a Pennsylvania district court.

And the government said -- these are preliminary injunctions. "To begin, the parties have a continuing interest in the injunction entered in this case," that's the case in the Ninth Circuit, "because the Pennsylvania injunction is neither final nor permanent. The possibility that the Pennsylvania injunction may not persist is sufficient reason to conclude that this appeal is not moot."

So, that's the DOJ five months ago. That's also what happened with the travel ban case and in the DACA case. So, it happens all the time that you see what the Supreme Court

has called issues of far-reaching national significance being adjudicated before different judges in different courts. And the Supreme Court in *U.S. versus Mendoza* has said that that has value. And that's 464 U.S. 154 from 1984.

At the end of the day, this case is brought by particular plaintiffs who have particular rights and, should we prevail, would have particular rights to enforce those rights. And the fact that other courts have an hour ago, 10 minutes ago, and maybe an hour from now, make other orders doesn't mean this Court should decline to reach its own conclusion, which we think would not only benefit the plaintiffs here, but also benefit the cause in general of trying to get to the right answer on these difficult questions.

There are other reasons why this is not moot, but I think I'll, in the interests of time, leave it at that unless your Honor has questions, your Honor.

I'm hopeful the conference call didn't run out?

THE COURT: No, no, I'm here. So, anyway --

MR. GORDON: Thank you, your Honor. I was just checking.

THE COURT: Yeah, I would give you fair warning before I just hung up.

So, anyway, let me give -- was it Mr. Kolsky who had addressed mootness? If you have anything -- you don't have to

say anything else, but if you would like to address the issue at all either on its own or in response to what Mr. Gordon just said, I wanted to give you that opportunity.

MR. KOLSKY: Thank you, your Honor. And this is Josh Kolsky.

Obviously, we'll need to look at these orders from these other courts and, you know, consider the impact on this case before we take a final position. You know, I wanted to notify the Court of them -- of these decisions and note the possibility that it may have an impact on the proceeding; but of course, our final position will require further consultation within the department.

And if your Honor would like us to file something on that, we can certainly do so.

THE COURT: Okay. If you would like to, you can, but you don't -- if you end up not doing it, it's fine. I won't -- I won't be expecting anything.

So, if either side would like to supplement on that particular late-breaking issue, please go ahead and do it; but I'd ask that you do it -- and this may be -- this may be a disincentive. I'd like you to do it by Sunday at, say, 3:00 o'clock Central Time, just given the exigencies of when I'm going to have to issue the ruling. If it's something more than, "This is moot," I'll probably be doing it on Monday. All right?

MR. KOLSKY: Very well. Thank you, your Honor.

MS. BERMAN: Thank you, your Honor.

MR. GORDON: Thank you, your Honor.

THE COURT: Okay. I really appreciate everybody's briefs. They were excellent. And I appreciate your presentations here at the hearing and your responding to my questions. You were all of tremendous value to the Court and to my decision-making process.

So I'll issue something. My plan is to issue it on Monday, given that we have a Tuesday effective date. And I'll set a further date for this case in the next order that I enter.

Anything further?

MR. MORRISON: Your Honor, on behalf of all the parties, we appreciate you taking the time, particularly when you're away from chambers, to hear this argument. Your -- we have a full courtroom, and we appreciate it.

THE COURT: All right. Thanks a lot. Everybody have a good weekend.

MS. SCHELLER: Thank you.

MR. GORDON: Thank you.

MR. KOLSKY: Thank you, your Honor.

MR. GORDON: Thank you.

(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 1, 2019*

Charles R. Zandi
Official Court Reporter

Date