No. 20-449

IN THE
Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, et al.,
Petitioners,

v.

NEW YORK, et al.,
Respondents.

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

BRIEF IN OPPOSITION FOR THE STATES OF NEW YORK, CONNECTICUT, AND VERMONT, AND THE CITY OF NEW YORK

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QUESTION PRESENTED

The Immigration and Nationality Act provides that an immigrant is "inadmissible," and thus ineligible for legal-permanent-resident status, if the immigrant "is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). "Public charge" is a term of art that has long been limited to individuals who are primarily dependent on the government for long-term subsistence. In August 2019, the United States Department of Homeland Security issued a Final Rule that, for the first time, expanded the statutory term "public charge" to include individuals who receive any amount of certain publicly funded supplemental benefits for twelve months out of a thirty-six-month period, even though Congress designed these benefits to supplement health, nutrition, and economic stability rather than to provide long-term subsistence. The district court postponed the Rule's effective date and preliminarily enjoined its enforcement pending resolution of this litigation. The question presented is:

Whether the district court abused its discretion in issuing a preliminary injunction against the Rule on the ground that (a) it is likely contrary to law and arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706; (b) plaintiffs below would suffer irreparable harm absent a preliminary injunction; and (c) the balance of the equities and the public interest supported interim relief.

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INTRODUCTION

Petitioners ask this Court to grant interlocutory review of a district court order that preliminarily postponed the effective date and enjoined enforcement of a Final Rule issued by the Department of Homeland Security (DHS). The Rule altered the test for evaluating whether an immigrant is likely to become a "public charge" under 8 U.S.C. § 1182(a)(4)(A), and is therefore ineligible for a green card. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019).

Certiorari is not warranted because the imminent mootness of this dispute and its preliminary and interlocutory nature make this case a poor vehicle to resolve the legal questions presented by the Rule. The incoming presidential administration has already announced that the Final Rule at issue here will be withdrawn or otherwise reversed within the administration's first one hundred days—action that will eliminate any live controversy under Article III. In addition, further proceedings in the district court may supersede the preliminary order here, or present a final adjudication that would provide a more appropriate basis for this Court's review. At minimum, the Court should hold the petition until the new administration has an opportunity to fully consider the federal government's litigation position and inform the Court of its views, or until the district court below rules on pending motions for partial summary judgment.

Moreover, the court of appeals' decision below correctly affirmed the preliminary order issued by the district court. The Rule's vast expansion of "public charge"—to include employed individuals who receive

any amount of certain benefits that provide supplemental health, nutrition, or housing support, for even brief periods of time—is a stark departure from a more-than-century-long consensus that has limited the term to individuals who are primarily dependent on the government for long-term subsistence. The Rule thus likely exceeds the authority conferred on DHS by law, and is likely arbitrary and capricious.

STATEMENT

A. The Public-Charge Statute

Under the Immigration and Nationality Act (INA), noncitizens who lawfully entered the country may adjust their status to legal permanent resident (LPR) if they are "admissible." 8 U.S.C. § 1255(a). A noncitizen is inadmissible if he or she is "likely at any time to become a public charge." *Id.* § 1182(a)(4). DHS makes public-charge determinations principally for noncitizens who have lawfully entered the country and are thus already living here.[1] *Id.* § 1185(d).

"Public charge" under federal immigration law is a term of art that has developed a settled meaning after more than a century of usage. This case concerns

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[1] Public-charge determinations for applicants living in the country were made by the Department of Justice (DOJ) until March 2003, when Congress transferred that authority to DHS. Pub. L. No. 108-7, § 105, 117 Stat 11 (2003). Two other agencies also apply the public-charge statute. The Department of State, through its consular officers, makes determinations for applicants outside the country seeking to obtain immigrant visas. 8 U.S.C. §§ 1182(a)(4), 1201(a). And DOJ is authorized to conduct another public-charge inquiry to deport an already admitted LPR who actually becomes a "public charge" within five years of entry from causes that did not arise after entry. *Id.* § 1227(a)(5).

a Rule promulgated by DHS in August 2019, which defined "public charge" in a manner that is utterly inconsistent with that settled meaning, expands the term to cover large numbers of people never before covered, and thus exceeds the authority that Congress conferred upon the agency.

Until the issuance of the Rule at issue in this case, "public charge" had never included employed persons who receive modest or temporary amounts of supplemental benefits—i.e., government benefits designed to promote health or upward mobility rather than provide basic subsistence. Instead, from its inception, the term "public charge" has been limited to individuals who do not work and are consequently primarily dependent on the government for long-term subsistence.

This understanding of "public charge" appeared in nineteenth-century state laws that required ship captains to execute bonds to support infirm passengers "likely to become permanently a public charge." Ch. 195, § 3, 1847 N.Y. Laws 182, 184; *see* Ch. 238, § 21, 1837 Mass. Acts 270, 270-71. In these statutes, "public charge" referred to "persons utterly unable to maintain themselves," Friedrich Kapp, *Immigration, and the Commissioners of Emigration of the State of New York* 87 (1870). It did not refer to "able-bodied and industrious" immigrants who merely lacked wealth or might receive modest assistance. *See Report of the Commissioners of Alien Passengers and Foreign Paupers*, Mass. S. Doc. No. 14, at 17 (1852). States allowed such employable immigrants to land without any bond, and instead collected a per-immigrant tax that was often used in part to help immigrants find transportation and work. *See Annual Reports of the Commissioners of Emigration of the State of New York* 135 (1861).

In 1882, Congress incorporated this narrow meaning of "public charge" into federal law. Following prior state laws, Congress prohibited any "lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge" from entering the country. Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 214. "Public charge" thus adhered to its already settled meaning to refer to the fraction of immigrants likely to "become life-long dependents on our public charities." 13 Cong. Rec. 5,109 (1882) (Rep. Van Voorhis) (quotation marks omitted). Congress did not by this term exclude immigrants who were likely to receive *any* public benefits, or manifest the view that immigrants should not receive public benefits. To the contrary, in the same statute that incorporated the "public charge" concept into federal law, Congress also expressly authorized the provision of public benefits to immigrants, by directing the collection of a per-person tax "for the support and relief" of immigrants who "may fall into distress or need public aid." 1882 Act, §§ 1-2, 22 Stat. at 214. Like the prior state taxes, these funds were used in part "for protecting and caring for" immigrants "until they can proceed to other places or obtain occupation for their support." *See* 13 Cong. Rec. 5,106 (Rep. Reagan).

From 1891 to 1951, Congress reenacted public-charge provisions substantially similar to the one in the 1882 Act.[2] Throughout this time, the scope of "public charge" remained limited to individuals likely to rely almost entirely on government support to survive. *See Gegiow v. Uhl*, 239 U.S. 3, 10 (1915);

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[2] *See* Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084; Immigration Act of 1907, ch. 1134, § 2, 34 Stat. 898, 898-99; Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 876.

Howe v. United States, 247 F. 292, 294 (2d Cir. 1917). "Public charge" did not include an immigrant "able to earn her own living," *Ex parte Mitchell*, 256 F. 229, 230 (N.D.N.Y. 1919), who also received minor public assistance.

Against this background of nearly a century of statutory and regulatory usage of the term "public charge," Congress enacted the INA's public-charge provision in 1952. Congress declined to enact a new definition of "public charge," thus incorporating that term's well-established meaning into the INA. *See generally McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). Federal immigration authorities adhered to this understanding, repeatedly confirming that "public charge" refers narrowly to immigrants who are "incapable of earning a livelihood" to sustain themselves, *In re Harutunian*, 14 I. & N. Dec. 583, 589 (B.I.A. 1974), and does not include employable immigrants who might receive modest amounts of public assistance, *see In re Martinez-Lopez*, 10 I. & N. Dec. 409, 421-22 (A.G. 1962) ("public charge" does not include "healthy person" in "prime of life"); *In re Perez*, 15 I. & N. Dec. 136, 137 (B.I.A. 1974).

In 1996, Congress amended the public-charge statute to require DHS to consider certain factors in making public-charge determinations—specifically, an immigrant's age, health, family status, financial resources, and "education and skills." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 531, 110 Stat. 3009, 3009-674. But Congress did not alter the established meaning of "public charge." To the contrary, Congress rejected a proposal that would have transformed the meaning of "public charge" in the deportation context to mean an immigrant's receipt of any amount of

public benefits within a short time period. H.R. Rep. No. 104-828, at 138-39, 241 (1996) (Conf. Rep.).

Separately, in 1996, Congress enacted a complex set of statutory provisions authorizing or prohibiting the use of specific public benefits by specific categories of noncitizens after they had already entered the country or been admitted as LPRs. To satisfy a declared "national policy with respect to welfare and immigration" under which "aliens within the Nation's borders not depend on public resources to meet their needs," 8 U.S.C. § 1601(2)(A), the 1996 provisions and subsequent amendments generally prohibited LPRs from using Medicaid and Supplemental Nutrition Assistance Program (SNAP) benefits until they had lived here for five years, *id.* §§ 1612(a)(2)(L), 1613(a). Additional limits on Medicaid and SNAP use apply to immigrants who obtain LPR status through family-based applications and thus have sponsors, until the sponsored immigrant has worked for approximately ten years or become a citizen. *See id.* §§ 1183a(a)(2), 1631(b). By contrast, Congress did not impose similar time bars on LPRs' use of a number of other federal means-tested benefits, including Section 8 and other publicly funded housing benefits, or many federal public benefits that are not means tested, such as Medicare.[3] *See id.*

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[3] Congress used but did not define the term "federal means-tested public benefit" in specifying time bars and other limits on availability of benefits for LPRs. *See* 8 U.S.C. § 1613(a); 8 C.F.R. § 213a.1. The benefit-administering agencies have determined that the only federal means-tested public benefits for purposes of the Welfare Reform Act are Supplemental Security Income, Temporary Assistance for Needy Families, Medicaid, and SNAP. PRWORA: Federal Means-Tested Public Benefits Paid by the Social Security Administration, 62 Fed. Reg. 45,284, 45,284-85

§§ 1611(a), (c); 1641(b)(1).) Congress explained that it was placing limitations on accessing certain benefits to promote "self-sufficiency" and avoid incentivizing immigration. *Id.* § 1601(3), (6). But it chose to select only certain benefits for this treatment, rather than creating a wholesale prohibition on the use of benefits by immigrants or amending the definition of "public charge" to render immigrants inadmissible based solely on their likely use of benefits.

In 1999, DHS's predecessor agency (the Immigration and Naturalization Service within DOJ) issued guidance confirming that the 1996 amendments had not altered the long-settled meaning of "public charge." Consistent with over a century of usage, the guidance explained that "public charge" refers only to individuals "primarily dependent on the government for subsistence," as evidenced by publicly funded long-term institutionalization or cash assistance for income maintenance. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689 (Mar. 26, 1999). The Guidance prohibited consideration of supplemental benefits—such as food stamps, Medicaid, and Section 8 housing—in rendering public-charge determinations because, as the benefit-granting agencies had explained, such benefits are often available to employed individuals "with incomes far above the poverty level" and thus reflect Congress's "broad public policy decisions" about

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(Aug. 26, 1997); PRWORA: Interpretation of "Federal Means-Tested Public Benefit," 62 Fed. Reg. 45,256, 42,257 (Aug. 26, 1997); Food Stamp Program: Noncitizen Eligibility, and Certification Provisions, 65 Fed. Reg. 10,856, 10,876 (Feb. 29, 2000). Certain statutory limits also apply to social services block grants. 8 U.S.C. § 1612(3)(b)(3)(B).

improving public health and upward mobility. *Id.* at 28,692.

B. The Final Rule

In August 2019, DHS issued the Final Rule challenged here. The Rule radically alters the meaning of "public charge" to include, for the first time, an immigrant likely to receive very small amounts of public benefits. The benefits to be counted for this purpose include, for the first time, certain supplemental benefits such as Section 8 housing assistance, Medicaid, and SNAP benefits. 84 Fed. Reg. at 41,501. The Rule deems an immigrant to be a "public charge" based on very short-term receipt of such benefits—specifically, receipt of "one or more public benefits" during "more than 12 months in the aggregate within any 36-month period" during his life. *Id.* The Rule further provides that "receipt of two benefits in one month counts as two months." *Id.* at 41,501. Thus, for example, receiving housing assistance, food stamps, and Medicaid for a period of four months would amount to twelve months of benefit use in the aggregate and make someone a public charge under the Rule. Thus, a person can be found "likely at any time to become a public charge," 8 U.S.C. § 1182(a)(4), if a DHS official believes that the person is likely to use three such benefits for four months at any time in his or her life. 84 Fed. Reg. at 41,501.

The Rule sets forth weighted factors that DHS officials must consider to predict whether an applicant is likely to receive an aggregate of 12 months of benefits within any 36-month period during his entire life. Actual past or present receipt of enumerated benefits counts heavily against an applicant. *Id.* at 41,504. Other factors that support a "public charge"

finding include low credit scores; lack of English-language skills; having ever applied for public benefits; or having a medical condition that requires extensive treatment or interferes with work or school, regardless of whether reasonable accommodations enable the applicant to work or learn. Heavily weighted positive factors include having household income or assets of at least 250% of the federal poverty guidelines, and having private health insurance not funded with tax subsidies under the Patient Protection and Affordable Care Act. *Id.* at 41,502-04.

C. Procedural Background

Government Respondents and other plaintiffs challenged the Final Rule under the APA, alleging, among other things, that the Rule was contrary to law and arbitrary and capricious.

1. The district court's preliminary injunction order

In October 2019, the district court granted Government Respondents motion to stay the Rule's effective date pending judicial review, *see* 5 U.S.C. § 705, and for a preliminary injunction. The court concluded that Government Respondents and the public will suffer concrete, irreparable harm absent preliminary relief; by contrast, the court found that petitioners will not suffer any irreparable harm from maintaining the long-existing status quo for a short time. (Pet. App. 113a-116a.) On the merits, the court concluded that the Final Rule's transformation of "public charge" to include even temporary receipt of any amounts of supplemental benefits was likely contrary to the INA, and arbitrary and capricious. (Pet. App. 103a-111a.) The court halted implementation of

the Rule nationwide pending judicial review. (Pet. App. 116a-119a.)

After the district court and the Second Circuit denied petitioners' motions for a stay pending appeal, this Court granted a stay.[4] *Department of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (mem.)

2. The Second Circuit's affirmance

The Second Circuit largely affirmed the district court's order, holding that a preliminary injunction was warranted but modifying its scope "to cover only the states of New York, Connecticut, and Vermont." (Pet. App. 3a-4a.)

As a threshold matter, the court of appeals held that the plaintiffs had standing and were within the zone of interests of the public-charge provisions of the INA. (Pet. App. 21a-30a.) The Government Respondents had established injury because the Rule itself predicted—and the record evidence confirmed—"that a significant number of non-citizens will disenroll from public benefits as a result of the Rule's enactment," and "that expected disenrollment will result in decreased federal funding to states, decreased revenue

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[4] Government Respondents subsequently asked this Court to temporarily modify or lift the stay in light of the COVID-19 pandemic. On April 24, this Court denied that request but noted that its order did "not preclude a filing in the District Court as counsel considers appropriate." *Department of Homeland Sec. v. New York*, No. 19A785, 2020 WL 1969276 (Apr. 24, 2020) (mem.). The district court here then granted a preliminary injunction, which the Second Circuit stayed pending DHS's appeal. *See New York v. United States Dep't of Homeland Sec.*, __ F. Supp. 3d __, 2020 WL 4347264 (S.D.N.Y. July 29, 2020); *New York v. United States Dep't of Homeland Sec.*, 974 F.3d 210 (2d Cir. 2020).

for healthcare providers, and an increase in uncompensated care." (Pet. App. 22a-23a (citations omitted).) The Government Respondents—who "seek to protect the economic benefits that result from healthy, productive, and engaged immigrant communities"—were also within the zone of interests of the statute, which reflects Congress's careful balancing of "its interest in allowing admission where it advances goals of family unity and economic competitiveness against its interest in preventing certain categories of persons from entering the country." (Pet. App. 29a.)

The court of appeals then held that plaintiffs were likely to succeed on the merits of their claims that the Final Rule is (a) contrary to the INA and (b) arbitrary and capricious. The Rule is likely contrary to the INA because of its sharp departure from "the settled meaning of 'public charge'" that Congress ratified when it enacted IIRIRA. (Pet. App. 53a.) Under that settled meaning, "public charge" was limited to "those non-citizens who were likely to be unable to support themselves in the future and to rely on the government for subsistence." (Pet. App. 53a.) The Rule, by contrast, would sweep much more broadly, relying on applicants' likely receipt of certain supplemental public benefits alone to render them inadmissible, even when they are indisputably able to work and support themselves. (Pet. App. 67a.)

The court of appeals further held that the Rule is likely arbitrary and capricious because DHS failed to adequately explain both (a) its departure from over a century of settled understanding of the term "public charge," and (b) its decision to expand the list of public benefits that would be considered as part of the admissibility determination. (Pet. App. 68a.) The court emphasized that DHS had "not provide[d] *any* factual

basis" for its assumption that noncitizens using the expanded list of benefits under the Rule "would be unable to provide for their basic necessities without governmental support." (Pet. App. 73a.)

On the remaining preliminary-injunction factors, the court of appeals agreed with the district court that Government Respondents had established irreparable injury because, among other harms, the Rule "will result in reduced Medicaid revenue and federal funding and a greater number of uninsured patients seeking care, putting public hospitals that are already insufficiently funded at risk of closure." (Pet. App. 78a-79a.) And the court of appeals also agreed with the district court that the balance of the equities and the public interest supported a preliminary injunction, particularly in light of DHS's own acknowledgment that the Rule will result in "'[w]orse health outcomes, including increased prevalence of obesity and malnutrition, . . . [i]ncreased prevalence of communicable diseases, . . . [i]ncreased rates of poverty and housing instability[,] and [r]educed productivity and educational attainment.'" (Pet. App. 81a (quoting 83 Fed. Reg. at 51,270).)

On the scope of the injunction, however, the court of appeals disagreed with the district court's imposition of nationwide relief and held that, in light of the multiple parallel challenges to the Rule then pending in different circuits, the preliminary injunction here should be limited to New York, Connecticut, and Vermont. (Pet. App. 84a.)

D. Other Challenges to the Final Rule

Three other courts of appeals have also addressed the likely validity of the Rule. The Seventh and Ninth

Circuits have agreed with the Second Circuit that the Rule is likely unlawful. A panel of the Fourth Circuit originally held otherwise, but the full court has now granted en banc review of that decision.

Seventh Circuit: In *Cook County v. Wolf*, in which the Acting DHS Secretary has filed a separate petition for certiorari, the Seventh Circuit affirmed a preliminary injunction against the Rule. 962 F.3d 208 (7th Cir. 2020), *pet. filed*, No. 20-450 (Oct. 7, 2020). On likelihood of success, the court held that the Rule relied on an unreasonable interpretation of the INA's public-charge provisions because, among other defects, it "penalizes disabled persons in contravention of the Rehabilitation Act"; "conflicts with Congress's affirmative authorization for designated immigrants to receive the benefits the Rule targets"; and would preclude the admissibility of "a person who receives only *de minimis* benefits for a *de minimis* period of time." *Id.* at 228-29. The Seventh Circuit also held that the Rule is arbitrary and capricious because it fails to provide a reasoned explanation for disregarding the Rule's chilling effect on immigrant participation in public-benefits programs or "the collateral consequences of such disenrollments." *Id.* at 231. The Seventh Circuit also found irrational the Rule's "single threshold for both monetizable and nonmonetizable benefits of 12 months (stacked) over a 36-month period," which it found reflected "an absolutist sense of self-sufficiency" unsupported by the statutes. *Id.* at 231-32. The court denied a petition for rehearing en banc. Order, *Cook County*, No. 19-3169 (7th Cir. Aug. 12, 2020), ECF No. 139.

Since that decision, the U.S. District Court for the Northern District of Illinois has granted summary

judgment to the *Cook County* plaintiffs and entered a final judgment under Federal Rule of Civil Procedure 54(b) vacating the Final Rule. *Cook County v. Wolf*, No. 19-6334, 2020 WL 6393005, at *7 (N.D. Ill. Nov. 2, 2020). DHS's appeal from that judgment is pending; in the meantime, the Seventh Circuit granted DHS's request to stay the judgment pending appeal. Order, *Cook County v. Wolf*¸ No. 20-3150 (7th Cir. Nov. 19, 2020), ECF No. 21.

Ninth Circuit: In *City & County of San Francisco v. USCIS*, __ F.3d __, 2020 WL 7052286 (9th Cir. Dec. 2, 2020), the Ninth Circuit also affirmed a preliminary injunction against the Rule. Like the Second and Seventh Circuits, the Ninth Circuit held that the Rule is likely contrary to law because it impermissibly departed from the long historical understanding of "public charge" as limited to "incapacity and reliance on public support for subsistence." *Id.* at *3. And the Ninth Circuit further agreed that the Rule was likely arbitrary and capricious because it "revers[ed] prior, longstanding public policy, without adequately taking into account its potential adverse effects on the public fisc and the public welfare." *Id.* at *14.

Fourth Circuit: In *Casa de Maryland, Inc. v. Trump*, a panel of the Fourth Circuit initially reversed a preliminary injunction against the Rule on the ground that "the Rule is a permissible interpretation of the public charge provision" in the INA. 971 F.3d 220, 231 (4th Cir. 2020). Recently, however, the full court granted en banc review and vacated this panel decision. Order, *Casa de Maryland*, No. 19-2222 (4th Cir. Dec. 3, 2020), ECF No. 147; *see* Fourth Circuit L.R. 35(c) ("Granting of rehearing en banc vacates the previous panel judgment and opinion . . . .").

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Case Is a Poor Vehicle for Resolving the Legal Questions Presented by This Rule.

A. This Dispute Will Soon Become Moot Because of the Imminent Change of Administration.

Certiorari is not warranted in light of the imminent withdrawal of the Rule at issue here and the imminent mootness of this dispute that will result. The incoming presidential administration has already publicly declared that it will reverse the Rule at issue within its first one hundred days. *See The Biden Plan for Securing Our Values as a Nation of Immigrant*s (internet).[5] At minimum, the Court should hold the petition until the incoming administration has the opportunity to fully consider the federal government's litigation position and inform the Court of its views.

Fundamental principles of judicial restraint and separation of powers counsel strongly against granting certiorari to consider a rule that the Executive Branch will soon withdraw. *See Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 498-99 (1971) (Harlan, J., concurring) (writ of certiorari dismissed as improvidently granted after statute at issue repealed). As soon as the incoming administration rescinds or otherwise stays the Rule, as it has declared it will do, there will no longer be a live case or controversy for this Court to resolve. *See Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414-

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[5] For authorities available on the internet, full URLs appear in the table of authorities. All sites last visited December 9, 2020.

15 (1972) (per curiam) (challenge to statute mooted by repeal). Where, as here, "[e]ach cause of action challenged the validity of" a regulation, the Court "can do nothing to affect" the challengers' rights after the regulation is withdrawn, "thus making th[e] case classically moot for lack of a live controversy." *Akiachak Native Cmty. v. United States Department of Interior*, 827 F.3d 100, 106 (D.C. Cir. 2016); *see, e.g.*, *Kremens v. Bartley*, 431 U.S. 119, 129 (1977) ("enactment of the new statute clearly moots the claims of the named appellees" (footnote omitted)); *Wyoming v. United States Dep't of Interior*, 587 F.3d 1245, 1250 (10th Cir. 2009) (Gorsuch, J.) ("beyond cavil" that Park Service's issuance of new rule mooted challenge to old rule).

Contrary to Petitioners' contentions, the Court need not, and should not, reach out to address the Rule's "validity" or to resolve any "uncertainty" about whether DHS exceeded its statutory authority in issuing the Rule. (*See* Letter from Acting Solicitor General Jeffrey B. Wall to Scott Harris ("Letter") 1, *Department of Homeland Sec. v. New York*, No. 20-449 (Nov. 20, 2020); *see also* Pet. 14-22.) An opinion regarding the legality of the Rule after it is no longer in force "could only constitute a textbook example of advising what the law would be upon a hypothetical state of facts rather than upon an actual case or controversy as required by Article III." *Wyoming*, 587 F.3d at 1250 (quotation marks omitted). The Court should not grant certiorari to decide "hypothetical issues or to give advisory opinions" about issues that will soon cease to have any practical effects on the parties, *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (per curiam)—no matter how important the issues might have been or how much a party might

want a ruling to "satisfy [its] demand for vindication or curiosity," *Wyoming*, 587 F.3d at 1250.

Petitioners contend that a live dispute about the Rule will remain until the end of the Court's current term because DHS must "go through notice-and-comment rulemaking again before making any final determination" to render the Public Charge Rule inoperative. (Letter, *supra*, at 2.) But this contention ignores the range of more immediate regulatory options available to the new administration that will also eliminate any live controversy. For example, the incoming administration could promptly amend or stay the Rule through an interim final rulemaking that would take effect immediately upon publication, without prior notice and comment or with notice and comment to follow publication.[6] *See* 5 U.S.C. § 553(b)(3)(B). Alternatively, just as the current administration has voluntarily refrained from full enforcement of the Rule during the COVID-19 pandemic,[7] the incoming administration could also exercise its executive discretion to decline to enforce the Rule in whole or in part.[8] Either of these options

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[6] *See, e.g.*, U.S. Dep't of the Treasury, U.S. Dep't of Labor, U.S. Dep't of Health & Human Servs., Interim Final Rule, Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,813-15 (Oct. 13, 2017).

[7] *See* U.S. Citizenship & Immigration Servs., *Public Charge: Alert* (internet) (declining to enforce Public Charge Rule as applied to use of testing, treatment, or preventative care related to COVID-19, even if such treatment is provided or paid for by a supplemental-benefit program covered by the Rule).

[8] *See e.g.*, Notification of Nonenforcement of Health and Human Services Grants Regulation, 84 Fed. Reg. 63,809 (2019)

could be done well before the end of the Court's current term.

In any event, denying certiorari will avoid unnecessary adjudication about a Rule that will soon be a dead letter, even if its withdrawal is accomplished through somewhat lengthier notice-and-comment procedures. In that situation, the Court should "say that the controversy has become so attenuated that considerations of prudence and comity counsel the court to stay its hand" and decline to rule "at least as a matter of judicial restraint if not constitutional imperative." *See Wilderness Soc'y v. Kane Cty., Utah*, 632 F.3d 1162, 1175 (10th Cir. 2011) (en banc) (Gorsuch, J., concurring) (quotation and alteration marks omitted). Such judicial restraint would also respect the incoming administration's prerogative to reevaluate the Rule—as it is entitled to do both under the INA and the Administrative Procedure Act—and to reach its own policy judgment about the implementation of the public-charge statutes.

Petitioners' speculation about potential legal challenges to the Rule's future withdrawal do not warrant granting certiorari in this case, which does not involve any such challenge. (*See* Letter, *supra*, at 2.) The existence, timing, or nature of any future lawsuit is wholly speculative; and to the extent such a lawsuit is filed, "the courts can and will address those questions if and when they arise," *Wilderness Soc'y*, 632 F.3d at 1175 (Gorsuch, J., concurring). Moreover,

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(announcing nonenforcement of promulgated regulation); U.S. Department of Labor, *Field Assistance Bulletin No. 2018-02* (May 7, 2018) (internet) (temporary nonenforcement policy regarding rules for investment advice fiduciaries).

it is dubious at best whether any party could successfully challenge the Rule's rescission, which would simply return the public-charge inquiry to the status quo ante under the 1999 Guidance. Petitioners have conceded that the 1999 Guidance constitutes a reasonable and lawful interpretation of the INA's public-charge provision. *See* Br. for Appellants 35, *New York v. United States Dep't of Homeland Sec.*, No. 19-3591 (2d Cir. Dec. 13, 2019), ECF No. 129.

No exception to mootness would apply to the incoming administration's imminent withdrawal of the Rule. Regulatory action to rescind or substantially alter a challenged rule does not fall under the "voluntary cessation" exception to mootness unless there is a reasonable likelihood that the agency will reissue the same challenged rule after dismissal. *See, e.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11 (1982). No such likelihood of reissuance exists where, as here, a new administration has already committed to following a different policy. *See Wilderness Soc'y*, 632 F.3d at 1174-76 (Gorsuch, J., concurring) (challenges to provisions of repealed county ordinance were moot where county expressed no interest in reenacting them).

The exception to mootness for legal questions that are capable of repetition yet evade review also does not apply here. There is no reasonable expectation that the incoming administration will again subject Government Respondents to this Rule. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (exception applies only where there is "a reasonable expectation that the same complaining party [will] be subject to the same action again" (brackets in original)). It is wholly speculative whether a future administration will choose to re-promulgate the

current Rule without any meaningful amendments. And even if one were to do so, a challenge to that new rule would not likely evade this Court's review. *See, e.g.*, *Diffenderfer*, 404 U.S. at 414.

B. The Preliminary Posture of This Case Renders It an Exceedingly Poor Vehicle for Reviewing the Legality of the Public Charge Rule.

Even if this dispute were not likely to become moot, the preliminary posture of the case would independently render it a poor vehicle for addressing the legality of the Rule.

First, the petition seeks review of a preliminary injunction order rather than a final adjudication of the merits of the Government Respondents' claims. This interlocutory order was issued without the benefit of the administrative record or the discovery that is currently ongoing in the district court, addresses only a subset of the Government Respondents' claims, and reflects only the lower courts' preliminary views of the merits. To the extent that the validity of this Rule remains a live issue, this Court's review would benefit from a final judgment that resolves all of plaintiffs' claims on a full record and with the benefit of the lower courts' final findings and legal analyses. *See University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (preliminary injunction "is customarily granted on the basis of procedures that are less formal and evidence that is less complete" than final judgments).

Such a vehicle may soon be presented to this Court. The challenge by Cook County, Illinois, to the validity of the Final Rule has now proceeded to final judgment in the U.S. District Court for the Northern

District of Illinois, which invalidated the Rule as both contrary to the INA and arbitrary and capricious under the APA. *Cook County*, 2020 WL 6393005, at *2. (An earlier decision in that case—a judgment of the Seventh Circuit affirming a preliminary injunction—is the subject of a pending petition for certiorari filed in parallel to the petition here and on the same date. *See* Petition for a Writ of Certiorari, *Wolf v. Cook County,* No. 20-450 (filed Oct. 7, 2020)). The appeal from the final judgment in the *Cook County* case has been held in abeyance by the Seventh Circuit pending this Court's disposition of the pending petition seeking review of the preliminary injunction ruling. But if this Court denies the pending petition in the *Cook County* case, the Seventh Circuit will proceed with briefing and argument on the appeal from the Rule 54(b) final judgment, and the issue can be appropriately presented for this Court's review in the context of a final judgment.

Second, the preliminary injunction at issue here is likely to be overtaken by further proceedings in the district court, including the adjudication of distinct grounds for invalidating the Rule that are not presented by this petition. The Government Respondents have already filed a motion for partial summary judgment seeking invalidation of the Rule on the alternative ground that it was improperly issued by former DHS Acting Secretary Kevin McAleenan, who was ineligible to serve in the Acting Secretary role under the Federal Vacancies Reform Act and Homeland Security Act. *See* Mem. of Law in Supp. of Pls.' Mot. for Partial Summary J., *New York v. Department of Homeland Sec.*, No. 19-cv-7777 (S.D.N.Y. Oct. 27, 2020), ECF No. 241. This summary judgment motion will be fully briefed by December 18, 2020. If the

district court issues a final judgment invaliding the Rule on this basis, the preliminary injunction will be moot, and on a legal ground that has not yet been presented for this Court's review. *See Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007). This Court should thus decline to grant certiorari to review a preliminary injunction order that may become "unimportant by reason of the final result, or of intervening matters," *American Constr. Co. v. Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893). *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree.").

C. There Is No Longer a Circuit Split for This Court to Resolve.

Although petitioners here urged this Court to grant certiorari because "[t]he courts of appeals are divided over the lawfulness of the Rule" (Pet. 24), intervening events have removed that circuit split. As of the filing of this brief, the only courts of appeals with extant decisions addressing the lawfulness of this Rule—the Second, Seventh, and Ninth Circuits—have each held that the Rule is likely unlawful, whether because it is contrary to the INA, arbitrary and capricious in violation of the APA, or both. See *supra*, at 12-14. Although a panel of the Fourth Circuit originally upheld the Rule, that ruling has since been vacated by the full court's decision to rehear the case en banc. See *supra*, at 14. There is thus no longer any split among the circuit courts arising from these interlocutory appeals for this Court to resolve.

II. The Court of Appeals Acted Well Within Its Discretion in Affirming the Preliminary Injunction.

Certiorari is also unwarranted because the court of appeals properly affirmed the preliminary injunction.

A. The Rule Is Likely Contrary to Law.

1. As the court of appeals correctly recognized, the Final Rule's unprecedented definition of "public charge" exceeds the well-established understanding of that term that Congress incorporated into the INA, and thus exceeds "the bounds of reasonable interpretation," *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014).

The Rule now defines "public charge" to include immigrants who are able to, and do in fact, work, but who might "receive only hundreds of dollars, or less, in public benefits" over just a few months. *See* 84 Fed. Reg. at 41,360-61. This new definition represents a radical departure from what had previously been a well-settled understanding of "public charge." When Congress originally enacted the public-charge provision in 1882, it adopted the prevailing understanding—reflected in early state laws—that "public charge" was limited to "persons utterly unable to maintain themselves," such as those individuals who were "physically and mentally incapacitated for labor." Kapp, *supra*, at 87, 91. Consistent with this understanding, the 1882 statute excluded only the few immigrants unable "to support themselves by honest industry and labor," 13 Cong. Rec. 5,112 (Rep. Van Voorhis), while allowing employable immigrants to enter the country subject to a per-person tax used to assist immigrants until they could "obtain occupation

for their support," *id.* at 5,106 (Rep. Reagan). (Pet. App. 33a-35a.)

In the decades that followed, courts and immigration agencies repeatedly made clear that "public charge" under federal immigration law was limited to individuals whose "intrinsic and problematic characteristics" rendered them unable or unwilling to work, and thus incapable of supporting themselves. (Pet. App. 36a.) *See, e.g.*, *Gegiow*, 239 U.S. at 10 ("public charge" means persons with "permanent personal objections" preventing them from employment); *Howe*, 247 F. at 294 ("We are convinced that Congress meant the act to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future."). By contrast, the term did not extend to employed or employable immigrants who might receive some modicum of public benefits. And Congress incorporated this established understanding of "public charge" when it enacted the INA's public-charge provision in 1952, without redefining the term. *See McDermott Int'l*, 498 U.S. at 342; *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."). Indeed, a Senate report about the INA confirms that Congress understood the extensive history of the public-charge provision and the precedents interpreting it, and retained the preexisting scope of "public charge" rather than expand it. *See* S. Rep. No. 1515, at 45-53, 335-50 (1950).

Here, the Final Rule goes far "beyond the meaning that the statute can bear," *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994), by adopting the unprecedented view that an individual

can become a "public charge" simply by receiving minor and temporary amounts of certain supplemental benefits. As DHS's predecessor and the federal agencies that actually administer these benefits made clear in the 1999 Guidance, Congress made these programs available not only to the truly destitute, but also to many employed individuals who have "incomes far above the poverty level"—not to support their subsistence, but rather to further "broad public policy decisions" about improving public health, nutrition, and economic opportunities, 64 Fed. Reg. at 28,692. The supplemental benefits targeted by the Rule are thus a far cry from almshouses, institutional care, or income-maintenance programs—programs that are designed to serve destitute individuals who are "extremely unlikely" to meet their "basic subsistence requirements" without relying primarily on the government in the long term. Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,678, 28,686 (May 26, 1999); *see id.* at 28,678 (long-term care institutions provide all subsistence needs); *id.* at 28,687 (Supplemental Security Income protects "from complete impoverishment").

2. Rather than engaging directly with this history, petitioners instead contend that certain historical sources (including a treatise and two dictionaries) support an understanding of "public charge" as including anybody who imposes *any* "money charge" or "expense" on "the public for support and care." (Pet. 14 (quotation marks omitted).) But, as those sources make clear, this language is drawn from a district court case that involved a noncitizen who was institutionalized because he was "unable to care for himself" and would have "starve[d] to death within a short time" absent institutional care. *Ex parte Kichmiriantz*, 283 F. 697,

698 (N.D. Ca. 1922); *see, e.g.*, *Black's Law Dictionary* (3d ed. 1933) (citing *Kichmiriantz*, 283 F. at 698). And the case held that even this noncitizen could not be deemed a public charge because the "money charge" for his institutional care had been paid for by his relatives rather than the public. *Kichmiriantz*, 283 F. at 698.

Petitioners also defend the Rule by arguing that the term "public charge" is "ambiguous" and thus "require[s] further administrative specification." (Pet. 18.) But as this Court has held, "the presence of some uncertainty" over a statutory term does not authorize an agency to adopt "virtually any interpretation," and a court "can discern the outer limits of the [statutory] term . . . even through the clouded lens of history." *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 525 (2009). Here, "[w]hatever gray area may exist at the margins . . . Congress's intended meaning of 'public charge' unambiguously forecloses the Rule's expansive interpretation." (Pet. App. 56a.)

Petitioners are also wrong to contend that "[r]elated statutory provisions" support their expansive new definition of "public charge." (Pet. 15.) Petitioners acknowledge that the provisions on affidavits of support are substantially narrower than the scope of the Rule in many ways but assert that these distinctions are immaterial to the meaning of the statutory term "public charge" (Pet. 15, 19). The Rule's vast expansion of that statutory term, however, is the regulatory action that is under review here and that petitioners must defend as a permissible and reasonable interpretation. The affidavit provisions' concededly limited reach thus does not support the critical change marked by this Rule: its expansion of "public charge" far beyond the outer bound settled by historical meaning and beyond even the affidavit provisions'

own scope. (Pet. App. 64a.) Among other distinctions, only some noncitizens must obtain affidavits of support; such affidavits are not required for Section 8 housing benefits, 8 C.F.R. § 213a.1, which are among the benefits that trigger application of this Rule; and the affidavit requirement applies only to covered benefits received during defined time periods. 8 U.S.C. §§ 1182(a)(4)(C)-(D), 1183a(a)(2)-(3). These limited affidavit provisions do not remotely suggest that Congress understood the meaning of "public charge" for *all* applicants to include *any* individual likely to receive *any* means-tested benefits at *any* time in the future—including time periods well beyond when affidavits of support would be enforceable.

The policy reasons to limit the affidavit provisions' scope (Pet. 20) further affirm that these provisions serve fundamentally different purposes and operate in fundamentally different ways from the public-charge provision. Congress required affidavits from family-sponsored LPR applicants and made those affidavits legally enforceable to ensure that a meaningful post-admission remedy will be available in some (but not all) instances where an LPR actually receives benefits after being admitted despite a sponsor's private contractual promise to support the applicant financially. (*See* Pet. App. 64a.) *See also City & County of San Francisco*, 2020 WL 7052286, at *10. Congress's addition of this post-admission remedy did not silently transform the settled scope of the threshold "public charge" inquiry.

Petitioners similarly misplace their reliance (Pet. 16) on policy statements in the 1996 Welfare Reform Act and related provisions about furthering "[s]elf-sufficiency" in "immigration policy" and preventing "the availability of public benefits" from incentivizing

immigration. 8 U.S.C. § 1601. Congress effectuated those goals in the 1996 Act by limiting immigrants' use of specific benefits in particular ways, such as by imposing a waiting period for eligibility for already-admitted LPRs and denying benefits altogether to undocumented immigrants. But that same Congress pointedly did *not* pursue these "self-sufficiency" goals through amending the threshold public-charge provision. To the contrary, Congress affirmatively rejected a proposal to transform the meaning of "public charge" in the deportation context to mean an immigrant's receipt of any amount of public benefits within a short time period. H.R. Rep. No. 104-828, at 138-39, 241. There is thus no support for petitioners' assumption that the "policy" expressed in the 1996 Act was meant to be reflected in an expanded definition of "public charge." *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174-75 (2009).

B. The Rule Is Likely Arbitrary and Capricious.

The court of appeals also correctly found that the Final Rule is likely arbitrary and capricious.

As an initial matter, petitioners simply do not respond to one of the court of appeals' grounds for finding the Rule arbitrary and capricious. As the court noted, in issuing the 1999 Guidance, DHS's predecessor consulted extensively with the benefit-granting agencies and found that receipt of non-cash benefits—including SNAP, housing assistance, and Medicaid—did not indicate poverty or dependence on the government because Congress had made those benefits available to "'families with incomes far above the poverty level,'" and for purposes distinct from providing basic subsistence. (Pet. App. 72a (quoting 64

Fed. Reg. at 28,692).) But the current Rule reaches the opposite conclusion—finding that receipt of these benefits automatically means that an individual cannot afford the "basic necessities of life" and is thus a "public charge," Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,159 (Oct. 10, 2018)—without "provid[ing] *any* factual basis" for this sharp change of position. (Pet. App. 73a.) As petitioners do not contest, SNAP, Medicaid, and federal housing assistance "sweep more broadly than just families on the margin, encompassing those who would no doubt keep their families fed and housed without government support but are able to do so in a healthier and safer way because they receive supplemental assistance." (Pet. App. 77a.) Petitioners thus "go[] too far in assuming that all those who participate in non-cash benefits programs would be otherwise unable to meet their needs and that they can thus be categorically considered 'public charges.'" (Pet. App. 77a.)

The court of appeals also correctly rejected petitioners' defense of the Rule as consistent with a congressional policy of "self-sufficiency." (Pet. App. 69a.) As explained above (at 27-28), petitioners misread Congress's invocation of this policy in the 1996 Welfare Reform Act; the policy there was not some free-floating authorization to DHS to police the self-sufficiency of the immigrant population, but rather was an explanation of that Act's immigration-based restrictions on eligibility for certain public benefits.

Petitioners fault the court of appeals for purportedly reading the INA's public-charge provision out of the statute by precluding DHS from taking into account *any* public benefit for which an immigrant would be eligible. (Pet. 20-21.) But the court of appeals did not question whether certain types of public

assistance for which an immigrant may be eligible—including cash assistance or institutionalized care—could be material to the public-charge determination. Instead, the court relied on the distinct nature and purpose of the specific benefits that the Rule includes in its expanded definition of public charge to reject petitioners' attempts to justify the Rule as a vindication of any "self-sufficiency" policy expressed by Congress in the 1996 Act. As the court of appeals noted, and petitioners do not dispute, the purpose of SNAP is to provide families with "a *more nutritious* diet," and the purpose of federal housing benefits is to provide safer or more convenient housing to "those of low *and moderate* income." (Pet. App. 74a-75a (quotation marks omitted).) In other words, Congress intended these programs to provide *supplemental* benefits even to families who otherwise are self-sufficient; there is no indication that these programs are limited to those who could not otherwise afford any food or housing without government support. The Rule's contrary conclusion that receipt of these public benefits necessarily indicates long-term dependence on public support is thus "unmoored from the nuanced views of Congress."[9] (Pet. App. 70a.)

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[9] Petitioners separately attack the district court's finding that the Rule also likely violated the Rehabilitation Act and equal protection. (Pet. 23-24.) But the court of appeals did not address those claims in light of its other holdings (Pet. App. 32a n.20), and petitioners' disagreement with the district court's reasoning provides no basis for a grant of certiorari by this Court.

C. The Equities Weigh In Favor of a Preliminary Injunction.

Petitioners do not respond at all to the court of appeals' findings that irreparable injury to the plaintiffs, the balance of the equities, and the public interest all support a preliminary injunction. (Pet. App. 78a-81a.) But these equitable considerations would by themselves be powerful reasons to uphold the preliminary injunction. As this Court has recognized, "[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam).

Here, the court of appeals found that implementation of the Rule would reduce Government Respondents' Medicaid revenue and other federal funding; strain public-health budgets by increasing the numbers of uninsured patients who must nonetheless be treated by public hospitals; and force States and localities "to undertake costly revisions to their eligibility systems to ensure that non-citizens are not automatically made eligible for or enrolled in benefits they may no longer wish to receive after the Rule's implementation." (Pet. App. 78a-79a.) And the Rule itself predicts that its likely effects include "[w]orse health outcomes"; "[i]ncreased prevalence of communicable diseases," including among citizens; "[i]ncreased rates of poverty and housing instability"; and "[r]educed productivity and educational attainment." 83 Fed. Reg. at 51,270.

On the other side of the ledger, the only interest petitioners have ever identified is their interest in

pursuing their preferred immigration policy. (Pet. 26-27.) But the preliminary injunction here merely restored the status quo that had been in place at least since the 1999 Guidance. At no point during this litigation have petitioners ever pointed to any concrete harms from implementation of the 1999 Guidance. The court of appeals correctly recognize that petitioners' desire to change the status quo did not "outweigh[] the wide-ranging economic harms that await the States . . . upon the implementation of the Rule." (Pet. App. 80a.)

D. Petitioners' Threshold Arguments Lack Merit.

Finally, the court of appeals correctly rejected petitioners' contention that Government Respondents fall outside of the zone of interests of the relevant statutes here.[10] (Pet. App. 27a-30a.) Given the APA's "generous review provisions," the zone-of-interests test is satisfied unless plaintiffs' 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." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 & n.16 (1987) (quotation marks omitted). Government Respondents easily satisfy this lenient standard here. Congress enacted the public-charge provision in part to protect state and city fiscs. But Congress also maintained a narrow meaning of "public charge" to ensure that States and their subdivisions will continue to receive the economic and other benefits that flow from employable immigrants becoming "a valuable

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[10] Petitioners no longer contest Government Respondents' standing.

component part of the body-politic," 13 Cong. Rec. 5,108 (Rep. Van Voorhis). The Rule acknowledges that it will impose substantial costs on these state fiscal interests. The zone-of-interests test is thus satisfied.

CONCLUSION

The petition for a writ of certiorari should be denied.

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