No. 19A785

In the Supreme Court of the United States

U.S. DEP'T OF HOMELAND SECURITY, *ET. AL.*,
Applicants,

v.

STATE OF NEW YORK, *ET AL.*,
Respondents.

U.S. DEP'T OF HOMELAND SECURITY, *ET. AL.*,
Applicants,

v.

MAKE THE ROAD NEW YORK, *ET AL.*,
Respondents.

On Application for a Stay of the Injunctions Issued by the United States District Court for the Southern District of New York

To the Honorable Ruth Bader Ginsburg, Associate Justice of the United States and Circuit Justice for the Second Circuit

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF, MOTION FOR LEAVE TO FILE BRIEF IN COMPLIANCE WITH RULE 33.2, *AMICUS CURIAE* BRIEF OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPLICANTS

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Movant Immigration Reform Law Institute ("IRLI") respectfully seeks leave to file the accompanying brief as *amicus curiae* in support of the application to stay the injunctive relief entered by the district court in these matters.* The federal applicants consented to the filing of the *amicus* brief, and the private and state-local respondent groups each stated that they "take no position" on the motion for leave to file.

* Consistent with FED. R. APP. P. 29(a)(4)(E) and this Court's Rule 37.6, counsel for movant and *amicus curiae* authored these motions and brief in whole, and no counsel for a party authored the motions and brief in whole or in part, nor did any person or entity, other than the movant/*amicus* and its counsel, make a monetary contribution to preparation or submission of the motions and brief.

IDENTITY AND INTERESTS OF MOVANT

IRLI is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and to reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including *Trump v. Hawaii*, 138 S.Ct. 2392 (2018); *United States v. Texas*, 136 S.Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010). For the foregoing reasons, IRLI has significant interests in the issues before this Court.

REASONS TO GRANT LEAVE TO FILE

By analogy to this Court's Rule 37.2(b), movant respectfully seeks leave to file the accompanying *amicus curiae* brief in support of the stay applicants. Movant respectfully submits that its proffered *amicus* brief brings several relevant matters to the Court's attention, complementing the Government's arguments on the issues that the application raises:

- **Lack of direct injury for equity action**. In addition to lacking diverted-resources standing and falling outside the relevant zone of interests, Plaintiffs

also lack the "direct injury" needed to assert an action in equity. *See* IRLI *Amicus* Br. at 10-11.

- **Historical evolution of the public-charge statutes**. IRLI's *amicus* brief analyzes the evolution of the immigration laws' public-charge provisions from the earliest immigration statutes through the present, an analysis that undermines the 1999 "field guidance" agency memorandum on which the respondents and the district court have relied. *See* IRLI *Amicus* Br. at 18-23. Indeed, that historical analysis also includes colonial provisions out of which the federal provisions grew. *Id.* at 19.
- **Irrelevance of 1999 proposed rulemaking**. Because the respondents' and the district court's analyses depend in part on a 1999 notice of proposed rule-making that the agency never finalized, IRLI's *amicus* brief addresses the lack of authority inherent in an aborted rulemaking (*i.e.*, a proposed rule that never became final). *See* IRLI *Amicus* Br. at 24-25 (collecting cases).
- **Administrative-law irrelevance of superseded guidance**. Because the respondents' and the district court's analysis depends in part on a 1999 guidance memorandum that the challenged 2019 final rule expressly supersedes, IRLI's *amicus* brief addresses the requirements that court can and cannot impose on an agency when it revises prior guidance that was exempt from notice-and-comment requirements when initially issued. *See* IRLI *Amicus* Br. at 26-27.

- **Nationwide injunctions**. The *amicus* brief expands on the legal protections that a district court short circuits when issuing an injunction beyond the parties — particularly a nationwide injunction — without invoking the limits posed by the class-action mechanism, the third-party standing doctrine, and *parens patriae* standing. *See* IRLI *Amicus* Br. at 31-33.

These issues are all relevant to deciding the stay application, and movant Immigration Reform Law Institute respectfully submits that filing the brief will aid the Court.

Dated: January 22, 2020

Respectfully submitted,

/s/ Lawrence J. Joseph

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MOTION FOR LEAVE TO FILE UNDER RULE 33.2

Movant Immigration Reform Law Institute ("IRLI") respectfully submits that the Court's rules require those moving or applying to a single Justice to file in 8½-by 11-inch format pursuant to Rule 22.2, as IRLI does here. If Rule 21.2(b)'s requirements for motions to the Court for leave to file an *amicus* brief applied here, however, IRLI would need to file 40 copies in booklet format, even though the Circuit Justice may not refer this matter to the full Court. Due to the expedited briefing schedule, the expense and especially the delay of booklet-format printing, and the rules' ambiguity on the appropriate procedure, IRLI has elected to file pursuant to Rule 22.2. To address the possibility that the Circuit Justice may refer this matter to

the full Court, however, movant files an original plus ten copies, rather than Rule 22.2's required original plus two copies.

Should the Clerk's Office, the Circuit Justice, or the Court so require, IRLI commits to re-filing expeditiously in booklet format. *See* S.Ct. Rule 21.2(c) (Court may direct the re-filing of documents in booklet-format). Movant respectfully requests leave to file the accompanying brief as *amicus curiae* — at least initially — in 8½-by 11-inch format pursuant to Rules 22 and 33.2, rather than booklet format pursuant to Rule 21.2(b) and 33.1.

For the foregoing reasons, the motion for leave to file in 8½-by 11-inch format should be granted.

Dated: January 22, 2020

Respectfully submitted,

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AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANTS

Amicus Curiae Immigration Reform Law Institute ("IRLI") respectfully submits that the Circuit Justice — or the full Court, if this matter is referred to the full Court — should stay the injunctive relief that the district court entered in these related actions until the federal applicants timely file and this Court duly resolves a petition for a writ of *certiorari.* Alternatively, because jurisdiction is lacking here, the Court could notice that defect and remand with instructions to dismiss. IRLI's interests are set out in the accompanying motion for leave to file.

INTRODUCTION

In 2018, the U.S. Department of Homeland Security ("DHS") issued a notice of

proposed rulemaking ("NPRM"), *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114 (Oct. 10, 2018), to set DHS policy on the "public charge" provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 ("INA"). Ten months later, DHS promulgated the final rule. *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (hereinafter, the "Rule"). The Rule guides determinations of whether an alien applying to enter or remain in the United States is "likely at any time to become a public charge" under the INA. *See* 8 U.S.C. § 1182(a)(4). In doing so, the Rule requires, *inter alia*, examination of an alien's use of certain public benefits. In two separate actions in the U.S. District Court for the Southern District of New York, several states, the City of New York, and various public-interest groups (hereinafter, collectively the "Plaintiffs") challenged the Rule and sought a preliminary injunction, which the district court granted in two overlapping decisions. The Government appealed in both cases, and those appeals are pending. In addition, the Government mode a motion to stay the preliminary injunctions that the Second Circuit denied. In this proceeding, the defendants-appellants (hereinafter, the "Government" or "DHS") applied to stay the two injunctions while the cases are on appeal, with an Addendum ("Add.") containing the relevant lower-court actions.

STANDARD OF REVIEW

A stay pending the timely filing and ultimate resolution of a petition for a writ of *certiorari* is appropriate when there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant *certiorari*; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay."

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010). For "close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

SUMMARY OF ARGUMENT

Amicus IRLI concurs with the Government's jurisdiction analysis and adds that Plaintiffs lack the type of "direct injury" needed to invoke equity, as distinct from the Article III and prudential standing that Plaintiffs need under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"). Of course, if Plaintiffs lack jurisdiction, they are unlikely to prevail on the merits.

Apart from standing, the district court erred by relying on congressional inaction and a now-superseded guidance memorandum by the former Immigration and Naturalization Service ("INS") to define the scope of the INA's "public charge" grounds for exclusion. The real definition is found in the term's plain meaning and the history of amendments over time. But the district court looked elsewhere. It considered two non-events to define the term "public charge": (1) Congress's inaction on statutory language in 1996 and 2013; and (2) the INS's inaction on a 1999 rulemaking. In both instances, the government declined to adopt or alter a definition of "public charge."

Congress's and the former INS's declensions are not authoritative. Instead, the plain meaning of "public charge" controls. Congress's actual statutory language is authority superior to Congress's debates over hypothetical statutory language that was never formalized into an enacted bill. And DHS's actual rulemaking is authority superior to the former INS's proposed 1999 rulemaking, which did not complete

notice-and-comment rulemaking under the APA. Past inaction toward defining "public charge" is not evidence of the term's meaning, but merely the absence of such evidence. In short, the district court's endowment of past inaction with undue legal authority and its disregard of the plain meaning and statutory context of "public charge" further show that Plaintiffs are unlikely to prevail on the merits.

Even if this Court finds jurisdiction and an entitlement to a preliminary injunction, the Court should narrow the injunctions' overbroad scope. Basing a nationwide injunction on so slender a reed as the district court's opinion violates the limits on facial challenges and class actions that protect defendants, such as class certification requirements and this Court's limitations on third-party and *parens patriae* standing. This type of overbroad injunction, moreover, effectively denies the Court the opportunity for multiple circuits to address the merits, an impact that is heightened here by the fact that two circuits reached the opposite conclusion on a stay. *See* Appl. at15.

ARGUMENT

I. THE COURTS BELOW LACKED JURISDICTION.

Before reaching the merits, this Court — or the Circuit Justice — first must establish the lower courts' jurisdiction. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). Without jurisdiction, Plaintiffs are unlikely to prevail.

DHS's arguments on the zone-of-interests test for all Plaintiffs and the lack of diverted-resource standing for the non-governmental Plaintiffs need no support. In addition, Plaintiffs lack jurisdiction for a suit in equity. To sue in equity, Plaintiffs need more than an injury that would — or at least *could* — suffice to confer standing

under the APA. Instead, an equity plaintiff or petitioner must invoke a statutory or constitutional right for equity to enforce, such as life, liberty, or property under the Due Process Clause or equal protection under the Equal Protection Clause or its federal equivalent in the Fifth Amendment. *See*, *e.g.*, *United States v. Lee*, 106 U.S. 196, 220-21 (1882) (property); *Ex parte Young*, 209 U.S. 123, 149 (1908) (property); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (liberty); *cf. Wadley S. R. Co. v. Georgia*, 235 U.S. 651, 661 (1915) ("any party affected by [government] action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution"). Plaintiffs' claimed injuries here fall short of what equity requires.

Unlike the APA review and this Court's liberal modern interpretation of Article III, pre-APA equity review requires "direct injury," which means "a wrong which directly results in the violation of a legal right." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). Without that elevated level of direct injury, there is no review:

> It is an ancient maxim, that a damage to one, without an injury in this sense, (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained.

Id. (alterations, citations, and interior quotation marks omitted). In short, Plaintiffs do not have an action in equity, even assuming *arguendo* they have an APA action.

II. THE GOVERNMENT IS LIKELY TO PREVAIL ON THE MERITS.

In order to warrant a stay, there must be a "fair prospect" of the Government's prevailing. *Hollingsworth*, 558 U.S. at 190. As explained in the prior subsection, the Government is likely to prevail because federal courts lack jurisdiction over Plaintiffs' claims. *See* Section I, *supra*. As explained in this subsection, the Government likely will prevail on the merits, assuming *arguendo* that federal jurisdiction existed.

A. DHS is likely to prevail because the Rule permissibly construes "public charge."

The district court's dispute with DHS's interpretation of "public charge" not only relies on congressional inaction — which is an insufficient basis here to infer congressional intent — but also fails to credit the actual congressional intent implicit in the relevant statutes' plain meaning and the historical development of those statutes. In short, the Rule is a permissible construction of "public charge" according to the term's plain meaning, statutory construction, and history.

1. The district court erred by using congressional inaction to depart from the statute's plain meaning.

The plain meaning of "public charge" controls the term's interpretation. "The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (internal quotation marks omitted). "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). The plain, ordinary, and natural meaning of "public charge" is "one who produces a money charge upon, or an expense to, the

public for support and care." Appl. at 24 (quoting *Public Charge*, Black's Law Dictionary (3d ed. 1933); Black's Law Dictionary (4th ed. 1951)).

Here, instead of interpreting "public charge" — which Congress did not define in the governing statute, 8 U.S.C. § 1182(a)(4)(A) — according to its plain meaning, the district court purported to interpret the term according to Congress's intent later. Yet, in this attempt at interpretation, the district court drew inferences from Congress's inaction rather than from Congress's statutes. "For example, during the 1996 debate over IIRIRA [Illegal Immigration Reform and Immigrant Responsibility Act of 1996], several members of Congress tried and failed to extend the meaning of public charge to include the use of non-cash benefits." Add. 13a, 39a. "Congress rejected similar efforts in 2013 because of its 'strict benefit restrictions and requirements.'" Add. 14a, 39a. But "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001); *see also* Section II.B.3, *infra*. Failed legislative proposals are not evidence of statutory meaning, but rather the absence of such evidence.

The district court's deference to Congress's inaction was erroneous. Rather than sifting Congress's inaction for meaning, the district court should have read the term "public charge" according to its plain meaning, which is not "demonstrably at odds with the intentions of its drafters," *Ron Pair Enters.*, 489 U.S. at 242, and so controls.

2. The Rule is consistent with statutory language construing "public charge."

If the district court found the plain meaning of "public charge" to be ambiguous, then that court should have resolved the ambiguity by reference to Congress's finding of "a compelling government interest to enact new rules … to assure that aliens be self-reliant," 8 U.S.C. § 1601(5), as required by the Personal Responsibility and Work Opportunity Act of 1996, PUB. L. NO. 104-193, 110 Stat. 2105 (1996) ("PRWORA" or "Welfare Reform Act"). Self-reliance, like public charge, is self-explanatory. A person who uses need-based public benefits is not self-reliant or self-sufficient. By definition, that person relies upon public benefits — or else exploits them gratuitously.

Ironically, the district court conceded as much while still insisting that DHS failed to provide a "reasonable explanation" for the Rule. "Receipt of a benefit, however, does not necessarily indicate that the individual is unable to support herself." Add. 40a. "One could envision, for example, a scenario where an individual is fully capable of supporting herself without government assistance but elects to accept a benefit, such as public housing, simply because she is entitled to it." Add. 15a, 41a. Indeed, some aliens do exploit need-based programs even though they are "fully capable of supporting themselves without government assistance." But it would be irrational to encourage this phenomenon instead of discouraging it, as the Rule does.

In any case, Congress unambiguously expressed its intent to reduce aliens' consumption of public benefits. "[S]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," so "aliens

… [should] not depend on public resources to meet their needs," and "current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable" of solving the problem that "aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates." 8 U.S.C. § 1601.

Not for nothing, the final Rule notice refers to self-sufficiency more than 400 times. *See* 84 Fed. Reg. at 41,292-41,507. "Congress has directly spoken to the precise question at issue," and "the court … must give effect to the unambiguously expressed intent of Congress," just as DHS did when issuing the Rule. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Congress's express policy that aliens "not depend on public resources to meet their needs" cannot be read to protect an alien's use of such resources "simply because she is entitled to it." For the district court, a rule allowing aliens to receive public benefits is a permissible construction of "public charge" inadmissibility because need-based public benefits can be consumed by aliens who do not actually need these benefits. Such a rule would abolish the congressional mandate, not implement it.

Just as the district court's reading of self-sufficiency contradicts the term's plain meaning and statutory construction, so does the district court's reading of the "education and skills" public-charge factor. "IIRIRA provides that in assessing whether an applicant is likely to fall within the definition of public charge, DHS should, 'at a minimum,' take into account the applicant's age; health; family status; assets; resources; and financial status; and education and skills." Add. 27a (citing 8

U.S.C. § 1182(a)(4)(B)(i)). Accordingly, DHS added English proficiency as an "education and skills" factor, citing "the 'correlation between a lack of English skills and public benefit usage, lower incomes, and lower rates of employment.'" Add. 17a.

But the district court found "[it] is simply offensive to contend that English proficiency is a valid predictor of self-sufficiency," because "[t]he United States of America has no official language" and "one can certainly be a productive and self-sufficient citizen without knowing *any* English." Add. 17a, 42a. Even if DHS had not explained *why* English proficiency is among the most fundamental of any "education and skills" in the United States, this Court may take judicial notice — as the district court should have — of the fact that English is the *lingua franca* of the United States, and is therefore enormously consequential to a person's self-sufficiency. English is even a compulsory subject within the American educational system, comprising two-thirds of the three R's: Reading, Writing, and 'Rithmetic. *E.g. Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 633 (7th Cir. 2010) (Easterbrook, C.J.). ("Because English has become the international lingua franca, it is unsurprising that most Americans, even when otherwise educated, make little investment in acquiring even a reading knowledge of a foreign language.").

While the district judge clearly was unhappy with the policy underlying the Rule, *see* Add. 17a, "policy arguments are more properly addressed to legislators or administrators, not to judges." *Chevron*, 467 U.S. at 864. Justification for the district court's opinion, just as for the Rule, must be found in Congress's statutes. And there the latter can be found: the exclusion of public charges is a statutory requirement.

Congress legislated the exclusion of any alien who "is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). Any implementation of Congress's statute will necessarily be a "policy of exclusion" against which the district court may raise no legitimate objections.

Tellingly, the district court's attitude toward the Rule suggests that the district court would reject *any new* implementation of the statute through agency rulemaking. The district court complains that "'public charge' has *never* been understood to mean receipt of 12 months of benefits within a 36-month period. Defendants admit that this is a 'new definition' under the Rule." Add. 13a, 38a. That observation — while false[1] — does not cut against the Rule, but against agency rulemaking itself. "[W]here an agency action changes prior policy, the agency need not [even] demonstrate 'that the reasons for the new policy are *better* than the reasons for the old one.'" Add. 14a (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2008)); Add. 40a (same). The test is whether a new policy permissibly construes a statute, not whether the policy had verbatim precedent in a prior administration or court.

The district court finds the Rule "repugnant to the American Dream of the opportunity for prosperity and success through hard work and upward mobility," Add. 17a, 43a, while implying that the American Dream is properly exemplified in the

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[1] For example, in *Ex parte Fragoso*, 11 F.2d 988, 989 (S.D. Cal. 1926), the court denied a writ of *habeas corpus* to an alien seeking to evade deportation after nine months as a public charge. This is but one example of many to show that the district judge's above-quoted statement is simply wrong.

alien who "elects to accept a benefit, such as public housing, simply because she is entitled to it." Add. 15a. To many, the concept of the American Dream involves a greater degree of self-reliance, consistent with the INA's excluding aliens based on a likelihood of their becoming public charges. But whoever is right about the American Dream in the abstract, the issue here is one of statutory construction and permissible agency interpretations. The district court's reading of the public charge rule is inconsistent with the plain meaning and statutory construction of the term, and the Rule is consistent with both. The district judge's idiosyncratic concept of the American Dream does not empower him to replace DHS's accurate reading with his own inaccurate one.[2]

3. The Rule is consistent with the historical meaning of "public charge."

If the district court wanted to search elsewhere than Congress's repeated insistence upon alien self-sufficiency in the Welfare Reform Act, it should have explored actual legislative precedent instead of citing failed legislative proposals. For more than two centuries, the public charge rule's drafters expressly intended it to exclude aliens who burden the public for support and care. Congress did not abolish this history when it declined to adopt new legislation in 1996 and 2013. *See* Section

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[2] By analogy, "extending constitutional protection to an asserted right or liberty interest" requires "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [federal judiciary]." *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997). If courts cannot rely on the Due Process Clause to legislate beyond "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," *id.*, they certainly cannot rely on their interpretation of the "American Dream."

II.B.3, *infra*.

The public charge rule is a simple, commonsense principle that even predates the first federal immigration statutes. "Strong sentiments opposing the immigration of paupers developed in this country long before the advent of federal immigration controls." 5 Gordon *et al.*, *Immigration Law and Procedure*, § 63.05[2] (Rel. 164 2018). America has excluded public-charge aliens since before the United States was founded and has consistently applied this principle across a wide range of categories. "American colonists were especially reluctant to extend a welcome to impoverished foreigners[.] Many colonies protected themselves against public charges through such measures as mandatory reporting of ship passengers, immigrant screening and exclusion upon arrival of designated 'undesirables,' and requiring bonds for potential public charges." JAMES R. EDWARDS, JR., PUBLIC CHARGE DOCTRINE: A FUNDAMENTAL PRINCIPLE OF AMERICAN IMMIGRATION POLICY 2 (Center for Immigration Studies 2001) (citing E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965 (Univ. of Penn. Press, 1981))[3]. About two hundred years later, this became the main purpose of the very first federal statutory immigration exclusion. *See* Act of March 3, 1875, § 5, 18 Stat. 477 (excluding convicts and sex workers, thought likely to become dependent on the public coffers for support).

Exclusion and deportation statutes using the term "public charge" have been on the books for over 137 years, ever since the first comprehensive federal

[3] *Available at* https://cis.org/sites/cis.org/files/articles/2001/back701.pdf (last visited Jan. 22, 2020).

immigration law included a bar against the admission of "any person unable to take care of himself or herself without becoming a public charge." Immigration Act of 1882, § 2, 22 Stat. 214. Congress continued to expand its exclusion of aliens who were public charges through the Progressive Era. *See*, *e.g.*, Act of March 3, 1891, § 1, 26 Stat. 1084 (excluding "paupers"); Act of March 3, 1903, § 2, 32 Stat. 1213, 1214 (excluding "professional beggars"); Act of February 5, 1917, § 3, 39 Stat. 874, 875 (excluding "vagrants").

Acceptance of a bond promising, in consideration for an alien's admission, that he will not become a public charge was authorized in 1903, reflecting earlier administrative practice. Act of March 3, 1903, § 26; 32 Stat. 1213, 1220. The essential elements of the current immigration bond provision, § 213 of the INA, have been in the law since 1907. *Compare* Act of February 20, 1907, § 26, 34 Stat. 898, 907 *with* 8 U.S.C. § 1183.

By 1990, the INA contained three separate exclusion grounds, which barred aliens who: (a) suffered from a disease or condition that affected their ability to earn a living; (b) were "paupers, professional beggars, [or] vagrants"; or (c) were "likely to become a public charge." 8 U.S.C. §1182(a)(7), (a)(8), (a)(15) (1988) (former INA § 212(a)(7), (a)(8), and (a)(15)). The Immigration Act of 1990 removed the first and second as their own discrete categories (that is, it collapsed them into the "public charge" ground). *See* PUB. L. NO. 101-649, § 601(a), 104 Stat. 4978, 5067-75 (1990). By classifying economic undesirability, indigence, and disability under the remaining public charge ground, Congress intended to improve enforcement efficiency by

eliminating obsolete terminology. Gordon, *supra* at § 63.05[4].

Public discontent over aliens' increasing use of public benefits and welfare programs culminated in passage of the Welfare Reform Act. The Welfare Reform Act enacted definitive statements of national policy regarding non-citizen access to taxpayer-funded resources and benefits. There, Congress determined that "[a]liens generally should not depend on public resources to meet their needs," and that "the availability of public benefits should not constitute an incentive for immigration to the United States." *See* 8 U.S.C. § 1601(2).

Congress has identified exclusion of aliens from public benefits programs as a "compelling government interest":

> 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.

8 U.S.C. § 1601(5). Consistent with this unambiguous policy, the Welfare Reform Act defined "state or local public benefits" in very broad terms. 8 U.S.C. § 1621(c).

While the Act allowed both qualified and non-qualified aliens to receive certain benefits, such as emergency benefits (all aliens) and the Supplemental Nutrition Assistance Program (qualified alien children), Congress did *not* exempt receipt of such benefits from consideration for INA § 212(a)(4) public charge purposes. "This change in law is intended to insure that the affidavits of support are legally binding and sponsors — rather than taxpayers — are responsible for providing emergency financial assistance during the entire period between an alien's entry into the United States and the date upon which the alien becomes a U.S. citizen." Report of Comm.

on Economic and Educational Opportunities, H.R. REP. NO. 104-75, at 46 (1995) (Conf. Rep.).

Later, Congress also enacted the Illegal Immigration Reform and Immigrant Responsibility Act, PUB. L. NO. 104-208, §505(a), 110 Stat. 3009, 3009-672 (1996) ("IIRIRA"). IIRIRA codified the five minimum factors that must be considered when making public charge determinations, 8 U.S.C. § 1182(a)(4)(B), and authorized consular and immigration officers to consider an enforceable affidavit of support as a sixth admissibility factor, making it a mandatory factor for most family-based immigration. 8 U.S.C. §§ 1182(a)(4)(C), 1183A.

IIRIRA's legislative history states that these amendments were designed to further expand the scope of the public charge ground for inadmissibility. H.R. REP. NO. 104-828, at 240-41 (1996) (Conf. Rep.). This intent was behind Congress's mandate to consider *both* receipt of past benefits or dependence on public funds *and* the prospective likelihood that such dependence would occur. To comply with the Welfare Reform Act, the Department of State developed a Public Charge Lookout System ("PCLS") to identify and seek repayment of Medicaid benefits consumed during prior visits to the United States. The State Department used this system to identify prior Medicaid and Aid to Families with Dependent Children payments to immigrant visa applicants for use in public charge determinations.

Significantly, the PCLS did not distinguish between cash support benefits such as Supplemental Security Income ("SSI") and Temporary Assistance for Needy Families ("TANF"), versus non-cash benefits such as Medicaid. At the encouragement

of the State Department, ten states were reported to have executed formal memoranda of understanding with consular posts regarding exchange of both cash and non-cash public benefits for public charge determination uses. Reported benefits typically included non-emergency Medicaid-covered benefits such as prenatal and childbirth expenses. *Affidavits of Support and Sponsorship Regulations: A Practitioners Guide*, (CLINIC June 1999) (citing Department of State Cable No. 97-State-196108 (May 27, 1997)).

The PCLS was never restrained by the courts. It operated effectively until late 1997. But, under pressure from the "FIX 96" campaign by interest groups seeking to roll back IIRIRA enforcement, the Department of Health and Human Services ("HHS") and other agencies terminated cooperative reporting agreements with consular officers and INS inspection and adjudication personnel. *See* Department of State Cable No. 97-State-228462 (Dec. 6, 1997); Letters from HHS to state Medicaid and TANF directors (Dec. 17, 1997); Memorandum from Paul Virtue, INS Associate Commissioner for Programs (Dec. 17, 1997).[4]

B. INS's 1999 Field Guidance in no way impairs DHS's likelihood of prevailing on the 2019 Rule.

Just as the district court erroneously imbued Congress's inaction with interpretive authority, it also erroneously vested the inaction of a rulemaking agency

[4] IRLI cited these documents in an amicus brief in the district court. *New York v. United States Dep't of Homeland Security*, No. 1:19-cv-07777-GBD (S.D.N.Y.) (ECF #100-2); *Make the Road New York v. Cuccinelli*, No. 1:19-cv-07993-GBD (S.D.N.Y.) (ECF #132-1).

with such power. In 1999, the INS issued an NPRM to define "public charge" for INS purposes. *Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,676 (May 26, 1999). On the same day, in conjunction with that NPRM, the INS also published an intra-agency guidance memorandum as "field guidance." *Field Guidance on Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,689 (May 26, 1999) (the "1999 Field Guidance"). The INS never completed the NPRM's rulemaking to define "public charge," but the field guidance appears to have remained in place until DHS issued its final rule. 84 Fed. Reg. at 41,292 (superseding 1999 Field Guidance).

Notwithstanding that modest regulatory background for the 1999 Field Guidance, the district court treated that non-rule as equivalent to an act of Congress and authority superior to DHS's *actual* Rule. The district court claimed that the 1999 Field Guidance "formally codified this definition" of "public charge," Add. 12a, even though an executive agency cannot "codify" anything: "All legislative powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1. The district court said this codification reigns, even though the 1999 Field Guidance never underwent the APA rulemaking process. "Although the parallel proposed rule was never finalized, the Field Guidance sets forth the current framework for public charge determinations." Add. 27a. Unlike the field guidance, the Rule underwent the APA process and, in doing so, expressly superseded the 1999 Field Guidance. This Court should reject the district court's suggestion that the field guidance is authoritative *vis-à-vis* the Rule.

1. INS's 1999 NPRM is a nullity.

Before addressing the 1999 Field Guidance's relevance as a stand-alone piece of agency guidance, IRLI first rebuts the suggestion that the 1999 notice of proposed rulemaking — of which the field guidance was a part[5] — has any ongoing relevance. Quite simply, an NPRM that never becomes a final rule is a nullity. *NRDC v. Abraham*, 355 F.3d 179, 201 (2d Cir. 2004) (no deference to agency actions that fail to complete the full notice-and-comment process applicable to the relevant rulemaking context[6]); *Tedori v. United States*, 211 F.3d 488, 492 n.13 (9th Cir. 2000) ("any notion of ascribing weight to anything that has remained in the 'proposed regulation' limbo for a like period [of 13 years] is totally unpersuasive"); *Matter of Appletree Markets, Inc.*, 19 F.3d 969, 973 (5th Cir. 1994); *Public Citizen, Inc. v. Shalala*, 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (citing *Public Citizen Health Research Group v. Commissioner, F.D.A.*, 740 F.2d 21, 32-33 (D.C. Cir. 1984)); *Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 829 (10th Cir. 2000). While the 1999 Field Guidance may have had a longer-than-planned run as stand-alone guidance (that is, as merely another agency guidance memorandum), nothing about INS's aborted 1999

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5 The 1999 Field Guidance announced its relationship to the 1999 NPRM as follows: "Before the proposed rule becomes final, the Immigration and Naturalization Service (Service) is publishing its field guidance on public charge issues as an attachment to this notice." 64 Fed. Reg. at 28,689. The 1999 Field Guidance was never intended to stand alone as anything other than interim guidance.

6 The statute in *Abraham* imposed requirements on rulemakings in addition to the APA requirements. *Id.* The core principle is the same: "it ain't over 'til it's over." Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 260 (1991) (quoting Yogi Berra).

rulemaking imbues the 1999 Field Guidance with anything more — under the APA — than an agency guidance document published in the Federal Register.

2. The current rulemaking nullified INS's 1999 Field Guidance.

When viewed independently from INS's aborted 1999 NPRM, the 1999 Field Guidance presumably qualifies as an "interpretative rule[], general statement[] of policy, or rule[] of agency organization, procedure, or practice" that the APA exempts from notice-and-comment requirements. *See* 5 U.S.C. § 553(b)(A). Under the circumstances, the rulemaking challenged here expressly superseded — that is, nullified — the 1999 Field Guidance: "This final rule supersedes the 1999 Interim Field Guidance on Deportability and Inadmissibility on Public Charge Grounds." 84 Fed. Reg. at 41,292. Since federal courts lack authority under the APA to require any more of an agency when it changes prior APA-exempt guidance, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101-02 (2015), the 1999 Field Guidance has no ongoing relevance to this matter unless, as the district court argued, Congress somehow ratified or acquiesced to the 1999 Field Guidance. *See* Section II.B.3, *infra*. Strictly from an APA perspective, however, the 1999 Field Guidance is simply a superseded, sub-regulatory guidance document: a nullity.

To elaborate on APA requirements, it can be a hard case if agency guidance follows an agency rulemaking and appears to change the underlying rule. *Noel v. Chapman*, 508 F.2d 1023, 1029-30 (2d Cir. 1975) (describing the distinction between rules and policy statements as "enshrouded in considerable smog"). Until 2015, it was arguably a hard case whether an interpretive rule modifying a prior interpretive rule

required a rulemaking, even if the initial interpretive rule did not. *But see Perez*, 575 U.S. at 101-02 (resolving that issue). By contrast, it is an easy case when — as here — a final rulemaking superseded a prior guidance document:

> An *initial agency interpretation is not instantly carved in stone*. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

Chevron, 467 U.S. at 863-64 (emphasis added). Indeed, *Chevron* was a slightly harder case because the final rule challenged there reversed a prior final rule. *See* 46 Fed. Reg. 50,766 (Oct. 14, 1981) (the discussion in the Background section explains the final rule that the *Chevron* agency changed). DHS had every right, then, to change the 1999 Field Guidance.

3. Congress did not ratify or acquiesce to INS's 1999 Field Guidance.

The district court claimed that Congress adopted the field guidance — and did so simply through inaction. "Defendants have made no showing that Congress was anything but content with the current definition set forth in the Field Guidance." Add. 13a, 39a. The district court offered two examples to substantiate this theory. First, "during the 1996 debate over IIRIRA, several members of Congress tried and failed to extend the meaning of public charge to include the use of non-cash benefits." *Id.* Second, "Congress rejected similar efforts in 2013." Add. 14a. Both arguments lack merit.

The first argument is absurd. The "1996 debate over IIRIRA" occurred in 1996, and the INS released the 1999 Field Guidance three years later, in 1999. The referenced legislative debate thus predated the field guidance by three years. As such,

Congress obviously cannot be read to have codified the 1999 Field Guidance in 1996.

The second argument is also entirely without merit. Congress did not enact anything pertaining to public charge admissibility in 2013: there is no Act from which to infer congressional acquiescence. "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval[.]" *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (interior quotation marks omitted), *abrogated in part on other grounds*, PUB. L. NO. 102-166, §§ 101-102, 105 Stat. 1071, 1072-74 (1991). In short, the district court appealed solely to congressional inaction on agency inaction, and that provides no authority for the district court's position.

4. To the extent that it remains extant, the 1999 Field Guidance is contrary to the INA and thus provides no support for Plaintiffs.

In any event, whether a rule or a non-rule, the field guidance deviated from the plain and conventional meaning of the term "public charge." The 1999 proposed rulemaking and its accompanying field guidance advanced a novel meaning of public charge as "the likelihood of a foreign national becoming primarily dependent on the government for subsistence, as demonstrated by either: [a] receipt of public cash assistance for income maintenance; or [b] institutionalization for long-term care at government expense." 83 Fed. Reg. at 51,133 (quoting proposed 8 C.F.R. § 212.102 (1999)). Even a cursory comparison with the controlling statutory policies and provisions summarized above, Section II.A.2, *supra*, shows that the 1999 proposal was arbitrary.

This proposed rule was suggested under two controversial theories. First, the

INS claimed the new rule implemented a policy favoring access to non-cash entitlements, particularly health care. The INS policy justification in the 1999 NPRM asserted that the provision of public benefits other than Supplemental Security Income, general relief, and long-term institutionalization to aliens "serve[s] important public interests." 64 Fed. Reg. at 28,676. Yet the INS's claim directly contradicts Congress's statutory policy that aliens should be excluded from eligibility for means-tested benefits, regardless of whether these benefits are "subsistence" or "supplementary" in nature. 8 U.S.C. §§ 1601-1646.

The plain language of the Welfare Reform Act, and the IIRIRA requirement of an enforceable affidavit of support for § 213A alien applicants for admission or adjustment of status, presumptively disqualified immigrant aliens from access to all "means-tested public benefits" for a lengthy period. The Welfare Reform Act did not distinguish between cash versus non-cash benefits or between subsistence versus supplemental benefits. "Federal benefits" denied to non-qualified aliens under the Act included both non-cash and earned benefits such as heath, disability, public housing, food assistance, unemployment benefits, and "any other similar benefit for which payments or assistance are provided … by an agency of the United States." 8 U.S.C. § 1611(c)(1). Other than "qualified aliens," noncitizens were made ineligible for any "means-tested benefit," including food stamps. Only emergency medical care, public health assistance for communicable diseases, and short-term "soup kitchen"-type relief were expected. 8 U.S.C. § 1611(b)(1).

Under IIRIRA, the income and resources of aliens who require an affidavit of

support as a condition of admissibility are deemed to include the income and resources of the sponsor whenever the alien applies or reapplies for any means-tested public benefits program, without regard to whether the benefit is provided in cash, kind, or services, 8 U.S.C. § 1631(a), (c), although certain exceptions apply for battered spouses and children, 8 U.S.C. § 1631(f).

The INS's second theory was that a lack of precedential statutes or cases allowed the INS to define "public charge" narrowly. So, the INS selected one of many dictionary meanings for "charge." This created, administratively, a new substantive legal meaning for the term "public charge." 64 Fed. Reg. at 28,677. For example, the field guidance interpreted its proposed rule to (1) ban consular officers and INS adjudicators from requiring or even suggesting that aliens, as a condition of reentry or adjustment of status to lawful permanent resident, repay any benefits previously received, (2) disregard continued cash payments under the TANF program, on the theory that they are "supplemental assistance" and not "income-maintenance" cash payments, and (3) disregard the receipt of cash income maintenance benefits by a family member unless the payments are the "sole means of support" for that family. 64 Fed. Reg. at 28,689.

This approach violated basic principles of statutory interpretation, which strongly favor the longstanding meaning of "public charge" over the INS's novel definition. Where a term not expressly defined in a federal statute has acquired an accepted meaning elsewhere in law, the term must be accorded that accepted meaning. *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990) ("But where a phrase in a

statute appears to have become a term of art … any attempt to break down the term into its constituent words is not apt to illuminate its meaning."). This is particularly true where an ordinary or natural meaning exists independent of a statutory definition, as was the case in the 1999 proposed rulemaking:

> The term … is not defined in the Act. In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning.

FDIC v. Meyer, 510 U.S. 471, 476 (1994). Indeed, Circuit precedent in relevant litigation over prenatal care for illegal alien women has rejected the argument that there is a "public interest" in obtaining welfare benefits. *Lewis v. Thompson*, 252 F.3d 567, 579-82 (2d Cir. 2001) (finding "a clear congressional intent to deny federally-sponsored prenatal care to unqualified aliens").

III. THE GOVERNMENT WOULD SUCCEED IN NARROWING THE NATIONWIDE ASPECT OF THE DISTRICT COURT'S INJUNCTION

Even if this Court finds the injunctions' *substance* acceptable, the Court should nonetheless narrow the injunctions' *scope* to cover only the parties. Otherwise, a single district court will have set nationwide immigration policy, contrary to the views — so far — of two courts of appeals. *See* Appl. at 15. That alone warrants this Court's narrowing the injunction to avoid application to non-parties.

For practical, jurisprudential, and jurisdictional reasons, "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Nationwide injunctions effectively preclude other circuits from ruling on the enjoined agency action and thus "substantially thwart the development of important questions of law

by freezing the first final decision rendered on a particular legal issue," depriving this Court of the benefit of decisions from several courts of appeals. *United States v. Mendoza*, 464 U.S. 154, 160 (1984). That practical harm is reason enough to reject nationwide relief. If this Court finds Plaintiffs entitled to any relief, this Court should narrow the relief to New York, Vermont, and Connecticut.

Had Plaintiffs purported to represent a class of those similarly situated, the law would require that the protected class indeed be similarly situated. FED. R. CIV. P. 23(a)(1)-(4) (requiring commonality and typicality, as well as numerosity and adequacy of representation). This Court has "repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (interior quotations omitted). Similarly, had Plaintiffs sought to assert standing for absent third parties, the Government could challenge such standing. *See Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004) (outlining parameters for third-party standing, including the impermissibility of asserting it for *future* relationships). On the other hand, to the extent that the governmental Plaintiffs claim to represent the immigrant beneficiaries, those Plaintiffs likely lack *parens patriae* standing against federal officials. *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez,* 458 U.S. 592, 610 n.16 (1982). In sum, there are numerous jurisdictional and prudential problems with nationwide injunctions.

A recent analysis focuses on a smattering of preliminary injunctions starting in 1913 to argue that "the Article III objection to the universal injunction should be

retired." Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924 (2020). *Amicus* IRLI respectfully submits that the assembled examples — some of which were uncontested[7] — did not consider the arguments against nationwide injunctions and, as such, "cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Serv., Inc.,* 543 U.S. 157, 170 (2004) (interior quotation omitted). Put another way, *stare decisis* from a prior decision is inapposite to decide issues a prior court reached by the prior parties' waiver. *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2320 (2016). These arguments apply with special force to the flawed enterprise of inferring jurisdiction from past actions that did not address the jurisdictional issue: *Steel Co.,* 523 U.S. at 91 ("drive-by jurisdictional rulings … have no precedential effect"). Prof. Sohoni's few examples do not directly address the legal arguments against nationwide injunctions — and especially nationwide *preliminary* injunctions — by a single

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[7] *See Journal of Commerce & Commercial Bulletin v. Burleson*, 229 U.S. 600, 601 (1913) (parties agreed to the injunction); *Bd. of Trade v. Clyne*, 260 U.S. 704 (1922) ("ordered by this Court, the defendants not objecting, that the status quo be preserved while this cause is pending in this Court"). The *Burleson* and *Clyne* matters were part of the proceedings in *Lewis Pub. Co. v. Morgan*, 229 U.S. 288 (1913), and *Bd. of Trade v. Olsen*, 262 U.S. 1 (1923), respectively (that is, in two of Prof. Sohoni's three main federal cases).

district court.[8] As statisticians put it, the plural of "anecdote" is not "data."

CONCLUSION

This Court should stay the district court's interim relief, pending the timely filing and resolution of a petition for a writ of *certiorari*. Alternatively, the Court should remand with instructions to dismiss this action.

Dated: January 22, 2020

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[8] In *Hill v. Wallace*, 259 U.S. 44 (1922), the plaintiff sued under former Equity Rule 38 – a predecessor of the current class-action rule – on behalf of its members. *Cf. Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) (standing on behalf of members). In *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940), this Court found that private plaintiffs lack standing to sue the federal government over the government's procurement decisions, a ruling Prof. Sohoni gamely suggests "left intact the propriety of injunctions reaching beyond the plaintiffs as remedies in cases brought by plaintiffs *with* standing." 133 HARV. L. REV. at 926 (emphasis in original). That issue was not presented in *Perkins*, and so *Perkins* did not decide it.

CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing motion for leave to file, motion for leave to file in compliance with Rule 33.2, and the accompanying *amicus* brief are proportionately spaced, have a typeface of Century Schoolbook, 12 points, and contain 4, 2, and 28 pages (and 677, 236, and 7,289 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: January 22, 2020

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 22nd day of January 2020, in addition to filing the foregoing document via the Court's electronic filing system, one true and correct copy of the foregoing document was served by U.S. Mail, postage pre-paid, with a PDF courtesy copy served via electronic mail on the following counsel:

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The undersigned further certifies that, on this 22nd day of January 2020, an original and ten true and correct copies of the foregoing document were served on the Court by hand delivery.

Executed January 22, 2020, at Washington, DC,

/s/ Lawrence J. Joseph

Lawrence J. Joseph