UNITED STATES COURT OF APPEALS *for the* SECOND CIRCUIT

STATE OF NEW YORK, et al.

Plaintiffs-Appellees,

No. 19-3591

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants-Appellants.

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR A STAY

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PRELIMINARY STATEMENT

In this proceeding, plaintiffs—the States of New York, Connecticut, and Vermont, and the City of New York—challenge a Final Rule by the Department of Homeland Security (DHS) that radically alters the test for evaluating whether an immigrant is likely to become a "public charge" under 8 U.S.C. § 1182(a)(4)(A), and thus be ineligible for a green card. *See Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019). The United States District Court for the Southern District of New York (Daniels, J.) issued a preliminary injunction against the Final Rule, and postponed its effective date under 5 U.S.C. § 705, to preserve the status quo pending further proceedings.

Defendants now seek a "stay" of the district court's decision that would allow them to immediately implement the Final Rule, before this Court can meaningfully consider defendants' appeal. This Court should reject defendants' extraordinary request.

The "stay" requested here, contrary to the principal purpose of such exceptional relief, would disrupt rather than preserve the status quo. It would precipitously supplant a more-than-century-old understanding of "public charge"—limited to individuals who are primarily dependent on

the government for long-term subsistence—with the Rule's unprecedented redefinition, which would sweep in individuals who receive *any* amount of certain means-tested benefits for brief periods of time. This radical disruption of the status quo and the serious harms that the Rule would cause to plaintiffs and the public are enough to deny defendants' motion.

Defendants have also failed to show that they have a likelihood of success in their appeal. The Final Rule is both contrary to the plain meaning of "public charge" and an unreasonable interpretation of how that term of art has been understood for over a century. The Rule's novel test for assessing whether an immigrant will be a public charge relies on multiple factors that have no rational connection to whether an immigrant will receive public benefits *at all*, let alone become primarily dependent on the government. And the Rule's reliance on disability as a negative factor violates the Rehabilitation Act. Defendants' motion should be denied.

BACKGROUND

A. The Public-Charge Statute

Under the Immigration and Nationality Act (INA), noncitizens who lawfully entered the country may adjust their status to legal permanent resident (LPR) if they are "admissible." 8 U.S.C. § 1255(a). Such a noncitizen is inadmissible for only a few reasons, including that he is "likely at any time to become a public charge." *Id.* § 1182(a)(4). Individuals who seek to enter the country with an immigrant visa may also be found inadmissible as public charges.[1] *Id.* § 1185(d).

"Public charge" under federal immigration law is a term of art that has developed a settled meaning after more than a century of usage. From its inception, the term "public charge" has meant an individual who is unlikely to work and is thus extensively dependent on the government to survive. The term has never been understood to include employed or employable persons who receive modest or temporary amounts of government benefits designed to promote health or upward mobility.

[1] Obtaining an immigrant visa requires satisfying the State Department's public-charge inquiry.

This understanding of "public charge" appears as early as nineteenth-century state laws that required ship captains to execute bonds to support infirm passengers "likely to become permanently a public charge." Ch. 195, § 3, 1847 N.Y. Laws 182, 184; *see* Ch. 238, § 21, 1837 Mass. Acts 270-71. In these statutes, "public charge" referred to "persons utterly unable to maintain themselves," Friedrich Kapp, *Immigration, and the Commissioners of Emigration of the State of New York* 87 (1870); *see Annual Reports of the Commissioners of Emigration of the State of New York* 135 (1861).

In 1882, Congress incorporated this narrow meaning of "public charge" into federal law. Following prior state laws, Congress prohibited any "lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge" from entering the country. Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 214 (1882). "Public charge" thus adhered to its already-settled meaning to refer to the fraction of immigrants likely to "become life-long dependents on our public charities." 13 Cong. Rec. 5109 (Rep. Van Voorhis). Congress did not intend to exclude immigrants who received *any* public benefits. To the contrary, in the same statute that incorporated the "public charge"

concept into federal law, Congress also directed the collection of a per-person tax "for the support and relief" of immigrants who "may fall into distress or need public aid." 1882 Act §§ 1-2, 22 Stat. at 214.

From 1891 to 1951, Congress reenacted public-charge provisions substantially similar to the one in the 1882 Act. *See City & County of San Francisco v. USCIS*, 2019 WL 5100718, at *12-20 (N.D. Cal. Oct. 11, 2019), *appeal filed*, No. 19-17213 (Oct. 30, 2019). Throughout this time, the scope of "public charge" remained limited to individuals likely to rely almost entirely on government support. *See Gegiow v. Uhl*, 239 U.S. 3, 10 (1915); *Howe v. United States*, 247 F. 292 (2d Cir. 1917). "Public charge" did not include an immigrant "able to earn her own living," *Ex parte Mitchell*, 256 F. 229, 230 (N.D.N.Y. 1919), even if she received minor public assistance, *see In re B-*, 3 I.&N. Dec. 323 (A.G. 1948).

Against this background, Congress enacted the INA's public-charge provision in 1952. Because Congress declined to adopt a new definition of "public charge," it incorporated that term's well-established meaning. *San Francisco*, 2019 WL 5100718, at *20-22 (collecting cases).

In 1999, DHS's predecessor agency (the Immigration and Naturalization Service) issued guidance codifying the settled meaning of

"public charge." Consistent with over a century of usage, the guidance defined "public charge" to mean individuals "primarily dependent on the government for subsistence," as evidenced by publicly funded long-term institutionalization or cash assistance for income maintenance. *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28,689, 28,689 (Mar. 26, 1999). The Guidance prohibited consideration of supplemental benefits—such as food stamps, Medicaid, and public housing—in rendering public-charge determinations because such benefits are often available to working individuals "with incomes far above the poverty level" and thus reflect "broad public policy decisions" about improving public health and upward mobility. *Id.* at 28,692.

B. The Final Rule

In August 2019, DHS issued the Final Rule challenged here. The Rule radically alters the meaning of "public charge" to include, for the first time, an immigrant who may receive any "public benefit[s]," defined to include any amount of certain supplemental benefits such as Medicaid, Supplemental Nutrition Assistance Program (SNAP) benefits (food stamps), and Section 8 housing assistance. 84 Fed. Reg. at 41,501.

Moreover, the Rule deems an immigrant to be a "public charge" based on short-term receipt of such benefits: DHS need merely believe that an immigrant "will receive[] one or more public benefits" during "more than 12 months in the aggregate within any 36-month period" during his life. *Id.* And the Rule separately considers the time period for each benefit an immigrant may receive, so that, for example, "receipt of two benefits in one month counts as *two months*." *Id.* (emphasis added).

An immigrant need not have actually received benefits to be considered a "public charge." Instead, the Rule sets forth weighted factors that DHS must consider to infer whether an applicant is likely to receive an aggregate of 12 months of benefits within 36 months during his life. Actual receipt of enumerated benefits counts against an applicant. *Id.* at 41,504. But the Rule also lists several other "negative factors" that support a "public charge" finding, including:

- low credit scores;
- lack of English-language skills;
- applying for any public benefit;
- a large family;
- a medical condition that will interfere with working or school, regardless of whether reasonable accommodations enable the applicant to work or learn.

Heavily weighted positive factors include having household income or assets of at least 250% of the federal poverty guidelines, and having private health insurance not funded with tax subsidies under the Patient Protection and Affordable Care Act (ACA). *Id.* at 41,502-04.

C. The Decision Below

Plaintiffs challenged the Final Rule under the Administrative Procedure Act (APA). In October 2019, the district court granted plaintiffs' motion to stay the Rule's effective date and for a preliminary injunction.[2]

The court concluded that plaintiffs and the public will suffer concrete, irreparable harm absent preliminary relief; by contrast, the court found that defendants will not suffer irreparable harm from maintaining the long-existing status quo. (Decision 19-21 (Oct. 11, 2019), SDNY ECF#110.) On the merits, the court concluded that the Final Rule's transformation of "public charge" to include even temporary

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[2] Four other courts likewise issued stays or preliminary injunctions against the Final Rule. *See Washington v. DHS*, 2019 WL 5100717 (E.D. Wa. Oct. 11, 2019); *San Francisco*, 2019 WL 5100718; *Casa de Maryland, Inc. v. Trump*, 2019 WL 5190689 (D. Md. Oct. 14, 2019); *Cook County v. McAleenan*, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019).

receipt of minor amounts of supplemental benefits was likely contrary to the INA, and arbitrary and capricious. (Decision 11-18.)

Defendants moved in the district court for a stay pending appeal. Without waiting for the district court to act on that motion, which remains pending, defendants filed this stay motion with this Court.

REASONS TO DENY THE MOTION

Because a stay intrudes on "the ordinary processes of administration and judicial review," the party seeking a stay bears the burden of justifying such extraordinary and disruptive relief. *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation marks omitted); *see id.* at 433. The Court considers the balance of the equities, the harm to each side and to the public, and the likelihood of success of the applicant's arguments. *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007). Each factor weighs heavily against a stay here.

A. The Balance of Hardships and Public Interest Weigh Decisively Against a Stay.

1. The "stay" would radically disrupt rather than preserve the status quo.

The fundamental purpose of a stay is to preserve the status quo. *See Nken*, 556 U.S. at 429. But the "stay" requested here would do the opposite by allowing the immediate implementation of a Final Rule that radically disrupts over a century of settled immigration policy. By contrast, the district court's order properly preserves the status quo. The Court should deny the motion on this ground alone.

As the district court explained, the Rule will upend the status quo that has governed public-charge determinations for over a century by adopting a new definition of "public charge" and a novel multi-factor methodology. (Decision 21.) Defendants provide no reason—let alone a plausible reason—to effect these radical changes *immediately*, before this Court can adjudicate their appeal. DHS displayed no urgency in the rulemaking process, taking nearly three years under the current administration to finalize the Rule. *See* 84 Fed. Reg. at 41,292. The Rule cites no national-security or law-enforcement interests that might conceivably warrant precipitous action. *Compare Trump v. International*

Refugee Assistance Project, 137 S. Ct. 2080, 2088 (2017) (per curiam) (national security); Application for a Stay Pending Appeal 4, *Barr v. East Bay Sanctuary Covenant*, No. 19A230 (U.S. Aug. 26, 2019) ("crisis at the southern border"). And there is no claim that the status quo is unlawful: defendants have not contested the legality of the 1999 Guidance or argued that their current interpretation is compelled by the INA. And the noncitizens directly affected by the Rule lawfully entered the country and have received only those public benefits that Congress or the States conferred on them. *See* 8 U.S.C. § 1255(a).

This Court should decline to disrupt the status quo pending its review of defendants' appeal.

2. Disrupting the status quo would seriously injure plaintiffs and the public.

The district court correctly found that allowing the Final Rule to take effect now will cause immediate and irreparable harm to plaintiffs, their residents, and the public. Defendants make the conclusory assertion that these harms are "speculative." (Appellants' Motion for a Stay ("Mot.") 21.) But they presented no evidence to counter plaintiffs' extensive factual record about the Rule's predictable—and intended—

consequences of causing widespread disenrollment from public-benefit programs and severe uncertainty in immigration decisions. Because there is no error, let alone clear error, in these findings, the Court should deny defendants' motion.

As the district court found, the Rule will cause many individuals and their families to forgo supplemental benefits to which they are legally entitled to avoid a public-charge finding under the Rule's radical new framework. *See* 84 Fed. Reg. at 41,300, 41,307. Defendants have acknowledged that such reductions in benefits use will significantly "reduce[] revenues for healthcare providers participating in Medicaid," *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114, 51,118 (Oct. 10, 2018)—including healthcare facilities operated by plaintiffs. (Decl. of Elena Goldstein, Ex.10 ¶¶ 7-10, 17-21 (NYC Health+Hospitals expects loss of $120 million to $187 million annually); Ex.11 ¶¶ 63-73; Ex.6 ¶¶ 36-37. [3]) These losses will not be offset by plaintiffs spending less to fund insurance benefits (Mot. 7), given that the Rule will simultaneously *increase* plaintiffs' healthcare costs as newly uninsured

[3] All cited exhibits are attached to the Goldstein Declaration (S.D.N.Y. ECF#34).

patients avoid preventative care, use costly emergency services, and suffer worse health outcomes. (Ex.11 ¶¶ 64-73; Ex.19 ¶¶ 16-24.)

The uncontroverted evidence also established that plaintiffs, as administrators of public-benefit programs, will incur direct programmatic costs because they will be forced to overhaul enrollment systems; implement training and outreach to combat fear and misinformation about the Rule; and collect information about past benefits use. (Ex.6 ¶¶ 38-47; Ex.8 ¶¶ 36-38; Ex.19 ¶¶ 56-71.) These harms are not incidental or self-inflicted (Mot. 8) given that the Rule expressly recognized that it will impose substantial operational costs on benefit-program administrators such as plaintiffs, 84 Fed. Reg. at 41,469.

Public health and economic welfare will be further harmed in plaintiffs' jurisdictions as the Rule causes residents to avoid benefits. For example, families who forgo Section 8 benefits will need to leave their homes, live in more dangerous neighborhoods, and suffer harms to their health, education, and employment. (Ex.1 ¶¶ 35-63; Ex.17 ¶¶ 25-31.) And lower SNAP usage means less nutritious food for families, lower revenues for grocery stores, and economic losses for plaintiffs. (Ex.16 ¶ 11; *id.* ¶ 9 ($325 million annual lost economic activity).)

If the Rule comes into effect immediately, these injuries will be both irreparable and long-lasting, even if this Court later affirms the preliminary injunction on appeal. Families that disenroll from Section 8 housing cannot reenter the program because the waiting lists are long. (Ex.17 ¶¶ 39-40.) And immigrants deemed "public charges" under the Rule may be forced to leave the country or face removal, 8 U.S.C. § 1227(a)(1)(A); may be subject to multi-year bars to reentering, *id.* § 1182(a)(9)(A)-(B); and will likely lose their path to LPR status or citizenship. These harms weigh heavily in favor of preserving the status quo and denying defendants' motion.

3. Defendants will not suffer any irreparable harm under the status quo.

By contrast, as the district court correctly found, defendants will suffer no irreparable harm from maintaining the status quo pending appeal. Defendants presented no evidence of such harm below. On appeal, their sole assertion of injury (Mot. 20-21) is that, under the status quo, they will grant LPR status to some immigrants who might be excluded by the Final Rule. But this argument simply begs the merits question presented in their underlying appeal. The district court—and

four other courts—have concluded that the Rule is likely unlawful. Defendants do not have any cognizable "interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

Defendants do not identify any injury from granting LPR status under the current, long-standing meaning of "public charge" other than their bare policy disagreement with that result. The absence of evidence is unsurprising. It beggars belief that defendants (or the public) would be harmed—let alone irreparably so—by extending for the few months of this appeal the public-charge framework that has been in place for over a century since Congress's initial enactment; for two decades since the 1999 Guidance; and for the first three years of the current administration. The balance of the equities weighs decisively against disrupting this status quo.

B. Defendants Are Unlikely to Prevail on the Merits.

This Court could also deny defendants' motion because they have failed to make a "strong showing" that they are likely to succeed on the merits of their appeal. *See Nken*, 556 U.S. at 426.

1. The Rule is contrary to law.

The district court did not abuse its discretion in finding that the Final Rule is likely contrary to the meaning of "public charge" in the INA. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984).

Below, defendants acknowledged that the scope of "public charge" turns on that term's historical meaning. (Mem. in Opp. to Mot. for Prelim. Inj. 13-22 (S.D.N.Y. ECF#99).) But as the district court properly concluded (Decision 13), defendants were simply wrong about history.

When Congress originally enacted the public-charge provision in 1882, it adopted the prevailing understanding—reflected in early state laws—that "public charge" was limited to "persons utterly unable to maintain themselves." Kapp, *supra*, at 87. See *supra*, at 3-5. "Public charge" has thus always meant individuals unlikely "to earn a living," *Wallis v. Mannara*, 273 F. 509, 509 (2d Cir. 1921), not hard-working individuals who might receive minor amounts of benefits. *See, e.g., Gegiow*, 239 U.S. at 10; *United States ex rel. De Sousa v. Day*, 22 F.2d 472, 473-74 (2d Cir. 1927). And Congress incorporated this established understanding of "public charge" when it enacted the INA's public-charge

provision in 1952, without redefining the term. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). The district court properly determined (Decision 13) that the Rule thus likely violates the limited scope of "public charge" and stretches it far beyond "the bounds of reasonable interpretation," *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014), by including employed immigrants who might "receive only hundreds of dollars, or less, in public benefits," 84 Fed. Reg. at 41,360-41,361.

Tellingly, defendants' motion abandons most of the historical sources they referenced below. The few sources they continue to cite do not support their position. A Senate report about the INA (Mot. 13) demonstrates that Congress understood the history of the public-charge provision and the precedents interpreting that provision, and retained the preexisting scope of "public charge" rather than expand it.[4] *See* S. Rep. No. 1515, at 45-53, 335-50 (1950). Defendants mischaracterize the few cases they cite, which turned on immigrants' lack of "capacity and

[4] Defendants misplace their reliance (Mot. 13-14) on DHS's discretion to make public-charge determinations because DHS may not exceed the scope of the public-charge statute. *See* S. Rep. No. 1515, at 44.

opportunity for employment," not their temporary receipt of benefits. *Ex Parte Turner*, 10 F.2d 816, 817 (S.D. Cal. 1926); *see Guimond v. Howes*, 9 F.2d 412, 413-14 (D. Me. 1925) (employment was illegal liquor trafficking). And contrary to defendants' characterization (Mot. 14), LPRs may not be deported for failure to repay *any* public benefit they receive. To be deportable, an LPR must *both* have become a "public charge"—i.e., substantially reliant on government funds to survive—*and* failed to repay those funds when demanded. *See In re B-*, 3 I.&N. Dec. at 325 (immigrant institutionalized).

Rather than history, defendants' motion now relies principally on two statutory provisions: (1) one protecting battered immigrants; and (2) another addressing sponsor affidavits. But defendants did not rely on these provisions below to support the Rule's redefinition of "public charge." The district court could not have abused its discretion by declining to consider arguments never presented. In any event, these unpreserved arguments are meritless.

First, defendants assert (Mot. 9-10) that a provision prohibiting DHS from considering "any benefits" received by battered immigrants in rendering public-charge determinations necessarily authorizes DHS to

consider "any benefits" for other immigrants. § 1182(s); *see* 8 U.S.C. § 1641(c). But there is no indication that Congress intended a shield for some immigrants to be used as a sword against others. Here Congress spoke broadly in enacting this legislation to make clear its intent to protect vulnerable immigrants who often lack any means of support outside their abusive relationships. *See* Battered Immigrant Women Protection Act, Pub. L. 106-386, §§ 1502-1505, 114 Stat. 1464, 1518-27 (2000). It would be perverse to read into such broad protective legislation, directed at a distinct problem, an implicit intent to *withdraw* similar protections from other immigrants. And such implied intent is particularly implausible when Congress was operating against a backdrop in which the well-settled public-charge framework did not automatically consider any receipt of public benefits to be disqualifying.

Second, defendants point (Mot. 10) to provisions requiring affidavits of support for some (but not all) applicants and stating that such affidavits must be enforceable contracts promising to repay certain means-tested benefits the applicant may receive. §§ 1182(a)(4)(C)-(D), 1183a. But this contractual obligation is limited in multiple ways—it applies primarily to certain applicants with family-based visas, is

enforceable only after an immigrant has been admitted, and covers only benefits received during defined time periods. This limited post-admission remedy does not remotely suggest that Congress silently transformed the *threshold* meaning of "public charge" to include *any* applicant likely to receive *any* means-tested benefits at *any* time in the future—including time periods well beyond which affidavits of support would be enforceable. As the Rule acknowledges, affidavits are at most a "separate requirement" in certain cases. 84 Fed. Reg. at 41,448. And such affidavits primarily serve a purpose distinct from the threshold admissibility review: "to provide a reimbursement mechanism" for the government or the LPR *after* the applicant's admission "to recover from the sponsor" who broke a contract to support the LPR, *id.* at 41,320.

At base, both of defendants' new arguments suffer from the same basic defect: they infer radical changes to the well-established definition of public charge through ancillary amendments that did not directly alter that definition. But Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). And it is especially implausible that Congress would have done so through its changes to the affidavit-of-support requirement, because during that

same legislative process Congress *rejected* a proposal that would have altered "public charge" in the deportability context to mean receipt of any supplemental benefits within 12 months. H.R. Rep. No. 104-828, at 138, 241 (1996) (Conf. Rep.). The district court thus properly concluded that DHS likely violated the INA by drastically expanding the meaning of public charge in a way that Congress had rejected. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983).

2. The Rule is likely arbitrary and capricious.

The Final Rule is also likely arbitrary and capricious for multiple, independent reasons, as the district court properly determined.

First, the Rule failed to adequately justify the need to radically alter the well-established public-charge framework, particularly given the grievous harms imposed by the Rule. Indeed, DHS refused to grapple with the magnitude of the Rule's harms, instead declaring that it lacked information. *See* 84 Fed. Reg. at 41,312-41,314. But DHS received extensive information on these harms and simply failed to "adequately analyze…the consequences" of its actions. *See American Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017). Moreover, the Rule contains no reasoned explanation for how these harms may be

justified by any purported gains: DHS identified no concrete problems caused by the current public-charge regime aside from that it grants LPR status more often than the Rule would.

Second, DHS "failed to provide any reasonable explanation" for considering receipt of *any* amount of supplemental benefits, even temporarily, as proof that an immigrant will be a public charge. (Decision 15.) There is no rational basis for concluding that individuals who receive supplemental benefits are necessarily unable to support themselves. (Decision 15.) As the administrative record demonstrates, and the 1999 Guidance concluded, supplemental benefits are often available to working individuals "with incomes far above the poverty level" to promote public health and upward mobility.[5] 64 Fed. Reg. at 28,692. An individual may thus be "fully capable of supporting herself" but elect to use benefits "simply because she is entitled" to them (Decision 15). The Rule thus "rests upon factual findings that contradict those which underlay [defendants'] prior policy," *FCC v. Fox Television Stations, Inc.*, 556 U.S.

[5] Higher spending on supplemental benefits compared to income maintenance (Mot. 16) thus reflects Congress's judgment to make supplemental benefits more widely available for reasons unrelated to self-sufficiency.

502, 515-16 (2009). Because the Rule does not acknowledge or explain the factual contradiction, it is arbitrary and capricious.

Third, multiple factors in the Rule's new public-charge test do not have a reasonable connection to an immigrant's likely receipt of supplemental benefits *at all*—let alone receipt to such an extent that the immigrant could rationally be considered a public charge. For example, the Rule assigns negative weight to low credit scores, lack of English proficiency, and a larger family. But the data on which DHS relies demonstrate that the vast majority of people with such factors do not use *any* public benefits. *See* 83 Fed. Reg. at 51,196 (no benefits use by 75.4% of people who do not speak English well); *id.* at 51,186 (no benefits use by 79.3% of people in families of four). And other factors—such as denying the heavily positive factor to immigrants who use ACA credits to obtain health-insurance—arbitrarily target middle-class workers who are not plausibly public charges.

Fourth, the Rule's aggregate-counting system—which, for example, counts the use of three benefits in one month as three of the twelve months that results in a public-charge finding—will capture immigrants who might use more than one benefit at a time, during a temporary

period of sudden job loss or illness. But defendants admit that such "short-term and intermittent" benefits use does not suggest a lack of self-sufficiency. (Mot. 19.) These and other aspects of the Rule are thus arbitrary and contrary to the evidence before the agency. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

3. The Rehabilitation Act likely renders the Rule unlawful and arbitrary.

The district court correctly concluded that the Rule likely contravenes the Rehabilitation Act by discriminating against individuals with disabilities. The Act does not, as defendants contend (Mot. 20), prohibit only public-charge determinations that are based "solely" on an applicant's disability. The statute also prohibits DHS from subjecting individuals to discrimination "solely by reason" of disability. 29 U.S.C. § 794(a); *see Henrietta D. v. Bloomberg*, 331 F.3d 261, 276 (2d Cir. 2003). Here, the Rule treats applicants differently based solely on their disabilities because it automatically "considers disability as a negative factor in the public charge assessment" (Decision 18), even if reasonable accommodations allow the applicant to work.

The Rule is also likely arbitrary and capricious given that it provides no rational basis for concluding that "disability alone is itself a negative factor indicative of being more likely to become a public charge." (Decision 18.) Contrary to defendants' arguments (Mot. 20), Congress's requirement that DHS consider "health" in making public-charge determinations does not authorize the agency to make the irrational conclusion that disability alone—particularly with a reasonable accommodation—will automatically render an applicant incapable of supporting himself. And that conclusion is further belied by the evidence submitted to DHS, which confirms "the reality that many individuals with disabilities live independent and productive lives" (Decision 18).

4. Defendants' threshold arguments lack merit.

The district court correctly determined that plaintiffs have standing and are within the applicable zone of interests.

Article III standing: By causing many of plaintiffs' residents to forgo public-benefit programs, the Rule will concretely injure plaintiffs' proprietary, economic, and sovereign interests. Drops in benefits enrollment will reduce Medicaid revenue, increase costs to healthcare systems, burden plaintiffs' public-benefit programs, and harm plaintiffs'

economies. See *supra*, at 11-13. Such injuries are "precisely the kind of 'pocketbook' injury" that confer standing. *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1059-60 (D.C. Cir. 2018). Defendants presented no evidence below—and identify none here—to counter plaintiffs' extensive evidence of these "predictable effect[s]" of the Final Rule. *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019); *Natural Res. Def. Council v. NHTSA*, 894 F.3d 95, 104 (2d Cir. 2018).

Zone of interests: The district court also correctly concluded that plaintiffs are within the INA's zone of interests. Given the APA's "generous review provisions," the zone-of-interests test is satisfied unless plaintiffs' interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 & n.16 (1987) (quotation marks omitted).

Plaintiffs easily satisfy this lenient standard here. As defendants acknowledge (Mot. 11), Congress enacted the public-charge provision in part to protect state and city fiscs. The Rule acknowledges that it will impose substantial costs on plaintiffs. And the affidavit-of-support provisions on which defendants now rely authorize public-benefit

administrators like plaintiffs to seek reimbursements from sponsors. § 1183a(a)(1), (b)(1)-(2). The zone-of-interests test is satisfied. *See Citizens for Responsibility & Ethics in Wash. v. Trump*, 939 F.3d 131, 158 (2d Cir. 2019).

C. The Scope of the Relief Ordered Is Proper.

Defendants' demand that this Court limit the scope of the district court's injunction ignores the separate provision of the district court's order postponing the Rule's effective date under 5 U.S.C. § 705. That express statutory remedy, like the APA's other remedial provisions, applies to the Rule as a whole rather than to particular parties or locations. *Cf. National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998) (vacatur applies to entire regulation, not particular parties). Indeed, § 705 also allows federal agencies to postpone the effective dates of their own rules, and agencies routinely exercise that authority to delay their regulations nationwide. *See Natural Res. Def. Council v. U.S. Department of Energy*, 2018 WL 1229733, at *2-3 (S.D.N.Y. Mar. 5, 2018). The district court did not abuse its discretion in issuing similar relief here under § 705.

In any event, the district court also properly issued a preliminary injunction without geographic limitation. The "scope of injunctive relief is dictated by the extent of the violation established, not by the geographical" location of plaintiffs. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Here, the district court found that the Rule likely violated the APA—which requires vacatur of the Rule, not vacatur of the Rule as to certain parties. 5 U.S.C. § 706(2); *National Mining*, 145 F.3d at 1409-10. The district court's preliminary injunction thus appropriately protects against precisely the harm that plaintiffs ultimately seek to prevent—implementation of an unlawful regulation. No partial stay is warranted.

CONCLUSION

The Court should deny defendants' motion.

Dated: New York, New York
November 25, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27 and 32 of the Federal Rules of Appellate Procedure, Oren Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this document, the document contains 5,198 words and complies with the typeface requirements and length limits of Rules 27(d) and 32(a)(5)-(6).

/s/ Oren L. Zeve