19-3595-cv

United States Court of Appeals

for the

Second Circuit

MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, ASIAN AMERICAN FEDERATION, CATHOLIC CHARITIES COMMUNITY SERVICES, (ARCHDIOCESE OF NEW YORK), CATHOLIC LEGAL IMMIGRATION NETWORK, INC.,

Plaintiffs-Appellees,

– v. –

KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security, UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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Corporate Disclosure Statement
(Federal Rule of Appellate Procedure 26.1)

1. Plaintiff Make the Road New York ("MRNY") has no parent corporation. No publicly held corporation owns 10 percent or more of MRNY.

2. Plaintiff African Services Committee ("ASC") has no parent corporation. No publicly held corporation owns 10 percent or more of ASC.

3. Plaintiff Asian American Federation ("AAF") has no parent corporation. No publicly held corporation owns 10 percent or more of AAF.

4. Plaintiff 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.

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

Table of Contents

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The district court's preliminary injunction prevents widespread, irreparable harm to plaintiffs, immigrants, their families (including citizen children), and public health—harm that defendants *concede*—while imposing no concrete harm on any legitimate government interest. The injunction merely requires defendants to preserve the status quo by continuing to use 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. Defendants have conceded that the existing test reflects a lawful exercise of agency authority. While defendants complain that the injunction "force[s]" them to "retain" the current standard, App. Br. at 53, they point to no urgent need or any changed circumstances requiring that standard to be abandoned while this litigation proceeds.

On the other side of the scale, as the district court found, allowing defendants to implement the radical changes they propose would "[o]vernight . . . expose individuals to economic insecurity, health instability, denial of their path to citizenship, and potential deportation." SA 49. This harm is not limited to noncitizens who are covered by the public charge rule (the "Rule").[1] By the

[1] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019).

Department of Homeland Security's ("DHS's") own estimates, the Rule will cause hundreds of thousands of individuals and households, in many cases noncitizens not subject to public charge scrutiny, to forgo 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, 51,267-69 & Tables 52-53 (Oct. 10, 2018). As a result, DHS projected that the Rule would lead to "[w]orse health outcomes," "[i]ncreased rates of poverty and housing instability," and "[r]educed productivity and educational attainment," among other harms. *Id.* at 51,270. Unrebutted expert declarations in the record show that even these dire projections greatly understate the Rule's likely effects, which could result in as many as 3.1 million individuals (including many U.S. citizens) forgoing Medicaid benefits every year. Ku Decl. ¶ 9, JA 220.

In these circumstances, the irreparable harm to plaintiffs, balance of equities, and public interest weigh strongly in favor of maintaining the current public charge standard pending the outcome of this litigation.

Plaintiffs are also likely to succeed on the merits of their challenge. The Rule represents a radical break from the consistent historical meaning of "public charge," repeatedly approved by Congress, in Section 212(a)(4) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(4). Under that provision, 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 term "public charge" to include any noncitizens who 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. Under the Rule, noncitizens can be deemed likely to be public charges even if they have never received any public benefits, and even if they working and able to provide for themselves, and regardless of the amount of benefits they are predicted to receive. 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).

The Rule is not subject to *Chevron* deference because it concerns a question of great economic and political significance that Congress cannot be assumed to have delegated to the Executive to resolve. In any event, the Rule fails at both *Chevron* steps, because the statutory term is unambiguous and the Rule

falls far outside reasonable interpretive bounds. Since the term "public charge" became part of federal immigration law in 1882, administrative agencies and courts, including the Supreme Court and 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. Defendants have not identified a single judicial or administrative decision to the contrary, and plaintiffs are aware of none. 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 grounds has consistently been a fraction of one percent. Congress has 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. 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 Public Comment at 15, JA 1381 (emphasis added). Congress did not

authorize defendants to "transform" or "reshape" immigration law in this fashion by Executive fiat. *See* Compl. ¶ 9, JA 46.

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(2), and its empowerment of the district court 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 Court should affirm the district court's decision and permit the injunction to remain in effect while the litigation below proceeds to final judgment.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Did the district court correctly conclude that plaintiffs are likely to succeed on their claim that the Rule is contrary to the INA?

2. Did the district court correctly conclude that plaintiffs are likely to succeed on their claim that the Rule is contrary to the Rehabilitation Act?

3. Did the district court correctly conclude that plaintiffs are likely to succeed on their claim that the Rule is arbitrary and capricious?

4. Did the district court correctly conclude that plaintiffs are likely to succeed on their claim that the Rule violates equal protection?

5. Did the district court correctly conclude that plaintiffs have standing to challenge the Rule and are within the INA's zone of interests?

6. Did the district court correctly conclude that the Rule will cause irreparable harm to plaintiffs, immigrant communities, and the public if not enjoined?

7. Did the district court correctly conclude that the balance of equities and public interest weigh in plaintiffs' favor?

8. Did the district court act within its discretion in issuing a nationwide injunction and postponing the effective date of the Rule under Section 705 of the APA?

COUNTERSTATEMENT OF THE CASE

I. 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 to only 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" to refer to people expected to receive any amount of benefits that are used by many millions of working Americans, regardless of their ability to work and care for themselves.

A. The Original Meaning of "Public Charge" Referred to a Narrow Class 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, § 2, 22 Stat. 214, 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, § 1, 26 Stat. 1084. 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 recognized, "[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) ("*San Francisco*"). Instead, 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), JA 990.

The 1882 Act expressly recognized that some immigrants who were not to be excluded as likely public charges might nonetheless need short-term public assistance. The Act established an "immigrant fund" to provide assistance for immigrants who, while not excludable as likely public charges, might require temporary "care" and "relief" "until they can proceed to other places or obtain occupation for their support." 22 Stat. 214, § 1; 13 Cong. Rec. 5106 (June 19, 1882) (statement of Rep. Reagan), JA 987. Contemporaneous state and local laws confirmed the common law understanding of "public charge" as individuals "incompetent to maintain themselves" or "permanently disabled," and "not merely

destitute persons, who, on their arrival here, have no visible means of support." *City of Boston* v. *Capen*, 61 Mass. 116, 121-22 (1851).

Consistent with Congress's intent that a temporary need for public assistance would not render an immigrant a public charge, the Supreme Court, in its only decision construing the public charge provision, determined that a group of "illiterate laborers" who did not speak English, had only $65 in their possession, and intended to move to an area where they were unlikely to find employment could not be excluded on public charge grounds. *Gegiow* v. *Uhl*, 239 U.S. 3, 8-9 (1915). The Court explained the provision was intended only to exclude immigrants "on the ground of permanent personal objections accompanying them," rather than those who might be unable to find work.[2] *Id.* at 10. This Court's 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.*

[2] Revisions to the statute in 1917 did not affect its meaning. *See, e.g.*, *Ex Parte Mitchell*, 256 F. 229, 230-32 (N.D.N.Y. 1919) (citing *Howe* v. *United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917)); *United States ex rel. Mantler* v. *Comm'r of Immigration*, 3 F.2d 234, 235-36 (2d Cir. 1924). Defendants elsewhere have cited *U.S. ex rel Iorio* v. *Day*, 34 F.2d 920 (2d Cir. 1929), for the proposition that the 1917 Act broadened the meaning of "public charge." But that decision—which held that an individual likely to end up in jail was not a public charge—equated the term "public charge" with "dependency" and explained that the provision covered noncitizens who "will become destitute." *Id.* at 922.

Savitsky, 247 F. 292, 294 (2d Cir. 1917); *accord Wallis* v. *Mannara*, 273 F. 509, 509 (2d Cir. 1921) (public charge means individuals unlikely "to earn a living"); *Mantler*, 3 F.2d at 235.

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

The original meaning of "public charge" remained in place throughout the twentieth century. In the leading case of *Matter of B-*, 3 I. & N. Dec. 323 (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." *Id.* at 324. The BIA further held in that case that, for removal purposes, *no* benefits would render a noncitizen a public charge unless the government made a lawful demand for repayment that was refused. 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.").

Defendants assert that *Matter of B-* expanded the scope of "public charge" by purportedly determining that "any" amount of unreimbursed benefits would render a noncitizen a public charge. App. Br. at 35-36. The Ninth Circuit similarly relied on this interpretation of *Matter of B-* in determining that the public charge analysis has changed over time to "reflect[] changes in the way in which we provide assistance to the needy." *San Francisco*, 944 F.3d at 796.

Defendants and the Ninth Circuit misinterpret the case. Nothing in the opinion suggests that the BIA intended to *lower* the threshold for benefits that could trigger a public finding, or that receipt of even a small amount of temporary or incidental benefits would be sufficient to render a person a public charge. That issue was not even 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 70 years since *Matter of B-* was decided in which receipt of a small amount of unreimbursed benefits, alone, was held sufficient to render a person a public charge. 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), JA 1298, 1300-06. Congress's rejection of this proposal is discussed further below. *See infra* pp. 17-19.

Administrative decisions over decades have consistently followed *Matter of B-* and focused on the noncitizen's ability to work and care for herself, not the mere receipt of public benefits:

- *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409 (B.I.A. 1962; A.G. 1964): Petitioner not likely to become a public charge, although he had falsified an offer of employment, completely lacked of English fluency, and had only $50 in assets, when he was young, had work experience, and had family in U.S. willing to assist him.

- *Matter of Harutunian*, 14 I. & N. Dec. 583 (B.I.A. 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 although "at the time of the hearing she was, and had been for some time, the recipient of welfare," because she was 28, healthy, capable of finding employment, and supported by family.

- *Matter of Vindman*, 16 I. & N. Dec. 131 (B.I.A. 1977): Petitioners likely to become public charges because they were 66 and 54 years old, had received 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 she and her spouse had been unemployed for four years and her family received cash assistance, as she was "young," currently employed, and able to earn a living.

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.

In keeping with the narrow scope of "public charge," federal immigration officials have excluded only a minuscule percentage of arriving immigrants on public charge grounds. DHS's own data shows that 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. The same has been true since. Between 1931 and 1980 (the last year for which DHS published 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]

Defendants have no response to this consistent historical record, and they have not identified a single case or administrative decision interpreting "public charge," as the Rule does, to include temporary receipt of noncash public benefits, regardless of amount, or to apply to those who rely primarily on their own earnings rather than public benefits. The two 90+-year-old district court opinions that defendants cite on this point are inapposite. App. Br. at 36. In *Guimond* v. *Howes*, 9 F.2d 412 (D. Me. 1925), a family was held likely to be public charges

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[3] *See* Dep't of Homeland Security, *Table 1. Persons Obtaining Lawful Permanent Resident Status: Fiscal Years 1820 to 2016* (Dec. 18, 2017), JA 1009-17; Immigration & Naturalization Service, *2001 Statistical Yearbook of the Immigration and Naturalization Service* 258 (2003), JA, 1019, 1033; *see also* Mae Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America 18 (2004), JA 1036, 1046.

where the husband's only occupation was illegal bootlegging and the wife and children relied on charity when he was in jail. In *Ex Parte Turner*, 10 F.2d 816, 817 (S.D. Cal. 1926), a family was held inadmissible where the husband was "likely [to] be incapacitated from performing any work or earning support for himself and [his] family," and the wife had no property "or any means of earning a livelihood."

Defendants also assert that the definitions of "public charge" in the 1933 and 1951 editions of Black's Law Dictionary, App. Br. 37, and a 1929 immigration treatise, *id.* (citing Arthur Cook et al., Immigration Laws of the United States § 285 (1929)), show 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 respondent in *Kichmiriantz* had been "committed to the Stockton State Hospital for the insane" within five years of admission, and was "unable to care for himself in any way." *Id.* at 697-98. The court found him *not* to be a public charge because his family covered the cost of his "care and maintenance." *Id.* at 698. Far from showing that the receipt of "any" amount of public benefits rendered a person a public charge, *Kichmiriantz* reflects the consistent historical focus of the term on those unable to care for themselves and without other support. *Id.*

C. Congress Has Approved Administrative Interpretations by Repeatedly Reenacting the Public Charge Provisions of the INA Without Relevant 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 inadmissibility provision in the Immigration and Nationality Act of 1952 without purporting to change its interpretation. Pub. L. No. 82-414, § 212(a)(15), 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. Br. 33). But that statement on its face reflects only Congress's recognition of the fact-specific nature of determining whether individual noncitizens are likely to be a public charge. Nothing in the report suggests that Congress intended to authorize the Executive to redefine the statutory term "public charge" itself far beyond its understood meaning.

Almost 40 years later, in the Immigration Act of 1990, Congress again reenacted the public charge provision without material change. 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 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), JA 1130, 1135. Again, Congress declined to depart from that definition.

In 1996, Congress yet again chose not to disturb the settled meaning of "public charge" in two major pieces of legislation that otherwise addressed noncitizen use of public benefits and public charge determinations. In the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Congress restricted noncitizens' eligibility for certain federal benefits. 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, which amended PRWORA and expanded access to benefits for noncitizens,[4] many noncitizens remain eligible for federal benefits, including Medicaid and SNAP, and states are 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 "not depend on public resources to meet their needs," 84 Fed. Reg. at 41,294 (quoting 8

[4] *See* Agricultural Research, Education and Extension Act of 1998, Pub. L. No. 105-185, 112 Stat. 523 (1998); Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134; Children's Health Insurance Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 8.

U.S.C. § 1601(2)(A)). But Congress has plainly concluded that allowing noncitizens to receive certain benefits is consistent with that purpose.

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 public charge determination should be based on the "totality of the circumstances" and should take account of the applicant's age; health; family status; assets, resources, and financial status; and education and skills. *See* 8 U.S.C. § 1182(a)(4)(B)(i). IIRIRA also required many noncitizens seeking admission or adjustment of status to obtain an enforceable affidavit of support. *See id.* §§ 1182(a)(4)(B), (C); *see also id.* § 1183a Congress otherwise re-enacted the existing 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 to include noncitizens who receive 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), JA 1298, 1300-06; *see supra* at 11.

The proposed amendment passed the House but was withdrawn in the Senate under threat of Presidential veto. 142 Cong. Rec. S11881-82 (daily ed. Sept. 30, 1996) (statement of Sen. Kyl), JA 1316-17. Contrary to defendants' unsupported assertion that the proposed amendment was rejected out of concern it would restrict the Executive's power to define "public charge," App. Br. at 38, the legislative history shows that opposition to the amendment was based on the view that its definition of "public charge" was overbroad and unduly harsh. President Clinton expressly 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).[5] Likewise, a leading opponent of the amendment 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), JA 1312-13.

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 Sessions 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), JA 1322, 1325, 1328-29. Senator Sessions's proposed amendment was rejected. *Id.* at 63, JA 1328.

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[5] The two pieces of legislative history defendants cite do not support their argument. App. Br. at 38-39. One is a House Committee Report issued several days *before* the expanded public charge provision was removed from IIRIRA that does not mention the President. *See* H.R. Rep. No. 104-828, at 241 (1996). The other is a Congressional debate from the day the bill was enacted that simply says the public charge provision was "dropped" during negotiations after the "administration threatened to veto" the bill. *See* 142 Cong. Rec. S11881-82 (daily ed. Sept. 30, 1996), JA 1316-17.

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.'" And it excluded from consideration in public charge determinations

receipt of noncash benefits such as Medicaid, SNAP, and housing assistance because 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. Defendants point to statements by INS that the Field Guidance was the "first time" the term "public charge" had been defined by statute or regulation. App. Br. at 7. But they ignore INS's unequivocal statement that the definition was consistent with the agency's "past practice" and "longstanding law." 64 Fed. Reg. at 28,689, 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.

A. The Rule

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). Receipt of two benefits in one month counts as two months. Thus, a person could be deemed a public charge for participating in four separate benefit programs for three months in any three-year

period, such as might occur after a sudden loss of employment or onset of a serious medical condition. *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[6]), 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 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., Dist. Ct. Dkt. 40, ¶¶ 6-19 & Tables 1-3; Allen Decl., ¶¶ 10-22, JA 161-66; Ku Decl. ¶¶ 16-22, 79-81, JA 223-29, 268-69. 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.

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[6] *See* Proposed 8 C.F.R. § 212.21(b)(5).

The Rule creates a complex and confusing scheme of positive and negative "factors," including "heavily weighted" factors, for USCIS personnel to consider in determining whether someone is likely to become a public charge. Proposed 8 C.F.R. § 212.22. The factors focus overwhelmingly on the applicant's income and financial resources. The strong correlation between these factors (such as low income, low credit score, past receipt of public benefits, or a medical condition requiring extensive medical treatment and lack of private health insurance) leads to a snowball effect in which a single characteristic—low income or limited means—triggers multiple negative factors, making a public charge finding virtually inevitable even when the applicant is employed.

The Rule would dramatically increase the number of persons potentially deemed a public charge. According to the Kaiser Family Foundation, 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* (Oct. 2018) at 1, JA 1351. 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") Public Comment at 3, 7-8, 10, JA 1158, 1162-63, 1165. Defendants have not challenged these estimates.

B. Consequences of the Rule

The Rule will cause grave harm to immigrant communities across the country. Defendants concede that noncitizens will forgo $1.5 billion in federal benefits, and more than $1 billion in state benefits, every year, because of the Rule. *See* DHS, Economic Analysis Supplemental Information for Analysis of Public Benefits Programs, at 7 & Table 5, JA 1642-43; Regulatory Impact Analysis, Inadmissibility on Public Charge Grounds, at 10-11 & Table 1, JA 1653-55. Studies from the Migration Policy Institute, Fiscal Policy Institute, and Manatt Health, among others, provide estimates that are many times greater. *See* Compl. ¶ 244 & nn. 137-39 (listing public comments submitted to DHS that referenced each of these studies), JA 138-39. Defendants concede that, as a result, the Rule would cause "[w]orse health outcomes," "[i]ncreased use of emergency rooms," "[i]ncreased prevalence of communicable diseases," "[i]ncreased rates of poverty and housing instability," and "[r]educed productivity and educational attainment." 83 Fed. Reg. at 51, 270, JA 938.

The uncontested declarations of plaintiffs' experts further demonstrate the vast impact the Rule will have on public health, homelessness, and food

insecurity, among other ills. As these experts explain, the Rule will 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—forgoing benefits for which they are eligible. *See* Ku Decl. ¶¶ 26, 46-54, JA 231-32, 244-52. For example, Professor Leighton Ku concludes that

> the public charge rule will lead between 1.0 and 3.1 million members of immigrant families, many of whom are United States citizens, to disenroll from or forego Medicaid benefits each year, even though they may be eligible. Those harmed are disproportionately low-income members of racial and ethnic minority groups, especially Latino and Asian families, and many have serious health problems . . . . As a result, there could be as many as 1,300 to 4,000 excess premature deaths per year.

Id. ¶ 9, JA 220. *See also* 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 projected not to participate in SNAP, of which 35 percent of households have children aged 4 or younger, many of whom are U.S. citizens). The Rule will also increase denials of adjustment and consequent family separation. Ku Decl. ¶ 29, JA 235-36. These hardships are especially likely to fall on the working poor, people with disabilities, and the elderly. *See id.* ¶ 29, JA 235-36; Van Hook Decl. ¶¶ 69-73, Table 9, Figure 9a, JA 398-400, 432, 420.

III. Procedural History

On August 27, 2019, plaintiffs—five nonprofit organizations that serve and advocate for low-income noncitizens in New York and nationwide—

commenced this action 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") and has proceeded in tandem with this case. Seventeen States (plus the District of Columbia), five municipalities, and multiple nonprofit organizations brought seven similar cases 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 barring enforcement of the Rule and postponing its effective date under 5 U.S.C. § 705. SA 25-27, 55-57. Each of the four other district courts in which the Rule was challenged also preliminarily enjoined it, in some cases nationwide and in others with a more limited geographic scope.

Defendants appealed these decisions to the Second, Fourth, Seventh, and Ninth Circuit Courts of Appeals, and moved for stays pending appeal. This Court and the Seventh Circuit (with one dissent) denied defendants' motions. CA2 Dkt. 129 & 92. Divided panels of the Fourth and Ninth Circuit stayed the preliminary injunctions entered by district court in those circuits. CA2 Dkt. 56 & 60; *San Francisco*, 944 F.3d 773.[7]

[7] On January 13, 2020, defendants filed an application in the Supreme Court seeking to stay the district court injunction pending appeal. No. 19A785 (U.S.). Plaintiffs filed an opposition brief on January 22, and defendants filed a reply on January 23. As of this filing, defendants' motion remains pending.

SUMMARY OF ARGUMENT

I. The district court correctly determined that the Rule is likely contrary to the INA. Defendants barely mention *Chevron*, but defendants are not entitled to *Chevron* deference and in any event the Rule cannot satisfy either prong of that test. The Rule represents a radical break from consistent judicial and administrative understanding of the public charge provision, and Congress has repeatedly approved that understanding by reenacting the provision without relevant change and by expressly rejecting proposals to change it.

II. The district court correctly determined that the Rule is likely contrary to the Rehabilitation Act and DHS's regulations thereunder because it denies noncitizens government services "on the basis of disability" and uses "criteria" with discriminatory "effect."

III. The district court correctly determined that the Rule is likely arbitrary and capricious. Defendants' contention that receipt of "any public benefits" indicates lack of self-sufficiency runs counter to the undisputed evidence that supplemental benefits promote rather than impede self-sufficiency, and that the benefit programs covered by the Rule are widely used by working families with incomes well above the poverty line.

IV. The district court correctly determined that the Rule likely violates equal protection. Contemporaneous statements by key decision-makers

and the unusual circumstances in which the Rule was adopted demonstrate that the Rule is driven by unconstitutional animus. Defendants do not dispute that the Rule will have a disparate impact on nonwhite immigrants.

V. The district court correctly determined that plaintiffs have standing to challenge the Rule. Plaintiffs have been forced to divert resources to respond to the Rule and are consequently less able to assist clients in other matters. The district court also correctly determined that "plaintiffs plainly fall within the INA's zone of interests." The INA provides a role for immigrant advocacy organizations whose interests are "inextricably intertwined" with the immigrant communities they serve. SA 39.

VI. The district court correctly determined that the Rule would irreparably harm plaintiffs by impeding their ability to assist and advocate for immigrants, and by imposing economic harm that cannot be recovered under the APA.

VII. The district court also correctly determined that the balance of equities and public interest favor plaintiffs. Defendants concede that the Rule will impose great harm on noncitizens and the broader public. On the other hand, the injunction merely requires defendants to maintain the status quo and continue to apply the Field Guidance. Defendants cite no emergency or changed circumstance requiring the immediate implementation of the Rule.

VIII. The district court did not abuse its discretion by issuing a nationwide injunction. The court correctly determined that nationwide relief was necessary to give plaintiffs "complete redress" and to preserve uniformity in the nation's immigration laws. The APA expressly provides that courts may "set aside" or "postpone the effective date" of unlawful agency action.

ARGUMENT

This Court reviews a district court's grant of a preliminary injunction for an abuse of discretion. *Wisdom Import Sales Co., L.L.C.* v. *Labatt Brewing Co., Ltd.*, 339 F.3d 101, 108 (2d Cir. 2003). The district court's findings of fact are subject to review under the "highly deferential 'clearly erroneous' standard." *Id.* The scope of the district court's injunction is also reviewed for abuse of discretion. *See Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009). A preliminary injunction is appropriate when plaintiffs establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter* v. *Nat. Res. Def. Counsel, Inc.*, 555 U.S. 7, 20 (2008).

I. Plaintiffs Are Likely to Succeed on the Merits

A. The Rule Violates the APA

A rule is "unlawful" and "shall [be] . . . set aside" under the APA if it is "not in accordance with [the] law." 5 U.S.C. §§ 706(2)(A), 706(2)(C). The Rule should be set aside because it is contrary to the INA and the Rehabilitation Act.

1. The Rule is Contrary to the INA

The district court correctly concluded that the Rule was likely contrary to the INA because defendants' novel definition of public charge has "no support in the history of U.S. immigration law" and is contrary to Congress's intent. SA 41, 46. The Rule is not entitled to deference under *Chevron*—which defendants scarcely mention in their brief—because it concerns a major question "of deep 'economic and political significance.'" *See King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015). Even applying the *Chevron* framework, the Rule is not a valid exercise of agency discretion because the term "public charge" is unambiguous and the Rule's definition is an unreasonable interpretation of the statute. Defendants' reliance on broad statements of Congressional policy and other statutory provisions to justify radically expanding the provision do not withstand scrutiny.

(a) The Rule is Contrary to the Consistent Historical Interpretation of 'Public Charge' that Congress has Repeatedly Approved

The Rule is contrary to the INA, as demonstrated by the plain language of the public charge inadmissibility provision, its longstanding and

consistent historical interpretation, and Congress's repeated approval of that interpretation and rejection of efforts to redefine it.

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—as shown in the 1882 Immigration Act itself and its legislative history. This interpretation was 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* at 7-10.

Second, the consistent, century-long judicial and administrative interpretation of "public charge" as 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, citations, and alteration omitted); *see United Airlines, Inc.* v. *Brien*, 588 F.3d 158, 172 (2d Cir. 2009). *See supra* at 10-14.

Third, the adoption of the Field Guidance only three years after enactment of PRWORA and IIRIRA further supports this interpretation. As the Supreme 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, 167-68 (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); *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 414 (1993). Here, defendants cite no "persuasive evidence that [INS] mistook" Congress's intent. *Solid Waste Agency*, 531 U.S. at 168.

Fourth, Congress's repeated reenactment of the public charge provision without relevant change evidences its approval of the agency interpretation. *See supra* at 15-17. "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 Helsinn Healthcare S.A.* v. *Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633-34 (2019) ("[W]e presume

that when Congress reenacted the same language . . . , it adopted the earlier judicial construction of the phrase."); *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."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) (where "a word or phrase has been . . . given a uniform interpretation by inferior courts or the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation").

Fifth, 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* at 17-19. 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. Similarly, this Court recently explained that the "rejection of [a] provision" and ultimate "omission of pertinent language from a [draft] bill being considered by Congress" is "strong evidence of a deliberate decision by Congress" and is "probative of [Congressional] intent." *Trump* v. *Deutsche Bank AG*, 943 F.3d 627, 642-43 (2d Cir. 2019); *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 Supreme Court has placed particular weight on Congress's decision—as it did in 1996, *see supra* at 17-19—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.

(b) 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.

(i) *Chevron* Does Not Apply

Defendants assert that the Rule is a "permissible construction of the [INA]" under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). App. Br. at 31. But the *Chevron* doctrine does not apply to regulations like the Rule that involve questions "of deep 'economic and political significance,'" such as those that involve "billions of dollars in spending" and affect healthcare "for millions of people." *See King*, 135 S. Ct. at 2489; *see also Texas* v. *United States*, 809 F.3d 134, 181-82 (5th Cir. 2015) (DHS regulation concerning non-enforcement policy for immigrant parents of citizen and lawful permanent resident children not afforded *Chevron* deference because it "implicates 'questions of deep economic and political significance'"), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). The Rule—which, among other things, affects billions of dollars of spending on public benefits programs for millions of people, *see supra* at 24-25—qualifies as such a "major question" to which *Chevron* deference does not apply.[8]

[8] Defendants argue in a footnote that the reference in the public charge provision to "Attorney General" really refers to the Secretary of Homeland Security. App.

(ii) The Rule Fails at Both *Chevron* Step One and Step Two

In any event, the Rule still fails at both *Chevron* steps. At *Chevron* step one, "a reviewing 'court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000) (quoting *Chevron*, 467 U.S. at 842-43).

Defendants' proffered interpretation of the statutory term "public charge" fails at *Chevron* step one. Defendants argue that the Rule is justified by the "broad discretion" the statute purportedly gives to the Executive Branch to define "public charge" as officials see fit. *See* App. Br. at 34. But while the statute undoubtedly gives the Executive authority to determine whether an individual noncitizen is likely to be a public charge based on the totality of the circumstances, the statute does not give it unfettered discretion to redefine the statutory term "public charge" in a way that is inconsistent with the plain meaning of the statute and decades of administrative and judicial interpretation and Congressional intent. *See supra* at 7-14.

Br. at 6 n.2. But DHS lacks authority to promulgate the Rule under the plain language of the public charge provision. *See* Mem. of Law in Supp. Of Pls. Mot. for Prelim. Inj., D. Ct. Dkt. 39 at 22-24; Reply Mem. in Further Supp. Of Pls. Mot. for Prelim. Inj., D. Ct. Dkt. 134, at 8-9. Because the district court did not rely on this point issuing the injunction, plaintiffs need not address it here.

The Supreme Court's decision in *Brown & Williamson Tobacco Corp.*, 529 U.S. at 143-56, is instructive. The Court held in that case that the FDA lacked authority to regulate nicotine in tobacco and tobacco products themselves, despite broad statutory grant of authority to regulate any "articles (other than food) intended to affect the structure or any function of the body." The Court concluded that the FDA's proposed regulation failed at *Chevron*'s first step based upon 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 re-defining "public charge" here.[9]

[9] The two cases cited by defendants for their broad reading of the statutory phrase "in the opinion of," App. Br. at 34, refer to *individual* determinations. *See Blanco* v. *INS*, 68 F.3d 642, 645-46 (2d Cir. 1995) (determining Attorney General abused discretion in denying suspension of deportation of individual petitioner); *Thor Power Tool Co.* v. *Comm'r*, 439 U.S. 522, 540 (1979) (IRS Commissioner appropriately exercised authority in rejecting individual taxpayer's accounting practices). Neither suggests that such language empowers the Executive to redefine a statutory term in the face of longstanding contrary administrative interpretation repeatedly approved by Congress.

If Congress's intent is ambiguous, then at *Chevron* step two courts will look to dictionary definitions and "contextual indications" of the term's meaning, and will reject an agency's interpretation "when it goes beyond the meaning the statute can bear." *MCI Telecomm. Corp.* v. *Am. Tel. & Tel. Co.*, 512 U.S. 218, 226, 229 (1994). Here, all interpretive tools indicate that the Rule is outside any permissible bounds. *See Michigan* v. *EPA*, 135 S. Ct. 2699, 2707-08 (2015). *See supra* at 31-35.

(iii) Other Provisions of the INA do not Justify Overriding Congress's Decision not to Redefine "Public Charge"

Defendants ask this Court to infer, based on statutory provisions other than the public charge provision, that Congress intended to expand the definition of public charge in 1996—despite its express consideration and rejection of such legislation. *See supra* at 17-19. None of the cited provisions support defendants' argument.

First, 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. Br. at 30-31. 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 allowing noncitizens to access those benefits is not inconsistent with the statements of purpose expressed in PRWORA, including the desire to promote self-sufficiency. *See supra* at 16-17.

PRWORA's statements of legislative purpose do not justify the Rule's radical expansion of public charge for another reason. The Supreme Court has repeatedly stressed that 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). 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*.

Second, defendants point to provisions in the INA that require certain noncitizens to provide enforceable affidavits of support by their sponsors as a condition of admissibility under the public charge provision. *See* App. Br. at 27-28. Affidavits of support had long existed in immigration law, but PRWORA required that they be enforceable against the sponsor, and IIRIRA made obtaining an enforceable affidavit an independent requirement under the public charge inadmissibility provision. *See generally* Center for Law and Social Policy ("CLASP") Public Comment at 15, 98, JA 1492, 1575. As discussed above, however, Congress chose not to redefine "public charge" to mean any receipt of cash or noncash benefits, and rejected such a proposal a month later when enacting IIRIRA. *See supra* at 17-19. Had Congress intended to redefine public charge, it would have done so directly. *See generally 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").

There is no inconsistency between requiring noncitizens seeking admission or status adjustment to provide an enforceable affidavit of support and

retaining the traditional, narrow interpretation of "public charge." 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 the sponsor's agreement to repay certain benefits used by the noncitizen can be enforced. It also 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.

Third, defendants 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. Br. at 26-27 (citing 8 U.S.C. §§ 1182(s), 1611-13, 1641) (emphasis added). In exempting so-called "battered qualified aliens" from public charge, 8 U.S.C. § 1182(a)(4)(E), Congress did not implicitly "presuppose," App. Br. at 27, that any benefits use by any other noncitizens would necessarily cause the latter to all be categorically 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 and radically reinterpret "public charge" *sub silentio*.

Fourth, defendants rely on the "special rule for determination of public charge" that applied to noncitizens seeking status adjustment pursuant to the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3399, which permitted certain undocumented immigrants to apply for lawful status. App. Br. at 27. Congress provided that a noncitizen applying for adjustment of status under IRCA could not be excluded as likely to become a public charge if she "demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance." 8 U.S.C. § 1255a(d)(2)(B)(iii). Consistent with plaintiffs' position, this provision reflects Congress's understanding of the distinction between cash assistance, which may reflect dependence on the government for subsistence, and noncash benefits. It further demonstrates Congress's understanding that employment is inconsistent with being a public charge. Defendants' argument that this rule was somehow intended to "narrow the Executive's application of the public-charge ground to only those who receive cash assistance," App. Br. at 27, has no support in the statute's text or legislative history.

2. The Rule is Contrary to the Rehabilitation Act

The Rule is also "contrary to law" because it discriminates against individuals with disabilities in violation of Section 504 of the Rehabilitation Act and DHS's regulations thereunder.

Under the Rule, applicants with disabilities start with multiple strikes against them. The Rule requires immigration officials to treat an applicant's disability diagnosis as a negative factor relating to the applicant'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)(B), 212.22(b)(4)(ii)(H); 84 Fed. Reg. at 41,408.

Defendants argue that the Rule does not violate the Rehabilitation Act because it does not deny noncitizens adjustment of status "solely by reason of disability." App. Br. at 51. But under the Rule, 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 multiple negative factors related to disability. This is the type of discrimination prohibited by the Rehabilitation Act. *See Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 276 (2d Cir. 2003) (in cases

involving government's provision of services or programs, plaintiffs must show that "disabilities were a substantial cause of their inability to obtain services.").

The Rule also runs afoul of DHS's regulations 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"). The Rule itself concedes that the Rule will have a "potentially outsized impact . . . on individuals with disabilities." 84 Fed. Reg. at 41,368.

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. Br. at 51. But the Rule does more. It penalizes disabled individuals whether or not the disability's limitations can be eliminated or reduced by reasonable accommodations. *See* proposed 8 C.F.R. § 212.22(b)(2). Here, contrary to defendants' argument, 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 specifically prohibits discrimination based upon disability. *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.").

3. The Rule is Arbitrary and Capricious

The District Court correctly ruled that the Rule was arbitrary and capricious because defendants failed to offer "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." SA 44.

Defendants' argument that the radical expansion of public charge under the Rule is not arbitrary and capricious depends on its contention 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. Br. at 43. 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. *Judulang* v. *Holder*, 565 U.S. 42, 55 (2011).

Defendants' position also "runs counter to the evidence before the agency." *See Motor Vehicle Mfrs. Ass'n of the U.S.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The undisputed evidence establishes that supplemental benefits actually promote rather than impede self-sufficiency, *e.g.*, CLASP Public Comment at 18-22, 31-36, 48, JA 1495-99, 1508-13, 1525; CBPP

Public Comment at 49-52, JA 1204-07; Compl. ¶¶ 116-30, JA 88-94, and that the programs covered by the Rule are widely used by working families—including those with incomes far above the poverty level—to supplement their incomes. Schanzenbach Decl., Dist. Ct. Dkt. 40 ¶¶ 6-19 & Tables 1-3; Allen Decl. ¶¶ 10-22, JA 161-66; Ku Decl. ¶¶ 16-22, 79-81, JA 223-29, 268-69; *accord* 64 Fed. Reg. at 28,692 (INS noting that noncash benefits are "available to families with incomes far above the poverty level"). The arbitrary nature of the rule is further demonstrated by the facts that a working person receiving less than $200 in SNAP benefits over three years could be considered a "public charge" under the Rule, *see City & Cty. of S.F.*, 408 F. Supp. 3d at 1099, and that half or more of U.S.-born citizens receive public benefits that would trigger a public charge finding for a noncitizen, *see supra* at 4, 23-24.

Defendants' argument is also inconsistent with the undisputed evidence showing a low likelihood that someone found to be a public charge under the Rule would actually receive benefits in the future. *See* Van Hook Decl. ¶¶ 79-90, JA 402-07 (concluding that there is a low correlation between being found likely to become a public charge under the Rule and receipt of government benefits). The district court similarly recognized that there is no "rational relationship[] between many of the additional factors outlined in the Rule and a finding of benefits use" in the future. SA 45 (specifically identifying the Rule's

reliance on such factors as an immigrant's "credit score" and "English-language proficiency," the latter of which lacks any standard for an immigration officer to apply, *see* proposed 8 C.F.R. § 212.22(b)(5)(ii)(D)).

4. The Rule Violates Equal Protection

The district court correctly concluded that plaintiffs are likely to prevail on their equal protection claim. SA 47-48. (The Court need not, of course, reach this issue if it concludes that the Rule is contrary to the INA or the Rehabilitation Act, or is arbitrary and capricious.)

Because the Rule was "motivated by discriminatory animus and its application results in discriminatory effect," the Rule is subject to heightened scrutiny under *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-68 (1977). *See, e.g.*, *Batalla Vidal*, 291 F. Supp. 3d at 274-77; *Saget* v. *Trump*, 375 F. Supp. 3d 280, 366-67 (E.D.N.Y. 2019); *Ramos* v. *Nielsen*, 336 F. Supp. 3d 1075, 1098 (N.D. Cal. 2018). Rules based on suspect classifications are subject to heightened scrutiny when applied to immigrants in the United States. *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1689-90 (2017) (applying heightened scrutiny to gender-based classifications in INA's citizenship provisions).

Arlington Heights permits plaintiffs to prove discriminatory purpose through a range of evidence, including discriminatory impact, contemporary

statements of the decisionmaking body, and the sequence of events leading up to the challenged decision. 429 U.S. at 267-68. As the district court recognized, it is undisputed that the Rule will disparately impact noncitizens of color. SA 20-21; *see also* Van Hook Decl. ¶¶ 46-68, 95, 96, JA 390-98, 409-11; Ku Decl. ¶ 9, 28, JA 220, 234-35. The evidence of the disparate impact is bolstered by the unique circumstances in which the Rule was developed and implemented, as well as the contemporaneous statements reflecting discriminatory animus by those responsible for crafting it, *see* Compl. ¶¶ 203-34, JA 120-34.

Defendants contend that the Rule satisfies rational basis scrutiny, without explaining why that standard should apply. App. Br. at 50. Defendants relied in the district court on *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018), but that case is inapposite. The Supreme Court applied a rational basis standard in *Hawaii* because the executive order there was based on national security concerns and involved the entry of noncitizens from outside the United States. *Id*. at 2439-40. The Rule, by contrast, applies to noncitizens within the nation's borders, and defendants have conceded there is no national security interest at play. Numerous courts have applied the *Arlington Heights* standard to equal protection claims in similar circumstances. *See, e.g.*, *New York* v. *U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 666-67 (S.D.N.Y. 2019); *Ramos*, 336 F. Supp. 3d at 1105-06; *Saget*, 375 F. Supp. 3d at 366-67.

The Rule does not even satisfy rational basis review because animus against a particular group "lacks a rational relationship to legitimate state interests." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996); *see City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985) ("Furthermore, some 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)); *United States* v. *City of Yonkers*, 837 F.2d 1181, 1226 (2d Cir. 1987).[10]

B. Plaintiffs Have Standing and Are Within the INA's Zone of Interests

An organization has standing when it is forced "to divert money from its other current activities to advance its established organizational interests[.]" *Centro de la Comunidad Hispana de Locust Valley* v. *Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017); *see also Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 379 (1982). "[O]nly a perceptible impairment of an organization's activities is necessary for there to be injury-in-fact." *Nnebe* v. *Daus*, 644 F.3d 147, 157 (2d Cir. 2011) (quotation marks and citation omitted). In *Nnebe*, for example, a taxi drivers' advocacy group had standing to assert due process claims challenging the

[10] Because the Rule is unconstitutional, it should also be set aside under the APA. *See United States* v. *Mead Corp.*, 533 U.S. 218, 227 n.6 (2001); 5 U.S.C. § 706(2)(B).

defendants' policies for suspending taxi licenses where those policies required the organization to "expend[] resources to assist its members . . . by providing initial counseling, explaining the suspension rules to drivers, and assisting the drivers in obtaining attorneys." *Id.* "[S]omewhat relaxed standing rules apply" in cases like this, where "a party seeks review of a prohibition prior to its being enforced." *Oyster Bay*, 868 F.3d at 110. Where "multiple parties seek the same relief, the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Id*. at 109 (quotation marks and citation omitted).

As the district court ruled, plaintiffs easily satisfy this standard because "the Rule forces them to devote substantial resources to mitigate its potentially harmful effects—resources that plaintiffs could and would have used for other purposes." SA 36. For example, as its noncitizen clients forgo public benefits and services, plaintiff African Services Committee ("ASC") has seen increased demand for its food pantries and ESL classes. As a result, ASC has been (and will continue to be) forced to turn clients away. Nichols Decl. ¶¶ 18-19, JA 470. Plaintiffs that provide direct legal services—Make the Road New York ("MRNY"), Catholic Charities Community Services ("CCCS-NY"), ASC, and CLINIC—must spend additional time and resources on applications for adjustment of status and related proceedings, with correspondingly less time and resources available to represent clients in other immigration matters, including removal

proceedings. Oshiro Decl. ¶¶ 27, 35, 41, JA 321, 324, 326; Russell Decl. ¶¶ 22-24, JA 345-46; Nichols Decl. ¶¶ 21-26, JA 471-74; Wheeler Decl. ¶¶ 10-16, JA 502-04. In some cases, the loss of time caused by the Rule also leads to decreased revenue. Nichols Decl. ¶¶ 25-26, JA 473-74.

These harms affect more than plaintiffs' "abstract social interests." App. Br. at 23. They hinder plaintiffs' ability to deliver critical services to the immigrants they are mission-bound to serve and threaten the viability of plaintiffs' programs. Defendants' reliance on *Kowalski* v. *Tesmer*, 543 U.S. 124, 134 & n.5 (2004) (cited in App. Br. at 23) is misplaced. The Court there held only that criminal defense attorneys lacked third-party standing to assert the rights of potential clients. Here, plaintiffs have standing based on the "concrete and particularized injuries that they themselves will suffer and, in fact, have *already* begun to suffer." SA 37.

The district court also correctly concluded that "Plaintiffs plainly fall within the INA's zone of interests." SA 39. The zone of interests inquiry "in the APA context . . . 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 and citation omitted). This Court

recently explained that the zone of interests inquiry "does not require the plaintiff to be an intended beneficiary of the law in question." *Citizens for Responsibility & Ethics in Wash.* v. *Trump*, 939 F.3d 131, 158 (2d Cir. 2019) ("*CREW*"). In *Bank of America* v. *City of Miami*, for example, the Supreme Court held that the city's discriminatory lending claims were within the zone of interests of the Fair Housing Act despite any indication that the Act was intended to protect municipal budgets. 137 S. Ct. 1296, 1303-04 (2017). The Supreme Court has also instructed that, in assessing Congress's intent, the court must consider not merely the specific provision at issue, but its "overall context" and "Congress's overall purpose in" enacting the statute. *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987).

Plaintiffs readily satisfy that standard. Contrary to defendants' assertion that only individual noncitizens possess "judicially cognizable interests" here (App. Br. at 24), immigrant advocacy organizations such as plaintiffs—including plaintiff MRNY itself—have been afforded standing to challenge immigration regulations in light of INA provisions that "give [such organizations] a role in helping immigrants navigate the immigration process." *E. Bay Sanctuary Covenant* v. *Trump*, 909 F.3d 1219, 1245 (9th Cir. 2018) (collecting statutory provisions); *see, e.g.*, *Batalla Vidal* v. *Nielsen*, 291 F. Supp. 3d. 260, 269 n.3 (E.D.N.Y. 2018) (challenge to termination of DACA program); *Al Otro Lado, Inc.* v. *Neilsen*, 327 F. Supp. 3d 1284, 1299-1302 (S.D. Cal. 2018) (challenge to DHS

asylum policy); *Doe* v. *Trump*, 288 F. Supp. 3d 1045, 1067-68 (W.D. Wash. 2017) (challenge to agency refugee policy). Plaintiffs' economic injuries also make them "reliable private attorney[s] general to litigate the issues of the public interest. *CREW*, 939 F.3d at 155.

Defendants' contention that plaintiffs' only interest is to "increase . . . enrollment in public-benefits programs," App. Br. at 25, reflects a fundamental misunderstanding of plaintiffs' roles in advising, assisting, and advocating for immigrants.[11] Defendants also ignore the "overall purpose[s]" of the INA. *See Clarke*, 479 U.S. at 401-02; *E. Bay Sanctuary Covenant*, 909 F.3d at 1244-45 & n.9 (in considering whether organizational plaintiffs were within the zone of interests of the asylum provision of the INA, the court should consider "any provision that helps us to understand Congress's overall purposes in the INA") (quotation marks and citation omitted). As DHS concedes, the INA's purposes include promoting "family unity, diversity, and humanitarian assistance." 84 Fed. Reg. at 41,306. These are all core components of plaintiffs' missions.

[11] *See, e.g.*, Oshiro Decl. ¶¶ 5, 36, JA 314, 324 (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. ¶¶ 4, 42, JA 339, 353; Nichols Decl. ¶¶ 4, 7-8, 10, 12, 15, 18, 20, 24, 26, JA 464-74; Wheeler Decl. ¶¶ 10, 14, 16, 18, JA 502-05; Yoo Decl. ¶¶ 21-25, JA 491-93.

II. Plaintiffs Will Suffer Irreparable Harm Absent a Preliminary Injunction

Nonprofit organizations like plaintiffs suffer irreparable harm when an administrative rule or actions cause "ongoing harms to their organizational missions," including diversion of resources. *Valle del Sol Inc.* v. *Whiting*, 732 F.3d 1006, 1018-19, 1029 (9th Cir. 2013); *see also Town of Oyster Bay*, 868 F.3d at 111. For example, in *League of Women Voters of U.S.* v. *Newby*, the D.C. Circuit concluded that a rule making it more difficult for plaintiff organizations to accomplish their mission of registering voters establishes "injury for purposes both of standing and irreparable harm." 838 F.3d 1, 9 (D.C. Cir. 2016); *see also Saget*, 375 F. Supp. 3d at 376.

Here, as the district court found, plaintiffs have been "forced to divert [their] resources from [their] usual mission-related activities because of the defendant's conduct," which conduct has "shift[ed] the burden of providing services to those who can no longer obtain federal benefits without jeopardizing their status in the United States." SA 36, 48-49.[12] The district court's findings are well supported by the record, *see supra* at 51-52, and are not clearly erroneous.

[12] Defendants' argument that plaintiffs' injuries are "at odds" with the public charge provision because they "promot[e] increased use of public benefits by aliens, contrary to Congress's clear intent," App. Br. at 53, makes no sense. It cannot violate Congress's intent for noncitizens to access public benefits that Congress itself authorizes them to access. And, as explained above at 40-41, the

Plaintiffs have also established irreparable harm by demonstrating economic injury. *E.g.*, Nichols Decl. ¶¶ 11, 16, 19, 25, 26, JA 466-67, 469, 470, 473-74; Wheeler Decl. ¶ 16, JA 504. Monetary harms such as these are irreparable in an APA action 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"); *Pennsylvania* v. *President U.S.*, 930 F.3d 543, 574 (3d Cir. 2019), *cert. granted*, 2020 WL 254168 (Jan. 17, 2020); *San Francisco*, 944 F.3d at 806-07.

Defendants decline to challenge any of the district court's findings of irreparable harm on appeal, and they assert only that "any required changes to the plaintiff organizations' education and advocacy efforts during the pendency of this litigation fall far short of irreparable injury." App. Br. at 52. But, as described above, that is not the law.

III. The Public Interest and Balance of Equities Support an Injunction

The district court correctly concluded that the balance of equities and public interest support a preliminary injunction. SA 50-51.

The undisputed evidence amply supports the district court's finding that implementation of the Rule will "expose individuals to economic insecurity, health instability, denial of their path to citizenship, and potential deportation." SA

INA serves multiple purposes other than restricting noncitizen access to public benefits, such as maintaining family unity.

49. As described above, defendants concede that noncitizens will forgo billions of dollars in benefits for which they are eligible every year, which will lead to, among other things, "worse health outcomes," "increased rates of poverty and housing instability," and "reduced productivity." And the uncontested declarations of plaintiffs' experts and studies presented to DHS further detail the Rule's impact on public health, homelessness, and food insecurity. *See supra* at 24-25.

By contrast, defendants suffer little if any harm from a delay in implementing the Rule during the pendency of this litigation. As the district court explained, its injunction merely requires DHS to continue applying the Field Guidance that has guided public charge determinations by DHS and its predecessors for more than 20 years. SA 50-51. Defendants concede that the Field Guidance is a lawful interpretation of the public charge provision. *See* Defts. Mem. of Law in Opp'n 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* CA2 Dkt. 24, at 13. That defendants wish to implement a different 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." *See San Francisco*, 944 F.3d at 806.

Defendants contend that the government is harmed by the injunction because it "force[s]" DHS "to retain" its prior immigration policy, allowing some unspecified number of noncitizens to obtain lawful permanent residence under the current rules which determinations DHS cannot "revisit[]." App. Br. at 52-53. But these generic assertions prove too much. In any 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 such a case. But the Supreme Court has recognized that the government is not irreparably injured by mere delay in implementing a policy or having to use disfavored criteria in its decision making. *See Trump* v. *Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017) (per curiam) ("*IRAP*") (requiring government to process visa applications for certain classes of individuals despite Executive Order suspending entry); *see also Texas*, 809 F.3d at 186 (rejecting as "vague" the government's argument that nationwide preliminary injunction against Deferred Action for Parents of Americans program "obstructs a core Executive prerogative and offends separation-of-powers and federalism principles").

Defendants' alleged harm in continuing to apply the lawful Field Guidance is not remotely comparable to the grave harm to plaintiffs and the public

that will occur if the Rule is permitted to take effect. Accordingly, the balance of hardships and public interest weighs decidedly in plaintiffs' favor. *See* SA 51.

IV. The District Court Appropriately Exercised its Discretion in Applying its Injunction and Postponement of the Rule's Effective Date Nationwide

The district court found that a nationwide injunction is necessary "to accord Plaintiffs and other interested parties with complete redress" because the individuals plaintiffs serve live in, and may move between, different states. SA 53. The district court also reasoned that a patchwork system of injunctions resulting in different public charge rules in different locations would "wreak havoc on the immigration system." SA 52. *See also* Wheeler Decl. ¶ 2, JA 499-500 (showing that plaintiff CLINIC supports affiliate programs that serve immigrants in 49 states and the District of Columbia). The district court's findings of fact are amply supported by the record, and are not clearly erroneous. Fed. R. Civ. P. 52(a)(6).

Defendants contend that the scope of the injunction is overbroad. App. Br. 18-19, 53-56. But the APA 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* SA 53 (granting relief under § 705). This statute authorizes enjoining agency action nationwide. *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).

The district court's injunction is also 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*, 930 F.3d at 575-76 (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).

Defendants assert that Article III does not permit nationwide injunctions except to redress the injuries of the plaintiffs before the Court. App. Br. at 18-19, 53-56. That contention ignores the district court's findings that a nationwide injunction is necessary to protect plaintiffs' interests. Defendants' assertion is also wrong as a matter of law. Contrary to defendants' characterization of nationwide injunctions as a recent invention, App. Br. at 54, Article III courts "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); *see also* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1080-81 & n.77 (2018). Most recently, in *IRAP*, involving President Trump's Executive Order suspending the entry of foreign nationals from 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. Ct. at 2087. Defendants' contention that a nationwide injunction here violates Article III cannot be squared with *IRAP*.

Finally, the district court's emphasis on avoiding "different public charge frameworks spread across the country," SA 52, is consistent with Congress's intent that the immigration laws "should be enforced . . . uniformly." IRCA, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384. *See also Texas*, 809 F.3d at 187-88 (affirming nationwide injunction in immigration action, based in part on need for uniformity in immigration enforcement).

CONCLUSION

For the foregoing reasons, the district court's order granting a preliminary injunction and stay under 5 U.S.C. § 705 should be affirmed.

Dated: New York, New York
January 24, 2020

By: */s/ Jonathan H. Hurwitz*

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Certificate of Compliance

I, Jonathan H. Hurwitz, attorney for plaintiffs-appellees, hereby certify that this brief conforms to the requirements of Fed. R. App. P. 32(a)(7) because this brief contains 13,942 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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