No. 19A785

In the Supreme Court of the United States

United States Department of Homeland Security, et al.,

Applicants,

v.

Make the Road New York, et al.,

Respondents.

OPPOSITION TO APPLICATION FOR A STAY OF THE INJUNCTIONS ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Ghita Schwarz
Brittany Thomas
Baher A. Azmy
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6445

Susan E. Welber
Kathleen Kelleher
Susan Cameron
Hasan Shafiqullah
THE LEGAL AID SOCIETY
199 Water Street, 3rd Floor
New York, New York 10038
(212) 577-3320

Andrew J. Ehrlich
Counsel of Record
Jonathan H. Hurwitz
Elana R. Beale
Robert J. O'Loughlin
Daniel S. Sinnreich
Amy K. Bowles
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Attorneys for Respondents Make the Road New York, African Services Committee, Asian American Federation, Catholic Charities Community Services (Archdiocese of New York), and Catholic Legal Immigration Network, Inc.

January 22, 2020

CORPORATE DISCLOSURE STATEMENT

Respondent Make the Road New York ("MRNY") has no parent corporation, and no publicly held corporation owns 10 percent or more of MRNY.

Respondent African Services Committee ("ASC") has no parent corporation, and no publicly held corporation owns 10 percent or more of ASC.

Respondent Asian American Federation ("AAF") has no parent corporation, and no publicly held corporation owns 10 percent or more of AAF.

Respondent Catholic Charities Community Services (Archdiocese of New York) ("CCCS-NY") is a wholly owned subsidiary of Catholic Charities, Archdiocese of New York. No publicly held corporation owns 10 percent or more of CCCS-NY.

Respondent Catholic Legal Immigration Network, Inc. ("CLINIC") has no parent corporation, and no publicly held corporation owns 10 percent or more of CLINIC.

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INTRODUCTION

This case does not present the extraordinary circumstances warranting a stay by this Court while the case is being considered by the Court of Appeals on an expedited basis. The preliminary injunction defendants challenge merely preserves the status quo. It does so by requiring defendants to continue using the same test to determine whether noncitizens are inadmissible as "likely at any time to become a public charge" that has been in place for more than twenty years—a test that defendants concede is consistent with the governing statute. Defendants point to no urgent need to change that standard immediately and identify no concrete harm if they are delayed in implementing their preferred policy. On the other side of the scale, as the district court found, allowing defendants to implement the radical changes they propose would cause irreparable injury to plaintiffs and grave, widespread harm to immigrants, their families, and the public health. Four courts of appeals, including the Second Circuit, are already addressing the issues presented by this application, all on an expedited basis. Those appeals will be fully briefed in a matter of weeks. It is premature to presume that this Court will grant certiorari before *any* appellate court has ruled on the merits. In these circumstances, defendants do not carry their "especially heavy burden," *Edwards* v. *Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (quotations marks omitted), to justify a stay by this Court.

Plaintiffs challenge a rule promulgated by the Department of Homeland Security ("DHS"), 84 Fed. Reg. 41,292 (Aug. 14, 2019) (the "Rule"), that seeks to impose drastic restrictions on the ability of low-income noncitizens (primarily persons already living in this country with their families) to achieve lawful permanent residence. Under Section 212(a)(4) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(4), noncitizens are deemed inadmissible or ineligible for status adjustment if, in the government's opinion, they are "likely

at any time to become a public charge." For a noncitizen living in the United States as a nonimmigrant, a finding of inadmissibility precludes adjustment of status to lawful permanent resident. In many cases, denial of status adjustment can also subject noncitizens to removal and separation from their families.

The Rule purports to redefine the statutory term "public charge" to include any noncitizens the government deems likely, for an aggregate of twelve months over three years at any time in the future, to receive cash or certain supplemental noncash public benefits, including Medicaid, Supplemental Nutrition Assistance Program benefits ("SNAP," formerly food stamps), or certain forms of housing assistance even in small amounts—irrespective of their ability to work and care for themselves, and regardless of whether they have received public benefits in the past. As one court noted, "[t]o take a plausible example, someone receiving $182 over 36 months . . . in SNAP benefits is a public charge under the Rule." *City & Cty. of S.F.* v. *USCIS*, 408 F. Supp. 3d 1057, 1099 (N.D. Cal. 2019).

Defendants cannot show a likelihood of success on the merits of plaintiffs' challenge. The Rule is contrary to Congressional intent, and represents a fundamental break from more than 138 years of judicial and administrative understanding of the meaning of the statutory term "public charge." In that time, administrative agencies and courts, including this Court, have consistently interpreted it to apply only to noncitizens who are unable to care for themselves, and are therefore likely to be primarily or exclusively reliant on public support for subsistence. Consistent with this narrow understanding, since the turn of the twentieth century, the percentage of immigrants denied admission or lawful permanent residence on public charge ground has consistently been a fraction of one percent. Congress has consistently approved this understanding by repeatedly reenacting the provision without relevant change and without

redefining the term "public charge," most recently in 1996. Congress has also repeatedly turned back legislative efforts to define the term as the Rule now seeks to do.

The Rule departs from this settled and Congressionally approved understanding. Plaintiffs are not aware of a single judicial or administrative case in the 138 years since the statute was enacted in which noncitizens were deemed likely to be a public charges based solely on their projected future eligibility for public benefits, without regard to their ability to work or to support themselves. In contrast to the historical exclusion rate of less than one percent, "the proposed redefinition [of 'public charge'] would mean that most native-born, working-class Americans are or have been public charges." Center for American Progress Comment, D. Ct. Dkt. 50-29, at 15. Defendants have offered no evidence that Congress ever intended to permit that extraordinary result.

The district court properly found, based on largely uncontradicted evidence, that the Rule will cause enormous harm to plaintiffs, immigrants, their families (including citizen children), and the Nation. As the district court concluded, the Rule would "expose individuals to economic insecurity, health instability, denial of their path to citizenship, and potential deportation." App. 46a. This harm is not limited to noncitizens who are covered by the Rule. By DHS's own estimates, the Rule will cause hundreds of thousands of individuals and households, in many cases noncitizens not even subject to public charge scrutiny, to forego public benefits for which they are eligible, out of fear and confusion about the consequences for their immigration status of accepting such benefits. *See* Notice of Proposed Rulemaking, 83 Fed. Reg. 51,114, 51,269 & Table 53 (Oct. 10, 2018). As a result, DHS projected that the Rule would lead to adverse health outcomes including increased malnutrition (especially for pregnant or breastfeeding women, infants, or children) and increased prevalence of communicable diseases, increased poverty and

housing instability, reduced productivity, and other "unanticipated consequences." *See id.* at 51,270. The stay that defendants seek would exacerbate this harm by creating even more confusion and uncertainty.

Finally, the district court did not abuse its discretion in enjoining the Rule nationwide. The injunction is consistent with Congress's directive in the Administrative Procedure Act ("APA") that the courts "set aside" unlawful agency action, 5 U.S.C. § 706, and its grant of authority to the courts to "postpone the effective date" of such action, *id.* § 705. The district court found that a nationwide injunction was necessary to provide complete preliminary relief to plaintiffs, including plaintiff Catholic Legal Immigration Network, Inc. ("CLINIC") which supports affiliates in 49 states and the District of Columbia. The courts of appeals should be allowed, after full briefing and argument and review of the evidentiary record, to address the scope of any injunction in the first instance. That the lower courts have come to different conclusions as to whether to stay preliminary injunctions pending those appeals does not subject defendants to inconsistent directives, or otherwise create a need for this Court to intervene before the courts of appeals address the merits.

The Court should decline defendants' invitation to intervene at this stage, and allow the normal appellate process to proceed.

STATEMENT OF THE CASE

I. THE HISTORY OF "PUBLIC CHARGE"

Since the term "public charge" first became part of U.S. immigration law as part of the Immigration Act of 1882, it has been interpreted and applied narrowly by courts and agencies to refer only to a small number of noncitizens who are unable to care for themselves, and accordingly are likely to be institutionalized or otherwise primarily dependent on the government for subsistence. Congress has repeatedly approved that interpretation, most recently in 1996. It

has never authorized the Executive to redefine "public charge"—as the Rule now seeks to do—to refer to anyone expected to receive benefits used by millions of working Americans. On the contrary, it has expressly rejected legislative efforts to achieve that result.

A. The Original Meaning of "Public Charge" Referred to Narrow Classes of Persons Unable to Care for Themselves

The term "public charge" first appeared in federal immigration law in the Immigration Act of 1882, 47th Cong. ch. 376, 22 Stat. 214, § 2, which provided that "any person unable to take care of himself or herself without becoming a public charge" could be denied admission to the United States. Later enactments adopted the current phrasing: "likely to become a public charge." *E.g.*, 1891 Immigration Act, 51st Cong. ch. 551, 26 Stat. 1084 § 1. Under current law, the statute applies both to noncitizens seeking admission and to those already residing in the United States and seeking to adjust their status to that of lawful permanent resident. *See* 8 U.S.C. § 1255(a).

As the Ninth Circuit acknowledged in granting defendants' motion to stay the injunctions issued from district courts within that circuit, "[t]he 1882 act did not consider an alien a 'public charge' if the alien received merely some form of public assistance." *City & Cty. of S.F.* v. *USCIS*, 944 F.3d 773, 793 (9th Cir. 2019). In enacting the 1882 Act, Congress intended "public charge" to refer to those likely to become long-term residents of "poor-houses and alms-houses"—*i.e.*, persons who were institutionalized and wholly dependent on the government for subsistence. 13 Cong. Rec. 5109 (June 19, 1882) (statement of Rep. Davis). The Act expressly recognized that a need for short-term public assistance did not render a person a public charge. Thus, the Act established an "immigrant fund" to provide assistance for immigrants who, while not excludible as likely public charges, might require temporary "care" and "relief" for new

immigrants "until they can proceed to other places or obtain occupation for their support." 22 Stat. 214, § 1; 13 Cong. 5106 (June 19, 1882) (statement of Rep. Reagan).

Consistent with Congress's intent that a temporary need for public assistance would not render an immigrant a public charge, this Court, in its only decision construing the public charge provision, held that the provision was intended only to exclude immigrants "on the ground of permanent personal objections accompanying them," rather than those needing temporary assistance or who might be unable to find work. *Gegiow* v. *Uhl*, 239 U.S. 3, 10 (1915). Other decisions from the same period likewise found the provision to apply only to "persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future." *Howe* v. *United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917).

B. Administrative Decisions for Nearly a Century Affirm That Mere Receipt of Public Benefits Does Not Render the Recipient a Public Charge

The original scope of "public charge" as referring solely to persons unable to care for themselves remained in place throughout the twentieth century. In the leading administrative case of *Matter of B-*, 3 I. & N. Dec. 323, 324 (B.I.A. 1948), the Board of Immigration Appeals ("BIA") held that "acceptance by an alien of services provided by a State . . . to its residents . . . does not in and of itself make the alien a public charge [for removal purposes]." The holding in *Matter of B-* has been the law for more than 70 years. *See, e.g.*, *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (B.I.A. 1962; A.G. 1964) (explaining that, to exclude a noncitizen as likely to become a public charge, "the [INA] requires more than a showing of a possibility that the alien will require public support"); *Matter of Perez*, 15 I. & N. Dec. 136, 137 (B.I.A. 1974) ("The fact that an alien has been on welfare does not, by itself, establish that he or she is likely to

become a public charge.").[1] Defendants have acknowledged that these and other administrative decisions "clarified that . . . receipt of welfare would not, alone, lead to a finding of likelihood of becoming a public charge." 83 Fed. Reg. at 51,125.[2]

Administrative decisions over decades have uniformly focused on the noncitizen's ability to care for herself, including through employability or assistance from family, not on the mere receipt of public benefits. To take just a few examples:

- *Matter of T-*, 3 I. & N. Dec. 641 (B.I.A. 1949): Petitioner and son not excluded on public charge grounds because petitioner was "quite capable of earning her own livelihood independent of her husband" and the son was trained in tailoring.

- *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409 (B.I.A. 1962; A.G. 1964): Petitioner not likely to become a public charge, despite his falsifying an offer of employment, complete

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[1] Defendants' assertion that *Matter of B-* held that a noncitizen could be deemed a public charge merely because she received benefits consisting of "clothing, transportation, and other incidental benefits" and those benefits were not repaid on demand, App. 25 & n.4, is unsupported by the decision. The opinion says nothing about whether receipt of such temporary benefits would be sufficient to trigger a public charge finding. Nor was that issue presented, because the respondent in that case was a long-term resident of a state mental institution. Defendants have pointed to no administrative decision in the seventy years since *Matter of B-* was decided in which receipt of such "incidental" benefits, alone, was held sufficient to render a person a public charge. On the contrary, as late as 1996, Senator Alan Simpson unsuccessfully proposed a measure to redefine "public charge" by statute so as to "override" *Matter of B-*, which he argued had rendered the public charge provision "virtually unenforced and unenforceable." 142 Cong. Rec. S4401, S4408–09 (1996). Congress's rejection of this proposal is discussed further below. *See infra* pp. 11–12.

[2] Defendants cite the 1933 and 1951 editions of Black's Law Dictionary, App. 24, and a 1929 immigration treatise, App. 25 (quoting Arthur Cook et al., *Immigration Laws of the United States* § 285 (1929)), in support of the claim that receipt of "any" amount of public benefits historically rendered the recipient a public charge. But all three of these sources rely for this purpose on a single case, *Ex Parte Kichmiriantz*, 283 F. 697 (N.D. Cal. 1922), and that case does not support defendants' position. The court in *Kichmiriantz* held that the respondent was not a public charge despite having been "committed to the Stockton State Hospital for the insane" within five years of admission, and was (according to testimony from an examining physician) "unable to care for himself in any way." *Id.* at 697–98. The court ultimately found him *not* to be a public charge because his family covered the cost of his "care and maintenance." *Id.* at 698. Far from supporting the notion that the receipt of "any" amount of public benefits renders a person a public charge, *Kichmiriantz* reflects the consistent historical focus of the term on those wholly unable to care for themselves. *Id*. at 697.

lack of English fluency, and only $50 in assets, when he was young, had work experience in the United States, and had family in United States that was willing to assist him.

- *Matter of Harutunian*, 14 I. & N. Dec. 583 (1974): Petitioner likely to become a public charge because she was 70, "incapable of earning a livelihood," "had no one responsible for her support," and expected to be dependent on old-age cash assistance.

- *Matter of Perez*, 15 I. & N. Dec. 136 (B.I.A. 1974): Petitioner not likely to become a public charge despite past receipt of welfare because having been "on welfare does not, by itself, establish that he or she is likely to become a public charge" and she was 28, healthy, capable of finding employment, and supported by family.

- *Matter of Vindman*, 16 I. & N. Dec. 131 (BIA 1977): Petitioners likely to become public charges because they were 66 and 54 years old, had received public cash assistance for the past three years, and were unemployed with no future prospects.

- *Matter of A-*, 19 I. & N. Dec. 867 (B.I.A. 1988): Petitioner not likely to become a public charge although neither she nor her spouse had worked during the past four years and her family received cash assistance, as she was "young," employed, and able to earn a living.

In keeping with the narrow scope of "public charge," Federal immigration officials have consistently excluded only a minuscule percentage of arriving immigrants on public charge grounds. Of the 21.8 million immigrants admitted to the United States as lawful permanent residents between 1892 and 1930, less than one percent were deemed inadmissible on public charge grounds, as shown by DHS's own data. The same has been true in subsequent years. Between 1931 and 1980 (the last year for which DHS publishes such data), only 13,798 immigrants were excluded on public charge grounds out of more than 11 million admitted as lawful permanent residents—an exclusion rate of about one-tenth of one percent.[3]

[3] *See* Dep't of Homeland Security, *Table 1. Persons Obtaining Lawful Permanent Resident Status: Fiscal Years 1820 to 2016* (Dec. 18, 2017), D. Ct. Dkt. 50-11; Immigration and Naturalization Service, *2001 Statistical Yearbook of the Immigration and Naturalization Service* 258 (2003), D. Ct. Dkt. 50-12.

C. Congress Has Approved Administrative Interpretations by Repeatedly Reenacting the Public Charge Provisions of the INA Without Material Change

Congress has approved these judicial and administrative interpretations of "public charge" by repeatedly reenacting the public charge provisions of the INA without material change. In 1952, four years after *Matter of B-* was decided, Congress reenacted the public charge provision in the Immigration and Nationality Act of 1952 without purporting to change its interpretation. 66 Stat. 163, 183. Defendants cite a statement in a 1950 Senate report stating that because "the elements constituting likelihood of becoming a public charge are varied, there should be no attempt to define the term in the law." S. Rep. No. 81-1515, at 349 (1950) (quoted at App. 26). But that statement on its face reflects only Congress's recognition that determining whether an individual noncitizen is likely to be a public charge is necessarily fact-specific. Nothing in the report suggests that Congress intended to authorize the Executive to redefine the statutory term "public charge" itself.

Almost 40 years later, in the Immigration Act of 1990, Congress again reenacted the public charge provision without material change. Immigration Act of 1990, Pub. L. No. 101-649, §§ 601–03, 104 Stat. 4978, 5067–85. The legislative history of the 1990 Act noted that courts had associated likelihood of becoming a public charge not by reference to mere receipt of benefits, but by pegging the status to "destitution coupled with an inability to work." Staff of the H. Comm. on the Judiciary, 100th Cong., Grounds for Exclusion of Aliens Under the Immigration and Nationality Act: Historical Background and Analysis 121 (Comm. Print 1988). Again, Congress declined to depart from that definition.

Congress again chose not to disturb the settled understanding of "public charge" in two major pieces of legislation enacted in 1996 that otherwise addressed noncitizen use of public benefits and public charge determinations. First, in the Personal Responsibility and Work

Opportunity Reconciliation Act ("PRWORA"), Congress restricted certain noncitizens' eligibility for certain federal benefits. *See* Pub. L. No. 104-193, § 403, 110 Stat. 2105, 2265–67 (1996) (codified at 8 U.S.C. § 1613). But, following the passage of PRWORA and subsequent legislation, many noncitizens remained eligible for federal benefits, including Medicaid and SNAP, and states were authorized to provide benefits to many others. *See generally* 8 U.S.C. §§ 1612–13. As defendants note, PRWORA's statement of policy provides that noncitizens should "not depend on public resources to meet their needs." 84 Fed. Reg. at 41,294 (quoting 8 U.S.C. § 1601(2)(A)). But Congress has plainly concluded that allowing noncitizens to receive certain benefits is consistent with that purpose. Indeed, since 1996, Congress has expanded noncitizen access to benefits, including SNAP and Medicaid.[4]

The second relevant statute enacted in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), likewise did not overturn the settled interpretation of the INA's public charge provisions. *See* Pub. L. No. 104-208, div. C, § 531, 110 Stat. 3009, 3674 (1996) (amending 8 U.S.C. § 1182(a)). The statute, enacted one month after PRWORA, amended the public charge admissibility provision only to codify the existing standard that a determination whether a noncitizen was likely to become a public charge should be based on the "totality of the circumstances," and should take account of the applicant's age; health; family

[4] *See* Agricultural Research, Education and Extension Act of 1998, Pub. L. No. 105-185 (1998) (restoring eligibility for certain elderly, disabled, and child immigrants who resided in the United States when PRWORA was enacted); Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171 (2002) (restoring eligibility for food stamps (now SNAP) to qualified immigrant adults who have been in the United States at least five years, and immigrants receiving certain disability payments and for children, regardless of how long they have been in the country); Children's Health Insurance Reauthorization Act of 2009, Pub. L. No. 111-3 (2009) (providing states an option to cover lawfully present immigrant children and pregnant women under the federal Medicaid and Children's Health Insurance Program programs).

status; assets, resources, and financial status; and education and skills. *See* 8 U.S.C. § 1182(a)(4)(B)(i). But Congress otherwise reenacted the existing INA public charge admissibility provision without material change.

Congress's decision not to expand the settled meaning of "public charge" in either of the 1996 statutes was not an oversight. In enacting IIRIRA, Congress expressly considered and rejected a proposal that would have defined public charge for purposes of removal as a noncitizen who receives certain benefits—including Medicaid, food stamps, and any other needs-based benefits—for more than 12 months. Immigration Control & Financial Responsibility Act of 1996, H.R. 2202, 104th Cong. § 202 (1996). A proponent of the proposed amendment explained that it was intended to override "a 1948 decision by an administrative law judge" (*i.e.*, *Matter of B-*), which he argued had rendered the public charge provision "virtually unenforced and unenforceable." 142 Cong. Rec. S4401, S4408–09 (1996) (statement of Sen. Simpson); *see supra* n.1.

The proposed amendment to redefine "public charge" passed the House but was withdrawn in the Senate under threat of Presidential veto. 142 Cong. Rec. S11872, S11881–82 (1996). Contrary to defendants' unsupported assertion that opposition to the amendment was driven only by concern about unduly restricting the Executive's power to define "public charge," App. 27, President Clinton threatened to veto any immigration bill that went "too far in denying legal immigrants access to vital safety net programs which could jeopardize public health and safety." Statement on Senate Action on the "Immigration Control and Financial Responsibility Act of 1996," 32 Weekly Comp. Pres. Doc. 783 (May 2, 1996). Likewise, a leading opponent of the amendment expressed concern that it was "too quick to label people as public charges for utilizing the same public assistance that many Americans need to get on their feet," and argued

that the proposed "definition of public charge goes too far in including a vast array of programs none of us think of as welfare," including medical services and supplemental nutritional programs. S. Rep. No. 104-249, at 63–64 (1996) (statement of Sen. Leahy).

In 2013, Congress again turned back efforts to redefine public charge to include anyone who received means-tested public benefits. During deliberations on the proposed Border Security, Economic Opportunity, and Immigration Modernization Act, a bill that sought to create a path to citizenship for noncitizens who could show they were "not likely to become a 'public charge,'" Senator Jefferson B. Sessions, later Attorney General while the Rule was under development at DHS, sought to amend the definition of public charge to include receipt of "noncash employment supports such as Medicaid, the SNAP program, or the Children's Health Insurance Program." S. Rep. No. 113-40, at 38, 42, 63 (2013). Senator Sessions's proposed amendment was rejected by voice vote. *Id.* at 42, 63.

D. Administrative Field Guidance from 1999 Confirmed the Settled Interpretation of Public Charge

In 1999, three years after the passage of PRWORA and IIRIRA, and under the administration of the same President who signed them into law, the Immigration and Naturalization Service ("INS," the predecessor agency to defendant U.S. Citizenship and Immigration Services ("USCIS")) issued its Field Guidance on Deportability and Inadmissibility on Public Charge Grounds ("Field Guidance"), 64 Fed. Reg. 28,689 (May 26, 1999), and a parallel proposed regulation, 64 Fed. Reg. 28,676 (May 26, 1999). INS explained that the Field Guidance "summarize[d] longstanding law with respect to public charge," and provided "new guidance on public charge determinations" in light of the recent legislation. 64 Fed. Reg. at 28,689. Defendants have cited no contemporaneous evidence questioning INS's interpretation of PRWORA or IIRIRA. The Field Guidance remains in effect today.

The Field Guidance reaffirmed the agency's longstanding approach to public charge as one focused on the ability of noncitizens to support themselves. It defined "public charge" as a noncitizen "who is likely to become (for admission/adjustment purposes) 'primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.'" *Id.* And it excluded from consideration in public charge determinations receipt of noncash benefits such as Medicaid, SNAP, and housing assistance, on the ground that those benefits "are by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or family." *Id.* at 28,692.

II. DHS'S PROPOSED "PUBLIC CHARGE" RULE

DHS issued the proposed Rule for notice and comment on October 10, 2018. 83 Fed. Reg. 51,114. More than 260,000 comments were submitted, the "vast majority" of them in opposition. 84 Fed. Reg. at 41,297. The Final Rule, largely rejecting those comments, was published in the Federal Register on August 14, 2019. *See id.* at 41,292.

The Rule defines "public charge" to mean any person who receives any amount of specified "public benefits" for more than 12 months in any 36-month period. Proposed 8 C.F.R. § 212.21(a). The Rule specifies that receipt of two benefits in one month counts as two months, so that a person could be deemed a public charge for participating in four separate benefit programs for three months in any three-year period. *Id.* It defines "public benefit" to mean cash benefits or benefits from specified noncash programs that offer short-term or supplemental support to eligible recipients, including SNAP, federal Medicaid (with certain exclusions[5]),

[5] Medicaid benefits excepted from the Rule's public charge analysis include benefits paid for an emergency medical condition, services or benefits provided under the Individuals with Disabilities Education Act, school-based benefits provided to children at or below the

Section 8 Housing Assistance, Section 8 Project-Based Rental Assistance, and Public Housing under section 9 of the U.S. Housing Act of 1937. Proposed 8 C.F.R. § 212.21(b).

The undisputed evidence before the district court shows that receiving these noncash benefits does not connote destitution or a lack of self-sufficiency. On the contrary, these benefits are widely used by working families and are available to many individuals and families with incomes well above the poverty level. Schanzenbach Decl., D. Ct. Dkt. 40, ¶¶ 6–19 & Tables 1–3 (discussing SNAP eligibility and use); Allen Decl., D. Ct. Dkt. 41, ¶¶ 10–22 (discussing federal housing benefit eligibility and use); Ku Decl., D. Ct. Dkt. 42, ¶¶ 16–22, 79–81 (discussing Medicaid eligibility and use). As the Field Guidance explained in concluding that such benefits should be excluded from public charge considerations, those benefits "are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient." 64 Fed. Reg. at 28,692.

A person can be deemed likely to be a public charge without having received any public benefits in the past. Instead, the Rule creates a complex and confusing scheme of positive and negative "factors," including "heavily weighted" factors, for USCIS personnel to consider in making that determination. Proposed 8 C.F.R. § 212.22. These factors focus overwhelmingly on the applicant's income and financial resources. The strong correlation between these factors (such as low income (regardless of employment status), a low credit score, or a medical condition requiring extensive medical treatment and lack of private health insurance) leads to a

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eligible age for secondary education, and benefits received by children under 21 years of age or women during pregnancy and 60 days post-partum. Proposed 8 C.F.R. § 212.21(b)(5).

snowball effect in which a single characteristic—low income or limited means—triggers multiple negative factors, making a public charge finding virtually inevitable.

The Rule would dramatically increase the number of persons potentially deemed a public charge. According to a Kaiser Family Foundation analysis, 94 percent of noncitizens who originally entered the United States without lawful permanent resident status have at least one characteristic that could be weighed negatively in a public charge determination, and 42 percent have characteristics that could be treated as heavily weighted negative factors. Samantha Artiga et al., Kaiser Family Foundation, *Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid*, D. Ct. Dkt. 50-28, at 1 (Oct. 2018). Another study submitted to DHS during the notice-and-comment process showed that between 40 and 50 percent of U.S.-born individuals covered by a 2015 survey participated in one of the listed benefit programs between 1998 and 2014. Center on Budget and Policy Priorities ("CBPP") Comment, D. Ct. Dkt. 50-20, at 9–10. Defendants have not challenged these estimates.

III. PROCEDURAL HISTORY

On August 27, 2019, plaintiffs—five nonprofit organizations that serve and advocate for low-income noncitizens—commenced this action by filing a complaint in the United States District Court for the Southern District of New York, asserting claims under the APA and the Equal Protection guarantee of the Fifth Amendment. The States of New York, Connecticut, and Vermont and the City of New York filed a related action that was assigned to the same district judge (the "New York Action"). This case and the New York Action have proceeded in tandem. Other states, municipalities, and nonprofit organizations filed seven similar actions in four other district courts.

On September 9, 2019, plaintiffs moved to preliminarily enjoin the Rule and postpone its proposed effective date. Plaintiffs in the New York Action submitted a similar motion. The

parties collectively submitted hundreds of pages of briefs and supporting materials on those motions, including 26 expert and fact declarations. Amici—including the American Medical Association, the American Academy of Nursing, and the American Academy of Pediatrics—submitted ten briefs, all but one urging that the Rule be enjoined, and explaining the dire public health and other consequences they expected from the Rule.

On October 11, 2019, the district court granted plaintiffs' motions, and issued preliminary injunctions in both cases barring enforcement of the Rule and postponing its effective date under 5 U.S.C. § 705. App. 69a–71a. Each of the four other district courts in which the Rule was challenged also preliminarily enjoined it, in some cases nationwide and in other cases with a more limited geographic scope.

Defendants appealed these injunctions to the Second, Fourth, Seventh, and Ninth Circuits. Defendants also moved in each district and circuit court for a stay pending appeal. The Second Circuit denied defendants' motion, noting that the appeal was expedited and that the merits panel "has full authority to consider the scope of the existing injunction." App. 65a. The Seventh Circuit (with one dissent) likewise denied a stay. Divided panels of the Fourth and Ninth Circuits stayed the preliminary injunctions entered by district courts in those circuits. CA2 Dkt. 56, 60, 92 (orders from panels of Ninth, Fourth, and Seventh Circuits). Only the Ninth Circuit panel issued a detailed opinion. *See San Francisco*, 944 F.3d 773.

The merits portions of these appeals are pending, and briefing and argument has been expedited. All of them, including this case, will be fully briefed on February 14, 2020. Oral argument in the Ninth Circuit has not been scheduled, while argument in the Second, Fourth, and Seventh Circuits is scheduled or tentatively scheduled for February or March.

ARGUMENT

Defendants bear a "heavy burden" to justify the "extraordinary" relief they seek. *Whalen* v. *Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). In seeking a stay pending appeal, defendants must establish:

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

Hollingsworth v. *Perry*, 558 U.S. 183, 190 (2010). A showing of irreparable harm is necessary for a stay to be granted. *Ruckelshaus* v. *Monsanto Co*., 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) ("An applicant's likelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay."); *Williams* v. *Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers) ("The question, then, is only whether the District Court's injunction should be observed in the interim. Unless the applicants will suffer irreparable injury, it clearly should be."). As Justice Stevens noted in *Williams*,

> In addressing the irreparable-injury issue, the task of a judge or Justice is to examine the competing equities, a task that involves balancing the injury to one side against the losses that might be suffered by the other. . . . Where there is doubt, it should inure to the benefit of those who oppose grant of the extraordinary relief which a stay represents.

Id. at 1312 (internal quotation marks, citations, and alterations omitted).

"Because this matter is pending before the Court of Appeals, and because the Court of Appeals denied [their] motion for a stay, [defendants] ha[ve] an especially heavy burden." *Packwood* v. *Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers). Such stays are "rare and exceptional," and are granted only "upon the weightiest considerations." *Fargo Women's Health Org*. v. *Schafer*, 507 U.S. 1013, 1014 (1993)

(O'Connor, J., concurring in denial of stay application) (voting to deny stay despite view that lower court decisions were "inconsistent" with Supreme Court precedent); *see also Pasadena City Bd. of Ed*. v. *Spangler*, 423 U.S. 1335, 1336 (1975) (Rehnquist, J., in chambers) ("Ordinarily a stay application to a Circuit Justice on a matter currently before a Court of Appeals is rarely granted."); *Edwards*, 512 U.S. at 1302 ("[W]hen a district court judgment is reviewable by a court of appeals that has denied a motion for a stay, the applicant seeking an overriding stay from this Court bears 'an especially heavy burden.'" (quoting *Packwood*, 510 U.S. at 1320)).

I. DEFENDANTS WILL SUFFER NO IRREPARABLE INJURY

Defendants cannot establish irreparable harm from a delay in implementing the Rule while the courts of appeals (and, if necessary, this Court) consider the pending appeals.

The district court's injunction merely maintains the status quo. It does so by requiring DHS to continue applying the Field Guidance that has guided public charge determinations by DHS and its predecessors for more than twenty years (including almost three years before the current Administration sought to adopt the Rule). Defendants have conceded that the Field Guidance is a lawful implementation of the public charge provision. *See* Defts. Memo. of Law in Opp. to Mot. for Prelim. Inj., D. Ct. Dkt. 129, at 21 ("The 1999 Interim Field Guidance . . . illustrate[s] an exercise of the authority Congress has delegated to the Executive Branch to define 'public charge' within the broad limits of its plain meaning . . . ."); *see also* Appellant's Mot. for Stay Pending Appeal, CA2 Dkt. 24, at 13. DHS remains able to deny admission or status adjustment to noncitizens it deems likely to be public charges under the standards set forth in the Field Guidance. That defendants wish to implement a different public charge rule does not render the Field Guidance unlawful, or imply that the injunction requires it to grant status adjustment to "those not legally entitled to it." App. 40 (quoting *San Francisco*, 944 F.3d at

806). In contrast to other recent cases in which the government has sought a stay pending appeal, defendants have identified no emergency or other pressing justification for departing from the normal appellate process in this case. *Cf., e.g.*, Appl. for a Stay Pending Appeal at 3–4, *Barr* v. *E. Bay Sanctuary Covenant*, No. 19A230 (U.S. Aug. 26, 2019) (asserting injunction prevented government from addressing a "crisis at the southern border"); Appl. for a Stay Pending Appeal at 25–26, *Trump* v. *Hawaii*, 138 S. Ct. 542 (Nov. 20, 2017) (No. 17A550) (asserting injunction interfered with government's "foreign-policy, national-security, and counterterrorism objectives").

The purported harm that defendants cite does not support a stay. Defendants contend that the government will be irreparably harmed if it is "precluded from implementing its chosen policy." App. 4. And they assert that, if the Rule remains enjoined, some noncitizens will be granted lawful permanent residence status who would not have received that status under the Rule, and that DHS has "no practical means of revisiting" those determinations. App. 40.

These generic assertions prove too much. In any APA challenge to administrative action, an injunction in favor of the plaintiffs impedes the Executive from implementing its preferred policy, and in many such cases Executive action taken under injunction will not be reversible. Thus, defendants' argument, if accepted, would mean that this factor always favors the government in every APA case. But this Court has routinely recognized that the government is not irreparably injured by mere delay in implementing a policy, *e.g.*, *Whalen*, 423 U.S. at 1317, or having to use disfavored criteria in decisionmaking, *e.g.*, *Trump* v. *Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088–89 (2017) (per curiam) (requiring government to process visa applications for certain classes of individuals despite Executive Order suspending entry); *Ruckelshaus*, 463 U.S. at 1317 (no irreparable harm to EPA from having to abide by a

preliminary injunction requiring the agency to process applications to register pesticides without collecting manufacturers' trade secrets). And any injury suffered by defendants as a result of an injunction pales in comparison to the demonstrable harm the Rule will inflict on plaintiffs and immigrant communities around the country if it is allowed to take effect, as discussed further below in Section III.

II. THE COURT IS UNLIKELY TO GRANT CERTIORARI AND REVERSE

Defendants' speculation that the Court would grant certiorari "if the court of appeals ultimately upholds the district court's nationwide preliminary injunctions," App. 15, highlights why this application is premature. Defendants hypothesize potential conflicts between the courts of appeals that may exist if they reach differing results on the merits, and suggest that they may seek certiorari on the nationwide scope of the injunction if it survives appellate review. *See id.* at 15–16. Such conjecture cannot satisfy defendants' heavy burden of establishing a need for immediate intervention by this Court.[6] In any event, defendants should not prevail on the merits.

[6] Defendants' contention that, if the Second Circuit rules in favor of plaintiffs on the merits, it will inevitably create a split with the Ninth Circuit (App. 15–16) assumes that the decision by the Ninth Circuit motion panel will be followed by the merits panel. *But see United States* v. *Houser*, 804 F.2d 565, 568 (9th Cir. 1986) ("[W]hile a merits panel does not lightly overturn a decision made by a motions panel during the course of the same appeal," it "do[es] not apply the law of the case doctrine as strictly" as when considering a prior merits panel's determination.). It ignores as well the possibility that the Ninth Circuit will grant the plaintiffs' pending motions for en banc review of the motion panel decision, *see* Counties' Mot. for Reconsideration En Banc, *City & Cty. of S.F.* v. *USCIS*, No. 19-17213 (9th Cir. Dec. 19, 2019), Dkt. 30, or would grant en banc review following a panel decision on the merits, in light of the dissent on the panel and contrary rulings denying stays in the Second and Seventh Circuits. *See* 9th Cir. Rule 35-1 (noting as "appropriate ground[s] for rehearing en banc that a panel opinion "conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity"). The defendants' need to speculate about how the courts of appeals will address these issues only underscores the premature nature of this application.

A. Plaintiffs Have Standing and Are Within the Zone of Interests of the INA

Defendants are unlikely to prevail on their contention that plaintiffs lack standing under Article III. App. 17–18. An organization establishes an injury-in-fact sufficient to confer standing if the defendants' actions have "perceptibly impaired" its activities or "drain[ed its] . . . resources." *Havens Realty Corp*. v. *Coleman*, 455 U.S. 363, 379 (1982). The presence of one party with standing is sufficient to satisfy Article III. *See Bowshar* v. *Synar*, 478 U.S. 714, 721 (1986). As the district court found, "the Rule forces [plaintiffs] to devote substantial resources to mitigate its potentially harmful effects—resources that Plaintiffs could and would have used for other purposes." App. 33a.[7] Such "concrete and demonstrable injury to the [plaintiff] organization[s'] activities—with the consequent drain on the [plaintiff] organization[s'] resources—constitutes far more than simply a setback to the [plaintiff] organization[s'] abstract social interests." *Havens Realty*, 455 U.S. at 379.

Plaintiffs are also well within the zone of interests of the INA. *See* App. 17–18. In an APA challenge to administrative action, the zone of interests inquiry "is not especially demanding" and 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 authorized that plaintiff to sue." *Lexmark Int'l, Inc*. v. *Static Control Components, Inc*., 572 U.S. 118, 130 (2014) (quotation marks omitted); *see also Match-E-Be-Nash-She-Wish Band*

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[7] For example, as its noncitizen clients turn away from public benefits out of fear of harming their immigration status, plaintiff African Services Committee ("ASC") has experienced an increased demand for its food pantries, English classes, and housing assistance, depleting resources that would otherwise be available to meet other client needs. Nichols Decl., D. Ct. Dkt. 46, ¶¶ 17–19. Similarly, plaintiffs that provide direct legal services must devote additional time and resources to status adjustment applications, with correspondingly less time available to represent clients in removal and other immigration matters, Oshiro Decl., D. Ct. Dkt. 43, ¶¶ 27, 35, 41; Russell Decl., D. Ct. Dkt. 44, ¶¶ 22–24; Nichols Decl., D. Ct. Dkt. 46, ¶¶ 21–26; Wheeler Decl., D. Ct. Dkt. 48, ¶¶ 10–16, and, in some cases, this leads to decreases in revenue, Nichols Decl., D. Ct. Dkt. 46, ¶¶ 25–26.

of Pottawatomi Indians v. *Patchak*, 567 U.S. 209, 225 (2012) (discussing "Congress' evident intent when enacting the APA to make agency action presumptively reviewable." (quotation marks omitted)). In assessing Congress's intent, the Court must consider not only the specific provision at issue, but its "overall context" and "Congress' overall purpose in" enacting the statute., *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987). In light of the multiple provisions of the INA giving immigrant assistance organizations like plaintiffs a role in helping noncitizens navigate the immigration system, *see E. Bay Sanctuary Covenant* v. *Trump*, 932 F.3d 742, 768–69 (9th Cir. 2018) (collecting statutory provisions), plaintiffs easily satisfy that standard.

Defendants' contention that plaintiffs' only interest is to "maintain[] enrollment in public-benefits programs," and is therefore contrary to what defendants claim is the purpose of the public charge provision, App. 18, reflects a fundamental misunderstanding of plaintiffs' roles in advising, assisting, and advocating for immigrants.[8] Defendants also ignore "Congress' overall purpose[s]" of the INA, *see Clarke*, 479 U.S. at 401–02, which, as the Rule concedes, include promoting "family unity, diversity, and humanitarian assistance." 84 Fed Reg. at 41,306. These are all core components of plaintiffs' missions.

B. The Rule Is Contrary to the INA

The Court is likely to hold that the Rule should be set aside under the APA because it is contrary to the INA, as demonstrated by the plain language and history of the public charge inadmissibility provision. Defendants' reliance on statements of Congressional policy and other statutory provisions to justify radically expanding the provision do not withstand scrutiny.

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[8] *See, e.g.*, Oshiro Decl., D. Ct. Dkt. 43, ¶¶ 5, 36 (plaintiff Make the Road New York's mission is to "build[] the power of immigrant and working-class communities to achieve dignity and justice through organizing, policy innovation, transformative education, and survival services"); Russell Decl., D. Ct. Dkt. 44, ¶¶ 4, 42; Nichols Decl., D. Ct. Dkt. 46, ¶¶ 4, 7–8, 10, 12, 15, 18, 20, 24, 26; Wheeler Decl., D. Ct. Dkt. 48, ¶¶ 10, 14, 16, 18; Yoo Decl., D. Ct. Dkt. 47, ¶¶ 21–25.

1. The Rule Is Inconsistent with the Meaning of "Public Charge" in the INA

Defendants' proffered interpretation of the statutory term "public charge" is inconsistent with the meaning of "public charge" as it has been understood for more than a century, and with Congress's demonstrated intent to approve that understanding.

First, the Rule is inconsistent with the plain language of the INA. As discussed above, at the time it was introduced in federal immigration law, the term "public charge" referred to a narrow category of persons who are institutionalized or otherwise completely dependent on public assistance, and this interpretation has been confirmed in case law from the early twentieth century. *See Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2363–64 (2019) (courts look to "common usage," such as "dictionary definitions" and "early case law," to "shed light on [a] statute's ordinary meaning"). *See supra* pp. 5–6.

Second, the consistent, century-long judicial and administrative interpretation of "public charge" as being unable to care for oneself and therefore *primarily* dependent on the government for subsistence is powerful evidence of the meaning of that term. "[A] long-standing, contemporaneous construction of a statute by the administering agencies is entitled to great weight, and will be shown great deference." *Leary* v. *United States*, 395 U.S. 6, 25 (1969) (quotation marks, alteration, and citations omitted). As discussed above, courts and immigration agencies have uniformly held that receipt (or likely future receipt) of benefits does not render a person a public charge absent additional circumstances showing that she is unlikely to be able to fend for herself. *See supra* pp. 6–8.

The adoption of the Field Guidance only three years after enactment of PRWORA and IIRIRA further supports this conclusion. As this Court has held, an implementing agency's interpretation of a statute soon after its enactment is better evidence of the statute's meaning and

Congress's intent than a later, inconsistent interpretation. *See Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168 (2001) (looking to agency's "*original* interpretation" of the Clean Water Act, "promulgated two years after its enactment," as well as the absence of any "persuasive evidence that the [agency] mistook Congress' intent," to determine that a later, inconsistent interpretation was against congressional intent (emphasis in original)); *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 414 (1993). Here, the definition of "public charge" in the Field Guidance in 1999 is the best reflection of Congress's intent, particularly absent any "persuasive evidence that [INS] mistook" that intent. *Solid Waste Agency*, 531 U.S. at 168.

Third, Congress's repeated reenactment of the public charge provision without material change evidences its approval of the agency interpretation. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986); *see Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239–40 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ."); *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184, 193–94 (2002) ("Congress's repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.").

The legislative history here demonstrates that Congress was aware of the administrative and judicial interpretations described above. *See supra* pp. 9–12. Congress's repeated

reenactments of the public charge provisions of the INA without material change reflect its intent to retain the longstanding judicial and agency interpretations of the term.

Fourth, Congressional intent to preserve an agency's interpretation of a statute is especially clear where, as here, Congress has rejected legislation specifically intended to overturn that interpretation. *See supra* pp. 11–12. In *Bob Jones University* v. *United States*, the Court considered the IRS's decade-old determination that private schools practicing racial discrimination were not entitled to tax-exempt status. 461 U.S. 574, 579 (1983). In upholding the agency's interpretation of the relevant provision of the tax code, the Court found that Congress's repeated consideration and rejection of bills intended to overturn the IRS's interpretation was "significant" evidence of "Congressional approval of the [IRS] policy." *Id.* at 600–01. *See also Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 801–02 (2014) (Congressional intent to approve longstanding judicial interpretation of scope of tribal immunity clear when Congress considered, but did not enact, two bills that expressly sought to abrogate that interpretation); *United States* v. *Bd. of Comm'rs*, 435 U.S. 110, 134–35 (1978) (Congress's intent to endorse an agency's interpretation is particularly clear where Congress reenacts a statute and "manifest[s] its view" on an existing interpretation). The Court has placed particular weight on Congress's decision—as it did in 1996, *see supra* pp. 11–12—to enact a bill without specific language overturning existing law that passed one chamber of Congress but was removed during conference. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 408, 414 n.8 (1975) (finding that "Congress plainly ratified" prior judicial interpretation when conference committee "specifically rejected" language overturning that interpretation, and the bill passed both chambers without such language). These considerations strongly weigh against the Rule.

2. Defendants' Arguments to the Contrary Are Unpersuasive

Defendants' arguments that the Rule is an appropriate administrative exercise of DHS's authority to construe the statute are not persuasive.

First, defendants argue that the Rule is justified by the "broad discretion" they allege the statute gives to the Executive Branch to define "public charge."[9] App. 20, 25–26. But while the statute undoubtedly gives the Executive authority to determine whether a noncitizen is likely to be a public charge based on the totality of the circumstances in an individual case, the statute does not give it unfettered discretion to redefine the statutory term "public charge" in a way that is inconsistent with decades of administrative and judicial interpretation and Congressional intent.[10] In *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143-56 (2000), for example, the Court held that the FDA lacked authority to regulate nicotine in tobacco and

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[9] Despite invoking the agency's purported discretion to interpret the "public charge" provision, defendants do not analyze the Rule under this Court's traditional two-step *Chevron* framework applicable to agency rulemaking. *See Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). As a threshold matter, because the Rule involves questions "of deep economic and political significance," including "billions of dollars in spending" and the health of "millions of people," it is exempt from *Chevron* deference under the "major question" doctrine. *See King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015). In any event, the Rule fails at both *Chevron* steps. Congressional intent is readily ascertainable at *Chevron* step one, given the legislative history and historical backdrop: the Rule is simply "inconsistent with the administrative structure that Congress enacted into law." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 497, 517 (1988)). And, under *Chevron* step two, all interpretive tools indicate that the Rule's interpretation of the public charge provision "goes beyond the meaning the statute can bear." *MCI Telecomm. Corp.* v. *Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994).

[10] The statutory reference to "the opinion of" the Executive in determining whether an individual noncitizen is likely to become a public charge does not on its face authorize the agency to redefine the statutory term. The sole case cited by defendants on this point, construing similar language in the Internal Revenue Code, likewise held only that the IRS Commissioner appropriately exercised his authority in rejecting individual taxpayer's accounting practices. *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 540 (1979) (cited in App. 20). *Thor* does not suggest that such language empowers to Executive to redefine a statutory term in the face of longstanding contrary administrative interpretation repeatedly approved by Congress.

tobacco products themselves, despite broad statutory grant of authority to regulate "drugs," defined broadly as any "articles (other than food) intended to affect the structure or any function of the body." The Court based its decision upon, among other things, the "range of plausible meanings" that the statutory language could have had when the statute was enacted; its legislative history, including rejected efforts to amend the statute to grant FDA such authority; and Congressional reenactment of the statute after the FDA took the position that it lacked jurisdiction to regulate tobacco. *Id*. *Accord Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 316–24 (2014) (rejecting agency reading of statute in light of prior inconsistent agency interpretation, as well as statute's structure and design). The same considerations foreclose defendants from redefining "public charge" here.

Second, defendants' reliance on statements of policy in PRWORA that "aliens within the Nation's borders not depend on public resources to meet their needs," and that "the availability of public benefits not constitute an incentive for immigration to the United States," 8 U.S.C. § 1601(2), is misplaced. App. 23. Nothing in PRWORA indicates that the statements of policy were intended to alter the longstanding definition of "public charge." On the contrary, by retaining immigrant eligibility for certain benefits in PRWORA—and expanding that eligibility in later legislation—Congress has plainly concluded that allowing noncitizens to access those benefits is not inconsistent with the statements of purpose expressed in PRWORA, including the desire to promote self-sufficiency.

PRWORA's statements of legislative purpose do not justify the Rule's radical expansion of public charge. As this Court has repeatedly stressed, balancing multiple legislative purposes "is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the

law," because "no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 525–26 (1987) (per curiam) (emphasis in original). As Chief Justice Burger explained:

> Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Bd. of Governors of Fed. Reserve Sys. v. *Dimension Fin. Corp.*, 474 U.S. 361, 373–74 (1986). Here, as noted, the INA reflects a balance among many Congressional goals, including "family unity, diversity, and humanitarian assistance." 84 Fed Reg. at 41,306. Defendants' assertion that Congress's identification of a single policy justifies overturning the longstanding meaning of one statutory provision ignores the teaching of *Rodriguez* and *Board of Governors*.

Third, defendants point to provisions in the INA, adopted as part of the 1996 legislation, requiring certain noncitizens to provide enforceable affidavits of support by their sponsors as a condition of admissibility under the public charge provision. *See* App. 21–22. As discussed above, however, Congress, in passing PRWORA, chose not to redefine "public charge" to mean any receipt of cash or noncash benefits. On the contrary, it rejected such a proposal a month later when enacting IIRIRA. *See supra* pp. 11–12. Had Congress intended to redefine public charge, it would have done so directly. *See also Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (noting that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes").

Nor is there any inconsistency between requiring noncitizens seeking admission or status adjustment to provide an enforceable affidavit of support from their sponsors and retaining the traditional, narrow interpretation of "public charge." To the contrary, the requirement of an affidavit of support—which DHS acknowledges is a requirement in relevant cases "separate"

from a public charge assessment, 84 Fed. Reg. at 41,448—protects the public fisc by ensuring that a sponsor's agreement to repay certain benefits used by the noncitizen can be enforced, and furthers the Congressional policy of discouraging immigrants from relying on public benefits. And it does so without undermining the compelling goals of family unity and diversity that would result from redefining "public charge" and rendering large numbers of noncitizens ineligible for lawful permanent residence.

Fourth, defendants erroneously rely on a provision of the INA that directs immigration officers adjudicating public charge inadmissibility determinations for immigrants who have been "battered or subjected to extreme cruelty" in the United States not to "consider *any benefits* the alien may have received" under section 8 U.S.C. § 1641(c)(1)(A). App. 22 (citing 8 U.S.C. §§ 1182(s), 1611–13) (emphasis added). Enacted as part of the Battered Immigrant Women Protection Act of 2000, the purpose of this provision is to protect vulnerable immigrants who often lack means of support outside abusive relationships. *See* Pub. L. No. 106-386, § 1502, 1505, 114 Stat. 1464, 1518, 1525–27. In categorically exempting these so-called "battered qualified aliens" from public charge, 8 U.S.C. § 1182(a)(4)(E), Congress did not implicitly "presuppose[]," App. 22, that any other noncitizens who use public benefits would be deemed public charges. Indeed, Section 1182(s) was enacted in 2000, when the Field Guidance was already in place, and defendants point to no evidence that Congress, in enacting that provision, intended to overrule the Field Guidance *sub silentio* and radically reinterpret the INA's public charge provision.

C. The Rule Should Be Set Aside Under the APA Because It Is Contrary to the Rehabilitation Act

The Rule is contrary to law under the APA for the additional reason that it explicitly discriminates against individuals with disabilities in violation of Section 504 of the

Rehabilitation Act and DHS's own regulations promulgated thereunder. Under the Rule, applicants with disabilities start with multiple strikes against them. The Rule expressly requires immigration officials to consider "an applicant's disability diagnosis," 84 Fed. Reg. at 41,408, and treat it as a negative factor relating to a noncitizen's "assets, resources, and financial status," and, separately, as a "heavily weighted negative factor" if the noncitizen lacks private health insurance or sufficient assets to cover reasonably foreseeable medical costs related to the disability. *See* proposed 8 C.F.R. §§ 212.22(c)(1)(iii), 212.22(b)(4)(H).

Defendants argue that the Rule does not violate the Rehabilitation Act because it does not deny noncitizens adjustment of status "solely by reason of her or his disability," as the statute requires. App. 30–31 (quoting 29 U.S.C. § 794(a)). Under the Rule's scheme, multiple independent "negative" factors flow from an individual's disability—including heavily-weighted negative factors. Thus, an "otherwise qualified" noncitizen could be excluded as likely to become a public charge "solely" because of the myriad negative factors related to their disability. This is precisely the type of discrimination prohibited by the Rehabilitation Act. *See Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 276 (2d Cir. 2003). The Rule also runs afoul of DHS's regulations promulgated under the Rehabilitation Act. *See* 6 C.F.R. § 15.30(b)(4) (providing that DHS may not "utilize criteria or methods of administration the purpose or effect of which would: (i) Subject qualified individuals with a disability to discrimination on the basis of disability; or (ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with a disability.").

Defendants argue that the statute's inclusion of "health" as a public charge factor requires DHS to take an immigrant's disability into account. App. at 31. But the Rehabilitation Act's disability discrimination provision controls because it is far more specific: the INA only requires

a general consideration of an immigrant's "health," while the Rehabilitation Act prohibits discrimination against one particular "health" concern, namely, a person's disability status. *See Clifford F. MacEvoy Co*. v. *U.S. for Use and Benefit of Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944) ("Specific terms prevail over the general in the same or another statute which might otherwise be controlling.").

D. The Rule Should Be Set Aside Under the APA Because It Is Arbitrary and Capricious

Defendants' primary argument that the radical expansion of public charge under the Rule is not arbitrary and capricious again depends on its position that the "receipt of any public benefits, including noncash benefits, [i]s indicative of a lack of self-sufficiency" in the view of Congress. App. 29. But, as explained above, defendants' misplaced reliance on broad statements of policy regarding immigrants' "self-sufficiency" in PRWORA means the Rule is based upon an "irrelevant comparison between statutory provisions" rather than "germane" factors, rendering it arbitrary and capricious. *Judulang* v. *Holder*, 565 U.S. 42, 55 (2011).

In any event, the district court correctly found that "[r]eceipt of a benefit . . . does not necessarily indicate that the individual is unable to support herself," recognizing that a person may elect to use a benefit simply "because she is entitled to it" despite being "fully capable of supporting herself without government assistance." App. 40a–41a. The district court similarly pointed out the inconsistency between an individual being made eligible for benefits by Congress, and being penalized with denial of adjustment of status for having used them or being likely to use them. *See* App. 41a. Defendants' position also ignores the undisputed evidence that supplemental benefits actually promote rather than impede self-sufficiency, and that the programs covered by the Rule are widely used by working families—including those with incomes above the poverty level—merely to supplement their incomes. Schanzenbach Decl., D.

Ct. Dkt. 40, ¶¶ 6–19 & Tables 1–3; Allen Decl., D. Ct. Dkt. 41, ¶¶ 10–22; Ku Decl., D. Ct. Dkt.42, ¶¶ 16–22, 79–81. Defendants also ignore the uncontested evidence that noncitizens who would be at risk of being denied status adjustment on public charge grounds are unlikely to use government benefits. Van Hook Decl., D. Ct. Dkt. 45, ¶¶ 11, 26, 39. Nor have defendants "articulate[d] a rational basis for equating public charge with receipt of benefits for 12 months within a 36-month period, particularly when this has never been the rule," nor explained "what evaluation of the factors enumerated in the Rule would make the DHS officer confident that she could make an appropriate prediction." App. 41a.

E. The Rule Violates Equal Protection

Evaluating the factors set forth in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp*., 429 U.S. 252, 267–68 (1977), demonstrates that the Rule is the product of discriminatory purpose by key decisionmakers, and therefore violates the Constitution's Equal Protection guarantees. First, direct "contemporary statements" by decisionmakers, as well as the "administrative history" and the "specific sequence of events leading up to the challenged decision," *Arlington Heights*, 429 U.S. at 267–68, which are described in detail in the Complaint and were presented to the district court, *see* Compl., Dist. Ct. Dkt. 1, ¶¶ 203–34, strongly support an inference of discriminatory purpose. Second, as the District Court found, App. 44a–45a, it is undisputed that the Rule will disparately impact noncitizens of color. *Arlington Heights*, 429 U.S. at 266. *See also* Van Hook Decl., D. Ct. Dkt. 45, ¶¶ 46-68, 95, 96; Ku Decl., D. Ct. Dkt. 42, ¶¶ 9, 28. The Rule also does not pass muster even if rational basis scrutiny applies, as animus against a particular group is never a legitimate governmental objective. *See*, *e.g.*, *City of Cleburne* v. *Cleburne Living Ctr*., 473 U.S. 432, 446–47 (1985) ("[S]ome objectives—such as a

bare desire to harm a politically unpopular group—are not legitimate state interests [under rational basis review]." (quotation marks, alteration, and citation omitted)).[11]

III. THE BALANCE OF THE EQUITIES AND RELEVANT HARMS WEIGH IN FAVOR OF MAINTAINING THE PRELIMINARY INJUNCTION AND STAYING THE RULE PENDING APPEAL

The balance of equities favors retaining the injunction. The purpose of a stay is to maintain the status quo, *Nken* v. *Holder*, 556 U.S. 418, 429 (2009), the opposite of what defendants seek here. As discussed, defendants have not shown that they will suffer any harm by continuing to apply the same rules set forth in the Field Guidance that have been in effect for decades. *See supra* pp. 18–20

On the other side of the ledger is the irreparable harm that the district court found, based on unrebutted evidence in the record, plaintiffs would suffer in responding to the impact of the Rule on their immigrant clients. Defendants dismiss plaintiffs' injuries as "speculative." App. 40. But the district court found that the Rule would irreparably harm plaintiffs "by forcing them to divert resources and by shifting the burden of providing services to those who can no longer obtain federal benefits without jeopardizing their status in the United States." App. 45a–46a. This, the district court explained, was "a direct and inevitable consequence of the impending implementation of the Rule." App. 46a. Plaintiffs also have suffered and will continue to suffer monetary harm as a result of the Rule. Nichols Decl., D. Ct. Dkt. 46, ¶¶ 11, 16, 19, 25, 26; Wheeler Decl., D. Ct. Dkt. 48, ¶ 16. That harm is irreparable because the APA does not permit recovery of monetary damages. *See* 5 U.S.C. § 702 (enabling claimants to obtain "relief other than money damages"); *San Francisco*, 944 F.3d at 806–07 (finding that "purely economic

[11] The Court need not reach plaintiffs' constitutional claims if it concludes that a preliminary injunction is warranted on statutory grounds.

harm" suffered by plaintiffs was irreparable because money damages are not available under the APA).

The Rule's detrimental impact on public health, homelessness, and food insecurity, among other ills, also weighs heavily in favor of an injunction. As the record shows, the Rule is expected to result in millions of noncitizens and citizens—many of whom are not subject to the Rule, but fear that they or their families will suffer immigration penalties if they continue to use benefits—foregoing benefits for which they are eligible. *See* Ku Decl., D. Ct. Dkt. 42, ¶¶ 26, 46–54 (describing millions of U.S. citizen family members who are expected to disenroll or decline to participate in benefits programs for which they are eligible, including up to 3.1 million members of immigrant families from Medicaid, resulting in as many as 4,000 excess premature deaths per year); Schanzenbach Decl., D. Ct. Dkt. 40, ¶¶ 5, 31–48 & Tables 4–8 (describing expected substantial harm to 524,897 households consisting of 1.78 million individuals, some of whom are U.S. citizens, who are projected not to participate in SNAP, of which 35 percent of households have children aged 4 or younger).

DHS does not dispute the grave harms the Rule will inflict. It concedes that the Rule will cause hundreds of thousands of noncitizens to forego benefits for which they are eligible, including benefits for healthcare, nutrition, and housing, although it greatly understates the severity of those effects. DHS estimates that, as a result, these individuals will lose nearly $1.5 billion in federal benefits payments, and more than $1 billion in state benefits payments, every year.[12] DHS has also projected that the Rule will lead to "[w]orse health outcomes"; "[i]ncreased use of emergency rooms and emergent care as a method of primary health care due to delayed

[12] *See* DHS, Economic Analysis Supplemental Information for Analysis of Public Benefits Programs, D. Ct. Dkt. 50-43, at 7 & Table 5; Regulatory Impact Analysis, Inadmissibility on Public Charge Grounds, D. Ct. Dkt. 50-44, at 10–11 & Table 1.

treatment"; "[i]ncreased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated"; "[i]ncreases in uncompensated care in which a treatment or service is not paid for by an insurer or patient"; "[i]ncreased rates of poverty and housing instability"; "[r]educed productivity and educational attainment"; and other "unanticipated consequences and indirect costs." 83 Fed. Reg. at 51,270. Unrebutted expert declarations in the record before the district court provide estimates of likely public harms that are many times greater than DHS's estimates. Schanzenbach Decl., D. Ct. Dkt. 40, ¶¶ 31– 48 & Tables 4–8; Ku Decl., D. Ct. Dkt. 42, ¶¶ 63–73 & Tables 2–4. The Rule will also lead to increases in denials of adjustment, resulting in possible removal from the U.S. and consequent family separation. These harms are especially likely to befall the working poor, people with disabilities, and the elderly. *See* Ku Decl., D. Ct. Dkt. 42, ¶ 29; Van Hook Decl., D. Ct. Dkt. 45, ¶¶ 69–73, Table 9, Figure 9a.

Accordingly, the balance of the equities and the public interest weigh heavily in favor of a preliminary injunction.

IV. THERE IS NO BASIS TO NARROW THE INJUNCTION

The district court found that a nationwide injunction is necessary "to accord Plaintiffs and other interested parties with complete redress" because the individuals whom plaintiffs serve live in, and may move between, different states. App. 50a. *See also* Wheeler Decl., D. Ct. Dkt. 48, ¶ 2 (showing that plaintiff CLINIC supports affiliate programs that deliver direct services to immigrants in 49 states and the District of Columbia). The district court reasoned as well that a patchwork system of injunctions would "result[] in different public charge frameworks spread across the country," which would "wreak havoc on the immigration system." App. 49a. The district court's findings of fact are amply supported in the record, and must not be set aside unless clearly erroneous. Fed. R. Civ. P. 52(a)(6).

Defendants' contention that the district court's injunction is overbroad should be addressed in the first instance by the courts of appeals, particularly in light of the fact-specific nature of the district court's ruling. In any event, defendants' arguments do not establish that the district court abused its discretion. *See City of Chicago* v. *Sessions*, 888 F.3d 272, 293 (7th Cir. 2018); *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009).

First, the APA expressly permits the relief ordered by the district court. Section 705 of the APA empowers the courts to "postpone the effective date of an agency action" pending review so as to "prevent irreparable injury." 5 U.S.C. § 705; *see* App. 50a n.4 (granting relief under § 705). This statute has been read to provide authority to preliminarily enjoin agency action in its entirety, with nationwide applicability to both parties and nonparties. *E.g.*, *Texas* v. *EPA*, 829 F.3d 405, 435 (5th Cir. 2016) (granting stay under Section 705 of final EPA rule pending judicial review). *See also Mexichem Specialty Resins, Inc*. v. *EPA*, 787 F.3d 544, 562 (D.C. Cir. 2015) (Kavanaugh, J., dissenting) (noting that Section 705 "authoriz[es] courts to stay agency rules *pending judicial review*" (emphasis in original)).

Second, the district court injunction is consistent with the APA's directive that the courts "set aside" unlawful agency action. 5 U.S.C. § 706(2). "[T]he ordinary result [of such a determination] is that the rules are vacated—not that their application to individual petitioners is proscribed." *Nat'l Min. Ass'n* v. *U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409–10 (D.C. Cir. 1998). *Accord Pennsylvania* v. *President United States*, 930 F.3d 543, 575–76 (3d Cir. 2019) (district court did not abuse its discretion in granting a nationwide injunction due, in part, to the "impact of the[] interstate activities" of the plaintiff States' residents). *See also Texas* v. *United States*, 809 F.3d 134, 187–88 (5th Cir. 2015) (approving nationwide injunction), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016); *Owner-Operator Indep. Drivers Ass'n* v. *Fed.*

Motor Carrier Safety Admin., 656 F.3d 580, 589 (7th Cir. 2011) (same); *Earth Island Inst*. v. *Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) (same), *rev'd on other grounds sub nom. Summers* v. *Earth Island Inst*., 555 U.S. 488 (2009). Such relief ensures that the entirety of "today's vast and varied federal bureaucracy" stays within the bounds of the laws as Congress has written them. *City of Arlington* v. *FCC*, 569 U.S. 290, 313 (Roberts, C.J., dissenting) (internal quotation marks omitted).

Third, defendants assert that nationwide injunctions run afoul of Article III where such relief goes beyond what is needed to redress the injuries of the plaintiff before the Court. App. 32–34. That contention ignores the district court's specific factual findings that this preliminary injunction is necessary to protect the interests of particularized interests of plaintiffs. Moreover, there is a long history of issuing an injunction against a defendant properly before the court that also protects the interests of nonparties. *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1080–81 & n.77 (2018). Because this relief was available at the time the Judiciary Act of 1789 was passed, *id*., federal courts may continue to exercise it today. *See Grupo Mexicano de Desarrollo, S.A*. v. *Alliance Bond Fund, Inc*., 527 U.S. 308, 318–19 (1999).

Contrary to defendants' claims that nationwide injunctions are a recent invention, App. 38, Article III courts, including this Court, "have issued injunctions that extend beyond just the plaintiff for well over a century." Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920, 924, 935–54 (2020). Most recently, in *Trump* v. *Int'l Refugee Assistance Project* ("*IRAP*"), involving President Trump's second Executive Order suspending the entry of foreign nationals from certain specified countries, the Court narrowed a nationwide injunction by limiting it to foreign nationals with a bona fide relationship with the United States, but left in

place nationwide injunctions with respect to the plaintiff "and those similarly situated." 137 S. at 2087. Defendants' contention that nationwide injunctions protecting parties other than the plaintiffs violate Article III cannot be squared with *IRAP*.

Fourth, defendants' assertion that a nationwide injunction will prevent the percolation of issues and the development of the law in the lower courts has no bearing here. App. 32, 38–39. While the Court has cautioned lower courts to "take care" in using their broad powers so as to "not improperly interfere with the litigation of similar issues in other judicial districts," *Califano* v. *Yamasaki*, 442 U.S. 682, 702–03 (1979), defendants do not suggest that the courts here did not consider that caution. And the multiple pending appeals show that the district court injunction here is not impeding the lower courts from considering the issues presented. *See San Francisco*, 944 F.3d at 788 (holding that appeal from preliminary injunction was not mooted by nationwide injunctions entered by the district court in this case).

Fifth, the district court's emphasis on the importance of avoiding "different public charge frameworks spread across the country," App. 49a, is further supported by Congress's intent that the immigration laws "should be enforced . . . uniformly." Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 115(1), 100 Stat. 3359, 3384. *See also Texas* v. *United States*, 809 F.3d 134, 187–88 (5th Cir. 2015) (affirming nationwide injunction in immigration action, based in part on need for uniformity in immigration enforcement).

CONCLUSION

Defendants respectfully submit that defendants' application for a stay should be denied.

Respectfully submitted.

/s/ Andrew J. Ehrlich

CENTER FOR CONSTITUTIONAL RIGHTS
Ghita Schwarz
Brittany Thomas
Baher A. Azmy

666 Broadway
7th Floor
New York, New York 10012
(212) 614-6445
gschwarz@ccrjustice.org
bthomas@ccrjustice.org
bazmy@ccrjustice.org

THE LEGAL AID SOCIETY
Susan E. Welber
Kathleen Kelleher
Susan Cameron
Hasan Shafiqullah

199 Water Street, 3rd Floor
New York, New York 10038
(212) 577-3320
sewelber@legal-aid.org
kkelleher@legal-aid.org
scameron@legal-aid.org
hhshafiqullah@legal-aid.org

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Andrew J. Ehrlich
Counsel of Record
Jonathan H. Hurwitz
Elana R. Beale
Robert J. O'Loughlin
Daniel S. Sinnreich
Amy K. Bowles

1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
aehrlich@paulweiss.com
jhurwitz@paulweiss.com
ebeale@paulweiss.com
roloughlin@paulweiss.com
dsinnreich@paulweiss.com
abowles@paulweiss.com

Attorneys for Respondents Make the Road New York, African Services Committee, Asian American Federation, Catholic Charities Community Services (Archdiocese of New York), and Catholic Legal Immigration Network, Inc.

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