No. 19-3169

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

COOK COUNTY, ILLINOIS, an Illinois governmental entity; and **ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC.**,

Plaintiffs-Appellees,

v.

CHAD F. WOLF, in his official capacity as Acting Secretary of U.S. Department of Homeland Security; **U.S. DEPARTMENT OF HOMELAND SECURITY,** a federal agency;

KENNETH T. CUCCINELLI II, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; and **U.S. CITIZENSHIP AND IMMIGRATION SERVICES**, a federal agency,

Defendants-Appellants.

Appeal from the United States District Court, Northern District of Illinois, Eastern Division

No. 19 CV 6334

The Honorable Gary S. Feinerman, Judge Presiding

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION FOR STAY PENDING APPEAL

INTRODUCTION

This case concerns an improper attempt by the Department of Homeland Security ("DHS") to usurp Congress's legislative function. DHS radically and improperly expanded the statutory term "public charge" to include a wide range of immigrants who receive modest and temporary benefits, preventing these immigrants from obtaining legal permanent residence (a "green card"). The District Court twice rejected Appellants' efforts, and this Court should do the same.

The Immigration and Nationality Act ("INA") allows the federal government to deny admission or adjustment of immigration status to any non-citizen "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The term "public charge" dates back to the Immigration Act of 1882, ch. 376, §§ 1-2, 22 Stat. 214, 214. For more than a century, administrative bodies and courts—including the Supreme Court—interpreted the term to refer only to those primarily and permanently dependent upon the government for long-term support and subsistence. Congress has repeatedly ratified this interpretation by re-adopting substantively identical "public charge" language in later statutes.

In August 2019, DHS upended that well-settled meaning by promulgating the *Inadmissibility on Public Charge Grounds* rule. 84 Fed. Reg. 41,292 (Aug. 14, 2019) (the "Final Rule"). The Final Rule "redefines the term 'public charge' to mean an alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." *Id.* at 41,295. This definition applies prospectively, meaning that the Final Rule bars those immigrants deemed likely in

the future to receive minimal, temporary benefits. *Id.* at 41,360–61. The Final Rule also expands the definition of "public benefit" to include non-cash benefits intended to promote health and upward mobility, such as SNAP (formerly food stamps), most forms of Medicaid, and various forms of housing assistance. *Id.* at 41,295. Thus, the Final Rule is inconsistent with the INA's plain meaning and Congressional intent.

Indeed, the District Court twice found Appellees—Cook County and the Illinois Coalition for Immigrant and Refugee Rights, Inc. ("ICIRR")—likely to succeed on the merits of their claims that the Final Rule contravenes the law. First, on October 14, 2019, the District Court granted Appellees' preliminary injunction motion. In relevant part, the District Court adopted *Appellants'* position that interpreting the term "public charge" turns on its meaning in the late-nineteenth century. Dkt. 106 at 17–18. But it further found that in 1915 the Supreme Court explained exactly what "public charge" meant in the late nineteenth century, consistent with Appellees' position: "persons who . . . would be substantially, if not entirely, dependent on government assistance on a long-term basis." *Id.* at 18–19. The District Court thus held that Appellees were likely to prevail on the merits of their claim that the Final Rule exceeds DHS's authority under the INA and violates the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"). *Id.* at 27.[1] The District Court preliminarily enjoined the Final Rule from taking effect in the State of

[1] Appellees also maintain that the Final Rule is arbitrary and capricious in violation of the APA. *See* 5 U.S.C. § 706(2)(A). The parties briefed this issue below. Pls' Mot. for PI [Dkt. 27] at 35–44; Def's. Opp, to PI [Dkt. 73] at 24–32. The District Court did not reach this independent ground for enjoining the Final Rule. Other courts, however, uniformly held that the Final Rule fails arbitrary and capricious review. *See infra* note 2.

Illinois. *Id.* at 32–33; Dkt. 87 at 2. Courts in related public charge litigation unanimously agreed and several nationwide injunctions remain in place.[2]

On November 14, 2019, the District Court denied Appellants' stay request for the same reasons detailed in its preliminary injunction order. The District Court found that Appellants' motion largely reiterated their earlier arguments, and rejected Appellants' attempts to cure the defects in those arguments. Dkt. 109 at 25 (a copy of the hearing transcript is attached as Exhibit A). For example, the District Court rejected Appellants': (1) unexplained pivot away from the nineteenth century as the relevant time period under *Chevron*, Dkt. 91 at 6; *see also id.* at 6 n.1; and (2) belated production of an affidavit from a USCIS official to document its purported harms, Dkt. 92. *See* Dkt. 109 at 19, 33–34.

This motion again seeks to stay the District Court's preliminary injunction pending appeal. But Appellants fail to offer any argument or evidence of harm to justify the "extraordinary" relief they request. *Chan v. Wodnicki*, 67 F.3d 137, 139 (7th Cir. 1995). Instead, Appellants rehash the same arguments regarding Appellees' standing and statutory construction the District Court twice considered

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[2] *See New York v. U.S. Dep't of Homeland Sec.*, No. 19 Civ. 7777 (GBD), 2019 WL 5100372 (S.D.N.Y. Oct. 11, 2019); *Make the Road New York,v. Cuccinelli,*, No. 19 Civ. 7993 (GBD), 2019 WL 5484638 (S.D.N.Y. Oct. 11, 2019); *Washington v. United States Dep't of Homeland Sec.*, No. 4:19-cv-5210-RMP, 2019 WL 5100717 (E.D. Wash. Oct. 11, 2019); *City & Cty. of San Francisco v. United States Citizenship & Immigration Servs.*, No. 19-cv-04717-PJH, 2019 WL 5100718 (N.D. Cal. Oct. 11, 2019) (multi-state injunction); *Casa De Maryland, Inc. v. Trump*, No. PWG-19-2715, 2019 WL 5190689 (D. Md. Oct. 14, 2019). The Maryland district court also denied the government's motion to dismiss a similar challenge. *See, Mayor & City Council of Baltimore v. Trump*, No. CV ELH-18-3636, 2019 WL 4598011, at *9 (D. Md. Sept. 20, 2019).

and rejected. Accordingly, Appellants cannot establish a likelihood of success on appeal. This Court should deny the motion.

STANDARD OF REVIEW

Pursuant to FRAP 8(a), the standard for granting a stay pending appeal mirrors that for granting a preliminary injunction: the moving party "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of [a stay], that the balance of equities tips in his favor, and that [a stay] is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Where, as here, a court already has evaluated the parties' likelihood of success on the merits—and ruled in Appellees' favor—the stay applicants face an even *higher* burden in seeking to stay the preliminary injunction. *In re Forty-Eight Insulations Inc.*, 115 F.3d 1294, 1301 (7th Cir. 1997). That five other courts around the country, addressing precisely the same APA claims, *all* have agreed with the District Court further heightens this burden.[3] *See id.*

ARGUMENT

I. Appellants are not likely to succeed on the merits.

Appellants fail to meaningfully address three of the four stay factors. Instead, Appellants focus only on whether the stay applicants have made a strong showing that they are likely to succeed on the merits. *Id.* at 1300-1301. Because the District Court analyzed this factor in detail and twice found in Appellees' favor, this Court should do likewise.

[3] *See supra* note 2.

A. Appellees have established standing.

Appellants argue that harm to Cook County's hospital system budget cannot serve as a cognizable injury, but do not, and cannot, offer any support for that assertion. Stay Motion at 6. The District Court found that Cook County "adduce[d] evidence showing, consistent with common sense, that where individuals lack access to health coverage and do not avail themselves of government-provided healthcare, they are likely to forgo routine treatment," resulting in costly uncompensated emergency care and community health epidemics. Dkt. 106 at 7. The District Court correctly concluded that this harm was "more than enough to establish Cook County's standing." *Id.* at 8 (citing *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565–66 (2019)). Appellants offer no reason to question this evidentiary finding, which is subject to a deferential clear error standard of review on appeal. *See Valencia v. City of Springfield,* 883 F.3d 959, 966 (7th Cir. 2018).

Appellants assert that ICIRR's diversion of resources in response to the Final Rule constitutes a "choice." Stay Motion at 6–7. Not so. Although organizations cannot "convert ordinary program costs into an injury in fact," an organization has standing if the challenged action "disrupt[s] [its] operations" and the organization responds by taking "remedial measures" that are "related to" its mission. *Common Cause Ind. v. Lawson*, 937 F.3d 944, 954–55 (7th Cir. 2019).

Here, the District Court found the Final Rule would decrease immigrants' access to health services, food, and other programs, all of which would frustrate ICIRR's existing programming effort, which focuses on increasing access to healthcare. Dkt. 106 at 9–10; Dkt. 109 at 27. This is not simply ICIRR's "policy goal", Stay Motion at

7, but instead a source of its revenue, which is in part connected to the number of immigrants that ICIRR and its member organizations assist in enrolling for public benefits. Dkt. 27-1 ¶¶ 29-30. This explains why the District Court found that "ICIRR already has expended resources to prevent frustration of its programs' missions, to educate immigrants and staff about the Rule's effects, and to encourage immigrants . . . to continue enrolling in benefits programs." Dkt. 106 at 10. For this reason, "ICIRR's standing is secure." *Id.*

B. Appellees fall within the zone of interests.

The zone-of-interests test is not "especially demanding": it "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S 388, 399 (1987)).

Here, the District Court found that Cook County falls within the zone of interests based upon *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017), because the Final Rule has caused, and will continue to cause, Cook County to suffer substantial "financial harms." Dkt. 106 at 15. According to Appellants, "the relevant point in *Bank of Am.* was not that the injury was financial, but rather that it resulted from interference with [Miami's] efforts to create integrated neighborhoods—precisely what the Fair Housing Act was trying to achieve." Stay Motion at 8–9. But Appellants offer no support for this misreading of *City of Miami*. Rather, the District Court correctly concluded that Cook County's financial harms

were comparable to the "lost tax revenue and extra municipal expenses" that placed Miami within the FHA's zone of interests. Dkt. 106 at 15.

With respect to ICIRR, Appellants argue that the INA creates judicially cognizable interests solely for immigrants subject to the Final Rule. Stay Motion at 8. Not so. Even if an APA plaintiff is not among "those who Congress intended to benefit, the plaintiff falls within the zone of interests if it is among those who in practice can be expected to police the interests that the [relevant] statute protects." Dkt. 106 at 13 (internal quotations omitted). Here, the District Court pointed to *five* INA provisions that "give[] organizations like ICIRR a role in helping immigrants navigate immigration procedures[.]" *Id.* at 14. Given the APA's "generous review provisions," *Clarke*, 479 U.S at 395 (internal quotation marks omitted), such provisions place ICIRR's claims "at the least[] 'arguably within the zone of interests'" protected by the INA. *Bank of Am.*, 137 S. Ct. at 1303.

C. Appellants are not likely to succeed on the merits of the APA claims.

The District Court correctly concluded that the Final Rule's expansive new definition of "public charge"—upon which the entirety of the Final Rule is premised—is inconsistent with the plain statutory meaning of that term and therefore must be invalidated at step one of the *Chevron* analysis. Dkt. 106 at 15–16 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

1. The District Court correctly concluded that the text forecloses the interpretation of the statute embodied in the Final Rule.

The District Court recognized the "'fundamental canon of statutory construction'" that "'words generally should be interpreted as taking their ordinary .

. . meaning . . . at the time Congress enacted the statute.'" *Id.* at 17-18 (quoting *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019)). In determining the relevant time period, the Court accepted Appellants' position that "given the unbroken line of predecessor statutes going back to at least 1882 [that] have contained a similar inadmissibility ground for public charges, the late 19th century [is] the key time to consider' for determining the meaning of the term 'public charge." *Id.* at 18 (internal quotations and citation omitted).

The plain meaning of "public charge" in the late nineteenth century bars the interpretation that Appellants now advance. Indeed, in the 1882 statute that first established the "public charge" provision, Congress also authorized the Secretary of Treasury to enter into contracts with state agencies "to provide for the support and relief of such immigrants *therein landing* as may fall into distress or need public aid." Act to Regulate Immigration, Ch. 376, § 2, 22 Stat. 214, (1882) (emphasis added). In the terminology of the time, an immigrant who "landed" was one who was *permitted entry*; by contrast, if a person was deemed a "public charge," they were "not . . . permitted to land." *Id.* Thus, Congress expressly contemplated that obtaining "support and relief" were insufficient to become a "public charge."

By contrast, immigrants who were subject to exclusion in the late nineteenth-century statutes were not those who merely received "support," but instead individuals who required long-term state care or institutionalization, and thus had primary and permanent dependence on the government. *See* Act of March 3, 1891, Ch. 551, § 1, 26 Stat. 1084 (1891) (excluding "idiots, insane persons, paupers or

persons likely to become a public charge, persons suffering from a loathsome or contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, [etc.]"). Following the "commonsense canon of *noscitur a sociis*," which "counsels that a word is given more precise content by the neighboring words with which it is associated," these surrounding terms confirm that a "public charge" determination likewise requires primary and permanent dependence. *See CFTC v. Worth Bullion Grp.*, 717 F.3d 545, 550 (7th Cir. 2013).

Indeed, that was the Supreme Court's holding in *Gegiow v. Uhl*, where the Court reasoned that "persons likely to become a public charge" must be interpreted in context of the terms surrounding it, each of which refers to people to be "excluded on the ground of permanent personal objections accompanying them[.]" 239 U.S. 3, 10 (1915). As the District Court explained, *Gegiow* thus instructs that the term "'public charge' does not . . . encompass persons who receive benefits, whether modest or substantial, due to being temporarily unable to support themselves entirely on their own." Dkt. 106 at 19.

Appellants try to limit *Gegiow* to its facts, contending that it stands only for the proposition that the public charge determination "must be based on something particular to the alien and not on the general state of 'local conditions.'" Stay Motion at 13. But the Supreme Court held that the statute authorizes the exclusion of immigrants as public charges only based on conditions that are both "personal" to the immigrant and "*permanent*." *Gegiow*, 239 U.S. at 10 (emphasis added). Thus, as

the District Court explained, *Gegiow* "plainly conveys" that "'public charge' encompasses only persons who . . . would be substantially, if not entirely, dependent on government assistance on a long-term basis." Dkt. 106 at 19.

Appellants also argue that *Gegiow* should not be followed because Congress amended the statute in 1917 in an effort to "overcome" that decision. Stay Motion at 13. The District Court rightly rejected this argument for two reasons. First, in arguing for injunctive relief, Appellants "maintained (correctly) that 'the late 19th century [is] the key time to consider' in ascertaining the meaning of the term 'public charge,' and therefore cannot be heard to contend that the pertinent timeframe is, on second thought, 1917." Dkt. 106 at 20 (quoting Dkt. 73 at 27). Indeed, "[t]he principle of waiver is designed to prohibit this very type of gamesmanship[.]" *Lott v. Levitt*, 556 F.3d 564, 568 (7th Cir. 2009) (holding that plaintiff "was not entitled to get a free peek at how his dispute will shake out under Illinois law and, when things don't go his way, ask for a mulligan under the laws of a different jurisdiction").

Second, "the 1917 Act did not change the meaning of 'public charge' in the manner urged by" Appellants. Dkt. 106 at 20. The 1917 amendment did not purport to redefine the term "public charge." *See* Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874. Rather, the 1917 amendment moved the reference to "public charge" from between the terms "paupers" and "professional beggars" to the end of a long list of examples of those likely to require prolonged governmental care—for reasons of ill health or a history of inability to care for oneself. *See id.* Appellants fail to explain

how this relocation of the term "public charge"—without any change to the definition of "public charge" itself—suggests intent to exclude as public charges those who receive *de minimis* public benefits.[4]

Rather than engage the District Court's textual analysis of the 1917 amendment, Appellants rely upon legislative history. Stay Motion at 13. To the extent this Court considers these materials,[5] they do not advance Appellants' position. The 1916 Senate report is of limited use because it does not identify what aspect of the *Gegiow* decision Congress sought to "overcome" by moving the term "public charge." *See* S. Rep. No. 64-352, at 5 (1916); *Busse v. Comm'r*, 479 F.2d 1147, 1151 (7th Cir. 1973) (refusing to consider congressional committee reports where the discussion of the statutory provision was "minimal and perfunctory" and thus "shed[] no light" on the issue before the court). And the Secretary of Labor's letter merely expressed concern that *Gegiow* would restrict the agency's ability to exclude individuals who had become public charges due to "economic," as distinct

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[4] If anything, the term's relocation suggests that the preceding list provides examples for the larger umbrella term of "persons likely to become a public charge." *See Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917) (stating that numerous categories listed in the 1907 Act—including "[i]diots, imbeciles, feeble-minded persons, insane persons, [and] persons affected with tuberculosis and prostitutes, might *all* be regarded as likely to become a public charge") (emphasis added); *United States ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929) (Hand, J.) (noting that "the [public charge] clause, however construed, overlaps other provisions; e.g. paupers, vagrants and the like.").

[5] Such legislative history materials are generally not a reliable indicator of a statute's meaning. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[J]udicial reliance on legislative materials like committee reports . . . may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.").

from "sanitary," reasons. *See* H.R. Rep. No. 64–886, at 4 (1916). But the letter did not suggest any need for Congress to address what *degree of dependency* was required to become a public charge. *See id.* Nor does it indicate that Congress disagreed with *Gegiow's* holding that the term "public charge" refers to only "permanent personal" characteristics, regardless of whether those characteristics stem from economic or health concerns. *Gegiow*, 239 U.S. at 10. It is thus unsurprising that, as the District Court recognized, "that is precisely how many cases of the era understood the 1917 Act." Dkt. 106 at 21 (citing authorities).

2. Case law and other authorities confirm the District Court's reading of the statute.

Contrary to Appellants' characterization, the District Court did not "rel[y] exclusively" on *Gegiow*. Stay Motion at 12. The Court also considered "a mélange of nineteenth century dictionaries and state court cases," as well as a 1929 treatise, pressed by Appellants. Dkt. 106 at 23–24. As the District Court concluded, these authorities "do not advance DHS's cause." *Id.* at 23–25.

First, when the term "public charge" entered the statutory lexicon in 1882, it referred to an individual so dependent upon the government that he or she was "'committed'" to its "'custody, care, concern, or management.'" *Id.* at 25 (quoting *The Century Dictionary of the English Language* at 929 (William Dwight Whitney, ed. 1889); *Webster's Condensed Dictionary of the English Language* at 84 (Dorsey Gardner, ed. 1884) (defining "charge" as a "person or thing committed to the care or management of another")). That plain meaning persists through the present day. *See Public charge*, *Oxford English Dictionary* (3d. ed. 2007) (defining "public

charge" as "a thing which is the responsibility of the state; a person who is dependent upon the State for care or support").

Upon an exhaustive review, the District Court also concluded that the cases Appellants relied upon instead "align with *Gegiow's*—and Cook County and ICIRR's—conception of what it means to be a public charge." Dkt. 106 at 26-27. The motion to stay does not address, much less refute, this conclusion. Instead, Appellants cite three cases that they did not raise in the District Court. But these cases similarly fail to support Appellants' interpretation. *See Guimond v. Howes*, 9 F.2d 412, 413–14 (D. Me. 1925) (upholding public charge determination where a man, who had been arrested three times, admitted that his occupation was "dealing in booze, bootlegging, breaking the law," because the family was dependent on local benefits while the husband was incarcerated (*i.e.*, institutionalized)); *Ex parte Turner*, 10 F.2d 816, 817 (S.D. Cal. 1926) (holding that individual was likely to become a "public charge" because he was "predisposed to physical infirmity" given his history of hospitalization); *Ex parte Kichmiriantz*, 283 F. 697, 697–98 (N.D. Cal 1922) (holding that applicant was a "public charge" because he was diagnosed "with dementia praecox . . . a chronic mental disorder," rendering him "unable to care for himself in any way"). Each of these cases follows the long line of judicial and administrative authority holding that a "public charge" is an individual with permanent or long-term dependence on the government for care.[6]

[6] *See, e.g.*, *Ex parte Mitchell*, 256 F. 229, 234 (N.D.N.Y. 1919) (defining "public charge" as "a pauper, or poor person who will be, or might properly be, *sent to an almshouse* and supported at the public expense") (emphasis added); *Ex parte Tsunetaro Machida*, 277 F. 239, 241 (W.D. Wash. 1921) (defining "public charge" as "a person committed to the custody

Against this backdrop of consistent judicial decisions interpreting the term "public charge" to refer to long-term and significant dependency, Congress repeatedly re-adopted the "public charge" language without modification, including in the operative statute. *See* Immigration Act of 1891, ch. 551, 26 Stat. 1084, 1084; Immigration Act of 1907, ch. 1134, 34 Stat. 898, 899; amended by Act of March 26, 1910, ch. 128, § 1, 36 Stat. 263, 263 (1910); Immigration Act of 1917, ch. 29 § 3, 39 Stat. 874, 876; INA of 1952, ch. 477, § 212(a)(15), 66 Stat. 163, 183; Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 531(a), 110 Stat. 3009-546, 3009-674-75 (1996); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54. Indeed, Appellants acknowledged that "in 1996 and 2013, . . . Congress left the public charge provision unchanged." Dkt. 73 at 23.

By retaining the "public charge" language, Congress ratified the longstanding judicial and administrative interpretation of that term. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 n.4 (2004) ("The doctrine of ratification states that 'Congress is presumed to be aware of [a] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'"); *see also*

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of a department of the government"); *United States ex rel. La Reddola v. Tod*, 299 F. 592, 592-93 (2d Cir. 1924) (holding that an alien who "suffer[ed] from an insanity" from which "recovery [was] impossible . . . was a public charge" while institutionalized, "for he was supported by public moneys of the state of New York *and nothing was paid for his maintenance by him or his relatives*") (emphasis added); *United States ex rel. De Sousa v. Day*, 22 F.2d 472, 473-74 (2d Cir. 1927) ("In the face of [*Gegiow*] it is hard to say that a healthy adult immigrant, with no previous history of pauperism, and nothing to interfere with his chances in life but lack of savings, is likely to become a public charge within the meaning of the statute.").

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 589–90 (2010) ("[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.") (internal citations, quotation marks, and ellipsis omitted); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 193-94 (2002) ("Congress' repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.").

3. The federal statutory scheme confirms that receipt of temporary noncash benefits does not render an immigrant a "public charge."

Appellants also rely upon Congress's decision to condition benefits for many immigrants upon five years of residency. Stay Motion at 11. But Appellants ignore that Congress has declined to eliminate immigrant eligibility under PRWORA and has, in fact, repeatedly affirmed and expanded its commitment to ensuring certain classes of lawful immigrants can enroll in benefit programs—including benefits targeted in the Final Rule.[7] Appellants cannot reconcile these Congressional grants of benefits with a reading of "public charge" that penalizes immigrants' prospective

[7] *See* Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996), 8 U.S.C. §§ 1611, 1621 (allowing even non-"qualified" immigrants to obtain numerous non-cash benefits, including public housing under the Section 8 program); Farm Security and Rural Investment Act, Pub. L. 107-171, § 4401, 116 Stat. 134 (2002) (codified as amended at 7 U.S.C. § 7901 et seq.) (granting food stamp benefits to certain immigrants); Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. 111-3, 123 Stat. 8 § 214 (2009) (codified as amended at 42 U.S.C. §§ 1396-97 et seq.) (extending public health benefits, including Medicaid and the Children's Health Insurance Program, to immigrant children and pregnant women regardless of the five-year waiting period).

acceptance of the very benefits Congress intended them to use. *See New York v. Dep't of Homeland Sec.*, 2019 WL 5100372, at *7 (explaining that "[t]here is no logic to this framework").

Next, Appellants argue that the affidavit-of-support provision shows that Congress believed "the mere possibility" that an alien might obtain "any means-tested public benefits . . . in the future was sufficient to render that alien likely to become a public charge[.]" Stay Motion at 10–11. But, as Appellants acknowledge, the statute requires only certain categories of applicants to obtain affidavits of support, whereas the Final Rule applies to all applicants. *Id.* at 10; *see also* 8 U.S.C. § 1182(a)(4)(C)-(D). And these affidavits serve a purpose distinct from the Final Rule's admissibility review: they provide a reimbursement mechanism for DHS *after* admission. 8 U.S.C. § 1183a(b). Nothing in this limited post-admission remedy suggests that Congress silently redefined "public charge" to include *any* applicant likely to receive *any* non-cash benefit at some future point.

That Congress expressly required certain categories of immigrants to obtain an affidavit of support shows that Congress knew how to impose this heightened requirement on all immigrants if it desired. Moreover, it confirms Congress did not believe the "public charge" provision alone would prevent immigrants from obtaining all forms of public benefits, such that the affidavit requirement was necessary in some cases.

Finally, unable to find support in the specific statutory provision at issue, Appellants point to Congress's expression of a general "self-sufficiency" principle in

the policy statements of the 1996 amendment to the INA. Stay Motion at 11–12. As the District Court explained, however, "those provisions express only general policy goals without specifying what it means for non-citizens to be '[s]elf-sufficient' or to 'not depend on public resources to meet their needs.'" Dkt. 106 at 16–17. PRWORA's grant of some public benefits to immigrants indicates that temporary use of public benefits may be a *means of achieving* self-sufficiency, not a contravention of it. Moreover, "[t]he law is settled that '[h]owever inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (citations omitted); *see also, e.g.*, *W. Fuels-Illinois, Inc. v. I.C.C.*, 878 F.2d 1025, 1029 (7th Cir. 1989) (explaining that, under "established principles of statutory interpretation," the "broad goals" announced in a statute's "statement of policies" did "not supersede a specific provision of the statute"). If Congress had intended to expand the definition of public charge in its 1996 amendments to the INA, it would have done so.

II. The remaining factors do not favor a stay.

Appellants fail to meaningfully address the other factors. In particular, Appellants cannot establish any irreparable harm, much less that the balance of harms weighs in their favor. Instead, Appellants' motion states only that so long as the Final Rule is enjoined, DHS "will grant lawful-permanent-resident status to aliens whom the Secretary would otherwise deem likely to become public charges in the exercise of his discretion." Stay Motion at 16.

As an initial matter, "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). Regardless, Appellants offer no explanation as to how simply preserving a century-long status quo would tip the balance of harms in their favor. *See Flynn v. Sandahl*, 58 F.3d 283, 287 (7th Cir. 1995) ("The purpose of a stay is simply to preserve the status quo."). To the contrary, the District Court determined that if the Final Rule goes into effect, Appellees will suffer irreparable financial and programmatic harm because: (1) immigrants will disenroll or refrain from enrolling in medical benefits, forgo routine treatment, and rely upon emergency care provided by Cook County; and (2) this disenrollment and lack of enrollment will risk the spread of vaccine-preventable and other communicable diseases. Dkt. 106 at 28-29. Indeed, DHS acknowledged the Final Rule may lead to these public health crises. *See, e.g.*, 83 Fed. Reg. 51,114 at 51,270 (Oct. 10, 2018). Appellants fail to explain how any harm to them caused by a temporary delay will outweigh these anticipated consequences, much less make the extraordinary showing required to stay the District Court's order.

CONCLUSION

Appellees respectfully request that Appellants' motion to stay be denied.

Dated: December 3, 2019 Respectfully submitted,

KIMBERLY M. FOXX
Cook County Illinois State's Attorney

COOK COUNTY, ILLINOIS

By /s/ Lauren Miller
Lauren Miller, Special Assistant

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This response complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,195 words, as reported by the word count function of Microsoft Word, excluding the parts of the response exempted by Federal Rule of Appellate Procedure 27(a)(2)(B); and

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/s/ David E. Morrison

INDEX OF EXHIBITS

Transcript of Nov. 14, 2019 Proceedings (19-c-6334 NDIL).....................Exhibit A

EXHIBIT A

1 IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
2 EASTERN DIVISION

3

COOK COUNTY, ILLINOIS, an Illinois governmental entity, and ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC.,	)	
Plaintiffs,	)	
-vs-	)	Case No. 19 C 6334
KEVIN K. McALEENAN, in his official capacity as Acting Secretary of U.S. Department of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; KENNETH T. CUCCINELLI, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; and U.S. CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency,	)	Chicago, Illinois November 14, 2019
Defendants.	)	10:00 a.m.

17 TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GARY FEINERMAN

18

19 APPEARANCES:

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1 (Proceedings heard in open court:)
2 THE CLERK: 19 C 6334, Cook County, Illinois, versus
3 McAleenan.
4 THE COURT: Good morning. So, do we have somebody on
5 the phone?
6 THE CLERK: The line is open.
7 THE COURT: Okay. The line is open. No one's joined
8 yet. So, who do we have on the plaintiffs' side?
9 MR. MORRISON: Good morning, your Honor. For Cook
10 County, Illinois, David Morrison of Goldberg, Kohn.
11 MS. FLINT: Good morning, your Honor. Tacy Flint,
12 Sidley Austin, for ICIRR.
13 MR. GORDON: Good morning. David Gordon, Sidley
14 Austin, for ICIRR.
15 MS. PAGAN: Good morning, your Honor. Militza Pagan
16 for ICIRR.
17 MS. CHAPMAN: Good morning, your Honor. Carrie
18 Chapman on behalf of ICIRR.
19 MS. MILLER: Good morning, your Honor. Special
20 Assistant State's Attorney Lauren Miller on behalf of Cook
21 County.
22 MS. CARTER: Good morning, your Honor. Meghan Carter
23 on behalf of ICIRR.
24 MS. SVATEK: Good morning, your Honor. Marlow Svatek
25 from Sidley Austin on behalf of ICIRR.

1 THE COURT: Good morning. You're way outnumbered.
2 MR. CHOLERA: Good morning, your Honor. Kuntal
3 Cholera from the Civil Division of the Federal Programs
4 Branch, and I'm here for all defendants.
5 THE COURT: Good morning. Are you expecting somebody
6 to appear by phone?
7 MR. CHOLERA: I will be the only one participating,
8 your Honor. I can't guarantee nobody else will or has already
9 dialed in to listen.
10 THE COURT: All right. Very good. So, we're here --
11 actually, we're here for a couple of reasons. One is the
12 motion to stay the preliminary injunction pending appeal, and
13 the second is just a regular status report.
14 So, why don't we do the regular status report first.
15 Thank you for the status report. The defendants have not yet
16 responded to the complaint, is that correct?
17 MR. CHOLERA: That's correct, your Honor.
18 THE COURT: Okay. When were you -- when would you
19 like to do that by?
20 MR. CHOLERA: So, in the status report, your Honor,
21 we had indicated it would be 45 days from the date on which we
22 would produce the administrative record. That would put us at
23 around January 9th, but obviously, the plaintiffs should
24 please correct me if I'm wrong about that.
25 We found out recently that in the District of

1 Maryland case, the judge -- or at least the plaintiffs had
2 requested a response by January 8th, which would be the day
3 before, so we were going to request perhaps an additional week
4 here. But obviously, if your Honor would like us to still
5 respond by January 9th with our motion to dismiss, we can see
6 if we can get an extension in the District of Maryland case.
7 THE COURT: So, when's your -- the administrative
8 record will be filed when?
9 MR. CHOLERA: November 25th, sir.
10 THE COURT: November 25th? Okay. And then just
11 when's -- a week here or there isn't terribly significant, so
12 when's a realistic, but not terribly lengthy time frame for
13 you to either move to dismiss or answer the complaint?
14 MR. CHOLERA: The week of January 14th, January 16th,
15 I think, is the one we had in mind. I'm hoping that doesn't
16 fall on a weekend. I think that's around a Wednesday, but --
17 THE COURT: That's a Thursday, 6 and 13 are Mondays,
18 so the 16th would be a Thursday. Is that all right with the
19 plaintiffs?
20 MR. MORRISON: Your Honor, the only thing I would
21 note is that I believe that the defendants had 60 days from
22 service to file their response to the complaint, so it was
23 actually technically due in November. But we don't object to
24 the defendants taking an additional period of time to respond
25 to the complaint.

1 THE COURT: Okay. That's fine. So, why don't we say
2 January 16th is the response to the complaint. And you're
3 going to move to dismiss at least in part and perhaps in full?
4 MR. CHOLERA: Yes, your Honor, at least for the equal
5 protection claims; but for preservation's sake, we might go
6 ahead and just reiterate the claims that your Honor had
7 already adjudicated.
8 THE COURT: That's fine. So, why don't we come in,
9 Jackie, the following week for a presentment of the motion.
10 THE CLERK: How about January 22nd.
11 THE COURT: Only if that's good for everybody.
12 MR. CHOLERA: That's my birthday. I'd be happy to
13 come in for it.
14 THE COURT: Are you going to be able to get back in
15 time?
16 MR. CHOLERA: Fortunately, my family actually lives
17 in Chicago, so it wouldn't be the worst thing.
18 THE COURT: Oh, perfect. We can pick another day if
19 you want.
20 MR. CHOLERA: That's perfectly fine, your Honor.
21 Thank you.
22 THE COURT: All right. So, the administrative record
23 will be filed by November 25th. And then in terms of
24 discovery, I saw one area where the parties disagree, and
25 you'll tell me if there are others. The one area is whether

1 there ought to be discovery beyond the administrative record
2 for purposes of the equal protection claim, is that right?
3 MR. MORRISON: Well, your Honor, before we address
4 that, I just wanted to address the administrative record for
5 a second, which was that the defendants have asserted they'll
6 be producing a non-privileged version of the administrative
7 record by November 25th. We would assume that they'll be
8 producing a privilege log with the administrative record to
9 identify those items that they are withholding on the basis of
10 privilege.
11 And, you know, it will be our intention as we set
12 further deadlines, such as dispositive motions, that we work
13 through the opportunity to address the missing documents that
14 are part of the record and not set a dispositive motion until
15 after the complete record is presented to the Court resolving
16 all issues of completeness and privilege.
17 THE COURT: Okay. Are -- is there going to be a
18 privilege log served along -- or filed along -- I guess served
19 along with the filing of the administrative record?
20 MR. CHOLERA: I don't think the privilege log will be
21 ready necessarily on November 25th. We are in the process of
22 putting the privilege log together, your Honor, especially
23 since it's been requested in the other cases as well.
24 THE COURT: Okay. Do you have some sense as to when
25 the privilege log might be ready?

1 MR. CHOLERA: I don't have a precise sense. We've
2 conferred with the client in this respect, and it's a lot of
3 an issue of getting all the ducks in a row. I can report back
4 to your Honor my understanding was that it should be within a
5 month of the service of the administrative record, but that's
6 still contingent on information that they don't have yet
7 regarding the search they'll have to conduct in order to
8 assemble the log. So, I can't necessarily represent that it
9 will, for sure, be within a month after the production of the
10 administrative record.
11 But I can certainly come back, your Honor, with more
12 concrete information, because I don't think we've had that
13 conversation with plaintiffs, at least, before coming before
14 the Court.
15 THE COURT: Okay. So, what they're saying is late
16 December.
17 MR. MORRISON: Right. And so -- yes. I was
18 anticipating that there would be a response to the complaint
19 without the basis of the record to respond to the complaint,
20 and then we would deal with any motions to dismiss. But the
21 administrative record would go to dispositive motions with
22 respect to the APA claim.
23 Certainly, if the plaintiff -- the defendants are
24 intending to brief a motion to dismiss with respect to the APA
25 claim based on an incomplete record, I think that would be

1 challenging. But if the motion to dismiss the APA claim is
2 not based on the administrative record, then we can work
3 through the timing of when we'll get the privilege log and get
4 a complete record.
5 THE COURT: Okay. Now I'm going to reveal that I sit
6 on the Northern District of Illinois and not the District of
7 the District of Columbia. In an APA case, when there's a
8 motion to dismiss, is that based solely on the pleadings,
9 which is what normally happens in my world; or does it also
10 include -- can you also refer outside the pleadings to the
11 administrative record? What's your thought?
12 MR. CHOLERA: My understanding is at least we were
13 going to rely on the face of the actual regulation. In terms
14 of what is necessarily allowed, your Honor, I'm not positive.
15 My understanding is that typically happens on a motion for
16 summary judgment. It's just that in the typical APA case,
17 because discovery is usually limited to the administrative
18 record, often the parties go to the summary judgment stage;
19 and it happens fairly quickly because it's not like this
20 regular civil case, where you have depositions, et cetera.
21 THE COURT: Right. So, we're just talking about what
22 you're going to be filing on January 16th is just a motion to
23 dismiss under 12(b)(6)?
24 MR. CHOLERA: Yes, your Honor.
25 THE COURT: So, therefore, you're limited to the

1 pleadings and any judicially noticeable materials, like, of
2 course, the regulation.
3 MR. CHOLERA: Yes, your Honor, and not documents we
4 would be producing.
5 THE COURT: Not the administrative record. Does that
6 alleviate your concerns?
7 MR. MORRISON: It does, your Honor.
8 THE COURT: Okay. Good. So, why don't you -- both
9 sides stay in touch about when the privilege log will be
10 produced. If you -- if there's no dispute, that's fine.
11 If there comes to be a dispute, you can bring it to me.
12 MR. MORRISON: And then I'm sorry. I took you away
13 from your line of questioning with respect to the equal
14 protection claim.
15 THE COURT: Right. So, the scope of discovery or
16 whether there is going to be discovery, I gather from the
17 status report that the plaintiffs believe there ought to be
18 discovery outside of the administrative record as to the equal
19 protection claim, and the defendants say no?
20 MR. CHOLERA: Yes, your Honor.
21 THE COURT: Are there any other disputes regarding
22 discovery?
23 MS. CHAPMAN: I think there may be a dispute about
24 the timing of discovery, should it be ordered or permitted. I
25 think that the defendants assert that everything should also

1 be -- discovery should be stayed until the dispositive motion
2 is adjudicated, and it is our position that the case on the
3 equal protection claim should be proceed as it normally would
4 were it an independent claim without the APA claim.
5 THE COURT: Right. But the logically anterior
6 question is whether there ought to be discovery in the first
7 place.
8 MS. CHAPMAN: Indeed.
9 MR. MORRISON: Your Honor, I will only also note that
10 the plaintiffs are reserving the right to identify additional
11 expert witnesses as it relates to the APA claim.
12 THE COURT: The APA?
13 MR. MORRISON: Yes, the arbitrary and capriciousness
14 aspect of the *Chevron II* analysis. That is subject to the
15 affidavit that we've supplied. We might provide additional
16 evidence, if necessary. There have been other affidavits that
17 have been supplied in other cases. So, we wanted to reserve
18 the right, if necessary, to provide additional expert
19 testimony.
20 THE COURT: Okay.
21 MS. CHAPMAN: And there might indeed be expert
22 testimony that we would like to provide on that equal
23 protection claim as well.
24 THE COURT: Okay. But that would happen after fact
25 discovery, if any.

1 So, how are we going to resolve whether or not there
2 can be fact discovery regarding the equal protection claim
3 that goes outside the administrative record?
4 Did Judge Furman deal with this issue in the census
5 case?
6 MS. CHAPMAN: It was addressed somewhat in the census
7 case. He permitted -- and correct me if I am misstating
8 anything. He permitted some discovery beyond the
9 administrative record based on an exception to that. He --
10 the Supreme Court then held that that was not a permissible
11 extension of discovery, but, in fact, the trial court ruled
12 based on the complete AR, as opposed to the initial
13 administrative record that was submitted; and the court found
14 that that complete AR was sufficient to make -- the Supreme
15 Court, to make their ruling.
16 So, he permitted it, but then the U.S. Supreme Court
17 said that on the APA claim, that extra discovery was not
18 permissible. But it wasn't to a separate equal protection
19 claim.
20 THE COURT: I see. So, maybe Judge Furman's decision
21 and the Supreme Court's reversal of that decision doesn't
22 speak to our situation, but what's your perspective?
23 MR. CHOLERA: That's true, your Honor. The Supreme
24 Court held that the initial expansion of discovery was
25 improper, but because there were different factual revelations

1 that came in the interim, that they could be retroactively
2 justified; and essentially that's why the Supreme Court ended
3 up at least considering in part the
4 extra-administrative-record evidence.
5 But it is true that they did reach the antecedent
6 conclusion that the initial expansion shouldn't have been
7 justified.
8 THE COURT: But that was only for -- the discovery
9 was for purposes of the APA claim, and there was no equal
10 protection claim?
11 MR. CHOLERA: Yes, your Honor.
12 THE COURT: Okay. What law is there on the question
13 whether -- in an APA case where there's also an equal
14 protection claim, whether there can be discovery on the equal
15 protection claim? Plaintiffs?
16 MS. CHAPMAN: So, we have looked, generally speaking,
17 at law on the equal protection claim; and it's our position
18 that because it's a separate and independent count and could
19 have been brought separately and independently, that we are
20 entitled to discovery on it.
21 We certainly think that in order to meet our factors
22 in *Village of Arlington Heights* that we are required to meet,
23 we have -- we need an opportunity to look at evidence and take
24 depositions, and that we aren't restricted as a matter of law
25 to the administrative record. We can continue to do research

1 on the issue and brief it if your Honor would prefer.
2 THE COURT: What's your perspective?
3 MR. CHOLERA: Our view is in light of the Supreme
4 Court's decisions in *Overton Park versus Volpe* and also the
5 Seventh Circuit's decision in *Fox*, essentially, the standard,
6 in our view, is that when you're assessing agency action or a
7 claim regarding agency action, it is held to a more confined
8 discovery process. And the fact that, you know, you can slap
9 the label APA on it in our view is not necessarily material,
10 given that even this equal protection claim could have been
11 brought under the APA because they could have been arguing
12 that the regulation is contrary to the equal protection
13 clause.
14 So, in our view, the simple fact that the plaintiffs
15 decided to bring it as a stand-alone equal protection claim
16 rather than an APA equal protection claim should not change
17 the standard of discovery. And if it did, obviously, it would
18 just invite attempts to circumvent the strictures placed on
19 administrative discovery.
20 THE COURT: I don't think I can resolve this issue,
21 not because you don't know the law, but because I don't know
22 the law. So, maybe we ought to have briefing on this. How
23 would you like to do it? We could have one side -- you know,
24 opening brief, response, and reply, or we could have one or
25 two simultaneous rounds of briefing. What would you prefer?

1 MR. CHOLERA: So, I guess it would -- I'd beg the
2 threshold question is we are going to move to dismiss the
3 equal protection claim, so would your Honor like us to go
4 ahead and get that out of the way and then move to the second
5 step, which is if the equal protection claim survives, we then
6 litigate what the scope of discovery is for that, or would
7 your Honor like us to --
8 THE COURT: Why don't we do it -- why don't you do
9 the: Should there be discovery; and, if so, what's the
10 timing? Why don't we have the briefing address both issues.
11 MR. CHOLERA: Okay, your Honor.
12 THE COURT: So, how would you prefer to do that?
13 Just with simultaneous briefs, one round or two rounds, or
14 one side and then the other side?
15 MR. CHOLERA: We have no strong preference, your
16 Honor, but I'd have to touch base with my team to see with
17 respect to timing what they're viewing. But as of right now,
18 I can say, this is obviously an issue that we have briefed
19 before, candidly, so I don't know if we have a strong
20 preference.
21 THE COURT: How about the plaintiffs? What would you
22 prefer?
23 MS. CHAPMAN: I think because this is the defendants'
24 issue that they're raising, we would prefer to be able to see
25 their points and respond to it, if it pleases the Court.

1 THE COURT: Okay. Then let's do this: Why don't we
2 have -- why don't we have two rounds of simultaneous briefs?
3 Because then you both get to see what the other side's
4 position is, and then you get to respond.
5 As for timing, I don't want to make it too quick, but
6 I also don't want to let it go for too long. So, what do you
7 propose?
8 MS. CHAPMAN: Could we maybe just have one brief
9 moment, your Honor, to talk about schedules?
10 THE COURT: Sure.
11 MS. CHAPMAN: I'm so sorry, but because we're a big
12 group, that might help --
13 THE COURT: That's fine.
14 MS. CHAPMAN: My apologies.
15 (Discussion between counsel, not within hearing.)
16 MS. CHAPMAN: Thank you, your Honor. I apologize.
17 We tried to do that quickly.
18 So, we would maybe propose that the initial briefs
19 are due in 21 days, on December 5th, and then the mutual
20 responses 14 days later on December 19th?
21 MR. CHOLERA: For the combined motion to dismiss and
22 the --
23 THE COURT: No, no, just the discovery.
24 MR. CHOLERA: Oh, just the discovery?
25 THE COURT: Like should there be discovery; and if

1 so, what should the timing be?
2 MR. CHOLERA: January 5th, sure.
3 THE COURT: No, December 5th.
4 MR. CHOLERA: December 5th, excuse me.
5 THE COURT: And December 19th.
6 MR. CHOLERA: What was the date?
7 MR. MORRISON: 21 days to December 5th for the
8 initial, and then the response 14 days later, December 19th.
9 MR. CHOLERA: Okay.
10 THE COURT: All right. Let's do that. And then
11 we're already getting together on -- in late January. Why
12 don't we also set a date, Jackie, the week of January 6th to
13 deal with this issue.
14 THE CLERK: Sure. How about we set you for -- are
15 you going to need a little bit of time?
16 THE COURT: Yeah, maybe 15 minutes, half hour.
17 THE CLERK: How about January 9th, 11:00 a.m.
18 THE COURT: Is that all right?
19 MS. CHAPMAN: My apologies, your Honor, but my
20 co-counsel at Shriver has a court appearance on January 9th
21 that isn't movable.
22 THE COURT: Okay.
23 THE CLERK: How about January 7th, 10:00 a.m.?
24 MS. CHAPMAN: Yes, that's fine with us.
25 MR. CHOLERA: Sure.

1 THE COURT: Okay. Good.
2 Anything else about discovery or briefing that we
3 haven't covered that either side would like to cover?
4 Plaintiffs?
5 MS. CHAPMAN: No, your Honor.
6 MR. CHOLERA: Nothing from us, your Honor.
7 THE COURT: Okay. So, let's move on to the motion to
8 reconsider. Is there anything that either side would like --
9 I have some -- a couple of questions; but before I get to
10 them, is there anything that either side would like to add to
11 what you've already argued in the briefs, or is there anything
12 in the briefs that you'd like to place particular emphasis on?
13 Why don't I start with the movant.
14 MR. CHOLERA: Nothing beyond what we've already
15 stated in our initial papers, your Honor.
16 THE COURT: Okay.
17 MS. FLINT: No, your Honor. We agree this is a
18 motion for reconsideration.
19 THE COURT: All right. So, excuse me.
20 I have a question for DHS about your interpretive
21 methodology.
22 MR. CHOLERA: Yes, your Honor.
23 THE COURT: So, in the -- and I basically agreed with
24 your interpretive -- your overarching interpretive methodology
25 in my opinion, and I disagreed with the plaintiffs, although

1 after I ran that interpretive methodology, I came to a
2 different conclusion than the government did.
3 So, in your preliminary injunction brief, you focused
4 on the original meaning of the word "public charge" in the
5 late 19th Century because the term entered the statutory
6 lexicon in the 1882 act. And you said the late 19th Century
7 was the key time to consider. And then DHS spent a few pages
8 addressing cases and dictionaries from the late 19th and early
9 20th Centuries.
10 And then you also addressed -- the DHS also addressed
11 the 1917 act and whether that changed things from where they
12 stood in the 1882 and the 1907 act.
13 And as to the 1996 act, DHS argued that Congress left
14 the public charge provision unchanged in the 1996 act. In the
15 motion to reconsider, DHS argues that the 1996 act created a
16 significantly different public charge regime.
17 So, which is it? Did the '96 act leave things the
18 same, or did it change?
19 MR. CHOLERA: So, your Honor, with respect, I think
20 the argument we're trying to make is that in 1996, it didn't
21 mark a significant departure in terms of what "public charge"
22 has meant. If I can clarify the antecedent point, which is
23 the interpretive mechanism of why we look at the late 1800s.
24 I think the point we were trying to make was that because
25 that's when the term really entered the statutory edifice,

1 that's sort of the time period we would look at to understand
2 the original meaning of "public charge."
3 Now, obviously, to the extent there's ambiguity,
4 subsequent congressional actions might clarify what Congress
5 at least understood "public charge" to mean. That's why when
6 we talk about the 1917 act, what we're really trying to say,
7 it's not so much that the definitions changed. It's just that
8 Congress clearly disagreed with certain interpretations of the
9 initial meaning of "public charge."
10 In other words, they disagreed, for example, with the
11 Supreme Court's decision in *Gegiow*. In 1995, we're certainly
12 not trying to say it marked a radical departure. I think the
13 point we're trying to make there is because that's the
14 operative provision, the ultimate statutory question is: What
15 does it mean in the 1996 act? But it certainly is that that
16 meaning is heavily informed by what the initial understanding
17 was of "public charge," at least with respect to how Congress
18 understood it.
19 THE COURT: Right. So, how -- but in the motion to
20 reconsider, the Department argued that the '96 act created,
21 quote, "a significantly different public charge regime," end
22 quote. That's on page 6. So, what significant change did the
23 1996 act effect with respect to the meaning of the term -- the
24 statutory term "public charge"?
25 MR. CHOLERA: So, I don't think it changed

1 fundamentally the underlying term or the meaning of "public
2 charge." I think when we said "regime" what we meant to say
3 is that marked a radical change in, for example, the
4 underlying policy, the way it's supposed to be deployed.
5 For example, "public charge" could have meant
6 something, but it could be that the overall policy is, for
7 example, not to necessarily apply the term "public charge"
8 aggressively or not to apply it to the full scope, to the full
9 outer bounds of what it allows.
10 So, when we say it changed the regime, what we really
11 meant to say was the term always historically was understood
12 to mean something broad. The regime now is to go ahead and
13 try to be expansive in how we apply it.
14 THE COURT: I understand. So, the '96 act added some
15 factors that the agency has to consider in making a public
16 charge determination and listed those statutory factors. I
17 get that.
18 What else did the '96 act do that sheds light on the
19 meaning of the term "public charge"?
20 MR. CHOLERA: Nothing else beyond, you know, the
21 policy proscriptions placed not just in 1996 but in sort of
22 the overall immigration apparatus. But as your Honor has
23 stated, the factors we think are very significant in terms of
24 what Congress's thinking was, especially when it comes to
25 initial ideas of how "public charge" were conceived, ideas

1 that the Congress had rejected, for example, the concept that
2 it has to be based on some type of debilitating physical
3 ailment. Obviously, we believe that was disposed of, and
4 Congress made clear that that is not how they interpreted
5 "public charge" by elucidating certain factors that aren't
6 tethered to permanent infirmities. But that's the primary
7 one, your Honor.
8 THE COURT: I see. Any thoughts from the plaintiffs
9 on that particular issue?
10 MS. FLINT: Well, I just wanted to add, in the motion
11 to reconsider, the plaintiffs, after asserting that they
12 shouldn't be held to the position they took before, that the
13 key time was the late 19th Century, they walk through the same
14 authorities related to *Gegiow* and how *Gegiow* doesn't -- to the
15 extent *Gegiow* supports our interpretation of the statute, that
16 has been changed, they argue.
17 The Court walked through those same authorities and
18 the same topic. Although the Court, in your Honor's
19 preliminary injunction opinion, accepted the premise that the
20 19th Century was the right time to consider, the Court's
21 opinion walks through several cases from the 1920s addressing
22 the very question of whether *Gegiow*'s interpretation of the
23 statute no longer holds.
24 So, there's nothing new in the motion for
25 reconsideration, which is exactly why it should be denied.

1 THE COURT: All right. Second question, in terms of
2 harm. In addressing the harm to DHS of denying a stay, DHS
3 argued that roughly 382,264 people apply for adjustment of
4 status and are subject to a public charge inquiry each year.
5 Is that an Illinois-only figure? And the reason I ask that is
6 because the preliminary injunction I entered covers only
7 Illinois.
8 MR. CHOLERA: Your Honor, that is not an
9 Illinois-only figure. We did not have an Illinois-only figure
10 that we could turn to.
11 THE COURT: Okay. All right. Any thoughts from the
12 plaintiffs on that particular issue?
13 MS. FLINT: On the declaration in general, this, of
14 course, is material that could have been raised in opposition
15 to the preliminary injunction. These are the very same types
16 of harms that the defendants were talking about in opposing
17 the preliminary injunction. Of course, they did not file this
18 declaration until their motion to reconsider the preliminary
19 injunction opinion.
20 So, this certainly shouldn't be considered in
21 connection with the merits of the preliminary injunction; and
22 in any event, it doesn't add much, or really anything, to the
23 harms that the Court already considered when it talked
24 generally about the nature of delaying the administrative
25 rule.

1 THE COURT: Any final thoughts on this issue?
2 MR. CHOLERA: Just as a threshold point, we certainly
3 don't view this as a motion to reconsider, your Honor. We
4 understand that components of it certainly push arguments that
5 your Honor respectfully has rejected in a thoughtful opinion;
6 but obviously, this is a motion for an interim stay pending
7 appeal, not a motion for reconsideration.
8 The second point, your Honor, is we certainly made
9 the harm argument earlier. Granted, we introduced the
10 declaration now; but that's because of their allegations that
11 we have no evidence of any of the actual specific harm.
12 That's been a point that's been raised in several of these
13 cases, and so we thought this would be a way to back up the
14 arguments we have already made.
15 So, it doesn't introduce something radically new. In
16 fact, we would submit it's a very predictable declaration that
17 supports arguments we were already relying on; namely, that
18 the interim harm would just be the harm that the new
19 regulation is aimed to prevent, which is that there are
20 significant drains on resources, given new people that would
21 come to the United States.
22 THE COURT: All right. Anything further from either
23 side? No?
24 MS. FLINT: No, your Honor.
25 MR. CHOLERA: Nothing from me, your Honor.

1 THE COURT: Okay. Well, thank you for your briefs.
2 Like the briefs on the preliminary injunction, they were very,
3 very well done and very illuminating.
4 I'm going to deny the motion for a stay pending
5 appeal, and just -- because I think -- I got the sense from
6 DHS's waiver of a reply that they'd rather have the ruling
7 sooner rather than later, so I'm going to accommodate DHS, and
8 I'm just going to give my reasons on the record. And we're
9 not going to be here for a terribly long period of time, but
10 it will be a few moments.
11 So, DHS -- in laying out the factors that bear on a
12 stay pending appeal, DHS laid them out on page 2 of its
13 motion. And those factors line up in large part, if not in
14 whole, with the factors that the Court considers and that I
15 did consider in deciding whether to issue a preliminary
16 injunction. So, given that the factors overlap, I'll deny the
17 motion for a stay based on the reasoning that's set forth in
18 my preliminary injunction opinion.
19 And let me add parenthetically, in reviewing my
20 preliminary injunction opinion yesterday, I saw that there
21 were a couple of minor citation errors, so I may be issuing a
22 corrected opinion; but it's going to -- I basically -- I
23 forgot a comma in one cite, and I forgot an "Emphasis Added"
24 in another cite. So, I just want to add those. I'm sure
25 there are other mistakes that I did not find, but I wanted to

1 take care to correct the mistakes that I did find.
2 So, I'm basically relying on my preliminary
3 injunction opinion for the grounds for denying the stay
4 pending appeal, but let me add these further observations.
5 With respect to standing, and as to Cook County,
6 DHS's motion didn't address *Gladstone*, which was a Supreme
7 Court case, or *Matchmaker*, which is the Seventh Circuit case;
8 didn't address the non-economic public health concerns arising
9 from the anticipated decrease in people getting vaccinations
10 that would flow from some other rule; and did not address that
11 DHS itself, in its explanation of the final rule, acknowledged
12 that implementing the rule would cause municipal-owned
13 hospital systems to suffer financial losses. And I address
14 that at page 8 of my opinion.
15 The DHS did distinguish that census case from last
16 year, the Supreme Court census case, on the ground that the
17 states in that case established at trial that the -- adding
18 the citizenship question to the census form would cause
19 non-parties to do something, not respond to the census form,
20 that in turn would impact the states.
21 And, yes, that was a finding based on a trial, and of
22 course, we didn't have a trial here. We just had a
23 preliminary injunction hearing that was based on a paper
24 record; and based on that limited record, I found the factual
25 predicate that was sufficient for the County to have standing.

1 And again, we didn't have a trial, like in the census case,
2 but that's because of the stage of the litigation.
3 In terms of ICIRR, the DHS's motion didn't address
4 the Seventh Circuit's recent and significant decision in the
5 *Common Cause Indiana* case or Judge Brennan's concurrence in
6 that case; and that case is close to being on all fours with
7 this case, and so I will reiterate my reliance on the *Common*
8 *Cause* decision.
9 In terms of the zone of interests test, I didn't see
10 that DHS's motion addressed the zone of interests standard in
11 the particular context of the APA. The DHS did reference the
12 San Francisco case, the San Francisco decision in another, a
13 parallel public charge case, which held that the private
14 organizations there did not fall within the zone of interests.
15 And the San Francisco -- the Northern District of
16 California certainly made that decision; but in so doing, the
17 court said that if the private organization had identified
18 specific references to the role of pro bono organizations
19 within the challenged statute itself, then that would have
20 sufficed for purposes of the zone of interests. And ICIRR did
21 that in this case, as I referenced on page 14 of my opinion.
22 On the merits, I did -- as I mentioned, I did apply
23 the methodology that DHS urged me to apply. It's just that in
24 looking at the historical materials, the dictionaries, the
25 19th Century cases, and the circumstances surrounding the

1 enactment of the 1917 act and how the 1917 act was interpreted
2 by contemporary courts of the day, I just reached a conclusion
3 different from DHS as to what "public charge" meant in 1882,
4 what it meant in 1917.
5 And there was some change in 1917. It just wasn't
6 a change that affects the particular issue that's before us
7 today. In other words, it's not a change that helps, that
8 advances the ball for DHS.
9 I examined that, and, of course, what the statute --
10 what "public charge" meant in 1882 and then in 1917 has a
11 large impact and is dispositive of what it means in the
12 present day, given the lack of any congressional indication
13 that it meant to change the meaning of the term "public
14 charge."
15 As to the 1882 act, the motion to -- for a stay of
16 the injunction pending appeal didn't address my examination
17 of the late 19th Century cases and dictionaries showing that
18 "public charge" did not -- the term "public charge" did not
19 include those who temporarily receive public benefits, let
20 alone minor public benefits.
21 And the motion for a stay didn't address my
22 conclusion that the DHS misinterpreted the three 19th Century
23 cases from Maine and Vermont and Pennsylvania that it cited.
24 DHS did try to limit *Gegiow*. I've been pronouncing
25 it wrong.

1 MR. CHOLERA: I've probably been pronouncing it
2 incorrectly.
3 THE COURT: I'm going with you.
4 MS. FLINT: None of us has.
5 THE COURT: G-E-G-I-O-W. DHS appears to be trying to
6 limit *Gegiow* to its facts as a case dealing only with whether
7 an alien can be declared likely to become a public charge on
8 the ground that the labor market in the city where the alien
9 went is overstocked. That was certainly the factual
10 circumstance of the case; but in deciding that issue and in
11 deciding whether Mr. Gegiow and his co-plaintiffs were public
12 charges, the court articulated and applied a more generally
13 applicable principle, which is that the public charge is
14 intended to cover -- what public charge means are those who
15 have a more permanent personal condition that precludes them
16 from supporting themselves.
17 And that's how precedent works. The Supreme Court
18 just doesn't decide cases that are limited to the facts. The
19 Supreme Court decides cases by, most of the time, and
20 certainly in *Gegiow*, by announcing a general principle that it
21 then applies to the particular circumstances of the case.
22 And as a lower court, I just can't say, "Well, *Gegiow*
23 doesn't count because it involved overstocked labor markets."
24 I have to listen to what the Supreme Court said in terms of
25 articulating the general principle that governed its analysis

1 of the case.
2 DHS, in its motion for a stay, also said that if
3 *Gegiow* were pertinent in the present day, then the 1999 field
4 guidance -- which I think was issued by INS, is that right?
5 MS. FLINT: Yes.
6 THE COURT: (Continuing) -- would have relied on it.
7 So, here we have a federal agency in 1999 that didn't use the
8 proper methodology to interpret a governing statute. That's
9 not shocking. I don't think it would be shocking to any
10 commentator or judge who has looked into *Chevron* and has
11 criticized *Chevron*. It happens. It happened here.
12 Now, as it happens, the field guidance did, despite
13 itself, come to the right result in terms of what "public
14 charge" meant, but all that illustrates is the adage that even
15 a broken clock is right twice a day.
16 In terms of the 1917 act, the motion for a stay
17 didn't address my examination of the case on which DHS heavily
18 relied, *Ex Parte Horn*, as well as the other contemporaneous
19 cases that my opinion cited.
20 And I would have wanted -- if DHS disagreed with
21 my -- DHS said, "*Ex Parte Horn* meant X," in its preliminary
22 injunction brief, and I said, "No, *Ex Parte Horn* does not
23 mean X. It means Y." I would have loved for DHS to come back
24 at me and say, "No, no, no, it really means X." And I would
25 have given that argument serious consideration. But DHS

1 didn't even go there.
2 And what *Ex Parte Horn* and the other post-1917 cases
3 say -- and this is in line with the commentary that DHS cited
4 in its preliminary injunction brief -- is that the 1917 act
5 expanded *Gegiow*'s understanding of "public charge," which was
6 limited to only personal economic causes of being a public
7 charge, to include non-economic causes of being deemed a
8 public charge, such as being imprisoned.
9 And the courts actually disagreed on that particular
10 issue. Does it cover -- does public charge cover people who
11 are in prison? Does it not? And -- but that debate doesn't
12 have anything to do with our case because even if we -- even
13 if I agreed with the courts that held that the 1917 act
14 expanded the term "public charge" to include folks who
15 couldn't support themselves, who were largely, if not
16 entirely, dependent on government assistance for their
17 sustenance, even if that were expanded to include people who
18 could work but who were in prison, that doesn't help DHS in
19 this case because in order for DHS to win this case, "public
20 charge" has to mean -- has to include people who are
21 temporarily dependent on even a modest amount of public
22 benefits, of government benefits.
23 The motion to -- for a stay did cite a new case, a
24 case that hadn't been cited before, which is the Second
25 Circuit's decision in 1929, *U.S., ex rel., Iorio* -- that's

1 I-O-R-I-O -- *versus Day*. But *Iorio* is of a piece with the
2 cases that were cited in my opinion that held that the 1917
3 act expanded *Gegiow*'s conception of "public charge" to include
4 those who are substantially, if not exclusively, dependent on
5 public benefits for reasons not having anything to do with
6 their ability to work.
7 The cases I cited dealt with people who were in
8 prison, so even though they can work, they can't support
9 themselves. They're entirely dependent on the government.
10 What *Iorio* held is that the 1917 act also included those who
11 were capable of working, but who were in an area of the
12 country, like *Gegiow*, where there was no work.
13 And so what *Iorio* said is that the 1917 act expanded
14 "public charge" to include people who, by virtue of their
15 circumstance, for example, being in a labor market that is
16 overstocked, couldn't support themselves, in addition to
17 people who just couldn't support themselves wherever they
18 were.
19 And the language that *Iorio* used was that the 1917 --
20 the amendment to the public charge provision in the 1917 act
21 was meant to capture situations, quote, "where the occasion
22 leads to the conclusion that the alien will become destitute,
23 though generally capable of standing on his own feet." And,
24 "generally capable of standing on his or her own feet" means
25 the person would be capable of working; but the occasion of

1 being in an area like Portland, Oregon, in the *Gegiow* case,
2 that had an overstocked labor market, would cause those people
3 otherwise able to work to become destitute.
4 And the *Iorio* case used the word "destitute," and
5 that's an important word because "destitute" has a meaning of
6 you're substantially, if not exclusively, dependent on the
7 government for your subsistence.
8 It doesn't mean -- so, *Iorio* did not interpret the
9 1917 act to include people that the final rule says that
10 "public charge" includes, which is people who are temporarily
11 reliant on public benefits, even to a modest extent.
12 As to the 1996 act, it didn't change -- in my view,
13 it didn't change the meaning of the term "public charge." It
14 only set forth the factors that DHS must consider in deciding
15 whether a particular person was a public charge. And the
16 motion for a stay said that the '96 act reiterated that DHS
17 has considerable discretion in deciding who is likely to
18 become a public charge.
19 Yes, the DHS does have that discretion, but the
20 discretion must be exercised within the confines of the
21 statute, within the confines of the meaning of the term
22 "public charge." And for the reasons I set forth in my
23 opinion, the final rule went beyond those confines by bringing
24 in people who were just temporarily reliant on a modest amount
25 of public benefits.

1 As to the balance of harms and the public interest,
2 even if it were appropriate to consider the -- the new
3 affidavit, the new declaration submitted by DHS, it doesn't
4 move the needle. For one, it refers to national figures, as
5 opposed to Illinois-only figures, so I don't know, because I
6 haven't been told, how many public charge evaluations DHS is
7 going to have to make or the government's going to have to
8 make in Illinois over the next year.
9 And in any event, in the Seventh Circuit, preliminary
10 injunction is a sliding scale analysis, and the plaintiffs
11 have a strong case on the merits. So, even if the balance of
12 harms did not tip as decisively in plaintiffs' favor as I
13 concluded in the preliminary injunction opinion, the bottom
14 line would still be the same, which is that preliminary
15 injunctive relief would still be appropriate.
16 Finally, as to the government's request that I stay
17 the injunction as to folks other than the plaintiffs, other
18 than Cook County and other than ICIRR's clients, I'm not going
19 to do that. ICIRR serves clients across the state, so
20 implementation of the final rule will have a statewide effect
21 on ICIRR's clients and, therefore, on ICIRR itself.
22 That said, the record is -- the factual record at
23 this point has not been substantially developed, and a
24 preliminary injunction is interlocutory. So, as the factual
25 record develops, if DHS would like to expand the factual

1 record on this particular point, it can do so and then move to
2 modify the preliminary injunction, cutting it back to Cook
3 County and perhaps other portions of Illinois on a more
4 complete record.
5 So, for those reasons, I'm going to deny the motion
6 for a stay pending appeal. We have our next date. You can
7 get the transcript from Chip if you want to send it upstairs.
8 Is there anything else that we need to address at
9 this point?
10 MR. CHOLERA: I just wanted to put one item on the
11 record for the benefit of our appellate team. It deals with
12 the argument about the interpretive device, looking to the
13 late 1800s. One of the other reasons we framed our argument
14 the way we did is because we're trying to harmonize our
15 approaches across different district courts, and not all
16 district courts, I think, have agreed on the same methodology
17 for how they determine it.
18 So, I do want to preserve that to the extent that the
19 appellate team does decide to argue our case based on a
20 different interpretive methodology, we would not consider that
21 contradictory because that would have been a methodology that
22 at least other district courts have adopted. In other words,
23 other district courts have not necessarily just looked to the
24 original meaning and have looked to later statutory elements.
25 So, that was another reason why the argument was also framed

1 that way.
2 THE COURT: Right. And you'll notice how much
3 reliance I placed on the 1999 field guidance in my opinion,
4 which was none. I haven't read in detail -- I've obviously
5 skimmed the other decisions, but I haven't -- I can't recall
6 at this point the extent to which their interpretive
7 methodologies differed from mine; but there's a reason I used
8 the interpretive methodology I used, and that's because I
9 believe it's the correct interpretive methodology.
10 So -- all right. Anything else?
11 MS. FLINT: No.
12 MR. MORRISON: No.
13 THE COURT: And we have two further dates. And I
14 will get out a very slightly corrected, really just changing
15 two -- correcting two citation errors. I'll get that out
16 today. Okay? Thanks.
17 MR. MORRISON: Thank you for your time, your Honor.
18 MR. CHOLERA: Thank you, your Honor.
19 MS. FLINT: Thank you, your Honor.
20 MR. GORDON: Thank you, your Honor.
21 (Which were all the proceedings heard.)

CERTIFICATE

22 I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.
23
24 */s/Charles R. Zandi* *November 26, 2019*

Charles R. Zandi — Date
25 Official Court Reporter

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ David E. Morrison