No. 19-3169

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

COOK COUNTY, ILLINOIS, *et al.*,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois No. 19-cv-6334 (Feinerman, J.)

BRIEF FOR APPELLANTS

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INTRODUCTION

The Immigration and Nationality Act (INA) provides that an alien is inadmissible if the alien is, in the Executive Branch's opinion, "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). On August 14, 2019, the Department of Homeland Security (DHS) published a final rule implementing the public-charge inadmissibility provision. The Rule defines "public charge" to mean an alien who receives one or more specified public benefits, including certain noncash benefits, for more than 12 months in the aggregate within any 36-month period. The Rule also sets forth the framework DHS will use to determine whether an alien is likely at any time to become a public charge. On October 14, 2019, the district court entered a preliminary injunction barring DHS from enforcing the Rule.

The district court's injunction should be set aside, as none of the traditional factors supports the entry of an injunction here. As a threshold matter, plaintiffs—Cook County and Illinois Coalition for Immigrant and Refugee Rights, Inc.—have not established standing to sue under Article III and zone-of-interest principles. Plaintiffs allege that the Rule will burden the County's budget and that the Coalition is

using its advocacy and educational programming to address the Rule. Those alleged injuries are not cognizable, and they are unrelated or opposed to the interests Congress sought to further through the public-charge statute.

As the Ninth Circuit recognized in staying injunctions against the Rule pending appeal, plaintiffs are not likely to succeed on the merits of their claim that the Rule's definition of "public charge" is inconsistent with the INA. Numerous statutory provisions demonstrate that Congress intended to require aliens to rely on their own resources, rather than taxpayer-supported benefits, to meet their basic needs. For example, Congress required many aliens to obtain sponsors who must promise to reimburse the government for public benefits the alien receives, and rendered any alien who fails to obtain a required sponsor automatically inadmissible on the public-charge ground. Congress also made it difficult for most aliens to obtain most public benefits after they enter the country, underscoring its stated goal of "assur[ing] that aliens [are] self-reliant in accordance with [national] immigration policy," 8 U.S.C. § 1601(5).

The Rule—which renders inadmissible aliens who are likely to rely on government support for a significant period to meet basic needs—fully accords with Congress's intent. Congress has not required DHS to adopt a narrow definition of "public charge," but rather has repeatedly and intentionally left the definition and application of the term to the discretion of the Executive Branch.

The remaining preliminary-injunction factors likewise weigh against a preliminary injunction. So long as the Rule is prevented from taking effect, the government will grant lawful-permanent-resident status to aliens whom DHS believes are inadmissible as likely to become public charges under the Rule. Any harm plaintiffs might experience does not constitute irreparable injury, let alone irreparable injury sufficient to outweigh that harm to the federal government and taxpayers.[1]

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[1] Four other district courts have issued preliminary injunctions, all of which the government has appealed. *See City & Cty. Of San Francisco v. USCIS*, No. 19-cv-4717 (N.D. Cal.) (Plaintiff Counties); *California v. USDHS*, No. 19-cv-4975 (N.D. Cal.) (Plaintiff States and the District of Columbia); *Washington v. DHS*, No. 19-cv-5210 (E.D. Wash.) (nationwide); *New York v. DHS*, 19-cv-7777 (S.D.N.Y), and *Make the Road New York v. Cuccinelli*, 19-cv-7993 (S.D.N.Y.) (nationwide); *Casa de Maryland, Inc. v. Trump*, 19-cv-2715 (D. Md.) (nationwide). The Fourth and Ninth Circuits have granted the government's motions to stay the district courts' injunctions pending appeal. *See* Order, *City &*

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331, raising claims under the Administrative Procedure Act, 5 U.S.C. §§ 704-706. Appendix (A) 22. Plaintiffs' standing is contested. *See infra* Part I. The district court entered a preliminary injunction and stay of the Rule's effective date under 5 U.S.C. § 705 on October 14, 2019. Short Appendix (SA) 34. The government filed a timely notice of appeal on October 30, 2019. A10. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether plaintiffs are appropriate parties to challenge the Rule.

2. Whether the Rule's definition of "public charge" is based on a permissible construction of the INA.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

Cty. of San Francisco v. U.S. Dep't of Homeland Sec., Nos. 19-17213, 19-17214, 19-35914 (9th Cir. Dec. 5, 2019); Order, *CASA de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir. Dec. 9, 2019).

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The INA provides that "[a]ny alien who, . . . in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A).[2] That assessment "shall at a minimum consider the alien's (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." *Id.* § 1182(a)(4)(B). A separate INA provision provides that an alien is deportable if, within five years of entry, the alien "has become a public charge from causes not affirmatively shown to have arisen" since entry. *Id.* § 1227(a)(5).

Three agencies make public-charge inadmissibility determinations under § 1182(a)(4). DHS makes such determinations with respect to aliens seeking admission at the border and aliens within the country who apply to adjust their status to that of a lawful permanent resident.

[2] The statute refers to the Attorney General, but in 2002, Congress transferred the Attorney General's authority to make inadmissibility determinations in the relevant circumstances to the Secretary of Homeland Security. *See* 8 U.S.C. § 1103; 6 U.S.C. § 557; *see also* 6 U.S.C. § 211(c)(8).

See 84 Fed. Reg. 41,292, 41,294 n.3 (Aug. 14, 2019). The Department of State's consular offices apply the public-charge ground of inadmissibility when evaluating visa applications filed by aliens abroad. *See id.* The Department of Justice enforces the statute when the question whether an alien is inadmissible on public-charge grounds arises during removal proceedings. *See id.* The Rule at issue governs DHS's public-charge inadmissibility determinations. *See id.* The Rule's preamble indicated that the State Department and Department of Justice were expected to promulgate rules and guidance that are consistent with the Rule. *See id.*

2. Although the public-charge ground of inadmissibility dates back to the first immigration statutes, Congress has never defined the term "public charge," instead leaving the term's definition and application to the Executive Branch's discretion. In 1999, the Immigration and Naturalization Service (INS), a DHS predecessor, proposed a rule to "for the first time define 'public charge,'" 64 Fed. Reg. 28,676, 28,689 (May 26, 1999) (1999 Guidance), a term that the INS noted was "ambiguous" and had "never been defined in statute or regulation," *id.* at 28,676-77. The proposed rule would have defined "public charge" for purposes of

admission or adjustment of status to mean an alien "who is likely to become primarily dependent on the Government for subsistence as demonstrated by either: (i) [t]he receipt of public cash assistance for income maintenance purposes, or (ii) [i]nstitutionalization for long-term care at Government expense." *Id.* at 28,681. When it announced the proposed rule, INS also issued "field guidance" adopting the proposed rule's definition of "public charge." *Id.* at 28,689. The proposed rule was never finalized, leaving the 1999 Guidance as the default definition of "public charge" since its issuance. 84 Fed. Reg. at 41,348 n.295.

In October 2018, DHS announced a proposed new approach to public-charge inadmissibility determinations. It did so through a proposed rule subject to notice and comment. 83 Fed. Reg. 51,114 (Oct. 10, 2018) (NPRM). After responding to the numerous comments it received during the notice-and-comment period, DHS promulgated the final Rule at issue here in August 2019. *See* 84 Fed. Reg. at 41,501. The Rule is the first time the Executive Branch has defined the term "public charge" and established a framework for evaluating whether an alien is likely to become a public charge in a final rule following notice and comment.

The Rule defines "public charge" to mean "an alien who receives one or more [specified] 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)." 84 Fed. Reg. at 41,501. The specified public benefits include cash assistance for income maintenance and certain noncash benefits, including most Medicaid benefits, Supplemental Nutrition Assistance Program benefits, and federal housing assistance. *Id.* As the agency explained, the Rule's definition of "public charge" differs from the 1999 Guidance in that: (1) it incorporates certain noncash benefits; and (2) it replaces the "primarily dependent" standard with the 12-month/36-month measure of dependence. *Id.* at 41,294-95.

The Rule was set to take effect on October 15, 2019, and would have applied prospectively to applications and petitions postmarked (or, if applicable, submitted electronically) on or after that date. 84 Fed. Reg. at 41,292.

B. Prior Proceedings

In September 2019, Cook County, Illinois and the Illinois Coalition for Immigrant and Refugee Rights, Inc. (the Coalition) challenged the

Rule. Cook County operates the Cook County Health and Hospitals System, and the Coalition is a membership-based organization that represents nonprofit entities that provide social and health services to aliens. SA4. As relevant here, plaintiffs allege that the Rule's definition of "public charge" is not a permissible construction of the INA. A34-37. Plaintiffs urge that the term unambiguously includes only aliens primarily and permanently dependent on the government for subsistence. SA17.

On October 14, 2019, the district court granted plaintiffs' request for a preliminary injunction barring DHS from implementing the Rule in Illinois, and a stay of the rule under 5 U.S.C. § 705. SA34-35. The court concluded that plaintiffs had standing because the County anticipates that its hospitals will incur greater costs when aliens disenroll from public benefits in response to the Rule, and because the Coalition has focused its educational programming on the Rule. SA5-10. The court also concluded that plaintiffs were within the zone of interests protected by the public-charge provision because Cook County would suffer economic injury, and because an advocacy organization like the Coalition is "precisely the type of organization that would

reasonably be expected to police the interests that the statute protects." SA13-15 (internal quotation marks omitted).

On the merits, the court concluded that plaintiffs were likely to prevail on their claim that the Rule's definition of "public charge" is inconsistent with the statute. SA18-27. The court thought that "the Supreme Court told us just over a century ago what 'public charge' meant in the relevant era." SA18 (citing *Gegiow v. Uhl*, 239 U.S. 3 (1915)). Specifically, the district court read the Supreme Court's 1915 decision in *Gegiow v. Uhl* to mean that a "public charge" is a person who will be primarily and permanently dependent on the government for support. SA17-18.

Regarding the other preliminary-injunction factors, the court concluded that the harms plaintiffs anticipated experiencing as a result of the Rule—economic injuries and possible public-health risks that Cook County could face down the road, and the Coalition's diversion of resources away from existing programs—were irreparable. SA28. As to the balance of equities and hardships, the court found that it "favor[ed]" plaintiffs "on the present record," even though a "delay in implementing the Rule undoubtedly would impose some harm on DHS." SA29. The

court also concluded that an injunction was in the public interest because of the public-health risks to Cook County caused by reduced alien enrollment in medical benefits, and because, in its view, plaintiffs were likely to succeed in showing that the Rule is unlawful. SA30.

The court enjoined enforcement of the Rule in Illinois. SA35. The government sought a stay of the injunction from the district court, which was denied on November 14, 2019, Dkt. No. 104, and sought a stay from this Court on November 15, 2019. The government's motion in this Court remains pending.

SUMMARY OF ARGUMENT

The district court erred in entering a preliminary injunction barring enforcement of the Rule.

I. As a threshold matter, plaintiffs have neither established standing to sue under Article III nor asserted injuries that fall within the public-charge inadmissibility provision's zone of interests. Cook County relies on predicted indirect effects of the Rule on its hospital system's budget, and the Coalition relies on its advocacy and educational activities in response to the Rule. Neither alleged injury can properly serve as a predicate for a challenge to the Rule.

The Coalition cannot assert standing based on its policy disagreement with the Rule, and its consequent decision to focus its existing programs on the Rule's effects. Moreover, the interest plaintiffs seek to further through this lawsuit—more widespread use of taxpayer-funded benefits by aliens—is diametrically opposed to the interests Congress sought to further through the public-charge inadmissibility statute. And the Coalition's asserted injury—a reshuffling of resources from some programs to other programs of the same kind—has no connection to the public-charge provision's purpose.

II. Even if plaintiffs had standing, they are not likely to prevail on the merits of their claims. Numerous statutory provisions demonstrate that Congress intended to require aliens to rely on their own resources, rather than taxpayer-supported benefits, to meet their basic needs. For example, Congress required many aliens seeking lawful-permanent-resident status to obtain sponsors who must promise to reimburse the government for any means-tested public benefits the alien receives, and declared any alien who fails to obtain a required sponsor automatically inadmissible on the public-charge ground, no matter the alien's individual circumstances. Congress also restricted the ability of certain

aliens within the United States to obtain public benefits, and allowed aliens who receive such benefits and fail to reimburse the government to be subject to removal from the country.

The Rule—which renders inadmissible aliens who are likely to rely on public benefits for a significant period to meet basic needs—fully accords with Congress's intent and adopts a permissible construction of the public-charge inadmissibility provision. The district court held to the contrary because it thought that the Supreme Court had established a contrary meaning of "public charge" in its decision in in *Gegiow v. Uhl*, 239 U.S. 3 (1915), and that Congress had implicitly adopted that definition each time it subsequently used that term. But the district court misunderstood *Gegiow*'s holding. *Gegiow* did not, as the district court thought, hold that "'public charge' encompasses only persons who . . . would be substantially, if not entirely, dependent on government assistance on a long-term basis." SA19. Rather, the Court in *Gegiow* held only that immigration officials could not find an alien likely to be a public charge based solely on the poor economic conditions in his destination city. 239 U.S. at 9-10. *Gegiow* says nothing about the level

of dependence necessary for an alien to be found a public charge—nor, indeed, about the plain meaning of the phrase "public charge" at all.

Even if the district court's understanding of *Gegiow* were correct, there is little reason to think Congress adopted *Gegiow*'s holding. Congress amended the Immigration Act to abrogate *Gegiow*'s restriction on the application of the public-charge ground of exclusion. Since then, far from adopting the fixed, narrow definition of "public charge" that the district court identified, Congress has repeatedly and intentionally left the definition and application of the term to the discretion of the Executive Branch. And, in any event, the restricted definition of "public charge" offered by plaintiffs and accepted by the court cannot be squared with Congress's 1996 immigration and welfare-reform legislation, which made clear that Congress had not adopted plaintiffs' cramped view of the term "public charge."

III. The remaining preliminary-injunction factors also weigh against the issuance of an injunction. Plaintiffs' purported injuries are not legally cognizable, much less irreparable. And preliminary relief seems unlikely to redress the Coalition's putative diversion of resources to

educate aliens about the Rule, which presumably would continue as long as the Rule's enforcement remains a possibility.

In any event, any injuries that plaintiffs might suffer during the pendency of litigation would be outweighed by the harm to the government and the public that the Rule's injunction creates. So long as the Rule cannot take effect, the government will grant lawful-permanent-resident status to aliens whom DHS would consider likely to become public charges under the Rule. Because the government has no viable means of revisiting these adjustments of status once made, those decisions cannot later be reversed.

STANDARD OF REVIEW

In reviewing the grant of a preliminary injunction, this court examines legal conclusions de novo, findings of fact for clear error, and the balancing of harms for abuse of discretion. *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018).

ARGUMENT

The district court erred in entering a preliminary injunction barring enforcement of the Rule. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is

likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). None of these factors is satisfied here.

I. Plaintiffs Lack A Cognizable Injury Sufficient To Support This Suit

As a threshold matter, plaintiffs lack standing to pursue injunctive relief because they have not adequately alleged a cognizable injury within the zone of interests protected by the public-charge statute.

To establish Article III standing, plaintiffs must demonstrate an injury that is "concrete, particularized, and actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). "[A]llegations of *possible* future injury are not sufficient." *Id.* Where, as here, "the plaintiff is not himself the object of the government action or inaction he challenges, standing . . . is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)).

To bring suit under the Administrative Procedure Act (APA), a plaintiff "must satisfy not only Article III's standing requirements, but an additional test: The interest he asserts must be arguably within the

zone of interests to be protected or regulated by the statute that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). A plaintiff fails that test where its asserted interests are only "marginally related to" or "inconsistent" with the purposes of the relevant statute. *Id.* at 225.

Plaintiffs' alleged injuries do not meet these requirements. Cook County posits that the Rule will harm the County's hospital system by causing some aliens to disenroll from benefits like Medicaid and to consequently use emergency services without being able to pay for them. SA7. Yet such an occurrence would not necessarily translate into a budgetary loss for the hospital, since an alien may at any time use state and federal public benefits to cover emergency services, and DHS will not hold receipt of benefits for emergency care against the alien in a public-charge inadmissibility determination. *See* 84 Fed. Reg. at 41,384; 83 Fed. Reg. at 51,131, 51,169. Similarly, the County's assertion that the Rule might increase the future risk of disease in the County because some aliens will forgo vaccinations is not an allegation of "imminent" injury, but rather of an unquantified risk insufficient to confer standing. *See Clapper*, 568 U.S. at 409.

The Coalition's assertion of harm is similarly insufficient. To establish standing on its own behalf, the Coalition must show that the Rule will "perceptibly impair[]" its "ability to" provide services to immigrant communities. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The Supreme Court has admonished that a "setback to the organization's abstract social interests" does not create standing. *Id.* And this Court has explained that organizations cannot assert "standing based solely on the baseline work they are already doing," and cannot "convert ordinary program costs into an injury in fact." *Common Cause Indiana v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019) (quotation marks and brackets omitted).

Here, the district court found that the Coalition had standing based on two observations: first, that the Rule harmed the Coalition's policy interest in "increas[ing] access to care, improv[ing] health literacy, and reduc[ing] reliance on emergency room care," as well as its interest in "encourag[ing] immigrants" to "enroll[] in benefit programs," SA10; and second, that because of the Rule's effect on those policy interests, the Coalition has chosen to "expend[] resources to prevent frustration of its programs' missions," by, for example, "educat[ing] immigrants and staff

about the Rule's effects," *id.* But the Coalition has not alleged that the Rule has "impaired" its "ability to" run its programs. *See Havens Realty Corp.*, 455 U.S. at 379. And the Coalition is allegedly spending resources on the kind of work it was "already doing," *Common Cause Indiana*, 937 F.3d at 955—namely, educational programming. That it now has focused that programming on a new target—a regulation that harms its policy interests—is not sufficient for standing.

A contrary holding would extend organizational standing farther than this Court has previously permitted. *See Common Cause Indiana*, 937 F.3d at 951 (voting rights organizations had standing to challenge a voting law that would cause erroneous cancellations of voter registrations (including those of some voters whom the organizations had helped register), because the organizations would be forced to "clean[] up the mess"). And contrary to the Supreme Court's repeated instruction that organizations cannot have standing based on policy disagreements, such a holding would allow an organization to manufacture standing simply by spending resources to counteract a law with which it disagrees. *See, e.g.*, *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 (1976) ("Insofar as these organizations seek

standing based on their special interest in the health problems of the poor their complaint must fail.").

In any event, plaintiffs' putative injuries are outside the zone of interests the public-charge inadmissibility ground is designed to protect. The public-charge inadmissibility provision is designed to ensure that aliens who are admitted to the country or become lawful permanent residents do not rely on public benefits. *See infra* Part II. The provision does not create judicially cognizable interests for anyone outside the federal government, except for an alien in the United States who otherwise has a right to challenge a determination of inadmissibility, for Congress has not given any third party a judicially enforceable interest in the admission or removal of an alien.

In direct contravention of that clear purpose, plaintiffs here seek to further an alleged interest in *greater* use of public benefits by aliens and those residing in households containing foreign-born individuals. *See, e.g.*, SA7, 10 (asserting that the Rule harms the County by "caus[ing] immigrants to disenroll from . . . public benefits," and harms the Coalition's interest in "encourag[ing] immigrants . . . to enroll[] . . . in benefit programs"). The public-charge inadmissibility statute's

objective is to reduce public-benefit use by aliens, not to safeguard the resources of local government (much less an advocacy organization) by requiring the federal government to expend more money on public benefits. Plaintiffs cannot bring a lawsuit to promote "the very . . . interest" that "Congress sought to restrain." *National Fed'n of Fed. Emps. v. Cheney*, 883 F.2d 1038, 1051 (D.C. Cir. 1989); *see also Patchak*, 567 U.S. at 209 (litigant's interests must not be "inconsistent with the purposes implicit in the statute").

Relatedly, the "injury" that the Coalition "complains of"—the alleged diversion of resources from some usual pursuits to other usual pursuits—is not "within the [statute's] 'zone of interests.'" *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990). Rather, it is a mere incidental consequence of a change in federal law that is not even "marginally related" to the statute's purpose. *See Patchak*, 567 U.S. at 225.

The district court asserted that the Coalition is "precisely the type of organization that would reasonably be expected to police the interests that the statute protects." SA14 (quotation marks omitted). But the statute protects taxpayer resources, which an organization that

represents non-profit health-service providers and advocates for healthcare can hardly be "expected to police."

The district court's reliance on *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017), was likewise misplaced. There, predatory and racially discriminatory lending practices hindered a "City's efforts to create integrated, stable neighborhoods," a harm at the heart of the Fair Housing Act's zone of interests. *Id.* at 1304. The district court cited the case for the proposition that municipalities like Cook County satisfy the zone-of-interests test so long as they have "financial harms." SA15. But the relevant point in Bank of America was not that the injury was financial, but rather that it resulted from interference with efforts to create integrated neighborhoods—precisely what the Fair Housing Act was trying to achieve. The case does not stand for the proposition that any financial interest will do; the Supreme Court has made clear that "injury in fact does not necessarily mean one is within the zone of interests to be protected by a given statute." *Air Courier Conference of Am. v. American Postal Workers Union AFL-CIO*, 498 U.S. 517, 524 (1991).

II. Plaintiffs Are Not Likely To Succeed On The Merits

Even assuming plaintiffs could pursue their claims, the district court erred in concluding that they are likely to succeed on the merits. The Rule is well within the discretion that Congress has granted DHS to construe the undefined term "public charge." The district court's conclusion to the contrary is based on a misunderstanding of the public-charge provision's history.

1. The INA provision at issue renders inadmissible "[a]ny alien who, in the opinion of the [Secretary] . . . , is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). In determining whether an alien is likely at any time to become a public charge, DHS must review the alien's individual circumstances, which must "at a minimum" include consideration of the alien's "age"; "health"; "family status"; "assets, resources, and financial status"; and "education and skills." *Id.* § 1182(a)(4)(B)(i).

The statute itself shows that DHS may properly consider an alien likely to become a public charge based on the alien's likely use of noncash public benefits. In the public-charge statute itself, Congress *required* DHS to classify some aliens as inadmissible under the public-

charge ground, solely because those aliens failed to obtain a sponsor who (for a period of time) would promise to reimburse any government benefits agency if the alien used "*any* means-tested public benefit." *See* 8 U.S.C. § 1183a(a)(1)(B) (emphasis added). Specifically, 8 U.S.C. § 1182(a)(4)(C)—which appears just below the text at issue here—states that (subject to some exceptions) "[f]amily-sponsored immigrants" are "inadmissible under this paragraph unless" the "person petitioning for the alien's admission . . . has executed an affidavit of support described in section 1183a of this title with respect to such alien." *Id.* And the following subsection requires the same from "[c]ertain employment-based immigrants." *Id.* § 1182(a)(4)(D).

The affidavit-of-support provision referenced in those subsections—8 U.S.C. § 1183a—in turn requires that an alien's sponsor promise "to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable." *Id.* § 1183a(a)(1)(A). And it renders the sponsor's affidavit "legally enforceable against the sponsor" by any "entity that provides *any means-tested public benefit*." *Id.* § 1183a(a)(1)(B)-(C) (emphasis added). Congress further required

benefits agencies to request that the sponsor reimburse them for "any means-tested public benefit" the alien may have received. *Id.* § 1183a(b)(1)(A). And it enhanced the penalties imposed in certain circumstances on sponsors who fail to provide notice of their change of address, if "such failure occurs with knowledge that the sponsored alien has received any means-tested public benefits." *Id.* § 1183a(d)(2).

The import of the public-charge statute's affidavit-of-support requirements is clear: To avoid being found inadmissible on public-charge grounds, an alien governed by those subsections must find a sponsor who has agrees to reimburse the government for *any* means-tested public benefits the alien receives while the sponsorship obligation is in effect (even if the alien receives those benefits only briefly and only in minimal amounts). Congress thus provided that the mere *possibility* that an alien might obtain unreimbursed, means-tested public benefits in the future was sufficient to render that alien inadmissible on public-charge grounds, regardless of the alien's other circumstances.

Congress enacted the affidavit-of-support provision in 1996—the same year that it enacted the current version of the public-charge provision—against the backdrop of a longstanding interpretation of the

term "public charge" for purposes of deportability under 8 U.S.C. § 1227(a)(5). Under that longstanding interpretation, an alien may be subject to deportation if he receives a public benefit that the alien or designated friends and relatives are legally obligated to repay, the relevant government agency demands repayment, and "[t]he alien and other persons legally responsible for the debt fail to repay after a demand has been made." 64 Fed. Reg. at 28,691 (citing *Matter of B-*, 3 I. & N. Dec. 323 (BIA and AG 1948)); *Concurrent Resolution on the Budget for Fiscal Year 1997: Hearings Before the Committee on the Budget*, 104th Cong. 81 (1996) (noting that interpretation). Thus, when Congress made sponsors legally responsible for repayment of any means-tested public benefits received by an alien and provided government agencies with a legally enforceable right to demand repayment, it understood that a failure to repay the benefit by the alien or sponsor could render the alien deportable as a "public charge" under 8 U.S.C. § 1227(a)(5). In other words, Congress implemented a system in 1996 under which an alien's receipt of an unreimbursed, means-tested public benefit could render the alien a "public charge" subject to deportation (provided a demand for repayment was made).

Related provisions of the INA further show that the receipt of public benefits, including noncash benefits, is relevant to the determination whether an alien is likely at any time to become a public charge. Congress expressly instructed that, when making a public-charge inadmissibility determination, DHS "shall not consider any benefits the alien may have received," 8 U.S.C. § 1182(s), including various noncash benefits, if the alien "has been battered or subjected to extreme cruelty in the United States by [specified persons]," *id.* § 1641(c); *see also id.* §§ 1611-1613 (specifying the public benefits for which battered aliens and other qualified aliens are eligible). The inclusion of that provision prohibiting the consideration of a battered alien's receipt of public benefits presupposes that DHS will ordinarily consider the past receipt of benefits in making public-charge inadmissibility determinations. *Cf. Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1844 (2018) ("There is no reason to create an exception to a prohibition unless the prohibition would otherwise forbid what the exception allows.").

Similarly, in a 1986 amnesty program, Congress created a "[s]pecial rule for determination of public charge" under which an alien meeting the program's qualifications would not be deemed a public charge if he

or she "demonstrate[d] a history of employment in the United States evidencing self-support without receipt of public cash assistance." 8 U.S.C. § 1255a(d). The fact that, as part of its amnesty program, Congress crafted a "special rule" to narrow the Executive's application of the public-charge ground to only those who receive cash assistance indicates that Congress understood the ordinary definition of public charge to be broader.

These conclusions are unsurprising given Congress's statements "concerning national policy with respect to welfare and immigration," 8 U.S.C. § 1601, which it made in related legislation the same year it enacted the current version of the public-charge provision. There, Congress declared that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes"—presumably a reference to the first public-charge statutes. *Id.* § 1601(1). For that reason, "the immigration policy of the United States" is that "aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations," and that "the availability of public benefits not

constitute an incentive for immigration to the United States." *Id.* § 1601(2).

There is no doubt that the "public benefits" to which Congress referred included noncash benefits. Congress defined "[f]ederal public benefit" broadly to include any "welfare, health, disability, public or assisted housing . . . or any other similar benefit." 8 U.S.C. § 1611(c). It also stressed the government's "compelling" interest in enacting "new rules for eligibility [for public benefits] and sponsorship agreements [for individuals subject to the public-charge provision] in order to assure that aliens be self-reliant in accordance with national immigration policy." *Id.* § 1601(5).

In that same legislation, Congress barred most aliens from obtaining many noncash public benefits like Medicaid, either at all or until they have been in the country for at least five years. *See* 8 U.S.C. §§ 1611-1613, 1641; 83 Fed. Reg. at 51,126-33. And to further restrict eligibility, Congress provided that an alien's income is generally "deemed to include" the "income and resources" of the sponsor. 8 U.S.C. § 1631(a). *See also* H.R. Rep. No. 104-828, at 242 (Sept. 24, 1996) (Conf.

Rep.) (explaining that the deeming provision was designed to further "the national immigration policy that aliens be self-reliant").

Consistent with that statutory text, context, and history, the Rule defines a "public charge" as an "alien who receives one or more [enumerated] public benefits" over a specified period of time. 84 Fed. Reg. at 41,501. That definition respects Congress's understanding that the term "public charge" would encompass individuals who rely on taxpayer-funded benefits to meet their basic needs. At a minimum, therefore, the Rule is "a permissible construction of the statute." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

2. The district court concluded that plaintiffs were likely to succeed in showing that the Rule's definition of "public charge" is not a permissible construction of the INA. SA27. It did so because it believed that in *Gegiow v. Uhl*, 239 U.S. 3 (1915), "the Supreme Court told us . . . what 'public charge' meant." SA18. In particular, the district court read that decision to "hold[]" that "'public charge' encompasses only persons who . . . would be substantially, if not entirely, dependent on government assistance on a long-term basis." SA18-19. The district court misunderstood the import of *Gegiow* for several reasons.

To begin, *Gegiow* did not so hold. In that case, an immigration official found a group of aliens likely to become public charges, and thus denied them entry, solely because the city to which they were headed (Portland, Oregon) had few jobs available. 239 U.S. at 8-9. Thus, "[t]he single question" in the case was "whether an alien [could] be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked." *Id.* at 9-10. The Court held that such a finding was improper for two reasons not relevant here.

The first was that, in the 1907 Immigration Act, the phrase "public charge" appeared within a list that included "paupers," "professional beggars," and "idiots," *Gegiow*, 239 U.S. at 10—an attribute that later public-charge provisions did not share. The Court observed that the other "persons enumerated" in the list were "to be excluded on the ground of permanent personal objections." And thus it noted that "[p]resumably" the phrase "public charge" was "to be read as generically similar to the others." *Id.*

The Court's other ground for decision is likewise irrelevant: the Court thought that "[i]t would be an amazing claim of power if

commissioners decided not to admit aliens because the labor market of the United States was overstocked." *Gegiow*, 239 U.S. at 10. Because the Immigration Act had granted only the President authority to curtail immigration on the basis of "[d]etriment to labor conditions," the Court could not "suppose that so much greater a power was intrusted by implication in the same act to every commissioner of immigration." *Id.* Thus, when the Court referred to reliance on "permanent personal objections," it was contrasting an approach centered on the alien's own circumstances with an approach centered on general labor conditions. It is extraordinary to attribute to that language in that context a holding that an individual alien who will rely on public resources for a significant period of time, but not necessarily indefinitely, may not be excluded as a public charge. Indeed, the 1999 Guidance, which plaintiffs seek to reinstate, did not reflect that meaning of the term.

Neither of those grounds for decision has any relevance here. Contrary to the district court's conclusion, *Gegiow* does not mention the level of dependence required for an alien to be a public charge. Indeed, it does not even purport to define the term "public charge." At most, it suggests that public charge inadmissibility determinations must be

based on an alien's personal characteristics—which is precisely the approach the Rule employs, *see* 84 Fed. Reg. at 41,501 (mandating that individual public-charge inadmissibility determinations must be "based on the totality of the alien's [particular] circumstances").

Even if *Gegiow* had defined the term public charge in the manner the district court believed, the court was further mistaken in concluding that Congress approved that definition. A few years after the decision, Congress amended the Immigration Act to move the public-charge ground of inadmissibility toward the end of the list of exclusions, *see* Immigration Act of 1917, 64th Cong. ch. 29, § 3, 39 Stat. 874, 875-76, so that the *Gegiow* Court's inference about the phrase's placement in the list would no longer hold. That was the way in which a Senate Report described the amendment: "The purpose of this change is to overcome recent decisions of the courts limiting the meaning of the description of the excluded class. . . . (See especially *Gegiow v. Uhl*, 239 U. S., 3.)." S. Rep. No. 64-352, at 5 (1916); *see* H.R. Doc. No. 64-886, at 3-4 (1916). And that was the way the change was understood by courts. *See, e.g.*, *United States ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929)

(explaining that in the wake of the 1917 Immigration Act, the public-charge statute "is certainly now intended to cover cases like *Gegiow*").

The district court discounted that amendment's significance on the ground that the 1917 Immigration Act did not shed light on the meaning of the phrase when Congress originally used it in the nineteenth century. SA20. To start, *Gegiow* itself did not concern the nineteenth century; it concerned the 1907 Immigration Act. *See* 239 U.S. at 10. But more importantly, Congress's amendment shows that it believed *Gegiow* to be mistaken as to the term's definition in *any* time period, because it had "limit[ed] the meaning" of public charge. S. Rep. No. 64-352, at 5.

The district court similarly erred in concluding that Congress's amendment showed only that "Congress wanted aliens dependent on government support for *noneconomic* reasons, like imprisonment, to be [subject to the public-charge inadmissibility provision] as well." SA21. *Gegiow* had nothing to do with imprisonment; it concerned an immigrant with poor job prospects because of the job market in Oregon. 239 U.S. at 8-9. And even as to imprisonment, the later cases on which the district court relied did not require permanent incarceration,

further underscoring the error in the district court's interpretation. *See* SA21-22 (citing, *e.g., United States ex rel. Medich v. Burmaster*, 24 F.2d 57, 59 (8th Cir. 1928), which held that an alien was likely to become a public charge because he had been incarcerated for 18 months). Similarly, in other post-*Gegiow* decisions, courts held that an alien's reliance on taxpayer support for basic necessities on a temporary or intermittent basis was sufficient to render the alien a public charge. *See, e.g.*, *Ex parte Turner*, 10 F.2d 816, 816 (S.D. Cal. 1926) (family was deportable as persons likely to become public charges where evidence indicated that the family had received "charitable relief" for two months and "public charities were still furnishing some necessaries to [the] family" one month later); *Guimond v. Howes*, 9 F.2d 412, 413-14 (D. Me. 1925) (alien was "likely to become a public charge" in light of evidence that she and her family had been supported by the town twice—once for 60 days and once for 90 days—over the previous two years).

Administrative interpretations of the term likewise undermine the district court's conclusion that "public charge" has been understood to apply only to aliens who are primarily and permanently dependent on the government. Since at least 1948, the Executive Branch has taken

the authoritative position that an alien qualifies as a "public charge" for deportability purposes if the alien or the alien's sponsor or relative fails to repay a public benefit upon a demand for repayment by a government agency entitled to repayment. *See Matter of B-*, 3 I. & N. Dec. at 326. Under that rubric, an alien can be subject to deportation on public-charge grounds based on a failure to repay upon demand, regardless of whether the alien was "primarily dependent" on the benefits at issue. *See id.* Indeed, although the Board of Immigration Appeals concluded that the alien in *Matter of B-* was not deportable as a public charge because Illinois law did not allow the State to demand repayment for the care she received during her stay in a state mental hospital, the opinion suggests that the alien would have been deportable as a public charge if her relatives had failed to pay the cost of the alien's "clothing, transportation, and other incidental expenses," because Illinois law made the alien "legally liable" for those incidental expenses. *Id.* at 327. That was so even though Illinois was not entitled to recover the sums expended for plaintiff's lodging, healthcare, and food. *See id.*

Later commentary also gave the term "public charge" a meaning contrary to the one plaintiffs assert—and consistent with the one the

Rule adopted. For example, both the 1933 and 1951 editions of Black's Law Dictionary defined the term "public charge," "[a]s used in" the 1917 Immigration Act, to mean simply "one who produces a money charge upon, or an expense to, the public for support and care"—without reference to amount. *Public Charge*, Black's Law Dictionary (3d ed. 1933); Black's Law Dictionary (4th ed. 1951). And a 1929 treatise did the same. *See* Arthur Cook et al., *Immigration Laws of the United States* § 285 (1929) (noting that "public charge" meant a person who required "any maintenance, or financial assistance, rendered from public funds, or funds secured by taxation"); *see also Ex parte Kichmiriantz*, 283 F. 697, 698 (N.D. Cal. 1922) ("[T]he words 'public charge,' as used in the Immigration Act, mean just what they mean ordinarily; . . . a money charge upon, or an expense to, the public for support and care." (citation omitted)). This history belies the suggestion that later Congresses must have adopted a meaning of public charge that covered only aliens who were primarily and permanently dependent on the government.

What the history instead shows is that Congress has repeatedly and intentionally left the term's definition and application to the discretion

of the Executive Branch. Although provisions barring entry to those likely to become a "public charge" have appeared in immigration statutes dating back to the late 19th century, Congress has never defined the term. 84 Fed. Reg. at 41,308. That is not because Congress assumed the term had a settled meaning. Rather, in an extensive report that served as a foundation for the enactment of the INA, the Senate Judiciary Committee emphasized that because "the elements constituting likelihood of becoming a public charge are varied, there should be no attempt to define the term in the law." S. Rep. No. 81-1515, at 349 (1950); *see also id.* at 803 (reproducing Senate resolution directing Committee to make "full and complete investigation of our entire immigration system" and provide recommendations). The report also recognized that "[d]ecisions of the courts have given varied definitions of the phrase 'likely to become a public charge,'" *id.* at 347, and that "different consuls, even in close proximity with one another, have enforced [public-charge] standards highly inconsistent with one another," *id.* at 349. Far from mandating plaintiffs' definition of public charge, the report concluded that the public-charge inadmissibility determination properly "rests within the discretion of" Executive

Branch officials. *Id.*; *cf. Barnhart v. Walton*, 535 U.S. 212, 225 (2002) (Where Congress enacts a "complex[]" statute implicating a "vast number of claims" with a "consequent need for agency expertise and administrative experience," it is appropriate to "read the statute as delegating to the Agency considerable authority to fill in, through interpretation, matters of detail related to its administration.").

When it enacted the INA a few years later, Congress followed that Report's recommendation, providing that public-charge inadmissibility determinations are made "in the opinion of" the Executive. Pub. L. No. 82-414, tit. 2, ch. 2, § 212, 66 Stat. 163, 183 (1952). And Congress used the same language granting a broad delegation of authority in the 1996 provision at issue here. *See* 8 U.S.C. § 1182(a)(4) (public-charge inadmissibility determinations are made "in the opinion of the [Secretary of Homeland Security]"); *supra* p.5 n.2. *See Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 540 (1979) (Where a statute specifies that a determination is to be made "in the opinion of" an agency decisionmaker, the statute confers "broad discretion" on the decisionmaker to make that determination.).

By leaving the definition of "public charge" to the discretion of the Executive Branch, Congress recognized not only the need for flexibility in the Executive Branch's application of the public-charge provision to varied individual circumstances, but also the need for the term "public charge" to evolve over time to reflect changes in the scope and nature of public benefits. In enacting immigration and welfare-reform legislation in 1996, Congress expressly recognized the need for public-charge laws to evolve to reflect current conditions. As one Senate report explained:

> It is even more important in this era that there be such a [public-charge] law, since the welfare state has changed the pattern of immigration and emigration that existed earlier in our history. Before the welfare state, if an immigrant could not succeed in the U.S., he or she often returned to "the old country." This happens less often today, because of the welfare "safety net." . . . It should be made clear to immigrants that the taxpayers of this country expect them to be able to make it in this country on their own and with the help of their sponsors.

S. Rep. No. 104-249, at 5-9 (1996). The 1999 Guidance—which, for the first time, defined the term "public charge" by reference to cash assistance—represents an exercise of the Executive Branch's longstanding discretion to define the term "public charge" and provides an example of the term's flexibility to reflect the modern welfare state.

In short, as the Ninth Circuit concluded, "the history of the use of 'public charge' in federal immigration law demonstrates that 'public charge' does not have a fixed, unambiguous meaning. Rather, the phrase is subject to multiple interpretations, it in fact has been interpreted differently, and the Executive Branch has been afforded the discretion to interpret it." Order, *City & Cty. Of San Francisco v. U.S. Dep't of Homeland Security*, Nos. 19-17213, 19-17214, 19-35914 (9th Cir. Dec. 5, 2019), at 46.

III. The Remaining Factors Weigh Against A Preliminary Injunction

The remaining preliminary injunction factors also weigh against an injunction. Contrary to the district court's conclusion, plaintiffs have not established that they will be irreparably harmed absent an injunction. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain an injunction, a plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction," *id.* at 22 (emphasis in original), and that such injury is "imminent," *Bedrossian v. Northwestern Mem'l Hosp.*, 409 F.3d 840, 844 (7th Cir. 2005).

Here, the Coalition's putative diversion of resources is not a cognizable injury. And the budgetary harms that the County predicts are not direct effects of the Rule; rather, the County posits that an alien who now or later disenrolls from benefits may come to require emergency care without being able to pay for it, or may increase the risk that communicable disease will spread in the County because fewer aliens will get vaccinated. A mere risk is not imminent irreparable harm.

The balance of equities and the public interest likewise do not support the entry of a preliminary injunction here. The federal government and the public will be irreparably harmed if the Rule cannot go into effect. So long as the Rule is enjoined, DHS will be forced to retain an immigration policy in which it grants lawful-permanent-resident status to aliens who, "in the opinion of the [Secretary]," are likely to become public charges as the Secretary would define that term. 8 U.S.C. § 1182(a)(4)(A). The district court thus properly acknowledged that the federal government would "undoubtedly" suffer harm. SA29. And DHS currently has no viable means of revisiting adjustment-of-status determinations once made, *see*

A13, so those aliens will likely receive lawful-permanent-resident status permanently (assuming they are not ineligible for other reasons), such that the harm is irreparable.

Finally, as noted, plaintiffs' asserted injuries are at odds with the purposes underlying the public-charge inadmissibility provision. Plaintiffs do not serve the public interest by promoting increased use of public benefits by aliens, contrary to Congress's clear intent. At a minimum, the harms to the federal government and the public preclude enjoining the Rule pending the resolution of this case on the merits.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the court's preliminary injunction and stay under 5 U.S.C. § 705 vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,377 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

s/ Joshua Dos Santos
Joshua Dos Santos

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I further certify that I will cause 15 paper copies of this brief to be received by the Clerk within seven days of the Notice of Docket Activity generated upon acceptance of the brief, in compliance with 7th Circuit Rule 31(b) and ECF Procedure (h)(2).

Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Joshua Dos Santos
Joshua Dos Santos

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all materials required by Circuit Rule 30(a) and (b) are included in the short appendix and appendix.

s/ Joshua Dos Santos
Joshua Dos Santos

STATUTORY ADDENDUM

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8 U.S.C. § 1182

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(4) Public charge

(A) In general

Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

(B) Factors to be taken into account

(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's--

(I) age;

(II) health;

(III) family status;

(IV) assets, resources, and financial status; and

(V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 1183a of this title for purposes of exclusion under this paragraph.

(C) Family-sponsored immigrants

Any alien who seeks admission or adjustment of status under a visa number issued under section 1151(b)(2) or 1153(a) of this title is inadmissible under this paragraph unless--

(i) the alien has obtained--

(I) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 1154(a)(1)(A) of this title;

(II) classification pursuant to clause (ii) or (iii) of section 1154(a)(1)(B) of this title; or

(III) classification or status as a VAWA self-petitioner; or

(ii) the person petitioning for the alien's admission (and any additional sponsor required under section 1183a(f) of this title or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(D) Certain employment-based immigrants

Any alien who seeks admission or adjustment of status under a visa number issued under section 1153(b) of this title by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is inadmissible under this paragraph unless such relative has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(E) Special rule for qualified alien victims

Subparagraphs (A), (B), and (C) shall not apply to an alien who--

(i) is a VAWA self-petitioner;

(ii) is an applicant for, or is granted, nonimmigrant status under section 1101(a)(15)(U) of this title; or

(iii) is a qualified alien described in section 1641(c) of this title.

* * *

(s) Consideration of benefits received as battered alien in determination of inadmissibility as likely to become public charge

In determining whether an alien described in subsection (a)(4)(C)(i) is inadmissible under subsection (a)(4) or ineligible to receive an

immigrant visa or otherwise to adjust to the status of permanent resident by reason of subsection (a)(4), the consular officer or the Attorney General shall not consider any benefits the alien may have received that were authorized under section 1641(c) of this title.

8 U.S.C. § 1183a

§ 1183a. Requirements for sponsor's affidavit of support

(a) Enforceability

(1) Terms of affidavit

No affidavit of support may be accepted by the Attorney General or by any consular officer to establish that an alien is not excludable as a public charge under section 1182(a)(4) of this title unless such affidavit is executed by a sponsor of the alien as a contract--

(A) in which the sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable;

(B) that is legally enforceable against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit (as defined in subsection (e)1), consistent with the provisions of this section; and

(C) in which the sponsor agrees to submit to the jurisdiction of any Federal or State court for the purpose of actions brought under subsection (b)(2).

(2) Period of enforceability

An affidavit of support shall be enforceable with respect to benefits provided for an alien before the date the alien is naturalized as a citizen of the United States, or, if earlier, the termination date provided under paragraph (3).

(3) Termination of period of enforceability upon completion of required period of employment, etc.

(A) In general

An affidavit of support is not enforceable after such time as the alien (i) has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act [42 U.S.C.A § 401 et seq.] or can be credited with such qualifying quarters as provided under subparagraph (B), and (ii) in the case of any such

qualifying quarter creditable for any period beginning after December 31, 1996, did not receive any Federal means-tested public benefit (as provided under section 1613 of this title) during any such period.

(B) Qualifying quarters

For purposes of this section, in determining the number of qualifying quarters of coverage under title II of the Social Security Act [42 U.S.C.A. § 401 et seq.] an alien shall be credited with--

(i) all of the qualifying quarters of coverage as defined under title II of the Social Security Act worked by a parent of such alien while the alien was under age 18, and

(ii) all of the qualifying quarters worked by a spouse of such alien during their marriage and the alien remains married to such spouse or such spouse is deceased.

No such qualifying quarter of coverage that is creditable under title II of the Social Security Act for any period beginning after December 31, 1996, may be credited to an alien under clause (i) or (ii) if the parent or spouse (as the case may be) of such alien received any Federal means-tested public benefit (as provided under section 1613 of this title) during the period for which such qualifying quarter of coverage is so credited.

(C) Provision of information to save system

The Attorney General shall ensure that appropriate information regarding the application of this paragraph is provided to the system for alien verification of eligibility (SAVE) described in section 1137(d)(3) of the Social Security Act [42 U.S.C.A. § 1320b-7(d)(3)].

(b) Reimbursement of government expenses

(1) Request for reimbursement

(A) Requirement

Upon notification that a sponsored alien has received any means-tested public benefit, the appropriate nongovernmental entity which provided such benefit or the appropriate entity of the

Federal Government, a State, or any political subdivision of a State shall request reimbursement by the sponsor in an amount which is equal to the unreimbursed costs of such benefit.

(B) Regulations

The Attorney General, in consultation with the heads of other appropriate Federal agencies, shall prescribe such regulations as may be necessary to carry out subparagraph (A).

(2) Actions to compel reimbursement

(A) In case of nonresponse

If within 45 days after a request for reimbursement under paragraph (1)(A), the appropriate entity has not received a response from the sponsor indicating a willingness to commence payment an action may be brought against the sponsor pursuant to the affidavit of support.

(B) In case of failure to pay

If the sponsor fails to abide by the repayment terms established by the appropriate entity, the entity may bring an action against the sponsor pursuant to the affidavit of support.

(C) Limitation on actions

No cause of action may be brought under this paragraph later than 10 years after the date on which the sponsored alien last received any means-tested public benefit to which the affidavit of support applies.

(3) Use of collection agencies

If the appropriate entity under paragraph (1)(A) requests reimbursement from the sponsor or brings an action against the sponsor pursuant to the affidavit of support, the appropriate entity may appoint or hire an individual or other person to act on behalf of such entity acting under the authority of law for purposes of collecting any amounts owed.

(c) Remedies

Remedies available to enforce an affidavit of support under this section include any or all of the remedies described in section 3201, 3203, 3204,

or 3205 of Title 28, as well as an order for specific performance and payment of legal fees and other costs of collection, and include corresponding remedies available under State law. A Federal agency may seek to collect amounts owed under this section in accordance with the provisions of subchapter II of chapter 37 of Title 31.

(d) Notification of change of address

(1) General requirement

The sponsor shall notify the Attorney General and the State in which the sponsored alien is currently a resident within 30 days of any change of address of the sponsor during the period in which an affidavit of support is enforceable.

(2) Penalty

Any person subject to the requirement of paragraph (1) who fails to satisfy such requirement shall, after notice and opportunity to be heard, be subject to a civil penalty of--

(A) not less than $250 or more than $2,000, or

(B) if such failure occurs with knowledge that the sponsored alien has received any means-tested public benefits (other than benefits described in section 1611(b), 1613(c)(2), or 1621(b) of this title) not less than $2,000 or more than $5,000.

The Attorney General shall enforce this paragraph under appropriate regulations.

(e) Jurisdiction

An action to enforce an affidavit of support executed under subsection (a) may be brought against the sponsor in any appropriate court--

(1) by a sponsored alien, with respect to financial support; or

(2) by the appropriate entity of the Federal Government, a State or any political subdivision of a State, or by any other nongovernmental entity under subsection (b)(2), with respect to reimbursement.

(f) "Sponsor" defined

(1) In general

For purposes of this section the term "sponsor" in relation to a sponsored alien means an individual who executes an affidavit of support with respect to the sponsored alien and who--

(A) is a citizen or national of the United States or an alien who is lawfully admitted to the United States for permanent residence;

(B) is at least 18 years of age;

(C) is domiciled in any of the several States of the United States, the District of Columbia, or any territory or possession of the United States;

(D) is petitioning for the admission of the alien under section 1154 of this title; and

(E) demonstrates (as provided in paragraph (6)) the means to maintain an annual income equal to at least 125 percent of the Federal poverty line.

(2) Income requirement case

Such term also includes an individual who does not meet the requirement of paragraph (1)(E) but accepts joint and several liability together with an individual under paragraph (5)(A).

(3) Active duty armed services case

Such term also includes an individual who does not meet the requirement of paragraph (1)(E) but is on active duty (other than active duty for training) in the Armed Forces of the United States, is petitioning for the admission of the alien under section 1154 of this title as the spouse or child of the individual, and demonstrates (as provided in paragraph (6)) the means to maintain an annual income equal to at least 100 percent of the Federal poverty line.

(4) Certain employment-based immigrants case

Such term also includes an individual--

(A) who does not meet the requirement of paragraph (1)(D), but is the relative of the sponsored alien who filed a classification petition for the sponsored alien as an employment-based immigrant under section 1153(b) of this title or who has a

significant ownership interest in the entity that filed such a petition; and

(B)(i) who demonstrates (as provided under paragraph (6)) the means to maintain an annual income equal to at least 125 percent of the Federal poverty line, or

(ii) does not meet the requirement of paragraph (1)(E) but accepts joint and several liability together with an individual under paragraph (5)(A).

(5) Non-petitioning cases

Such term also includes an individual who does not meet the requirement of paragraph (1)(D) but who--

(A) accepts joint and several liability with a petitioning sponsor under paragraph (2) or relative of an employment-based immigrant under paragraph (4) and who demonstrates (as provided under paragraph (6)) the means to maintain an annual income equal to at least 125 percent of the Federal poverty line; or

(B) is a spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, or grandchild of a sponsored alien or a legal guardian of a sponsored alien, meets the requirements of paragraph (1) (other than subparagraph (D)), and executes an affidavit of support with respect to such alien in a case in which--

(i) the individual petitioning under section 1154 of this title for the classification of such alien died after the approval of such petition, and the Secretary of Homeland Security has determined for humanitarian reasons that revocation of such petition under section 1155 of this title would be inappropriate; or

(ii) the alien's petition is being adjudicated pursuant to section 1154(l) of this title (surviving relative consideration).

(6) Demonstration of means to maintain income

(A) In general

(i) Method of demonstration

For purposes of this section, a demonstration of the means to maintain income shall include provision of a certified copy of the individual's Federal income tax return for the individual's 3 most recent taxable years and a written statement, executed under oath or as permitted under penalty of perjury under section 1746 of Title 28, that the copies are certified copies of such returns.

(ii) Flexibility

For purposes of this section, aliens may demonstrate the means to maintain income through demonstration of significant assets of the sponsored alien or of the sponsor, if such assets are available for the support of the sponsored alien.

(iii) Percent of poverty

For purposes of this section, a reference to an annual income equal to at least a particular percentage of the Federal poverty line means an annual income equal to at least such percentage of the Federal poverty line for a family unit of a size equal to the number of members of the sponsor's household (including family and non-family dependents) plus the total number of other dependents and aliens sponsored by that sponsor.

(B) Limitation

The Secretary of State, or the Attorney General in the case of adjustment of status, may provide that the demonstration under subparagraph (A) applies only to the most recent taxable year.

(h) "Federal poverty line" defined

For purposes of this section, the term "Federal poverty line" means the level of income equal to the official poverty line (as defined by the Director of the Office of Management and Budget, as revised annually by the Secretary of Health and Human Services, in accordance with section 9902(2) of Title 42) that is applicable to a family of the size involved.

(i) Sponsor's social security account number required to be provided

(1) An affidavit of support shall include the social security account number of each sponsor.

(2) The Attorney General shall develop an automated system to maintain the social security account number data provided under paragraph (1).

(3) The Attorney General shall submit an annual report to the Committees on the Judiciary of the House of Representatives and the Senate setting forth--

(A) for the most recent fiscal year for which data are available the number of sponsors under this section and the number of sponsors in compliance with the financial obligations of this section; and

(B) a comparison of such numbers with the numbers of such sponsors for the preceding fiscal year.

8 U.S.C. § 1227

§ 1227. Deportable aliens

(a) Classes of deportable aliens.

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(5) Public charge

Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

8 U.S.C. § 1601

§ 1601. Statements of national policy concerning welfare and immigration

The Congress makes the following statements concerning national policy with respect to welfare and immigration:

(1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.

(2) It continues to be the immigration policy of the United States that--

(A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and

(B) the availability of public benefits not constitute an incentive for immigration to the United States.

(3) Despite the principle of self-sufficiency, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.

(4) Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.

(5) It is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy.

(6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.

(7) With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available

for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.

SHORT APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COOK COUNTY, ILLINOIS, an Illinois governmental entity, and ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC.,	)	19 C 6334
Plaintiffs,	)	Judge Gary Feinerman
vs.	)	
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 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.	)	

MEMORANDUM OPINION AND ORDER

In this suit under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, Cook County and Illinois Coalition for Immigrant and Refugee Rights, Inc. ("ICIRR") challenge the legality of the Department of Homeland Security's ("DHS") final rule, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pt. 103, 212-14, 245, 248). Doc. 1. The Final Rule has an effective date of October 15, 2019. Cook County and ICIRR move for a temporary restraining order and/or preliminary injunction under Civil Rule 65, or a stay under § 705 of the APA, 5 U.S.C. § 705, to bar DHS (the other defendants are ignored for simplicity's sake) from implementing and enforcing the Rule in the State of Illinois. Doc. 24. At the parties' request, briefing closed on October 10, 2019, and oral argument was held on October 11, 2019. Docs. 29, 81. The motion is granted, and DHS is enjoined from implementing the Rule in the State of Illinois absent further order of court.

Background

Section 212(a)(4) of the Immigration and Nationality Act ("INA") states: "Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4). The public charge provision has a long pedigree, dating back to the Immigration Act of 1882, ch. 376, §§ 1-2, 22 Stat. 214, 214, which directed immigration officers to refuse entry to "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." The provision has been part of our immigration laws, in various but nearly identical guises, ever since. *See* Immigration Act of 1891, ch. 551, 26 Stat. 1084, 1084; Immigration Act of 1907, ch. 1134, 34 Stat. 898, 899; 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 ("IIRIRA"), Pub. L. No. 104-208, § 531(a), 110 Stat. 3009-546, 3009-674-75 (1996).

Prior to the rulemaking resulting in the Final Rule, the federal agency charged with immigration enforcement last articulated its interpretation of "public charge" in a 1999 field guidance document. *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28,689 (May 26, 1999). The field guidance defined a "public charge" as a person "primarily dependent on the government for subsistence," and instructed immigration officers to ignore non-cash public benefits in assessing whether an individual was "likely at any time to become a public charge." *Ibid*. That definition and instruction never made their way into a regulation.

On October 10, 2018, DHS published a Notice of Proposed Rulemaking, Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (Oct. 10, 2018), which was followed by a sixty-

day public comment period. Some ten months later, DHS published the Final Rule, which addressed the comments, revised the proposed rule, and provided analysis to support the Rule. *See* Inadmissibility on Public Charge Grounds, *supra*. As DHS described it, the 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)." 84 Fed. Reg. at 41,295.

By adopting a duration-based standard, the Rule covers aliens who receive only minimal benefits so long as they receive them for the requisite time period. As the Rule explains: "DHS may find an alien inadmissible under the standard, even though the alien who exceeds the duration threshold may receive only hundreds of dollars, or less, in public benefits annually." *Id.* at 41,360-61. The Rule "defines the term 'public benefit' to include cash benefits for income maintenance, SNAP, most forms of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher (HCV) Program, Section 8 Project-Based Rental Assistance, and certain other forms of subsidized housing." *Ibid.* The Rule sets forth several nonexclusive factors DHS must consider in determining whether an alien is likely to become a public charge, including "the alien's health," any "diagnosed … medical condition" that "will interfere with the alien's ability to provide and care for himself or herself," and past applications for the enumerated public benefits. *Id.* at 41,502-04. The Rule provides that persons found likely to become public charges are ineligible "for a visa to come the United States temporarily or permanently, for admission, or for adjustment of status to that of a lawful permanent resident." *Id.* at 41,303. The Rule also "potentially affect[s] individuals applying for an extension of stay or change of status because these individuals would have to demonstrate that they have not received, since obtaining

the nonimmigrant status they are seeking to extend or change, public benefits for" more than the allowed duration. *Id*. at 41,493.

Cook County and ICIRR challenge the Rule's legality and seek to enjoin its implementation. Cook County operates the Cook County Health and Hospitals System ("CCH"), one of the largest public hospital systems in the Nation. Doc. 27-1 at p. 326, ¶ 5. ICIRR is a membership-based organization that represents nonprofit organizations and social and health service providers throughout Illinois that deliver and seek to protect access to health care, nutrition, housing, and other services for immigrants regardless of immigration status. *Id*. at pp. 341-342, ¶¶ 3-10. Cook County and ICIRR maintain that the Rule will cause immigrants to disenroll from public benefits—or to not seek benefits in the first place—which will in turn generate increased costs and cause them to divert resources from their existing programs meant to aid immigrants and safeguard public health. Doc. 27-1 at pp. 330-338, ¶¶ 25-52; *id*. at pp. 342-350, ¶¶ 11-42. Cook County and ICIRR argue that the Rule exceeds the authority granted to DHS under the INA and that DHS acted arbitrarily and capriciously in promulgating the Rule.

Discussion

"To win a preliminary injunction, the moving party must establish that (1) without preliminary relief, it will suffer irreparable harm before final resolution of its claims; (2) legal remedies are inadequate; and (3) its claim has some likelihood of success on the merits." *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381 (7th Cir. 2018). "If the moving party makes this showing, the court balances the harms to the moving party, other parties, and the public." *Ibid*. "In so doing, the court employs a sliding scale approach: the more likely the plaintiff is to win, the less heavily need the balance of harms weigh in [its] favor; the less likely [it] is to win, the more need [the balance] weigh in [its] favor." *Valencia v. City of Springfield*, 883 F.3d 959,

966 (7th Cir. 2018) (alteration and internal quotation marks omitted). "The sliding scale approach is not mathematical in nature, rather it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief." *Stuller, Inc. v. Steak N Shake Enters.*, 695 F.3d 676, 678 (7th Cir. 2012) (internal quotation marks omitted). "Stated another way, the district court sits as would a chancellor in equity and weighs all the factors, seeking at all times to minimize the costs of being mistaken." *Ibid.* (alteration and internal quotation marks omitted). A request for a temporary restraining order is analyzed under the same rubric, *see Carlson Grp., Inc. v. Davenport*, 2016 WL 7212522, at *2 (N.D. Ill. Dec. 13, 2016), as is a request for a stay under 5 U.S.C. § 705, *see Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 446 (7th Cir. 1990) ("The standard is the same whether a preliminary injunction against agency action is being sought in the district court or a stay of that action [under 5 U.S.C. § 705] is being sought in [the appeals] court.").

I. Likelihood of Success on the Merits

A. Standing

DHS argues at the outset that Cook County and ICIRR lack Article III standing. Doc. 73 at 20-23. "To assert [Article III] standing for injunctive relief, [a plaintiff] must show that [it is] under an actual or imminent threat of suffering a concrete and particularized 'injury in fact'; that this injury is fairly traceable to the defendant's conduct; and that it is likely that a favorable judicial decision will prevent or redress the injury." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 949 (7th Cir. 2019) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).

On the present record, Cook County has established its standing. In *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), where a municipality alleged under the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, that real estate brokers had engaged in racial steering, the Supreme Court held for Article III purposes that "[a] significant reduction in property values

directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." *Id*. at 110-11. That was so even though the causal chain resulting in the municipality's injury involved independent decisions made by non-parties; as the Court explained, "racial steering effectively manipulates the housing market" by altering homebuyers' decisions, which "reduce[s] the total number of buyers in the … housing market," particularly where "perceptible increases in the minority population … precipitate an exodus of white residents." *Id*. at 109-10. That reduction in buyers, in turn, meant that "prices may be deflected downward[,] … directly injur[ing] a municipality by diminishing its tax base." *Id*. at 110-11.

Applying *Gladstone*, the Seventh Circuit in *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086 (7th Cir. 1992), held that Chicago had standing in a similar FHA case, reasoning that "racial steering leads to resegregation" and to "[p]eople … becom[ing] panicked and los[ing] interest in the community," generating "destabilization of the community and a corresponding increased burden on the City in the form of increased crime and an erosion of the tax base." *Id*. at 1095. The Seventh Circuit added that Chicago's standing also rested on the fact that its "fair housing agency ha[d] to use its scarce resources to ensure compliance with the fair housing laws" rather than to "perform its routine services." *Ibid*.

The Supreme Court's decision earlier this year in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), is of a piece with *Gladstone* and *Matchmaker*. In a challenge to the Department of Commerce's addition of a citizenship question to the census, the Court held that the plaintiff States had shown standing by "establish[ing] a sufficient likelihood that the reinstatement of a citizenship question would result in noncitizen households responding to the census at lower rates than other groups, which in turn would cause them to be undercounted and

lead to" injuries to the States such as "diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources." *Id*. at 2565. In so holding, the Court explained that the fact that a "harm depends on the independent action of third parties," even when such actions stem from the third parties' "unfounded fears," does not make an injury too "speculative" to confer standing. *Id*. at 2565-66.

Cook County asserts injuries at least as concrete, imminent, and traceable as did the government plaintiffs in *Gladstone*, *New York*, and *Matchmaker*. As the parties agree, the Final Rule will cause immigrants to disenroll from, or refrain from enrolling in, critical public benefits out of fear of being deemed a public charge. Doc. 27-1 at pp. 330-332, ¶¶ 25, 30; *id*. at pp. 344-345, ¶¶ 19-20, 23; 84 Fed. Reg. at 41,300 ("The final rule will … result in a reduction in transfer payments from the Federal Government to individuals who may choose to disenroll from or forego enrollment in a public benefits program."); *id*. at 41,485 (same). Cook County adduces 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 more costly, uncompensated emergency care down the line. Doc. 27-1 at pp. 331-333, 335-337, ¶¶ 30-32, 41-50. Additionally, because uninsured persons who do not seek public medical benefits are less likely to receive immunizations or to seek diagnostic testing, the Rule increases the risk of vaccine-preventable and other communicable diseases spreading throughout the County. *Id*. at pp. 329-330, 333, ¶¶ 20-21, 33; *id*. at pp. 358-359, ¶¶ 29, 32. Both the costs of community health epidemics and of uncompensated care are likely to fall particularly hard on CCH, which already provides approximately half of all charity care in Cook County, *id*. at pp. 335-336, ¶¶ 42-43, including to non-citizens regardless of their immigration status, *id*. at p. 327, ¶ 11. Indeed, DHS itself recognizes that the Rule will cause

"[s]tate and local governments … [to] incur costs" stemming from "changes in behavior caused by" the Rule. 84 Fed. Reg. at 41,389; *see also id*. at 41,300-01 ("DHS estimates that the total reduction in transfer payments from the Federal and State governments will be approximately $2.47 billion annually due to disenrollment or foregone enrollment in public benefits programs by foreign-born non-citizens who may be receiving public benefits."); *id*. at 41,469 ("DHS agrees that some entities, such as State and local governments or other businesses and organizations, would incur costs related to the changes."). DHS specifically noted that "hospital systems, state agencies, and other organizations that provide public assistance to aliens and their households" will suffer financial harm from the Rule's implementation. *Id*. at 41,469-70.

Given its operation of and financial responsibility for CCH, that is more than enough to establish Cook County's standing under the principles set forth in *Gladstone*, *New York*, and *Matchmaker*. DHS's contrary arguments fail to persuade.

First, DHS suggests that it is "inconsistent" for Cook County to maintain both that immigrants will forgo treatment and that they will come to rely more on uncompensated care from CCH. Doc. 73 at 21. But as Cook County observes, Doc. 80 at 14, there is no inconsistency: immigrants will "avoid seeking treatment for cases other than emergencies," Doc. 1 at ¶ 109, and the emergency treatment they seek will involve additional reliance on uncompensated care from CCH, Doc. 27-1 at p. 330, ¶ 21 ("When individuals are uninsured, they avoid seeking routine care and instead risk worse health outcomes and use costly emergency services."). The Rule itself acknowledges as much. 84 Fed. Reg. at 41,384 ("DHS acknowledges that increased use of emergency rooms and emergent care as a method of primary healthcare due to delayed treatment is possible and there is a potential for increases in uncompensated care.").

Second, DHS argues that because some non-citizen residents of Cook County have already disenrolled from benefits and are unlikely to re-enroll, the County cannot rely on their disenrollment as showing that others will follow suit. Doc. 73 at 21. That argument ignores the plain logic of Cook County's position—if the mere prospect of the Rule's promulgation after the Notice of Proposed Rulemaking in October 2018 prompted some immigrants to disenroll, it is likely that the Rule's going into effect will prompt others to do so as well. Again, the Rule itself acknowledges that disenrollment is a likely result of the Rule's implementation. 84 Fed. Reg. at 41,300-01.

Third, DHS argues that Cook County's invocation of its need to divert resources is a "novel" and unsupported extension of organizational "standing from the private organizations to whom it has always been applied to a local government entity." Doc. 73 at 22. Even if this argument were correct, it would not speak to the injuries to the County arising from CCH's provision of uncompensated care. But the argument is wrong, as municipal entities and private organizations alike may rely on the need to divert resources to establish standing. *See Matchmaker*, 982 F.2d at 1095 (holding that Chicago had Article III standing because its "fair housing agency has to use its scarce resources to ensure compliance with the fair housing laws … [and] cannot perform its routine services … because it has to commit resources against those engaged in racial steering"); *see also City of Milwaukee v. Saxby*, 546 F.2d 693, 698 (7th Cir. 1976) ("In any case where a municipal corporation seeks to vindicate the rights of its residents, there is no reason why the general rule on organizational standing should not be followed.").

As for ICIRR, the Supreme Court held in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), that if a private organization shows that a defendant's "practices have perceptibly impaired" its ability to undertake its existing programs, "there can be no question that the

organization has suffered injury in fact." *Id*. at 379; *see also Common Cause Ind.*, 937 F.3d at 954 ("Impairment of [an organization's] ability to do work within its core mission [is] enough to support standing."). ICIRR adduces evidence that its existing programs include efforts within immigrant communities to increase access to care, improve health literacy, and reduce reliance on emergency room care. Doc. 27-1 at pp. 341-342, ¶ 4-10. ICIRR further shows that the Rule is likely to decrease immigrants' access to health services, food, and other programs. *Id*. at p. 344-345, ¶¶ 19-20, 23. Indeed, 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 not covered by but nonetheless deterred by the Rule to continue enrolling in benefit programs. *Id*. at pp. 343-345, ¶¶ 14-15, 22. If the Rule goes into effect, those consequences are likely to intensify and ICIRR's diversion of resources likely to increase. *Id*. at pp. 343-347, ¶¶ 16, 18, 23-31. ICIRR's standing is secure. *See Common Cause Ind.*, 937 F.3d at 964 (Brennan, J., concurring) ("[I]f a defendant's actions compromise an organization's day-to-day operations, or force it to divert resources to address new issues caused by the defendant's actions, an Article III injury exists.").

In pressing the contrary result, DHS contends that ICIRR "does not allege that the Rule will disrupt any of its current programs," and therefore that ICIRR is not "required" to alter its activities but instead "simply elected to do so." Doc. 73 at 22-23. But the evidence adduced by ICIRR suggests a "concrete and demonstrable injury to the organization's activities," not "simply a setback to [its] abstract social interests." *Havens*, 455 U.S. at 379. That is enough to establish standing, for "[w]hat matters is whether the organization['s] activities were undertaken because of the challenged law, not whether they were voluntarily incurred or not." *Common Cause Ind.*, 937 F.3d at 956 (internal quotation marks omitted).

B. Ripeness

DHS next contends that this case is not ripe. Doc. 73 at 23-25. Suits directed at agency action "are appropriate for judicial resolution" where the challenged action is final and the issues involved are legal ones, provided that the plaintiff shows that the action's impact on it "is sufficiently direct and immediate." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-52 (1967). The challenged agency action here is the Final Rule's promulgation, the issues involved (as discussed below) are purely legal challenges to DHS's implementation of the public charge provision enacted by Congress, and—as shown above and addressed below in the discussion of irreparable harm—Cook County and ICIRR allege a direct and immediate impact of the Rule on them. Under these circumstances, the suit is ripe. *See OOIDA v. FMCSA*, 656 F.3d 580, 586-87 (7th Cir. 2011) (rejecting a federal agency's ripeness challenge, which posited that the "petitioners [we]re not currently under a remedial directive," because "the threat of enforcement is sufficient" to show hardship under *Abbott Laboratories*); *id.* at 586 ("Where … a petition involves purely legal claims in the context of a facial challenge to a final rule, a petition is presumptively reviewable.") (internal quotation marks omitted).

DHS retorts that this suit will not be ripe until the Rule is applied to actual admissibility or adjustment determinations. Doc. 73 at 23-24. At most, DHS's argument pertains to any individual non-citizen's challenge to the Rule. It is far from clear that ripeness would pose an impediment even to claims by affected individuals. *See OOIDA*, 656 F.3d at 586 ("[T]he threat of enforcement is sufficient" to make a suit ripe "because the law is in force the moment it becomes effective and a person made to live in the shadow of a law that she believes to be invalid should not be compelled to wait and see if a remedial action is coming."). In any event, certain of Cook County's and ICIRR's injuries—like their need to respond to the Rule's chilling

effect on benefits enrollment, or to divert resources to educate immigrants about the Rule—result from the Rule's promulgation. It follows that their claims are ripe.

C. Zone of Interests

DHS next argues that Cook County and ICIRR fall outside the "zone of interests" protected by the INA. Doc. 73 at 25-26. "[A] person suing under the APA must satisfy not only Article III's standing requirements, but an additional test: The interest … assert[ed] must be 'arguably within the zone of interests to be protected or regulated by the statute'" that the agency action allegedly violated. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). "Whether a plaintiff comes within the 'zone of interests' is an issue that requires [the court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (internal quotation marks omitted). The question here is whether Cook County and ICIRR "fall[] within the class of plaintiffs whom Congress has authorized to sue under" the relevant statutes. *Ibid.*

"[I]n the APA context, … the [zone of interests] test is not 'especially demanding.'" *Lexmark*, 572 U.S. at 130 (quoting *Match-E-Be-Nash-She-Wish Band*, 567 U.S. at 225). As the Supreme Court explained, it has "always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff" and the test does not require any "indication of congressional purpose to benefit the would-be plaintiff." *Match-E-Be-Nash-She-Wish Band*, 567 U.S. at 225 (internal quotation marks omitted); *see also Lexmark*, 572 U.S. at 130 (reaffirming *Match-E-Be-Nash-She-Wish Band* and distinguishing non-APA cases). Accordingly, the zone of interests test "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." *Math-E-Be-Nash-She-Wish Band*, 567 U.S. at 225 (internal quotation marks omitted). The appropriate frame of reference here is not only the public charge provision, but the immigration laws as a whole. *See Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 401 (1987) (holding that the court should "consider any provision that helps [it] to understand Congress' overall purposes in the" relevant statutes); *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 186 (D.C. Cir. 2012) ("Importantly, in determining whether a petitioner falls within the zone of interests to be protected by a statute, we do not look at the specific provision said to have been violated in complete isolation, but rather in combination with other provisions to which it bears an integral relationship.") (internal quotation marks omitted). And even if an APA plaintiff is not among "those who Congress intended to benefit," the plaintiff nonetheless 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." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998); *see also Amgen, Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004) ("[T]he salient consideration under the APA is whether the challenger's interests are such that they in practice can be expected to police the interests that the statute protects.") (internal quotation marks omitted); *ALPA Int'l v. Trans States Airlines, LLC*, 638 F.3d 572, 577 (8th Cir. 2011) (same).

Cook County and ICIRR both satisfy the zone of interests test. As DHS observes, the principal interests protected by the INA's "public charge" provision are those of "aliens improperly determined inadmissible." Doc. 73 at 25. ICIRR's interests in ensuring that health and social services remain available to immigrants and in helping them navigate the immigration process are consistent with the statutory purpose, as DHS describes it, to "ensure[] that only certain aliens could be determined inadmissible on the public charge ground." *Ibid*. There is

ample evidence that ICIRR's interests are not merely marginal to those of the aliens more directly impacted by the public charge provision. Not only is ICIRR precisely the type of organization that would reasonably be expected to "police the interests that the statute protects," *Amgen*, 357 F.3d at 109, but the INA elsewhere gives organizations like ICIRR a role in helping immigrants navigate immigration procedures generally, *see*, *e.g.*, 8 U.S.C. § 1101(i)(1) (requiring that potential T visa applicants be referred to nongovernmental organizations for legal advice); *id*. § 1184(p)(3)(A) (same for U visa applicants); *id*. § 1228(a)(2), (b)(4)(B) (recognizing a right to counsel for aliens subject to expedited removal proceedings); *id*. § 1229(a)(1), (b)(2) (requiring that aliens subject to deportation proceedings be provided a list of pro bono attorneys and advised of their right to counsel); *id*. § 1443(h) (requiring the Attorney General to work with "relevant organizations" to "broadly distribute information concerning" the immigration process). Especially given the APA's "generous review provisions," *Clarke*, 479 U.S. at 395 (internal quotation marks omitted), these considerations place ICIRR's claims "at the least[] 'arguably within the zone of interests'" protected by the INA, *Bank of Am. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017) (quoting *Data Processing*, 397 U.S. at 153).

In pressing the contrary result, DHS relies principally on Justice O'Connor's in-chambers opinion in *INS v. Legalization Assistance Project of Los Angeles County*, 510 U.S. 1301 (1993). Doc. 73 at 25-26. That reliance is misplaced. As an initial matter, Justice O'Connor's opinion is both non-precedential and concededly "speculative." *Legalization Assistance Project*, 510 U.S. at 1304. In any event, the opinion predates the Court's articulation in *Match-E-Be-Nash-She-Wish Band* and *Lexmark* of the current, more flexible understanding of the zone of interests test in APA cases.

Cook County satisfies the zone of interests test as well. In *City of Miami*, the Supreme Court held that Miami's allegations of "lost tax revenue and extra municipal expenses" placed it within the zone of interests protected by the FHA, which allows "any person who … claims to have been injured by a discriminatory housing practice" to file a civil action for damages. 137 S. Ct. at 1303 (internal quotation marks omitted). Cook County asserts comparable financial harms from the Final Rule. True enough, Cook County is not itself threatened with an improper admissibility or status adjustment determination, but neither did Miami itself suffer discrimination under the FHA. In both *City of Miami* and here, the consequences of the challenged action generate additional costs for the municipal plaintiff. If such injuries place a municipality within the FHA's zone of interests in a non-APA case like *City of Miami*, they certainly do so in this APA case.

D. *Chevron* Analysis

The APA provides for judicial review of final agency decisions. *See* 5 U.S.C. §§ 702, 706; *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."). The question here is whether DHS exceeded its authority in promulgating the Final Rule. Under current precedent, which this court must follow, resolution of that question is governed by the framework set forth in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

"At *Chevron*'s first step, [the court] determine[s]—using ordinary principles of statutory interpretation—whether Congress has directly spoken to the precise question at issue." *Coyomani–Cielo v. Holder*, 758 F.3d 908, 912 (7th Cir. 2014). If "Congress has directly spoken to the precise question at issue … the court … must give effect to the unambiguously expressed intent of Congress," *Indiana v. EPA*, 796 F.3d 803, 811 (7th Cir. 2015) (quoting *Chevron*, 467

U.S. at 842-43) (alterations in original) (internal quotation marks omitted), and end the inquiry there, *see Coyomani–Cielo*, 758 F.3d at 912. "If, however, 'the statute is silent or ambiguous with respect to the specific issue,'" *Chevron*'s second step, at which "a reviewing court must defer to the agency's interpretation if it is reasonable," comes into play. *Indiana*, 796 F.3d at 811 (quoting *Chevron*, 467 U.S. at 843-44). As shown below, because the pertinent statute is clear, there is no need to go beyond *Chevron*'s first step.

"When interpreting a statute, [the court] begin[s] with the text." *Loja v. Main St. Acquisition Corp.*, 906 F.3d 680, 683 (7th Cir. 2018). "Statutory words and phrases are given their ordinary meaning." *Singh v. Sessions*, 898 F.3d 720, 725 (7th Cir. 2018); *see also United States v. Titan Int'l, Inc.*, 811 F.3d 950, 952 (7th Cir. 2016). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Brumfield v. City of Chicago*, 735 F.3d 619, 628 (7th Cir. 2013); *see also LaPlant v. N.W. Mut. Life Ins. Co.*, 701 F.3d 1137, 1139 (7th Cir. 2012) ("We try to give the statutory language a natural meaning in light of its context.").

Congress has expressed in general terms that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," 8 U.S.C. § 1601(1), that "[t]he immigration policy of the United States" provides that "aliens within the Nation's borders not depend on public resources to meet their needs," *id.* § 1601(2)(A), and that "the availability of public benefits [is] not [to] constitute an incentive for immigration to the United States," *id.* § 1601(2)(B). But 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." *Cf. NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992) ("You cannot discover how far a statute goes by observing the

direction in which it points. Finding the meaning of a statute is more like calculating a vector (with direction and length) than it is like identifying which way the underlying 'values' or 'purposes' point (which has direction alone).") (internal quotation marks omitted). The public charge provision is intended to implement those general policy goals—yet in none of its iterations since its original enactment in 1882 did Congress define the term "public charge."

This lack of a statutory definition gives rise to the interpretative dispute that divides the parties. Cook County and ICIRR submit that the term "public charge" includes only "those who are likely to become *primarily and permanently dependent* on the government for *subsistence*." Doc. 27 at 15 (emphasis in original). DHS submits that the term is broad enough to include any non-citizen "who receives" a wide range of "designated public benefits for more than 12 months in the aggregate within a 36-month period," Doc. 73 at 18-19—including, as the Final Rule acknowledges, those who "receive only hundreds of dollars, or less, in public benefits annually" for any twelve months in a thirty-six month period, 84 Fed. Reg. at 41,360-61. As Cook County and ICIRR contend, and as DHS implicitly concedes through its silence, if Cook County and ICIRR are correct about what "public charge" means, the Final Rule fails at *Chevron* step one, as there would be "no ambiguity for the agency to fill." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018).

Settled precedent governs how to ascertain the meaning of a statutorily undefined term like "public charge." "[I]t's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary … meaning … at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (alterations in original and internal quotation marks omitted). As noted, the term "public charge" entered the statutory lexicon in 1882 and has been included in nearly identical inadmissibility provisions ever since.

For this reason, the court agrees with DHS's foundational point that, given the "unbroken line of predecessor statutes going back to at least 1882 [that] have contained a similar inadmissibility ground for public charges," Doc. 73 at 16, "the late 19th century [is] the key time to consider" for determining the meaning of the term "public charge," *id*. at 27.

Fortunately, the Supreme Court told us just over a century ago what "public charge" meant in the relevant era, and thus what it means today. In *Gegiow v. Uhl*, 239 U.S. 3 (1915), several Russian nationals brought suit after they were denied admission to the United States on public charge grounds because, the immigration authorities reasoned, they were bound for Portland, Oregon, where the labor market would have made it impossible for them to obtain employment. *Id*. at 8-9. In holding that the aliens could not be excluded on that ground, the Court observed that in the statute identifying "who shall be excluded, 'Persons likely to become a public charge' [we]re mentioned between paupers and professional beggars, and along with idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living, convicted felons, prostitutes, and so forth." *Id*. at 10. In light of the statutory text, the Court held that "[t]he persons enumerated … are to be excluded on the ground of *permanent personal objections accompanying them* irrespective of local conditions unless the … phrase ['public charge'] … is directed to different considerations than any other of those with which it is associated. Presumably [the phrase 'public charge'] is to be read as generically similar to the other[phrase]s mentioned before and after." *Ibid*. (emphasis added).

Gegiow teaches that "public charge" does not, as DHS maintains, encompass persons who receive benefits, whether modest or substantial, due to being temporarily unable to support themselves entirely on their own. Rather, as Cook County and ICIRR maintain, *Gegiow* holds

that "public charge" encompasses only persons who—like "idiots" or persons with "a mental or physical defect of a nature to affect their ability to make a living"—would be substantially, if not entirely, dependent on government assistance on a long-term basis. That is what *Gegiow* plainly conveys—DHS does not contend otherwise—and that is how courts of that era read the decision. *See 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."); *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"); *Ng Fung Ho v. White*, 266 F. 765, 769 (9th Cir. 1920) (holding that "the words 'likely to become a public charge' are meant to exclude only those persons who are likely to become occupants of almshouses for want of means with which to support themselves in the future"), *rev'd on other grounds* 259 U.S. 276 (1922); *Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917) (holding that "Congress meant the act to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future"); *Ex parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923) ("The record is conclusive that the petitioner was not likely to become a public charge, in the sense that he would be a 'pauper' or an occupant of an almshouse for want of means of support, or likely to be sent to an almshouse for support at public expense.") (citations omitted).

In an attempt to evade *Gegiow*'s interpretation of "public charge," DHS argues that Congress, through amendments enacted in the Immigration Act of 1917, "negated the Court's

interpretation in *Gegiow*." Doc. 73 at 30-31. That argument fails on two separate grounds. The first is that DHS maintained (correctly) that "the late 19th century [is] the key time to consider" in ascertaining the meaning of the term "public charge," *id*. at 27, and therefore cannot be heard to contend that the pertinent timeframe is, on second thought, 1917. The second is that, even putting aside DHS's arguable waiver, the 1917 Act did not change the meaning of "public charge" in the manner urged by DHS.

As relevant here, the 1917 Act moved the phrase "persons likely to become a public charge" from between the terms "paupers" and "professional beggars" to much later in the (very long) list of excludable aliens. 1917 Act, 39 Stat. at 875-76. The Senate Report states that this change was meant "to overcome recent decisions of the courts limiting the meaning of the description of the excluded class because of its position between other descriptions conceived to be of the same general and generical nature. (See especially Gegiow v. Uhl, 239 U.S., 3.)." S. Rep. No. 64-352, at 5 (1916). The value of any committee report in ascertaining a statute's meaning is questionable. *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."); *Covalt v. Carey Can. Inc.*, 860 F.2d 1434, 1438 (7th Cir. 1988) ("Even the contemporaneous committee reports may be the work of those who could not get their thoughts into the text of the bill."). And the value of this particular Senate Report is further undermined by its opacity, as it does not say in which way its author(s) believed that court decisions had incorrectly limited the statute's breadth. *See Azar v. Allina*

Health Servs., 139 S. Ct. 1804, 1815 (2019) (holding that "murky legislative history … can't overcome a statute's clear text and structure").

Later commentary on the 1917 Act—which DHS cites as authoritative, but the origin of which DHS fails to identify, Doc. 73 at 30—explained that the public charge provision "has been shifted from its position in sec. 2 of the Immigration Act of 1907 to its present position in sec. 3 of this act in order to indicate the intention of Congress that aliens shall be excluded upon said ground *for economic as well as other reasons* and with a view to overcoming the decision of the Supreme Court in Gegiow v. Uhl, 239 U.S. 3 (S. Rept. 352, 64th Cong., 1st sess.)." U.S. Dep't of Labor, Immigration Laws and Rules of January 1, 1930 with Amendments from January 1, 1930 to May 24, 1934 (1935), at 25 n.5. This explanation suggests that Congress understood *Gegiow*, given its exclusive focus on an alien's economic circumstances, to have held that aliens may be deemed public charges only if there were *economic* reasons for their dependence on government support, and further that Congress wanted aliens dependent on government support for *noneconomic* reasons, like imprisonment, to be included as well.

That is precisely how many cases of the era understood the 1917 Act. *See United States ex rel. Medich v. Burmaster*, 24 F.2d 57, 59 (8th Cir. 1928) ("The fact that the appellant confessed to a crime punishable by imprisonment in the federal prison, and the very fact that he was actually incarcerated for a period of 18 months was sufficient to support the allegation in the warrant of deportation that he was likely 'to become a public charge.'"); *Ex parte Horn*, 292 F. at 457 (holding that although "the petitioner was not likely to become a public charge, in the sense that he would be a 'pauper' or an occupant of an almshouse for want of means of support, or likely to be sent to an almshouse for support at public expense," he was, as a convicted felon, a public charge because he was "a person committed to the custody of a department of the

government by due course of law") (citations omitted); *Ex parte Tsunetaro Machida*, 277 F. 239, 241 (W.D. Wash. 1921) ("[A] public charge [is] a person committed to the custody of a department of the government by due course of law."). Other cases disagreed, holding that noneconomic dependence on the government for basic subsistence did not make one a public charge. *See Browne v. Zurbrick*, 45 F.2d 931, 932-33 (6th Cir. 1930) (rejecting the proposition "that one who is guilty of crime, and therefore likely to be convicted for it and to be imprisoned at the public expense, is ipso facto likely to become a public charge"); *Coykendall v. Skrmetta*, 22 F.2d 120, 121 (5th Cir. 1927) (holding that "it cannot well be supposed that the words in question were intended to refer to anything other than a condition of dependence on the public for support," and therefore that the public charge provision did not include the public expense imposed by imprisonment); *Ex Parte Mitchell*, 256 F. 229, 232 (N.D.N.Y. 1919) ("The court holds expressly that the words 'likely to become a public charge' are meant to exclude only those 'persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future.'"). The divergence between those two lines of precedent is immaterial here, for DHS cites no case holding that the 1917 Act upended *Gegiow*'s holding that an alien could be deemed a public charge on economic grounds only if that person's dependence on public support was of a "permanent" nature. *Gegiow*, 239 U.S. at 10. Nor does DHS cite any case holding that an alien could be deemed a public charge based on the receipt, or anticipated receipt, of a modest quantum of public benefits for short periods of time.

DHS's contrary view rests upon an obvious misreading of *Ex parte Horn*. DHS cites *Ex parte Horn* for the proposition that post-1917 cases "recognized that" the 1917 Act's transfer of the public charge provision to later in the list of excludable persons "negated the Court's interpretation of *Gegiow* by underscoring that the term 'public charge' is 'not associated with

paupers or professional beggars.'" Doc. 73 at 30 (quoting *Ex parte Horn*, 292 F. at 457). But *Ex parte Horn* involved not an alien whose economic circumstances were less dire than a pauper's or professional beggar's and thus who might have needed only modest government benefits for a short period of time; rather, the case involved a person who had committed crimes and was likely to be imprisoned. 292 F. at 458. Thus, in saying that "[t]he term 'likely to become a public charge' is not associated with paupers or professional beggars, idiots, and certified physical and mental defectives," *id*. at 457, *Ex parte Horn* held not that the 1917 Act ousted *Gegiow*'s view regarding the severity and duration of the economic circumstances that could result in an alien being deemed a public charge; rather, it held that the 1917 Act expanded the meaning of "public charge" to include persons who would be totally dependent on the government for noneconomic reasons like imprisonment. *See id*. at 458 ("When he was convicted he became a public charge, and a tax, duty, and trust was imposed upon the government by his conduct; and at the time of his entry he was likely to become a public charge by reason of the crime which he had committed.") (internal quotation marks omitted). *Ex parte Horn* thus faithfully implements the change that, as shown above, DHS's own historical authority suggests the amendment was intended to effect.

DHS has three other arrows in its quiver, but none hits its mark. The first is a 1929 treatise stating that "public charge" means "any maintenance, or financial assistance, rendered from public funds, or funds secured by taxation." Arthur Cook et al., *Immigration Laws of the United States* § 285 (1929). The treatise is wrong. It does not address *Gegiow* in expressing its understanding of "public charge." And the sole authority it cites, *Ex parte Kichmiriantz*, 283 F. 697 (N.D. Cal. 1922), does not support its view. *Ex parte Kichmiriantz* concerned an alien "committed to the Stockton State Hospital for the insane" for dementia, who, without care,

"would starve to death within a short time." *Id.* at 697-98. Thus, although *Ex parte Kichmiriantz* observes that "the words 'public charge,' as used in the Immigration Act, mean just what they mean ordinarily; … a money charge upon, or an expense to, the public for support and care," *id.* at 698 (citation omitted), the context in which the court made that observation shows that it had in mind a person who was totally and likely permanently dependent on the government for subsistence. The case therefore aligns with Cook County and ICIRR's understanding of the term, not DHS's.

DHS's second arrow consists of a mélange of nineteenth century dictionaries and state court cases addressing whether one municipality or another was responsible for providing public assistance to a particular person under state poor laws. Doc. 73 at 29, 32-33. Those authorities, which address the meaning of the words "public," "charge," and "chargeable" and the term "public charge," would be material to the court's interpretative enterprise but for one thing: The Supreme Court told us in *Gegiow* what the statutory term "public charge" meant in that era. The federal judiciary is hierarchical, so in deciding here whether the Final Rule faithfully implements the statutory "public charge" provision, this court must adhere to the Supreme Court's understanding of the term regardless of what nineteenth century dictionaries and state court cases might have said. *See Shields v. Ill. Dep't of Corrs.*, 746 F.3d 782, 792 (7th Cir. 2014); *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004); *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 393 (7th Cir. 2010) (Easterbrook, J., dissenting).

As it happens, the dictionaries and state court cases do not advance DHS's cause. An 1888 dictionary cited by DHS defines "charge" as "an obligation or liability," but the only *human* example it offers of a "charge" is "a *pauper* being chargeable to the parish or town."

Dictionary of Am. and English Law 196 (1888) (emphasis added). An 1889 dictionary defines "charge" in the context of a person as one who is "committed to another's custody, care, concern, or management," Century Dictionary of the English Language 929 (1889), and an 1887 dictionary likewise defines "charge" as "[t]he person or thing committed to the care or management of another," Webster's Condensed Dictionary of the English Language 85 (3d ed. 1887). Those definitions are consistent with *Gegiow*'s understanding of "public charge" and do nothing to support DHS's view that the term is broad enough to include those who temporarily receive modest public benefits. The same holds for state court cases from the era. *See Cicero Twp. v. Falconberry*, 42 N.E. 42, 44 (Ind. App. 1895) ("The mere fact that a person may occasionally obtain assistance from the county does not necessarily make such person a pauper or a public charge."); *City of Boston v. Capen*, 61 Mass. 116, 121-22 (Mass. 1851) (holding that "public charge" refers "not [to] merely destitute persons, who … have no visible means of support," but rather to those who "by reason of some permanent disability, are unable to maintain themselves" and "might become a heavy and long continued charge to the city, town or state"); *Overseers of Princeton Twp. v. Overseers of S. Brunswick Twp.*, 23 N.J.L. 169 (N.J. 1851) (repeatedly equating "paupers" with being "chargeable, or likely to become chargeable").

As it did with *Ex parte Horn*, DHS misreads the state court cases upon which it relies. According to DHS, *Poor District of Edenburg v. Poor District of Strattanville*, 5 Pa. Super. 516 (1897), held that a person who temporarily received "some assistance" while ill was not "chargeable to" the public solely because she was "without notice or knowledge" that her receiving the assistance would "place[] [her] on the poor book," and not because the public assistance was temporary. Doc. 73 at 32 (quoting *Edenburg*, 5 Pa. Super. at 520-24, 527-28). But it is plain that the court's holding rested in large part on the fact that the person had

economic means and was only temporarily on the poor rolls. *See Edenburg*, 5 Pa. Super. at 526 (noting that the person "had for sixteen years been an inhabitant of the borough and for twelve years the undisputed owner by fee simple title of unincumbered real estate, and household goods of the value of $300 in the district," and that she "had fully perfected her settlement by the payment of taxes for two successive years"). DHS characterizes *Inhabitants of Guilford v. Inhabitants of Abbott*, 17 Me. 335 (Me. 1840), as holding that a person was "likely to become chargeable" based on his receipt of "'a small amount' of assistance" and "'his age and infirmity.'" Doc. 73 at 33 (quoting *Guilford*, 17 Me. at 335-36). To be sure, DHS's brief quotes words that appear in the decision, but as DHS fails to acknowledge, the court observed that the person "for many years had no regular or stated business, … was at one time so furiously mad, that the public security required him to be confined," had "occasionally since that time, … been deranged in mind," and at a later time "was insane, roving in great destitution." *Guilford*, 17 Me. at 335. DHS describes *Town of Hartford v. Town of Hartland*, 19 Vt. 392, 398 (Vt. 1847), as holding that a "widow and children with a house, furniture, and a likely future income of $12/year from the lease of a cow were nonetheless public charges." Doc. 73 at 32. But DHS fails to mention the court's explanation that the widow's "mother claimed to own some part of the furniture, … that her brother … claimed a lien upon the cow," and that the $12 annual lease income—which, incidentally, was for the house, not the cow—was past due for the preceding year with no reason to expect payment in the future. *Hartford*, 19 Vt. at 394. Accordingly, contrary to DHS's treatment of those state court cases, they align with *Gegiow*'s—and Cook County and ICIRR's—conception of what it means to be a public charge.

DHS's third arrow is an 1894 floor speech in which Representative Warner, objecting to a bill to support "industrial paupers" or "deadbeat industries"—what today might be called

corporate welfare—drew a rhetorical comparison with his constituents' view that, because the immigration laws would bar admission of an alien who "earn[s] half his living or three-quarters of it," they had "no sympathy … with the capitalist who offers to condescend to do business in this country provided this country will tax itself in order to enable him to make profits." 26 Cong. Rec. 657 (1894) (statement of Rep. Warner) (cited at Doc. 73 at 29). Representative Warner's remarks have no value. They only obliquely reference the immigration laws, and he had every incentive to exaggerate the harshness of immigration law to support his opposition to the industrial assistance under consideration.

To sum up: As DHS argues, interpretation of the statutory term "public charge" turns on its meaning in the late nineteenth century. The Supreme Court in *Gegiow* interpreted the term in a manner consistent with Cook County and ICIRR's position and contrary to DHS's position in the Final Rule. The Immigration Act of 1917 did not undermine *Gegiow*'s understanding of the severity of the economic circumstances that would lead an alien to be deemed a public charge. Contemporaneous dictionaries and state court cases are immaterial and, even if they were material, are consistent with *Gegiow*. DHS cites no case from any era holding that the public charge provision covers noncitizens who receive public benefits—let alone modest public benefits—on a temporary basis. And against that statutory and case law backdrop, Congress retained the "public charge" language in the INA of 1952 and the IIRIRA of 1996. *See Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018) (holding that Congress "presumptively was aware of the longstanding judicial interpretation of the phrase [included in a newly enacted statute] and intended for it to retain its established meaning"). It follows, based on the arguments and authorities before the court at this juncture, that Cook County and ICIRR are likely to prevail on the merits of their challenge to the Final Rule.

II. Adequacy of Legal Remedies and Irreparable Harm

Although a party seeking a preliminary injunction must show "more than a mere possibility of harm," the harm need not "actually occur before injunctive relief is warranted" or "be certain to occur before a court may grant relief on the merits." *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044-45 (7th Cir. 2017). "Rather, harm is considered irreparable if it cannot be prevented or fully rectified by the final judgment after trial." *Ibid.* (internal quotation marks omitted).

The final relief potentially available to Cook County and ICIRR is circumscribed by the APA's limited waiver of sovereign immunity: it waives the sovereign immunity of the United States only to the extent that the suit "seek[s] relief other than money damages." 5 U.S.C. § 702. Thus, if Cook County and ICIRR show that, in the absence of a preliminary injunction, they will suffer injury that would ordinarily be redressed by money damages, that will suffice to show irreparable harm, as "there is no adequate remedy at law" to rectify that injury. *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015).

Cook County and ICIRR have made the required showing. As set forth in the discussion of standing, Cook County has shown that the Rule will cause immigrants to disenroll from, or refrain from enrolling in, medical benefits, in turn leading them to forgo routine treatment and rely on more costly, uncompensated emergency care from CCH. Doc. 27-1 at pp. 330-333, 335-337, ¶¶ 25, 30-32, 41-50; *id.* at pp. 344-345, ¶¶ 19-20, 23. In addition, because uninsured persons who forgo public medical benefits are less likely to receive immunizations or to seek diagnostic testing, the Rule increases the entire County's risk of vaccine-preventable and other communicable diseases. *Id.* at pp. 329-330, 333, ¶¶ 20-21, 33; *id.* at pp. 358-359, ¶¶ 29, 32. And as also shown above, ICIRR will have to divert resources away from its existing programs to respond to the effects of the Final Rule. *Id.* at pp. 343-347, ¶¶ 16, 18, 23-31. Given the

unavailability of money damages, those injuries are irreparable, satisfying the adequacy of legal remedies and irreparable harm requirements of the preliminary injunction standard.

III. Balance of Harms and Public Interest

In balancing the harms, "the court weighs the irreparable harm that the moving party would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief." *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018) (internal quotation marks omitted). As discussed above, Cook County and ICIRR have shown that the Final Rule is likely to impose on them both financial and programmatic consequences for which there is no effective remedy at law. On the other side of the balance, DHS asserts that it has "a substantial interest in administering the national immigration system, a *solely federal* prerogative, according to the expert guidance of the responsible agencies as contained in their regulations, and that the Defendants will be harmed by an impediment to doing so." Doc. 73 at 54. A temporary delay in implementing the Rule undoubtedly would impose some harm on DHS. But absent any explanation of the practical consequences of the delay and whether those consequences are irreparable, it is clear—at least on the present record—that the balance of harms favors Cook County and ICIRR.

As for the public interest, DHS makes no argument beyond the public interest in its unimpeded administration of national immigration policy. *Id*. at 54-55. But at the same time, "[t]here is generally no public 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). Given the court's holding that Cook County and ICIRR are likely to succeed on the merits of their challenge to the Final Rule, given that the balance of harms otherwise favors preliminary relief, and bearing in mind the

public health risks to Cook County if the Final Rule were allowed to take effect, entry of a preliminary injunction satisfies the public interest.

DHS raises two other equitable points. First, it argues that an ongoing challenge to the Final Rule in the Eastern District of Washington in which the State of Illinois is a party, and in which the court last Friday granted a preliminary injunction, *see Washington v. U.S. Dep't of Homeland Sec.*, No. 19-5210 (E.D. Wash. Oct. 11, 2019), ECF No. 162, renders this case duplicative. Doc. 73 at 52-53. Relatedly, DHS contends that the Eastern District of Washington's injunction, as well as a nationwide preliminary injunction issued last Friday by the Southern District of New York, *see New York v. U.S. Dep't of Homeland Sec.*, __ F. Supp. __, 2019 WL 5100372, at *8 (S.D.N.Y. Oct. 11, 2019), renders moot this court's consideration of the present motion. Doc. 82. While recognizing the federal courts' general aversion to duplicative litigation, *see Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223-24 (7th Cir. 1993), the court concludes that the pendency of those other cases and the preliminary injunction orders entered therein do not moot the present motion or otherwise counsel against its consideration.

Neither the parties nor this court have any power over or knowledge of whether and, if so, when those two preliminary injunctions will be lifted or modified. Even a temporary lag between the lifting of both injunctions and the entry of a preliminary injunction by this court would entail some irreparable harm to Cook County and ICIRR. Indeed, the federal government in other litigation earlier this year maintained, correctly, that "[t]he possibility that [a nationwide] injunction may not persist is sufficient reason to conclude that … appeal" of an injunction entered elsewhere was "not moot." Supplemental Brief for the Federal Appellants at 152, *California v. U.S. Dep't of Health and Human Servs.*, No. 19-15072 (9th Cir. May 20, 2019), ECF No. 152.

Second, DHS argues that Cook County and ICIRR's "[l]ack of diligence, standing alone," is sufficient to "preclude the granting of preliminary injunctive relief." Doc. 73 at 53 (quoting *Majorica, S.A. v. R.H. Macy*, 762 F.2d 7, 8 (7th Cir. 1982)). Cook County and ICIRR's delay in bringing this suit relative to when the New York and Washington suits were brought, while not trivial, is not sufficiently severe to justify denying them equitable relief, particularly because any delay "goes primarily to the issue of irreparable harm," which they have otherwise amply established. *See Majorica*, 762 F.2d at 8. In any event, because DHS was already preparing substantially similar briefs in the other cases challenging the Final Rule, the effect of the delay on its ability to contest the present motion was minimal.

Finally, DHS asks that any preliminary injunction be limited "to Cook County and specific individual members of ICIRR." Doc. 73 at 55. But because the record shows that ICIRR "represent[s] nearly 100 nonprofit organizations and social and health service providers *throughout Illinois*," Doc. 27-1 at p. 341, ¶ 5 (emphasis added), it is appropriate for the preliminary injunction to cover the entire State.

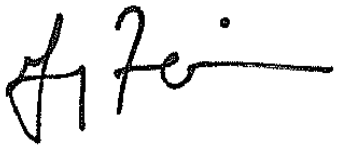
Conclusion

The parties (to a lesser extent) and their *amici* (to a greater extent) appeal to various public policy concerns in urging the court to rule their way. To be sure, this case has important policy implications, and the competing policy views held by parties and their *amici* are entitled to great respect. But let there be no mistake: The court's decision today rests not one bit on policy. The decision reflects no view whatsoever of whether the Final Rule is consistent or inconsistent with the American Dream, or whether it distorts or remains faithful to the Emma Lazarus poem inscribed on the Statue of Liberty. *Compare New York*, 2019 WL 5100372, at *8 (asserting that the Final Rule "is repugnant to the American Dream of the opportunity for

prosperity and success through hard work and upward mobility"), *with* Jason Silverstein, "Trump's top immigration official reworks the words on the Statue of Liberty," CBS News (Aug. 14, 2019, 4:25 AM), http://www.cbsnews.com/news/statue-of-liberty-poem-emma-lazarus-quote-changed-trump-immigration-official-ken-cuccinelli-after-public-charge-law (quoting the acting director of the Citizenship and Immigration Services suggesting in defense of the Final Rule that the Lazarus poem conveys this message: "Give me your tired and your poor who can stand on their own two feet, and who will not become a public charge."). The court certainly takes no position on whether, as DHS suggests, the Old Testament sheds light on the historical backdrop of Congress's enactment of the 1882 Act. Doc. 73 at 28 (citing *Deuteronomy* 15:7-15:8).

Today's decision, rather, rests exclusively on a dry and arguably bloodless examination of the authorities that precedent requires courts to examine—and the deployment of the legal tools that precedent requires courts to use—when deciding whether executive action complies with a federal statute. *See SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1357-58 (2018) ("Each side offers plausible reasons why its approach might make for the more efficient policy. But who should win that debate isn't our call to make. Policy arguments are properly addressed to Congress, not this Court. It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed."). And having undertaken that examination with the appropriate legal tools, the court holds that Cook County and ICIRR are likely to succeed on the merits of their challenge to the Final Rule, that the other requirements for preliminary injunctive

relief are met, and that the Final Rule shall not be implemented or enforced in the State of Illinois absent further order of court.



October 14, 2019

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COOK COUNTY, ILLINOIS, an Illinois governmental entity, and ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC.,	)	19 C 6334
Plaintiffs,	)	Judge Gary Feinerman
vs.	)	
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 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.	)	

PRELIMINARY INJUNCTION AND STAY

Having considered the parties' written submissions and oral arguments, and pursuant to Civil Rule 65 and 5 U.S.C. § 705, the court grants Plaintiffs' emergency motion for temporary restraining order and/or preliminary injunction or stay (Doc. 24).

The court finds and holds as follows:

1. Plaintiffs have Article III standing and their suit is ripe.

2. Plaintiffs are likely to succeed on the merits of their claim that the Department of Homeland Security's ("DHS") final rule, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pt. 103, 212-14, 245, 248), referred to herein as the "Final Rule," is unlawful.

3. Plaintiffs have no adequate remedy at law and will suffer irreparable harm if the Final Rule is not preliminarily enjoined and stayed.

4. The balance of harms and the public interest favor the grant of a preliminary injunction and a stay.

Accordingly, the court orders as follows:

1. Defendants Kevin K. McAleenan in his official capacity, the Department of Homeland Security, Kenneth T. Cuccinelli II in his official capacity, and U.S. Citizenship and Immigration Services, along with their officers, agents, servants, employees, and attorneys, and any person in active concert or participation with them, are enjoined and restrained from implementing or enforcing the Final Rule in the State of Illinois absent further order of court.

2. Implementation of the Final Rule is stayed within the State of Illinois absent further order of court.

3. Plaintiffs are not required to give security in the form of a bond or otherwise.

October 14, 2019

United States District Judge