# 19-3591

## United States Court of Appeals for the Second Circuit

STATE OF NEW YORK, CITY OF NEW YORK, STATE OF CONNECTICUT, STATE OF VERMONT,

*Plaintiffs-Appellees*,

v.

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

*Defendants-Appellants*.

On Appeal from the United States District Court
for the Southern District of New York

**BRIEF FOR APPELLEES**

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## PRELIMINARY STATEMENT

Plaintiffs—the States of New York, Connecticut, and Vermont, and the City of New York—challenge a Final Rule by the Department of Homeland Security (DHS) that radically alters the test for evaluating whether an immigrant is likely to become a "public charge" under 8 U.S.C. § 1182(a)(4)(A), and thus be ineligible for a green card. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019). The Rule's vast expansion of "public charge"—to include employed individuals who receive any amount of certain means-tested benefits for brief periods of time—is a stark departure from a more-than-century-long consensus limiting the term to individuals who are primarily dependent on the government for long-term subsistence.

The United States District Court for the Southern District of New York (Daniels, J.) postponed the effective date of the Rule and preliminarily enjoined its enforcement. This Court should affirm.

Pending full adjudication of plaintiffs' claims, the district court properly exercised its discretion to maintain the status quo to prevent disruption and irreparable harms to plaintiffs and the public from immediate implementation of the Final Rule. Defendants have identified

no reason for such precipitous action: they have not claimed that the Rule is needed to address any imminent harm to public safety, national security, or immigration or public-benefits administration. And simply maintaining the existing public-charge framework will not impose any irreparable harms on defendants because defendants admit that this framework is lawful and administrable.

The district court also properly concluded that plaintiffs are likely to succeed on the merits. The Final Rule's unprecedented redefinition of "public charge" is contrary to law because it vastly exceeds the long-established understanding of that term, in conflict with Congress's intent to incorporate this consensus understanding into federal immigration law. "Public charge" has never been understood to target employable immigrants who might use nominal and temporary amounts of public benefits designed to boost economic mobility and public health. The Final Rule's extension of "public charge" to such immigrants far exceeds the bounds of reasonable interpretation.

The Rule's novel multifactor test for assessing whether an immigrant will likely be a public charge is also arbitrary and capricious for multiple reasons. For example, as the district court correctly determined, the Rule

arbitrarily targets temporary use of benefits, and relies on multiple factors that do not rationally predict whether an immigrant will receive public benefits at all, let alone become primarily dependent on the government for long-term subsistence.

Finally, the scope of the preliminary relief ordered below is proper. The district court postponed the effective date of the Rule under 5 U.S.C. § 705, a statutory remedy authorized by the Administrative Procedure Act (APA) that, by its plain terms, allows district courts to delay the effect of a rule as a whole. This case thus does not require the Court to address any general question about the scope of district courts' power to grant nationwide equitable relief, although defendants' arguments on that score are meritless in any event.

## QUESTION PRESENTED

Did the district court properly exercise its discretion in postponing the Rule's effective date and preliminarily enjoining its enforcement when defendants will not suffer any irreparable harm from maintaining the status quo, plaintiffs and the public will be irreparably harmed absent preliminary relief, and the Rule is likely contrary to law and arbitrary and capricious?

## STATEMENT OF THE CASE

### A. Statutory and Regulatory Background

#### 1. The public-charge statute

Under the Immigration and Nationality Act (INA), noncitizens who lawfully entered the country may adjust their status to legal permanent resident (LPR) if they are "admissible." 8 U.S.C. § 1255(a). One of the narrow categories that would render such a noncitizen inadmissible is if he is "likely at any time to become a public charge." *Id.* § 1182(a)(4). DHS[1] makes public-charge determinations for noncitizens who have lawfully entered the country and are thus already living here.[2]

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[1] The Immigration and Naturalization Service (INS), a component of the United States Department of Justice (DOJ), made public-charge determinations for applicants living in the country until March 2003, when its authority was delegated to the United States Customs and Immigration Services, a component of DHS.

[2] DHS may also make public-charge determinations when noncitizens seek to enter the country with an immigrant visa. 8 U.S.C. § 1185(d). Two other agencies also apply the public-charge statute. The Department of State, through consular officers, conducts a public-charge inquiry for individuals seeking to obtain an immigrant visa from abroad. *Id.* §§ 1182(a)(4), 1201(a). And DOJ conducts another public-charge inquiry when it seeks to deport an already admitted LPR who actually becomes a "public charge" within five years of entry from causes that did not arise after entry." *Id.* § 1227(a)(5).

"Public charge" under federal immigration law is a term of art that has developed a settled meaning after more than a century of usage. From its inception, the term never encompassed every individual who receives any public benefit whatsoever, as defendants assert here (*see* Br. for Appellants (Br.) 2, 15, 26-31). Rather, "public charge" has been limited to individuals who do not work and are thus primarily dependent on the government for long-term subsistence—the paradigmatic example being persons requiring life-long institutionalization. Inadmissibility as a "public charge" thus did not extend to recipients of modest or temporary amounts of government benefits designed to promote economic mobility rather than to provide subsistence, or to individuals who were either employed or plainly able to work. To the contrary, both early state laws and ultimately Congress welcomed the admission of such individuals and provided for their public support, recognizing that such immigrants make important contributions to this country and its economy, and that public investment in their well-being and productivity was worthwhile.

This understanding of "public charge" began as early as nineteenth-century state laws that required ship captains to execute bonds to support infirm passengers "likely to become *permanently* a public charge." Ch.

195, § 3, 1847 N.Y. Laws 182, 184 (emphasis added); *see* Ch. 105, § 1, 1850 Mass. Acts 338, 338-39 (requiring bonds for anyone "infirm or destitute, or incompetent to take care of himself or herself[] without becoming a public charge"). Through these public-charge provisions, States sought to guard against European governments purposefully sending into their jurisdictions individuals "physically and mentally incapacitated for labor." Friedrich Kapp, *Immigration, and the Commissioners of Emigration of the State of New York* 91 (1870). But States encouraged "able-bodied and industrious" individuals to immigrate because such individuals contributed "great public benefit" and added "to the durable wealth of the country." *Report of the Commissioners of Alien Passengers and Foreign Paupers* ("*Massachusetts Report*"), Mass. S. Doc. No. 14, at 17 (1852).

To discourage only the former but not the latter class of immigrants, States used the term "public charge" in these statutes to refer solely to "persons utterly unable to maintain themselves." Kapp, *supra*, at 87.[3] The term did not include "courageous and enterprising" immigrants who

[3] *See Smith v. Turner*, 48 U.S. 283, 381 (1849) (Massachusetts's public-charge statute addressed "infirm persons, incompetent to maintain themselves"); *Mayor of New York v. Miln*, 36 U.S. 102, 141 (1837) (New York's public-charge statute addressed individuals lacking "means of supporting themselves").

could work, even if they were quite poor or might receive some form of public assistance. *See id.* at 150. Rather, States not only allowed such employable immigrants to land without any bond, but also provided for their public support—for example, by collecting a per-immigrant tax used in part to help such immigrants find transportation and work.[4] *See Annual Reports of the Commissioners of Emigration of the State of New York* ("*New York Reports*") 135 (1861); *see also* Kapp, *supra*, at 115-17 (labor exchange to help immigrants find work).

In 1882, Congress incorporated this narrow meaning of "public charge" into federal law. To address ongoing concerns about European governments sending unemployable individuals, who would be permanent drains on the public fisc, Congress prohibited any "lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge" from entering the country. Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 214; *see* 13 Cong. Rec. 5108-12 (1882) (Rep. Van Voorhis) (describing European governments' practices). "Public charge" thus adhered to its already settled meaning to refer to the fraction of

[4] *See New York Reports*, *supra*, at 225 (funds advanced on pledges on baggage to assist immigrants "who might otherwise have become the prey of fraud, or have fallen into destitution").

immigrants likely to "become life-long dependents on our public charities." 13 Cong. Rec. 5109 (Rep. Van Voorhis).

Incorporating the same careful balance struck under state law, Congress did not exclude employable immigrants who might be poor or receive any public assistance. As legislators explained, such immigrants, despite their lack of wealth, contributed to the economy and could "become a valuable component part of the body-politic." *Id.* at 5108. And, as the States had, Congress decided not only to admit such immigrants, but also to provide public support for them. In the same statute that incorporated the "public charge" concept into federal law, Congress also directed the collection of a per-person tax "for the support and relief" of immigrants who "may fall into distress or need public aid." §§ 1-2, 22 Stat. at 214. Like the state taxes, this immigration fund was used in part "for protecting and caring for" immigrants from "when they arrive…until they can proceed to other places or obtain occupation for their support." 13 Cong. Rec. 5106 (1882) (Rep. Reagan).

From 1891 to 1951, Congress repeatedly reenacted public-charge provisions substantially similar to the one in the 1882 Act.[5] Throughout, the scope of the term "public charge" remained limited to the small number of individuals who were not just poor but unable to support themselves and were thus likely to depend almost entirely on the government for subsistence. *See Gegiow v. Uhl*, 239 U.S. 3, 10 (1915) ("public charge" means individuals unable to work due to "permanent personal objections"); *Howe v. United States*, 247 F. 292 (2d Cir. 1917) (Congress meant "to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves").[6] "Public charge" did not include immigrants "able to earn [their] own living," *Ex parte Mitchell*, 256 F. 229, 230 (N.D.N.Y. 1919).

Against this background of nearly a century of statutory and regulatory usage of the term "public charge," Congress enacted the INA's

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[5] *See* Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084; Immigration Act of 1907, ch. 1134, § 2, 34 Stat. 898, 898-99; Immigration Act of 1917, ch. 29 § 3, 39 Stat. 874, 876.

[6] *See e.g.*, *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922) (public charge does not include "able-bodied woman" with "disposition to work"); *Lam Fung Yen v. Frick*, 233 F. 393, 396 (6th Cir. 1916) ("public charge" means persons without "permanent means of support, actual or contemplated").

public-charge provision in 1952, providing that immigrants who "are likely at any time to become public charges" are inadmissible. Act of June 27, 1952, Pub. L. No. 414, § 212(a)(15), 66 Stat. 163, 183. Congress understood that "public charge" was a term of art that had been interpreted and applied in court and agency decisions, and prior state and federal laws. But rather than redefining the term or devising a new standard for federal immigration law, Congress instead consciously decided to incorporate "public charge" without modification into the INA. As courts and federal immigration agencies consistently explained after the 1952 enactment, Congress's decision incorporated the well-established meaning of "public charge" into the INA, preserving that term's narrow application to immigrants who were "incapable of earning a livelihood" and thus depended primarily on public support to survive long term, *In re Harutunian*, 14 I.&N. Dec. 583, 589 (B.I.A. 1974), not employable immigrants who might receive modest amounts of public assistance, *In re Martinez-Lopez*, 10 I.&N. Dec. 409, 421-22 (A.G. 1964) ("A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge.").

The basic public-charge provision has remained the same since 1952. In 1996, Congress required DHS to consider certain factors in making public-charge determinations—i.e., an immigrant's age, health, family status, financial resources, and education and skills. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, 3009-674. But Congress did not alter the established meaning of "public charge." To the contrary, Congress rejected a proposal in 1996 that would have altered "public charge" in the deportability context to mean receipt of *any* supplemental benefits within 12 months. H.R. Rep. No. 104-828, at 138, 241 (1996) (Conf. Rep.). And in 2013, Congress rejected a similar attempt to expand the meaning of "public charge" in the admissibility context to encompass using modest amounts of supplemental benefits designed to promote public health and economic mobility. *See* S. Rep. No. 113-40, at 42 (2013). The underlying standard for "public charge" thus remains the term of art that had already developed settled contours after more than a century of usage when Congress decided to incorporate it without modification into the 1952 Act.

### 2. The welfare reform provisions enacted in 1996

Separately, in the Personal Responsibility and Work Opportunity Act of 1996 (Welfare Reform Act or PRWORA), Congress enacted a complex set of statutory provisions directed at noncitizens' use of specific public benefits after they have already entered the country or been admitted as LPRs.

To satisfy a declared "national policy with respect to welfare and immigration" under which "aliens within the Nation's borders not depend on public resources to meet their needs," 8 U.S.C. § 1601(2)(A), the 1996 provisions and subsequent amendments generally prevented LPRs from using certain means-tested benefits, including Medicaid and Supplemental Nutrition Assistance Program (SNAP) benefits, until they had lived here for five years. *Id.* §§ 1612(a)(2)(L), 1613(a). Additional limits on Medicaid and SNAP use apply to the subset of LPRs who have sponsors, until the sponsored immigrant has worked a substantial amount of time or become a citizen. *See id.* §§ 1183a(a)(2), 1631(b). For example, a sponsor's income is attributed to the immigrant for purposes of determining the immigrant's eligibility for Medicaid and SNAP; but this income-deeming rule ceases to apply after the sponsored immigrant becomes a citizen or works forty "qualifying quarters"—i.e., earns enough to qualify for Social Security

coverage during forty quarters.[7] § 1631(a)-(b). These provisions ultimately did not apply to LPRs' use of Section 8 housing benefits, many other federal means-tested public benefits, or a wide array of public benefits that are not means tested.[8] *See id.* §§ 1611(a), (c); 1641(b)(1).

Congress explained that these limits on LPRs' access to benefits promoted "self-sufficiency" and prevented "the availability of public benefits" from incentivizing immigration. § 1601(3), (6). In other words, the Welfare Reform Act's restrictions were intended to ensure that certain public benefits would go to only those immigrants who had proven that they were generally capable of self-sufficiency (because they had either

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[7] In 1996, the amount to qualify was $640 per quarter; today, it is $1,410 per quarter. Social Sec. Admin., *Quarter of Coverage* (internet) (last visited Jan. 24, 2020).

[8] Congress did not define the term "federal means-tested public benefit" for purposes of its benefits-use provisions. *See* 8 U.S.C. § 1613(a); 8 C.F.R. § 213a.1. The benefit-administering agencies have determined that the only federal means-tested public benefits for purposes of the Welfare Reform Act are Supplemental Security Income (SSI), Temporary Assistance for Needy Families, Medicaid, and SNAP. *See* PRWORA: Federal Means-Tested Public Benefits Paid by the SSA, 62 Fed. Reg. 45,284, 45,284-85 (Aug. 26, 1997); PRWORA: Interpretation of "Federal Means-Tested Public Benefit," 62 Fed. Reg. 45,256, 42,257 (Aug. 26, 1997); Food Stamp Program: Noncitizen Eligibility, and Certification Provisions, 65 Fed. Reg. 10,856, 10,876 (Feb. 29, 2000). Certain statutory limits also apply to social services block grants. § 1612(b)(3)(B).

been present for five years without receiving such benefits, or because they had been employed for substantial periods) and had not immigrated for the purpose of receiving those benefits. But after immigrants made such a showing, Congress allowed them to use such benefits to improve their health or economic opportunities, or cope with a short-term emergency. Again, however, Congress did not alter the established meaning of "public charge" in the 1996 amendments or thereafter.

### 3. The 1999 Guidance

In 1999, DHS's predecessor agency (the INS) issued guidance confirming that the 1996 Welfare Reform Act's changes to immigrants' access to benefits had not altered the long-settled meaning of "public charge." Consistent with over a century of usage, the Guidance explained that "public charge" refers only to individuals likely to become "primarily dependent on the government for subsistence," as evidenced by publicly funded long-term institutionalization or cash assistance for income maintenance. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689 (Mar. 26, 1999). The Guidance prohibited consideration of supplemental benefits—such as Medicaid, Section 8 housing, and SNAP benefits—in rendering public-

charge determinations because, as the federal benefit-granting agencies had explained, such benefits are often available to employed individuals "with incomes far above the poverty level." They thus are not the equivalent of subsistence-level support, but instead reflect Congress's "broad public policy decisions" about improving public health and upward mobility for middle- and low-income individuals. *Id.* at 28,692.

### B. The Final Rule

In August 2019, DHS issued the Final Rule challenged here. The Rule radically alters the definition of "public charge" in several key ways.

First, for the first time, the Rule abandons the settled understanding that a "public charge" is a person who cannot support himself and thus depends on public benefits for subsistence. The Rule deems an immigrant to be a "public charge," even if he works or can otherwise support himself, if he is likely to receive a broader class of "public benefit[s]," including supplemental benefits such as Medicaid, Section 8 housing assistance, and SNAP, which DHS's predecessor concluded were *not* subsistence-level benefits. 84 Fed. Reg. at 41,501. Moreover, the Rule deems the likely receipt of *any amount* of those benefits—not just substantial amounts—to mark an immigrant as a "public charge." *Id.*

Second, the Rule deems an immigrant to be a "public charge" based on *short-term receipt* of such benefits: a DHS official need merely believe that an immigrant "will receive[] one or more public benefits" during "more than 12 months in the aggregate within any 36-month period" during his life. *Id.* Even that 12-month threshold is a misnomer, however, because the Rule stacks the time period for each benefit an immigrant may receive, so that, for example, "receipt of two benefits in one month counts as *two months*." *Id.* (emphasis added). Thus, an immigrant who accesses multiple public benefits for just a few months due to a temporary emergency would be deemed a "public charge" even if the overall amount of time the immigrant received such benefits fell well short of a year.

The Rule does not treat likely receipt of supplemental benefits in 12 out of 36 months as merely persuasive evidence—rebuttable by other facts—that an immigrant will be a public charge. Rather, the Rule has *redefined* "public charge" to mean, as a categorical matter, that an immigrant is inadmissible as a public charge if a DHS official believes that the immigrant may temporarily receive any amount of supplemental benefits for 12 out of 36 months at any point in his life—even if he will otherwise be reliant on his own resources for the rest of his life.

The Rule sets forth differently weighted factors that DHS officials must consider in predicting whether an applicant is likely to receive an aggregate of 12 months of benefits within any 36-month period. Actual receipt of benefits is a heavily weighted negative factor. *Id.* at 41,504. The Rule also lists several other negative factors, including:

- low credit scores;
- lack of English-language skills;
- a large family;
- a medical condition that requires extensive treatment or interferes with working or school, regardless of whether reasonable accommodations enable the applicant to work or learn.

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

### C. Procedural Background

Plaintiffs challenged the Final Rule under the APA, alleging, among other things, that the Rule was contrary to law and arbitrary and capricious.

### 1. The district court's order of preliminary relief

In October 2019, the district court granted plaintiffs' motion to postpone the Rule's effective date pending judicial review, *see* 5 U.S.C. § 705, and also issued a preliminary injunction.

The court found that the balance of the equities and the public interest warranted temporarily halting the Rule's implementation to preserve the status quo pending this litigation. As the court found, there was no reason to disrupt the more-than-century-old status quo given that defendants had provided no compelling reason, let alone an urgent reason, to implement the Rule immediately. By contrast, plaintiffs and the public will suffer immediate and irreparable harm absent preliminary relief. (Special Appendix (SA) 19-21.)

The court also concluded that plaintiffs are likely to succeed on the merits. The court explained that the Final Rule's radical transformation of "public charge" far exceeded the bounds of reasonable interpretation because it targeted working individuals based solely on their potential receipt of nominal and temporary amounts of supplemental benefits—in contravention of the well-established meaning of "public charge."

(SA11-14.) The court also concluded that the Rule was likely arbitrary and capricious for multiple reasons. (SA15-16.)

The district court and this Court subsequently denied defendants' motions for a stay pending appeal.

**2. Pending litigations in other courts**

Different plaintiffs separately challenged the Rule in four other district courts. Each of those courts issued orders postponing the Rule's effective date or preliminarily enjoining its implementation. *See Casa de Maryland, Inc. v. Trump*, 2019 WL 5190689 (D. Md. Oct. 14, 2019); *Cook County v. McAleenan*, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019); *Washington v. DHS*, 2019 WL 5100717 (E.D. Wa. Oct. 11, 2019); *City & County of San Francisco v. USCIS*, 408 F. Supp. 3d 1057 (N.D. Cal. 2019). Defendants appealed each order, and sought stays pending appeal.

The Seventh Circuit denied defendants' motion for a stay. Order, *Cook County v. Wolf*, No. 19-3169 (Dec. 23, 2019), ECF#41. The Fourth and Ninth Circuits each issued a stay. Order, *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (Dec. 9, 2019), ECF#21; *City & County of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019). The plaintiffs in each of those cases have sought en banc review of those interim stay rulings. None of these

three circuit courts has issued any decision on the merits of defendants' appeals, but each court is moving expeditiously to adjudicate the appeals.

## STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

This Court reviews the district court's issuance of preliminary relief for abuse of discretion. *Goldman Sachs & Co. v. Golden Empire Schs. Fin. Auth.*, 764 F.3d 210, 214 (2d Cir. 2014). The district court's legal conclusions are reviewed de novo, its factual findings for clear error, and its ultimate decision for abuse of discretion. *County of Nassau, N.Y. v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008). Here, the district court properly exercised its discretion in issuing preliminary relief to halt the Final Rule's implementation temporarily.

I. The balance of hardships and the public interest tip decidedly in favor of preserving the status quo until the district court can adjudicate the rights of the parties.

A. Defendants will not suffer any hardship from maintaining the status quo public-charge framework that they have applied for more than a century. Defendants failed to identify any good reason, let alone an urgent one, for immediately implementing the Rule's radical and unprecedented

transformation of "public charge." Defendants' mere preference to do so now does not constitute irreparable harm, particularly when it is undisputed that the current framework is both lawful and administrable.

B. By contrast, plaintiffs and the public would suffer irreparable harms if the Rule's novel framework were allowed to take effect immediately. As the district court found, the Rule will severely disrupt plaintiff States' and City's administration of their public-benefits programs. Widespread drops in benefits enrollment caused by the Rule will also substantially burden plaintiffs' healthcare systems by reducing Medicaid revenue and increasing costs. And public health and economic welfare in plaintiffs' jurisdictions will be further harmed as thousands of immigrants and their families avoid benefits that would otherwise promote health, nutrition, and economic mobility.

II. Preliminary relief is further warranted because plaintiffs are likely to succeed on the merits of their claims.

A. As the district court correctly determined, the Rule's sweeping expansion of "public charge" far exceeds the settled meaning of that term, which Congress incorporated into the INA. Defendants claim authority to interpret "public charge" to mean *any* receipt of *any* amount of *any*

public benefits, including supplemental benefits, for a short period of time during an applicant's life. But the statutory term "public charge" cannot plausibly be stretched that far. Over a century of state and federal laws, judicial and agency interpretations, and regulatory practice establish that "public charge" is a term of art that refers solely to individuals who rely primarily on public support for long-term subsistence because they are unable to provide for themselves. Congress incorporated and maintained this limited meaning of "public charge" in federal law for a reason: to ensure that only those who are truly destitute are excluded, while encouraging immigration by employable individuals whom Congress deemed would contribute to the nation.

The Rule breaks with this well-settled meaning of "public charge" by disqualifying applicants for using *any* amount of supplemental benefits, even those designed to promote economic mobility and public health rather than provide long-term subsistence. The Rule further expands "public charge" beyond its historical meaning by including *temporary* use of such benefits for a few months. And the Rule automatically requires a public-charge finding whenever an applicant is likely to use *any amount*

of non-subsistence benefits for a short period. The Rule's vast expansion of "public charge" goes beyond the bounds of reasonable interpretation.

Defendants misplace their reliance on policy statements and related provisions from the Welfare Reform Act of 1996 and its amendments, none of which altered the established meaning of "public charge." Although Congress expressed in those statutes policy goals of promoting "self-sufficiency" among immigrants and preventing the availability of benefits from incentivizing immigration, it chose to accomplish those objectives by limiting access to certain benefits to certain newly admitted LPRs. But the same Congress rejected attempts to pursue those goals further by expanding the meaning of "public charge." The requirement that some (but not all) applicants obtain an affidavit of support from a sponsor likewise reflects a separate procedural requirement for some LPR applicants, not any alteration of the threshold meaning of "public charge" applicable to all applicants.

B. The Rule is likely arbitrary and capricious for multiple reasons. For example, the Rule irrationally assumes that receipt of *any* amount of supplemental benefits, even temporarily, means that an applicant cannot sustain herself—an assumption contradicted by the prior determinations

of DHS and benefit-granting agencies. The Rule's targeting of short-term use of benefits irrationally undermines DHS's goal of ensuring that temporary benefits use does not result in a public-charge finding. The Rule also relies on multiple factors that do not rationally predict whether an immigrant will receive public benefits; fails to evaluate the full scope of the harms it will impose; and violates the Rehabilitation Act by negatively weighing an applicant's disability, even if reasonable accommodations allow her to work.

C. Plaintiffs have standing and are within the zone of interests of the relevant statutes. The predictable harms that the Rule will cause to plaintiffs' public-benefits programs, healthcare systems, and economies were established by the evidence and largely conceded in the Rule. Plaintiffs also easily satisfy the lenient zone-of-interests test because, as defendants recognize, Congress enacted the public-charge provision in part to protect state and city fiscs.

III. The scope of the preliminary relief is proper. The district court postponed the effective date of the Rule under 5 U.S.C. § 705, a statutory remedy that expressly allows district courts to delay the effect of a rule as a whole. Such postponement of the Rule itself, rather than its

application to particular parties or locations, properly preserves the status quo until the district court determines whether the Rule as a whole should be vacated or remanded as unlawful—the APA remedy that plaintiffs seek. The Court thus need not address general questions about the scope of courts' equitable authority to issue preliminary injunctions nationwide. In any event, the district court properly enjoined the Rule's implementation to protect the rights of plaintiffs, who seek vacatur of the Rule, and to prevent grave harm to the public.

## ARGUMENT

### THIS COURT SHOULD AFFIRM THE PRELIMINARY RELIEF ORDERED BY THE DISTRICT COURT TO PRESERVE THE STATUS QUO PENDING FURTHER PROCEEDINGS

The district court properly exercised its discretion to postpone the effective date of the Final Rule under § 705 and preliminarily enjoin its enforcement to preserve the status quo until the court can "conclusively determine the rights of the parties." *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). The party seeking preliminary relief must show that the balance of the harms and the public interest favor such relief, and that it is likely to succeed on the merits. *Kelly v. Honeywell Int'l, Inc.*, 933 F.3d 173, 183-84 (2d Cir. 2019).

Here, the district court properly found that all four factors weigh in favor of preserving the status quo by temporarily deferring the Final Rule.

## POINT I

### THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST WARRANT PRELIMINARY RELIEF

### A. Defendants Failed to Identify Any Irreparable Harm from Maintaining the Status Quo.

The district court properly halted the Rule's implementation as a temporary matter to preserve the status quo that has governed public-charge determinations and public-benefits administration for over a century. By contrast, allowing the immediate implementation of the Rule would radically upend over a century of settled immigration policy and disrupt public-benefits programs.

Defendants have failed to demonstrate any compelling need that would justify such disruption while the district court adjudicates to final judgment the merits of plaintiffs' claims. As the district court correctly found, defendants will not suffer any "actual hardship" from maintaining the status quo. (SA21.) Indeed, defendants presented no evidence of such harm: not to public safety, not to national security, and not to immigration or public-benefits administration.

Defendants instead claim that they are entitled to implement the Rule now because of their bare interest in implementing their chosen "immigration policy." Br. 53. But that interest, which is always present when the government seeks to implement a new policy, cannot by itself constitute irreparable injury—particularly when defendants have conceded that the status quo public-charge framework is lawful and administrable, and when defendants did not issue the Rule until nearly three years into the current administration. It beggars belief that defendants or the public would be harmed, let alone irreparably so, by extending for the short time needed for the district court to adjudicate this case the public-charge framework that has been in place for over a century since Congress's initial enactment; for two decades since the 1999 Guidance; and for the first three years of this administration.

Defendants' sole assertion of harm is that they will grant LPR status to some immigrants who would otherwise be excluded by the Rule. But defendants fail to identify any actual negative consequences from that result, instead asserting merely that they cannot do what they want for an interim period. But because defendants are unlikely to succeed on the merits, the public interest weighs against allowing them to implement

a policy of dubious legality. *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (government lacks cognizable interest in "perpetuation of unlawful agency action"). Although DHS may not revoke LPR status once granted (Br. 53), DOJ retains authority to deport a LPR who actually becomes a "public charge" within five years of admission from causes arising before admission. § 1227(a)(5). And LPRs admitted under the existing framework will not be eligible for Medicaid or SNAP for five years, and will receive only such other benefits as Congress or States have chosen to confer. The lack of any irreparable harm to defendants thus weighs heavily in favor of preliminary relief.

### B. Disrupting the Status Quo Would Irreparably Harm Plaintiffs and the Public.

By contrast, allowing the Final Rule to take effect now will inject severe confusion and uncertainty into immigration proceedings and public-benefits administration, cause widespread disenrollment from public benefits, undermine the healthcare systems operated by plaintiffs, and harm public health. These significant and costly disruptions warrant preliminarily halting the Rule, particularly when defendants have provided no good reason to implement the Rule immediately.

As the unrebutted evidence established, immediate implementation of the Rule will severely disrupt plaintiffs' administration of their public-benefit programs. Without preliminary relief, plaintiffs would be forced to overhaul their systems for determining benefits eligibility and enrollment. But if the district court ultimately vacates the Rule, plaintiffs would be forced to undo these major changes. For example, Connecticut currently automatically reenrolls Medicaid beneficiaries each year and automatically confers eligibility for SNAP or Medicaid if an applicant receives other benefits. Because such processes would lead to severe negative consequences for applicants under the Rule, Connecticut would be forced to alter its systems if the Rule takes effect. (Joint Appendix (JA) 236-237.) Similarly, the Rule would force New York's Special Supplemental Nutrition Program for Women, Infants, and Children to conduct costly and time-consuming eligibility verification procedures rather than rely on streamlined processes that leverage applicants' existing SNAP and Medicaid eligibility. (JA527-529.)

Allowing the Rule to take effect will further irreparably harm plaintiffs and public health as thousands of immigrants forgo benefits. As DHS acknowledged, the Rule will cause many individuals and their

families to forgo supplemental benefits—to which they are legally entitled—to avoid a public-charge finding under the Rule's radical new framework. *See* 84 Fed. Reg. at 41,300, 41,307. These reductions in benefits use will "reduce[] revenues for healthcare providers participating in Medicaid," Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,118 (Oct. 10, 2018), including public healthcare facilities operated by plaintiffs. (SA7-SA8; JA314-323; *see* JA268-269 (NYC Health+Hospitals would lose $42 million in Medicaid revenue during Rule's first year).)

Public health and economic welfare will be further harmed in plaintiffs' jurisdictions as the Rule causes residents to avoid benefits. These harms will be both irreparable and long-lasting, even if the Rule is later vacated as unlawful. For example, families who forgo Section 8 benefits will need to leave their homes, live in more dangerous neighborhoods, and suffer harms to their health, education, and employment. (JA135-149; JA498-501.) And lower SNAP usage means less nutritious food for families, lower revenues for grocery stores, and economic losses for plaintiffs—harms that cannot be undone later. (JA455; JA466-474.)

These injuries to plaintiffs and the public will be disruptive, irreparable, and long-lasting. For example, families that disenroll from

Section 8 housing cannot easily reenter the program because the waiting lists are long. (JA127-128; JA503-504.) And immigrants deemed "public charges" under the Rule may be forced to leave the country or face removal, § 1227(a)(1)(A); may be subject to multi-year bars to reentering, *id.* § 1182(a)(9)(A)-(B); and will likely lose their path to LPR status or citizenship. These irreparable harms weigh heavily in favor of preliminary relief to preserve the status quo.

## POINT II

### THE STATES ARE LIKELY TO PREVAIL ON THE MERITS

### A. The Final Rule Is Likely Contrary to Law.

Defendants do not seriously dispute the district court's finding that the Rule's new definition of "public charge" "to mean receipt of 12 months of benefits within a 36-month period…has *never* been referenced in the history of U.S. immigration law" (SA13; *see* Br. 39). Nor can defendants dispute that this new definition will lead significantly more people to be deemed inadmissible than the established public-charge framework would. Indeed, the Rule targets public benefits—including Medicaid, Section 8 housing, and SNAP—that more than 40% of native-born citizens in the

United States used between 1998 and 2014.[9] The district court properly concluded that the Final Rule's radical new definition of "public charge" likely exceeds the well-established understanding of that term as incorporated into the INA. *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-44 (1984).

### 1. The Final Rule improperly expands "public charge" beyond its historically limited meaning.

Defendants' legal argument is extraordinarily broad. They claim that under the public-charge statute, § 1182(a)(4)(A), DHS may deem *any* "receipt of public benefits, including noncash benefits, [to be] relevant to the determination whether an alien is likely to become a public charge." Br. 26. And under the Rule's 12-months-in-36-months threshold and aggregate-counting rule (which, for example, counts the use of three benefits in one month as three months of benefits use), defendants claim authority to deem *any amount* of benefits, for a short period of time, sufficient to render an applicant a "public charge." As the district court properly concluded (SA11-13), the Rule's radical new approach to "public

[9] Center on Budget & Policy Priorities, Comments on DHS Notice of Proposed Rulemaking 10-11 (Dec. 7, 2018).

charge" represents a sharp and untenable break from the long-established meaning of the term that Congress incorporated into the INA. Indeed, in the district court, defendants agreed that the permissible scope of "public charge" turns on its historical meaning. (Mem. in Opp. to Mot. for Prelim. Inj. 13-22 (S.D.N.Y. Sept. 27, 2019), ECF#99.) And that historical meaning does not support defendants' attempt to count any amount of any public benefit for short periods of time as proof that an applicant will be a public charge.

As explained (at 5-15), "public charge" has historically been understood to encompass only specific types of public assistance: namely, long-term support for the subsistence of an individual who is unable to provide for himself and is thus primarily dependent on public resources. By contrast, "industrious" individuals were not deemed inadmissible as public charges even if they were poor and required a helping hand; to the contrary, such individuals were welcomed and publicly supported for the "great public benefit" that their work would provide "to the durable wealth of the country." *Massachusetts Report*, *supra*, at 17.

Early state laws drew precisely this distinction, limiting "public charge" to "persons utterly unable to maintain themselves" or "physically

and mentally incapacitated for labor." Kapp, *supra*, at 87, 91; *see City of Boston v. Capen*, 61 Mass. 116, 124 (1851) (Massachusetts statute applied to individuals "without means of support"); *American Dictionary of the English Language* (N. Webster 1828 online ed.) (internet) (defining the noun "charge" as "person or thing committed to another[']s custody, care or management"). At the same time, these early state laws not only welcomed the immigration of poorer individuals who were able to work, but provided them with public support to become productive members of society. See *supra* at 5-7.

When Congress enacted a federal public-charge provision in 1882, it adopted this prevailing understanding that immigrants could be excluded as "public charges" only if they were unable "to support themselves by honest industry and labor." 13 Cong. Rec. 5112 (Rep. Van Voorhis). But like the earlier state laws, the provision permitted employable immigrants to enter the country and publicly supported them through a per-person tax used to assist immigrants until they could "obtain occupation for their support," *id.* at 5106 (Rep. Reagan). This established understanding of "public charge" carried forward through the early twentieth century. As courts and immigration agencies repeatedly made clear, "public charge"

referred solely to individuals who were unlikely "to earn a living" and thus necessarily dependent on public resources for the long term. *Wallis v. United States ex rel. Mannara*, 273 F. 509, 509 (2d Cir. 1921). It has never been understood to include employable immigrants who might receive some modicum of public benefits. See *supra* at 8-10.

Congress enacted the INA's public-charge provision in 1952 with the understanding that "public charge" was a term of art with an extensive history of statutory, judicial, and administrative interpretation. By incorporating this term of art without alteration or redefinition, Congress presumably "intended it to have its established meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978). This presumption has particular force here because, as a Senate report about the INA demonstrates, Congress fully understood the historical meaning of "public charge" and the precedents interpreting that term, and chose to retain the preexisting scope of "public charge" rather than modify it. *See* S. Rep. No. 1515, at 45-53, 335-50 (1950).

Statutory provisions enacted in 1986 further demonstrate that Congress considered the employability of immigrants to be a critical feature of the public-charge analysis. These provisions state that certain

undocumented individuals and agricultural workers will not be considered "public charges" if they demonstrate "a history of employment in the United States evidencing self-support without receipt of public cash assistance." 8 U.S.C. § 1255a(d)(2)(B)(iii); *see id.* § 1160(c)(2)(C). Congress understood that these individuals—many of whom had been living in the shadows due to their undocumented status—might be so destitute and lacking in immediate employment prospects that they would normally be deemed "public charges" under that term's established meaning.[10] *See* H.R. Rep. No. 99-1000, at 96 (1986) (Conf. Rep.). The Final Rule's disregard of immigrants' employability for purposes of its redefinition of "public

[10] *See Immigration Control & Legalization Amendments: Hr'gs Before the H. Subcomm. on Immigration, Refugees, and International Law* ("*Legalization Hr'g*"), 99th Cong. 88 (1985) (Hyman Bookbiner, American Jewish Committee) (workers' "ability to earn despite legal handicaps should be taken as an indication of their capacity to support themselves once legalized"); *id.* at 94 (Dale S. De Haan, Director of Church World Service) (many "undocumented workers have been consistently employed, and have subsisted without reliance upon cash assistance, though they have existed below poverty levels"); *id.* at 100 (HIAS International Jewish Migration Agency, Lutheran Immigration and Refugee Service) (many undocumented individuals "are hard-working people who survive on desperately low incomes below the government poverty line").

charge" conflicts with Congress's view that this factor would render even certain truly destitute individuals admissible because of their ability to "make contributions to our society." *Legalization Hr'g*, *supra*, at 100.[11]

Defendants' attempts to reinterpret the historical meaning of "public charge" are unavailing. Tellingly, defendants' brief abandons most of the historical sources they referenced below. And the few sources they reference do not support their position.

For example, defendants mischaracterize the two cases they reference as finding immigrants to be public charges based on temporary receipt of benefits (Br. 36). But those cases turned on the immigrants' lack of "capacity and opportunity for employment." *Ex parte Turner*, 10 F.2d 816, 817 (S.D. Cal. 1926); *see Guimond v. Howes*, 9 F.2d 412, 413-14 (D. Me. 1925) (employment was illegal liquor trafficking).

[11] Defendants contend (Br. 27) that these provisions support the Final Rule's expansion of the meaning of "public charge" to include receipt of any amount of supplemental benefits, but they are wrong. Nothing in the statutes' text or history refers to receipt of supplemental benefits as the trigger for a public-charge finding. To the contrary, these provisions identify receipt of only *cash assistance*, not supplemental benefits, as relevant to the public-charge inquiry—consistent with the later determinations in the 1999 Guidance.

Defendants also misplace their reliance on a sentence from a treatise and two dictionaries to argue that "public charge" includes anybody who imposes "a money charge" on "the public for support and care." *See* Br. 37. But that sentence is drawn from a district court case that involved a noncitizen who was institutionalized because he was "unable to care for himself" and would have quickly "starve[d] to death" absent institutional care. *See, e.g.*, *Black's Law Dictionary* (3d ed. 1933) (citing *Ex parte Kichmiriantz*, 283 F. 697, 698 (N.D. Ca. 1922)). Even under those circumstances, the case held that this noncitizen could *not* be deemed a public charge because the "money charge" for his institutional care had been paid for by his relatives rather than the public. *Kichmiriantz*, 283 F. at 698.

Defendants and the Ninth Circuit's stay order also badly misread a decision of the Board of Immigration Appeals (BIA), *In re B-*, 3 I.&N. Dec. 323 (B.I.A. 1948), as altering the meaning of "public charge" by allowing already admitted LPRs to be deported for failure to repay *any* public benefit they receive. In that decision, the BIA actually narrowed the public-charge provision applicable to admitted LPRs by requiring that, to be deportable, an LPR must *both* have become a "public charge"—i.e.,

substantially reliant on government funds to survive—*and* have actually failed to repay those funds when demanded. *See In re B-*, 3 I.&N. Dec. at 325 (immigrant institutionalized for eight years). This additional failure-to-repay requirement was thus a further protection against deportation of already admitted LPRs, *see In re Harutunian*, 14 I.&N. Dec. at 588-89, not an expansion of the meaning of "public charge."[12]

The Final Rule's interpretation of "public charge" is well outside the established historical understanding of that term of art, for several reasons. First, as Congress and the expert federal benefit-granting agencies have made clear, the supplemental benefits targeted by the Rule do not serve only the truly destitute who might plausibly be considered "public charges" under that term's historically established meaning. Rather, Congress made these programs available as well to many employed individuals who have "incomes far above the poverty level" to further its "broad public policy decisions" about improving public health,

[12] The BIA did not indicate that the institutionalized LPR in *In re B-* could have been deported for failure to repay incidental expenses (*see* Br. 36). The BIA noted that the LPR was required to pay for her own incidental expenses to emphasize that, by contrast, the government could not seek reimbursement for her institutional care and therefore could not deport her. 3 I.&N. Dec. at 327.

nutrition, and economic opportunities for middle- and low-income individuals. 64 Fed. Reg. at 28,692; *see* 7 U.S.C. § 2011 (SNAP "safeguard[s] the health and well-being of the Nation's population by raising levels of nutrition among low-income households"); 42 U.S.C. § 5301(b) (housing-assistance programs, including Section 8, "improve the living environment of low- and moderate-income families").[13]

The supplemental benefits newly targeted by the Rule thus are not limited to individuals who are unable to work and dependent on the public for their subsistence. To the contrary, in plaintiffs' jurisdictions, more than 60% of adult Medicaid recipients work;[14] and in New York City, Section 8 recipients may retain benefits while earning up to $85,350 annually (JA126). Thus, as the district court correctly reasoned, an individual may be "fully capable of supporting herself without government

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[13] *See also* Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, § 2, 113 Stat. 1860, 1862-63 (Medicaid enables "individuals with disabilities" to "maintain employment"); *id.* § 201, 113 Stat. at 1981-84 (expanding state authority to offer Medicaid to individuals with disabilities who earn incomes far above poverty line).

[14] Kaiser Family Foundation, *Medicaid in Connecticut* (Oct. 2019) (internet) (67% of adult Medicaid enrollees work); Kaiser Family Foundation, *Medicaid in Vermont* (Oct. 2019) (internet) (65%); Kaiser Family Foundation, *Medicaid in New York* (Oct. 2019) (internet) (61%).

assistance but elect[] to accept" a supplemental benefit "simply because she is entitled" to use it to obtain more nutritious food, safer housing, or better healthcare. (SA15.) *See* 64 Fed. Reg. at 28,692 (supplemental programs enhance "diet, health, and living conditions" of many "low- to middle-income working families").

Second, the Rule's 12-months-in-36-months threshold and aggregate-counting rule mean that noncitizens will be considered "public charges" based on the likelihood of using multiple benefits *temporarily*, for just a few months, to address an acute period of financial strain or emergency. But short-term use of any amount of supplemental benefits, particularly by employed individuals, bears no resemblance to the types of long-term uses of almshouses, institutional care, or income maintenance that have traditionally been the sole bases for finding an applicant to be a public charge. Such long-term support is designed to serve destitute individuals who are "extremely unlikely" to meet their "basic subsistence requirements" without relying primarily on the government. Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,678 (May 26, 1999); *see id.* (institutions provide all "subsistence needs"); *id.* at 28,687 (SSI protects "vulnerable people…from complete impoverishment"). But

the type of temporary reliance on supplemental benefits that the Rule now considers disqualifying for admission is no indication that an applicant will be the long-term drain on the public fisc that the historical meaning of "public charge" was intended to identify.

Finally, the Rule's categorical treatment of supplemental benefits takes it even further afield from the historical understanding of "public charge." Although some individuals who receive Medicaid, Section 8 housing, or SNAP may be truly destitute, the Rule is not tailored to those individuals. Nor does the Rule treat the likely receipt of these supplemental benefits as merely a "relevant" consideration (Br. 26) in individual public-charge determinations. Rather, "if a DHS officer believes that any individual is likely" to use *any* amount of these supplemental benefits for 12 out of 36 months during her entire life, "the inquiry ends there, and the individual is *automatically* considered a public charge" (SA16)—even if there is no plausible basis to infer that acceptance of such benefits indicates long-term dependence on the government for subsistence. The Rule's treatment of short-term receipt of any amount of supplemental, non-subsistence benefits as dispositive of a public-charge finding is too sharp a departure from the historical understanding of "public charge"

and thus stretches far beyond "the bounds of reasonable interpretation," *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014).

### 2. Congress did not confer on DHS discretion to radically transform the meaning of "public charge."

Echoing the flawed reasoning of the Ninth Circuit stay order, defendants contend (Br. 33-35) that the public-charge statute confers discretion on DHS to determine the definition of "public charge" by rendering inadmissible "[a]ny alien who…in the opinion of [DHS]…is likely at any time to become a public charge, § 1182(a)(4)(A). But the fact that a statute may confer *some* discretion on an agency does not mean that the agency can do whatever it wants. Here, DHS may have discretion to determine for a particular applicant whether the totality of the circumstances satisfies the statutory meaning of "public charge." But discretion to make individual public-charge determinations does not allow DHS to rewrite the public-charge provision—whether in individual cases or in a categorical manner—in a way that goes "beyond the meaning that the statute can bear." *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994).

Defendants have never directly argued here that their redefinition of "public charge" in the Final Rule is entirely unreviewable. *Cf. Department of Commerce v. New York*, 139 S. Ct. 2551, 2567-69 (2019) (rejecting argument that Secretary of Commerce had unreviewable discretion over decennial census questions). Yet the limitless nature of the authority defendants claim here amounts to much the same thing. Under defendants' sweeping theory of their "discretion," DHS could redefine "public charge" to mean short-term receipt of "'*any* maintenance, or financial assistance, rendered from public funds'" (Br. 37), regardless of whether using such public benefits remotely reflects that the recipient is likely to rely extensively on the government to survive. For example, DHS could define "public charge" to include participation in veteran-benefits programs; receipt of federally subsidized student loans; or the use of ACA tax subsidies to obtain private health insurance (a benefit that is available to those earning up to 400% of the federal poverty line). And in place of the Rule's 12-months-in-36-months threshold, DHS could simply deem the receipt of any public benefit for even a single month to disqualify an applicant as a public charge.

There is no indication that Congress intended to delegate such sweeping power to defendants. To the contrary, by choosing a term of art that was freighted with over a century of meaning, Congress sought to incorporate a body of interpretation that had crystallized over years into a particular understanding of what it takes for an immigrant to be inadmissible as a public charge. As the 1999 Guidance properly recognized, the meaning of "public charge" is thus constrained by its "plain meaning" and "the historical context of public dependency when the public charge immigration provisions were first enacted more than a century ago"; "the expertise of the benefit-granting agencies that deal with subsistence issues"; and "the factual situations presented in the public charge case law." 64 Fed. Reg. at 28,677.

By contrast, it is highly unlikely that Congress would leave unbounded authority to DHS alone to determine what level of public benefits would render applicants inadmissible—including hard-working, law-abiding, and productive members of our communities. DHS has no expertise in benefits programs or regulatory authority such programs. *See MCI*, 512 U.S. at 230-31 (unlikely that Congress would delegate to agency the authority to decide question of whether to substantially

regulate industry). And it is even more unlikely that Congress granted DHS such sweeping powers through such a subtle device as reenacting essentially the same public-charge provision that has existed for over a century. *See id.*; *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (when Congress delegates "question of deep economic and political significance" it typically "does so expressly").

The Rule's radical transformation of "public charge" to mean working individuals who might use *any* amount of supplemental benefits for a short time during their life is thus far beyond the bounds of any discretion DHS might have. Whatever ambiguity may exist in the two-word term "public charge," it does not implicitly authorize DHS to "undo what [Congress] has done" by radically remaking immigration law and benefit programs. *See id.* at 2496. Such determinations are for Congress rather than DHS.

### 3. The Final Rule improperly attempts to undo the careful balance Congress struck between the public-charge provision and other benefits-related provisions.

Lacking any persuasive response to the history and established meaning of the public-charge provision, defendants rely principally on a scattershot assortment of other provisions: namely, (i) policy statements in the 1996 Welfare Reform Act and related provisions addressing

noncitizens' use of public benefits; (ii) provisions requiring certain applicants to submit affidavits of support to avoid being deemed a public charge; and (iii) provisions protecting immigrants subjected to battery or extreme cruelty. But except for the 1996 policy statements, defendants did not rely on any of these provisions below to support the Rule's redefinition of "public charge." The district court could not have abused its discretion by declining to consider arguments never presented.

In any event, each of these arguments is meritless. None of these provisions altered the well-established meaning of "public charge." To the contrary, they reflect Congress's considered judgment to regulate certain admitted LPRs' use of specific public benefits in particular ways *instead of* drastically expanding the established understanding of "public charge." Because the Rule essentially reverses the specific policy choices that Congress struck, it exceeds the bounds of any reasonable interpretation. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 138-39 (2000) (rejecting agency interpretation as contrary to Congress's determination to regulate tobacco products in certain ways but not others).

First, the Welfare Reform Act's policy statements did not relate to the threshold meaning of "public charge." Defendants cite the Welfare

Reform Act's goals of furthering "[s]elf-sufficiency" in "immigration policy" and preventing "the availability of public benefits" from incentivizing immigration. § 1601. But Congress effectuated those goals in the 1996 Act by limiting immigrants' use of specific benefits in particular ways, such as by imposing a waiting period for already admitted LPRs to access certain benefits and denying benefits altogether to undocumented immigrants. The same Congress pointedly did *not* pursue these "self-sufficiency" goals through amending the threshold public-charge provision. To the contrary, although Congress in 1996 made many other changes to federal immigration law, it affirmatively rejected a proposal to transform the meaning of "public charge" in the deportation context to mean an immigrant's receipt of any amount of public benefits within a short time period. H.R. Rep. No. 104-828, at 138, 241. And in 2013, Congress again rejected an attempt to make a similar change to the meaning of "public charge" in the admissibility context. *See* S. Rep. No. 113-40, at 42 (2013). There is thus no plausible basis to import the 1996 Act's policy statements into the public-charge provision. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174-75 (2009).

Indeed, doing so would run counter to Congress's judgment in the Welfare Reform Act. Defendants assert that the Act's invocation of "self-sufficiency" expresses a congressional policy to deny *any* "taxpayer-funded benefits" to immigrants (Br. 30). But Congress did not deny benefits to immigrants altogether—it merely limited them. And Congress found that, with these limitations, immigrants' receipt of certain public benefits was compatible with Congress's goal that they be "self-sufficient." The Final Rule's treatment of receipt of these very same benefits as a sign of a *lack* of self-sufficiency thus conflicts with Congress's contrary judgment in the 1996 Act. *See Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) (because "no legislation pursues its purposes at all cost," deciding which "competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice").

Second, defendants are fundamentally incorrect in finding support for the Final Rule in statutory provisions requiring some (but not all) applicants to provide affidavits of support from third-party sponsors to avoid being deemed a public charge. §§ 1182(a)(4)(C)-(D), 1183a. For one thing, affidavits of support are far narrower than the Final Rule's new definition. Affidavits are nearly always required only for applicants with

family-based visas, not employment-based visas, but the Final Rule applies to both categories of applicants. Moreover, contrary to defendants' contention, affidavits of support do not require the sponsor to repay "*any* means-tested public benefit" the applicant may receive. Br. 28. The repayment obligation does not apply to Section 8 housing benefits at all, as the Final Rule does. *See* 8 C.F.R. § 213a.1. And the affidavits' contractual obligation is enforceable only after an immigrant has been admitted, and encompasses only the covered benefits received during defined time periods. §§ 1182(a)(4)(C)-(D), 1183(2)-(3). By contrast, the Final Rule's new definition of "public charge" would apply to *any* applicant, would be applied *before* their admission, and would consider *any* benefits they might receive during their life—including time periods well beyond the period when affidavits of support are enforceable.

More fundamentally, as the Final Rule acknowledges, affidavits of support are more appropriately considered a "separate requirement" for certain immigrants' applications for adjustments of status, 84 Fed. Reg. at 41,448, not a requirement that fundamentally alters the threshold public-charge analysis. Although certain immigrants must file an affidavit of support with their application to avoid a public-charge finding, such

affidavits become relevant only *after* an immigrant has been admitted. Such affidavits thus serve a purpose distinct from the threshold admissibility review: "to provide a reimbursement mechanism" for the government or the LPR after the applicant's admission "to recover from the sponsor" who broke a contract to support the LPR, *id.* at 41,320. This limited post-admission remedy does not remotely suggest that Congress sought to transform the threshold meaning of "public charge" at all.

Finally, defendants err in asserting (Br. 26-27) that a provision prohibiting DHS from considering "any benefits" received by battered immigrants in rendering public-charge determinations necessarily authorizes DHS to consider "any benefits" for other immigrants. §§ 1182(s), 1641(c). There is no indication that Congress intended a shield for some immigrants to be used as a sword against others. Congress spoke broadly in enacting this legislation to make clear its intent to protect vulnerable immigrants who often lack any means of support outside their abusive relationships. *See* Battered Immigrant Women Protection Act, Pub. L. No. 106-386, §§ 1502-1505, 114 Stat. 1464, 1518-27 (2000). Congress thus most likely referred to "any benefits" to ensure that battered immigrants could receive any benefits that might reflect primary reliance on the

government to subsist long-term, such as income-maintenance payments, without risking a public-charge determination. It would be perverse to read into such broad protective legislation, directed at a distinct problem, an implicit intent to *withdraw* protections from other immigrants. And such implied intent is particularly implausible when Congress was operating against a backdrop in which the well-settled public-charge framework and the 1999 Guidelines did not automatically consider any receipt of public benefits to be disqualifying.

At base, all of defendants' arguments about these scattershot provisions suffer from the same basic defect: they infer radical changes to the well-established meaning of public charge through provisions that did not alter that meaning, and instead serve very different roles in complex legislative schemes. But Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The district court thus properly concluded that DHS likely violated the INA by drastically expanding the meaning of public charge in a way that Congress had rejected.

## B. The Final Rule Is Likely Arbitrary and Capricious.

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

### 1. The Rule arbitrarily equates use of minor amounts of supplemental benefits with an inability to afford basic necessities.

As the district court correctly determined (SA15), DHS failed to provide any reasoned explanation for determining that likely receipt of *any* amount of supplemental benefits, even temporarily, automatically means that an applicant cannot afford the "basic necessities of life" and is thus a "public charge." 83 Fed. Reg. at 51,159. That determination "rests upon factual findings that contradict those which underlay [defendants'] prior policy" and find no support in the record before DHS. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

Based on the expertise of benefit-granting agencies, the 1999 Guidance concluded that receiving supplemental benefits does not automatically suggest that the recipient is unable to afford her basic needs, because such benefits are often available to working individuals to promote public health, nutrition, and economic mobility. DHS's failure to provide any rational basis for "disregarding [the] facts and circumstances that

underlay" its prior conclusions renders the Rule arbitrary and capricious. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 216 (2016).

Indeed, DHS did not rely on any evidence to support its unsupported assumptions about the nature of supplemental programs and the populations they serve, and received ample evidence contradicting its assumptions. (*See* JA540-542; JA70-572; JA651-655). *See also Islander E. Pipeline Co. v. Connecticut Dep't of Envtl. Prot.*, 482 F.3d 79, 103 (2d Cir. 2006) (no deference where "record directly contradicts the unsupported reasoning of the agency"). Defendants point to potentially higher per-recipient costs to provide supplemental benefits compared to income maintenance (Br. 43-44), but such expenditures simply reflect Congress's judgment about the costs worth bearing to further the public health and economic goals that supplemental benefits promote. The Rule is thus arbitrary and capricious.

### 2. The Rule's aggregate-counting system irrationally targets short-term benefits use.

The Rule's aggregate-counting system—which, for example, counts the use of three benefits in one month as three months of benefits use—irrationally undermines DHS's own stated goal of not including as a

"public charge" immigrants who suffer only a short-term emergency. (*See* SA16.) In the Rule, DHS stated that it had imposed a durational threshold requiring likely benefits use for 12 out of 36 months to ensure that "short-term and intermittent access to public benefits" will not render applicants "public charges." 84 Fed. Reg. at 41,361. But the aggregate-counting system does the opposite by deeming the use of multiple benefits over just a few months to satisfy the Rule's new definition of "public charge." *See General Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir.1987) ("internally inconsistent" agency action was arbitrary). And the Rule severely penalizes applicants who have actually used multiple benefits for a few months to address a temporary need by using the aggregate-counting system in applying the heavily weighted negative factor of past benefits use.

The effect of the aggregate-counting system is thus to shorten the durational threshold to a fraction of 12 months for many applicants. But DHS failed to provide any reasoned explanation for arbitrarily shortening the 12-month threshold that it selected as a "bright-line rule" to differentiate between long-term and short-term benefits use. 84 Fed. Reg. at 41,360; *see District Hosp. Partners v. Burwell*, 786 F.3d 46, 59

(D.C. Cir. 2015) (rejecting rule containing "unexplained inconsistencies"). Although "receipt of multiple benefits" in a single month may indicate that an immigrant used more assistance during that month, *id.* at 41,361, it does not alter the short-term nature of such benefits use. And as defendants admit, temporary use of benefits does not suggest that the applicant is a "public charge," even under DHS's understanding of that term. Br. 49; *see* 84 Fed. Reg. at 41,359 (12 months of benefits use "exceeds a nominal level of support that merely supplements" applicant's "independent ability" to meet needs).

### 3. Many of the Rule's factors do not rationally predict likely benefits use.

Multiple factors in the Rule's new public-charge test do not reasonably predict that an immigrant is likely to receive supplemental benefits at all—let alone receive them to such an extent that she could plausibly be considered a public charge. Defendants' abstract comparisons of the financial security of individuals with these factors to individuals without such factors do not reasonably predict benefits use.

For example, the Rule assigns negative weights to low credit scores, lack of English proficiency, and a larger family. But the data on which

DHS relies demonstrate that the vast majority of people with such factors do not use any supplemental public benefits *at all*. As DHS's data show:

- 79.3% of people in families of four do not use benefits. 83 Fed. Reg. at 51,185.
- 69.6% of people in families of five do not use benefits. *Id.*
- 75.4% of people who do not speak English well do not use benefits. *Id.* at 51,195.
- 69.2% of people who do not speak English *at all* do not use benefits. *Id.* at 51,195.

And DHS did not present *any* basis for concluding that credit scores rationally predict benefits use, instead admitting that many immigrants lack a credit history because they recently arrived here. *Id.* at 51,189.

Additional factors also do not plausibly predict benefits use. For example, the Rule denies the heavily positive factor of having private health insurance to immigrants who use ACA credits to obtain insurance. But ACA credits are available to immigrants who earn up to 400% of the federal poverty line—approximately $100,000 a year for a family of four—and using such credits to purchase private insurance makes it extremely unlikely that the immigrant will use Medicaid.[15]

[15] *See* U.S. Centers for Medicare & Medicaid Servs., *Federal Poverty Level* (internet) (last visited Jan. 24, 2020).

Defendants contend (Br. 50) that these factors are rational because an applicant with any one of these factors is marginally more likely to have weaker finances than individuals without that factor. But the relevant question is not the abstract one of whether an applicant is more or less financially secure than a hypothetical comparator. Rather, the Rule's public-charge analysis is meant to focus on whether a factor is reasonably predictive of likely benefits use. Merely being somewhat less well-off than somebody else is not necessarily probative of that question. For example, an applicant who makes less than $500,000 a year could be said to have weaker finances than an individual who makes $1 million a year, but that comparison does not rationally predict that the applicant is likely to use public benefits. Because many of DHS's factors are thus based on unsupported assumptions rather than "some logic and evidence," the Rule is arbitrary and capricious. *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014).

### 4. The Rule failed to rationally assess or justify the harms it will cause.

The Rule also failed to adequately consider or justify the need to radically alter the well-established public-charge framework, particularly given the grievous harms it will impose.

First, DHS "failed to consider an important aspect of the problem," *Motor Vehicle Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), by refusing to grapple with the magnitude of the Rule's harms. *See Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732-33 (D.C. Cir. 2016) ("costs of an agency's action are a relevant factor that the agency must consider" (Kavanaugh, J., dissenting)); *Public Citizen, Inc. v. Mineta*, 340 F.3d 39, 55-58 (2d Cir. 2003) (vacating rule given agency's failure to consider costs).

DHS refused to assess or meaningfully consider the substantial harms from widespread benefits disenrollment caused by the Rule. Instead, DHS declared that it lacked information to quantify or assess the Rule's costs, *see* 84 Fed. Reg. at 41,312-14; DHS, *Regulatory Impact Analysis* 104 (Aug. 2019). But DHS received extensive information on the full scope of the Rule's harms and simply failed to "adequately analyze…the

consequences" of its actions.[16] *American Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017). And given DHS's reliance on a purported lack of information, its conclusion that the Rule "will ultimately strengthen public safety, health, and nutrition," 84 Fed. Reg. at 41,314, is impermissibly based on "sheer speculation," *Sorenson*, 755 F.3d at 708.

Second, as the district court properly concluded, the Rule contains no reasoned explanation for how the harms caused by the Rule may be justified by any purported gains. (SA14-16.) DHS identified no actual negative consequences from the current public-charge regime aside from that it grants LPR status more often than the Rule would. *See* 84 Fed. Reg. at 41,312. But given that the Rule indisputably repudiates the agency's long-standing prior policy and factual findings, DHS was required to at least "show that there are good reasons for the new policy." *Fox Television*, 556 U.S. at 515. DHS's desire to deny many more immigrants LPR status is simply a "solution" in search of any rational justification.

On appeal, defendants claim (Br. 45) that the Rule will save public-benefit programs money as immigrants forgo benefits or are deemed

[16] (*See* JA561-568; JA606-625; JA645-656; JA700-706.)

inadmissible. But in the Rule, DHS disclaimed reliance on drops in benefit-program spending to justify the Rule, asserting that the Rule "does not aim" to "curtail spending on public assistance." 84 Fed. Reg. at 41,305. And decreased spending on public benefits results not in a gain but in massive public health and economic harms to the plaintiff States, their residents, and the public. At minimum, it is arbitrary and capricious for DHS to quantify and consider purported gains from agencies spending less on supplementary programs while claiming that it cannot quantify or fully consider the concomitant harms from such spending decreases.

### C. The Rule Is Likely Unlawful and Arbitrary and Capricious Under the Rehabilitation Act.

The district court correctly concluded that the Rule is likely arbitrary and capricious and contrary to law because it violates Section 504 of the Rehabilitation Act by discriminating against individuals with disabilities. (SA18.) Section 504 provides that no individual "shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination" under any activity conducted by a federal agency. 29 U.S.C. § 794(a). This provision does not, as defendants contend (Br. 51), prohibit only public-charge

determinations that are based solely on an applicant's disability. Rather, it also prohibits DHS from subjecting an applicant to "a more onerous condition" based solely on disability, *Henrietta D. v. Bloomberg*, 331 F.3d 261, 276 (2d Cir. 2003)—including, as DHS's own regulations provide, different "criteria or methods of administration," 6 C.F.R. § 15.30(b)(4). The Rule violates these principles by automatically "consider[ing] disability as a negative factor in the public charge assessment." (SA18.)

The Rule is also arbitrary and capricious given that it provides no rational basis for concluding that "disability alone is itself a negative factor indicative of being more likely to become a public charge" when reasonable accommodations would allow the applicant to work. (SA18.) And the Rule's irrational treatment of individuals with disabilities is compounded by its use of duplicative factors that essentially double- and triple-count a person's disability. For example, an applicant's disability could also underlie both a negative factor for a serious medical condition, and a heavily negative factor for past use of Medicaid—a common resource for people with disabilities who have substantial incomes (JA541-542). *See* 84 Fed. Reg. at 41,504.

Contrary to defendants' arguments (Br. 51-52), Congress's requirement that DHS consider "health" in making public-charge determinations does not authorize the agency to make the irrational conclusion that disability alone—particularly with a reasonable accommodation—automatically renders an applicant incapable of supporting himself. And that conclusion is further belied by the evidence submitted to DHS, which confirms "the reality that many individuals with disabilities live independent and productive lives" (SA18). (JA537-544.)

### D. Defendants' Threshold Arguments Lack Merit.

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

#### 1. Plaintiffs have standing.

The "predictable effect[s]" of the Final Rule give plaintiffs standing. *Department of Commerce*, 139 S. Ct. at 2566; *see NRDC v. NHTSA*, 894 F.3d 95, 104 (2d Cir. 2018). Plaintiffs presented unrebutted evidence that the Rule will concretely injure plaintiffs' proprietary, economic, and sovereign interests by causing many of plaintiffs' residents to forgo public-benefit programs. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555,

561 (1992) (standing must be shown with "degree of evidence required" at relevant stage of litigation). Such drops in benefits enrollment will reduce Medicaid revenue, increase costs to healthcare systems, burden plaintiffs' public-benefit programs, and harm plaintiffs' economies. See *supra* at 64. Such injuries are "precisely the kind of 'pocketbook'" injuries that confer standing, *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1059 (D.C. Cir. 2018).

The significant losses in Medicaid revenue earned by plaintiffs' healthcare systems will not be offset by plaintiffs spending less to fund Medicaid, as defendants assert (Br. 21-22). The Rule will simultaneously *increase* plaintiffs' healthcare costs as newly uninsured patients avoid preventative care, suffer worse health outcomes, and use more costly services. (JA314-322; JA512-513; JA269 (NYC Health+Hospital expects losses to rise from $42 million to at least $121 million annually given costs).) Indeed, plaintiffs' healthcare systems will face risks of closures and staffing cuts, and decreased capacity for patient care if the Rule takes effect. (JA316; JA321-323; JA512-513.) Defendants did not present *any* evidence below, let alone evidence to suggest that plaintiffs' healthcare

systems, which often treat all patients regardless of their financial resources (JA315; JA321), will somehow recoup these substantial losses.

In any event, plaintiffs need not show that they will suffer a "net drain on their" overall budgets (Br. 14). The possibility of countervailing benefits from a challenged action "does not negate standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006). And defendants' improper and unsupported attempt to assess plaintiffs' overall budgets fails to account for the undisputed evidence that the Rule will harm plaintiffs' economies through $3.6 billion in economic ripple effects, thousands of lost jobs, and $175 million in lost tax revenue. (SA8; *see* JA227; JA455; JA737-741.)

Second, the uncontroverted programmatic costs that the Rule will impose on plaintiffs' administration of their public-benefit programs—such as being forced to overhaul enrollment and record-keeping systems—are not incidental or self-inflicted, as defendants contend (Br. 25). The Rule recognized that it will impose such operational costs on benefit-program administrators. 84 Fed. Reg. at 41,457, 41,469-70. And these direct and significant burdens will not necessarily arise each time "*any* change in federal policy" affects plaintiffs' residents (Br. 22). The

burdens here are not limited to reading the Rule and answering questions, but rather extend to redesigning complex enrollment, recordkeeping, and informational systems—burdens not imposed by every change to federal policy.

Third, and in any event, plaintiffs are also concretely injured from having to implement costly training and outreach efforts to combat fear and misinformation about the Rule—problems that indisputably fuel the Rule's disenrollment effects and harms to plaintiffs. *See* 64 Fed. Reg. at 28,692 (past confusion regarding benefits resulted in widespread avoidance of benefits). Plaintiffs' reasonable steps to "mitigate" such "substantial risk" of harm further support standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013).

**2. Plaintiffs are within the zone of interests.**

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

Plaintiffs easily satisfy this lenient standard here. As defendants acknowledge (Br. 15), Congress enacted the public-charge provision in part to protect state and city fiscs. But Congress also maintained a narrow meaning of "public charge" to ensure that States and their subdivisions continue to receive the economic and other benefits that flow from employable immigrants becoming "a valuable component part of the body-politic." 13 Cong. Rec. 5108 (Rep. Van Voorhis). Given that the Rule recognizes that it will affect these fiscal interests, the zone-of-interests test is satisfied. *See Citizens for Responsibility & Ethics in Wash. v. Trump*, 939 F.3d 131, 158 (2d Cir. 2019).

The fundamental purpose of the public-charge provision has never been, as defendants contend (Br. 24), to eliminate LPRs' use of *any* public benefits. But anyway, plaintiffs are the administrators of the public-benefit programs that defendants assert are at issue. Plaintiffs' interests are thus within the zone of interests for this reason as well. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

## POINT III

### THE SCOPE OF THE RELIEF ORDERED IS PROPER

The district court properly halted implementation of the Rule pending judicial review. Defendants' demand to limit the scope of the preliminary injunction ignores the separate provision of the district court's order postponing the Rule's effective date under 5 U.S.C. § 705. Section 705 provides that "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury," a court "may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." By authorizing the court to suspend "*the* effective date" of an agency's action, this express statutory remedy applies to a rule as a whole rather than to particular parties or locations. *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 562 (D.C. Cir. 2015) (Kavanaugh, J., dissenting in part) (§ 705 "authorizes courts to stay agency rules pending judicial review" (emphasis omitted)).

The scope of the provisional relief authorized by § 705 thus parallels the ultimate remedies of vacatur or remand that a court is authorized to issue under the APA—remedies that also apply to an entire regulation,

not particular parties. 5 U.S.C. § 706(2); *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998). Likewise, when agencies have invoked § 705 to postpone the effective dates of their own rules, they have routinely done so on a nationwide basis. *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 21-22 (D.D.C. 2012). The district court did not abuse its discretion in issuing similar relief under § 705 here. *See West Virginia v. EPA*, 136 S. Ct. 1000 (Mem.) (2016) (staying regulation); Application for Stay of Final Agency Action 5, 13, *West Virginia v. EPA*, No. 15A773 (U.S. Jan 26, 2016) (requesting § 705 stay); *Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016) (granting § 705 stay).

The district court's postponement of the Rule's effective date under § 705 means that this Court need not resolve any issues regarding the scope of courts' authority to grant nationwide equitable relief. *See* Br. 53-54. Contrary to defendants' conclusory assertion, a § 705 stay is not "one and the same" as a preliminary injunction. *See Nken v. Holder*, 556 U.S. 418, 424, 434 (2009) (injunction and stay "serve different purposes"). Although courts have looked to similar factors in issuing both forms of relief, a § 705 postponement is directly authorized by statute and does not rely on the courts' inherent equitable authority. Moreover, unlike an

injunction, a § 705 stay operates on a regulation's effective date rather than the "conduct of a party." *See id.* at 428. A § 705 stay thus does not risk exposing DHS officials to conflicting injunctions issued by different courts.

The prospect that different courts may reach different decisions about whether to issue a § 705 postponement (Br. 54) is a feature of Congress's statutory remedies rather than any judicial overreach. The APA authorizes different plaintiffs to challenge the same regulation in different courts, *see* 5 U.S.C. § 703, and each "reviewing court" is authorized to stay a regulation's effective date if circumstances warrant, *id.* § 705. When Congress wants to remove judicial authority to issue a § 705 postponement, it does so expressly. *See* 16 U.S.C. § 1855(f)(1)(A) (§ 705 "not applicable" to fishery-management regulations); 15 U.S.C. § 3416(b) (same for natural gas regulations). The absence of any such limitation here precludes any argument that the district court improperly relied on § 705 to do exactly what Congress authorized—postpone the effective date of the Rule as a whole "pending conclusion of the review proceedings." 5 U.S.C. § 705.

In any event, the district court properly issued a preliminary injunction without geographic limitation. The "scope of injunctive relief

is dictated by the extent of the violation established, not by the geographical" location of plaintiffs. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Here, plaintiffs claim, and the district court found, that the Rule likely violated the APA—a finding that would require vacatur of the Rule altogether. 5 U.S.C. § 706(2); *National Mining*, 145 F.3d at 1409-10. The district court's preliminary injunction thus appropriately protects against precisely the harm that plaintiffs ultimately seek to prevent—implementation of an unlawful regulation. *See Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 753, 765 (1994).

Moreover, the district court properly exercised its "sound discretion to consider" both the harms to plaintiffs and "the necessities of the public interest when fashioning injunctive relief." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001). For example, as the district court found (SA22-24), the preliminary injunction is appropriate here given the immigration context—both because a nationwide scope is necessary to protect plaintiffs and the public from irreparable harms, and given the importance of uniformity in the application of federal immigration law. An injunction allowing the Rule's disruptive and unprecedented framework to take effect now in some States but not others would

exacerbate the fear and confusion about the Rule that is harming plaintiffs and the public interest—the harms that the injunction is preventing. The scope of the preliminary relief is proper.

## CONCLUSION

The Court should affirm the order postponing the effective date of the Final Rule and preliminarily enjoining its enforcement.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Megan Chu, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 13,964 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ *Megan Chu*