No. 19-3169

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

COOK COUNTY, ILLINOIS, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

REPLY BRIEF

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INTRODUCTION AND SUMMARY

The Supreme Court recently issued a stay pending appeal of an injunction against the Rule at issue in this litigation. In doing so, the Court necessarily concluded that challenges to the Rule, like this one, are unlikely to succeed, and that the public interest is not served by blocking implementation of the Rule while those challenges proceed.

As a threshold matter, plaintiffs assert speculative and self-inflicted injuries, and seek to vindicate interests that are irrelevant or contrary to the interests protected by the public-charge inadmissibility statute.

On the merits, plaintiffs identify no provision of the INA with which the Rule is inconsistent, fail to meaningfully address the numerous provisions with which the Rule accords, and ignore Congress's longstanding decision to leave the definition of "public charge" to the Executive Branch's discretion. Plaintiffs instead claim that "public charge" has a uniformly accepted meaning that applies only to a narrow set of aliens and public benefits. Nothing in the statute's text, context, or history requires that narrow reading, or precludes DHS's natural and reasonable conclusion that aliens who rely on public support to feed,

house, or care for themselves over a protracted or intense period are public charges.

The remaining factors likewise weigh against an injunction. Even if plaintiffs' alleged harms were cognizable, plaintiffs fail to show that a preliminary injunction is likely to redress any harm during the pendency of this litigation. In contrast, the harm to the government and the public interest is undisputed: the injunction leads to the likely irreversible grant of lawful-permanent-resident status to aliens whom DHS believes should be inadmissible.

ARGUMENT

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

A. Article III Standing

Plaintiffs claim that Cook County has suffered a cognizable injury because it will have to provide uncompensated emergency medical care to aliens who disenroll from Medicaid as a result of the Rule. Br. 9. Yet plaintiffs do not contest that the Rule contains an exception that allows aliens to receive public benefits for emergency services without any adverse consequences in a public-charge inadmissibility determination. It is thus unclear whether the County will actually bear uncompensated

costs for emergency care as a result of the Rule. That kind of uncertain, speculative future injury cannot support standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

Plaintiffs complain that the availability of coverage for emergency services will not "fully compensate" Cook County for the "$30 million [that] Cook County stands to lose annually as a result of the Rule." Br. 12. But the funds that the County "stands to lose" are reimbursements for costs. Plaintiffs do not address the fact that the County will not incur costs for individuals who stop using the County's medical services.

Plaintiffs seek to dismiss the emergency-services exception as "meaningless" because other, *non-medical* benefits a person might receive during a temporary emergency could still count in public-charge inadmissibility determinations. Br. 11. It is unclear what this observation has to do with Cook County's likelihood to incur uncompensated *medical* expenses.

Plaintiffs alternatively attempt to dismiss the import of the emergency-services exception as "speculation." Br. 10. There is nothing speculative about the language of the exception. To the extent that plaintiffs are uncertain how the Rule will affect Cook County's bottom

line, they underscore that they have not satisfied their burden to establish standing.[1]

As for the Coalition, it insists that it has suffered a cognizable injury simply because it has "expended resources" to counter a rule with which it disagrees, including by engaging in "education efforts to inform immigrants and staff about the Rule's effects" and by "encouraging immigrants to continue enrolling in benefits programs." Br. 18-19. But the same can be said of any organization that disagrees with any rule or policy. And the Coalition's decision to re-focus educational programming it was "already doing" is insufficient. *Common Cause Indiana v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019).

Nor is it enough that the Rule will allegedly make it more difficult for the Coalition to achieve its "core organizational mission" of assisting aliens in enrolling for public benefits. Br. 15. The Supreme Court has required organizations to show that a challenged action will "perceptibly impair[]" the organization's "*ability* to" provide services,

[1] Plaintiffs suggest that DHS "waived" reliance on the emergency-services exemption in district court. Br. 10. Article III standing is not, of course, waivable. And in any event, DHS clearly argued that any "net increase in uncompensated care is speculative." Dkt. 73 at 8.

Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (emphasis added)—not just that the organization's clients will obtain less favorable results.

B. Zone-of-Interests

Plaintiffs' arguments only confirm that their alleged injuries fall outside the zone of interests of the public-charge inadmissibility statute. Plaintiffs' alleged harms are entirely premised on the predicted effects of *decreased* benefit use by aliens. *See* Br. 5-6, 8-9, 12. By thus seeking to *increase* spending on public benefits, plaintiffs impermissibly advance "the very . . . interest" that "Congress sought to restrain." *National Fed'n of Fed. Employees v. Cheney*, 883 F.2d 1038, 1051 (D.C. Cir. 1989).

In arguing otherwise, plaintiffs misconstrue the zone-of-interests inquiry. Plaintiffs insist that the County's financial harm is comparable to the lost revenue and extra expenses at issue in *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017), without any explanation other than that both are "financial." Br. 16-17. But the Supreme Court said that the financial injuries at issue there "f[ell] within the zone of interests that the [Fair Housing Act] protects," and

that its "case law with respect to the [Fair Housing Act] dr[ove] that conclusion." 137 S. Ct. at 1304. The Court then discussed how the challenged practices affected African-American and Latino neighborhoods, which in turn affected the City's budget. *Id.* Plaintiffs make no attempt to explain why the Court would have needed to say any of this on their reading of the case, nor do they draw a similar connection between their injuries and the purposes of the public-charge inadmissibility statute.

Instead, plaintiffs claim it is enough that the County's alleged financial harms are "related to the Final Rule." Br. 17. But the question is whether Congress intended for plaintiffs to be able to bring suit, not whether there is any conceivable relation between their harms and the Rule. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). And the Supreme Court has made clear that "injury in fact does not necessarily mean one is within the zone of interests to be protected by a given statute." *Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 524 (1991).

As for the Coalition, plaintiffs' acknowledge that the Coalition's interest here arises from the "important revenue" it receives by enrolling aliens for public benefits. Br. 14. That interest in expanding public-benefits coverage for aliens is "inconsistent with the purposes implicit in the [public-charge statute]" and therefore it "cannot reasonably be assumed that Congress intended to permit [this] suit." *Match-E-Be*, 567 U.S. at 225.

In response, plaintiffs try to reformulate the Coalition's interest as one "in protecting aliens from being improperly deemed inadmissible." Br. 17-18. The Coalition has not established standing to assert the rights of aliens not before the Court, and cannot do so simply by invoking an abstract interest in promoting their rights. *Cf. Kowalski v. Tesmer*, 543 U.S. 125, 134 & n.5 (2004) (holding that attorney could not challenge law adverse to his clients). In any event, the Coalition has not alleged that it represents aliens or otherwise participates in admissibility proceedings. *See* SA10.

The Coalition's reliance on INA provisions that reference legal services organizations, Br. 17-18, is therefore also misplaced. The Coalition is not a legal-services organization, *see* SA10, and this case in

any event relates not to the provisions on which the Coalition relies, but to the public-charge inadmissibility provision.

II. Plaintiffs Are Not Likely To Succeed On The Merits

DHS reasonably interpreted "public charge" to refer to an alien who charges expenses to the public for his support and care over a sustained period; the agency then implemented that interpretation by establishing an administrable threshold level of benefits below which an alien would not be considered a public charge. The Rule is "easily" a reasonable interpretation of the statute. *City & Cty. of San Francisco v. USCIS*, 944 F.3d 773, 799 (9th Cir. 2018). Much of plaintiffs' contrary argument turns on their erroneous contention that the term "public charge" has a longstanding, fixed meaning that Congress implicitly adopted. Specifically, plaintiffs assert that the term "'public charge' "encompasses only persons who . . . would be substantially, if not entirely, dependent on government assistance on a long-term basis." Br. 26 (quoting SA19). The public-charge inadmissibility provision's text and history negate plaintiffs' contention.

A. The Rule Is Consistent With The INA

As an initial matter, plaintiffs admit that Congress has "manifested a national policy to further self-sufficiency for immigrants to the United States." Br. 35. And they do not contest that this policy provides the "direction" in which the public-charge inadmissibility provision "points." Br. 35 (quoting SA16-17). Plaintiffs nonetheless disregard the policy because it did not directly amend the public-charge ground of inadmissibility. *Id.* But Plaintiffs cannot seriously dispute that statements of "national policy with respect to welfare and immigration," 8 U.S.C. § 1601, are highly relevant to the public-charge inadmissibility provision that Congress enacted a month later. Indeed, the legislation in which Congress declared that policy altered the public-charge inadmissibility determination by introducing the affidavit-of-support provision, 8 U.S.C. § 1183a. *See* Pub. L. No. 104-193, § 423 (1996). And the statements of policy reference the "sponsorship agreements" that are central to public-charge determinations under the provisions of the public-charge inadmissibility statute itself. 8 U.S.C. § 1601(1), (5); 8 U.S.C. § 1182(a)(4)(B)(ii), (C)-(D).

Neither can plaintiffs dispute that the affidavit-of-support provisions support the Rule's interpretation of public charge. As the government explained, Appellants' Opening Brief (AOB) 23-26, the affidavit-of-support provision, 8 U.S.C. § 1183a, and the public-charge provision, 8 U.S.C. § 1182(a)(4), together require many aliens seeking to adjust status to obtain sponsors, mandate that those sponsors agree to repay means-tested benefits the alien receives, and declare inadmissible on public-charge grounds any alien who fails to obtain a required affidavit of support. Thus, as the government noted, Congress provided that the mere possibility that an alien might receive an unreimbursed, means-tested public benefit, even if the aliens' individual circumstances do not indicate that the alien is likely to use such benefits, was sufficient to render the alien inadmissible on public-charge grounds. *See* AOB 25.

Plaintiffs offer no real response. They make the irrelevant observation that the public-charge inadmissibility provision does not render *all* aliens inadmissible for failure to obtain an affidavit of support, and that "Congress knew how to impose this heightened requirement on all immigrants if it wanted to." Br. 35-36. No one contends that Congress did impose that requirement on all immigrants.

The point is that the existing requirement renders certain aliens inadmissible on the public-charge ground based on the mere possibility that those aliens will use *any amount* of public benefits (including in-kind benefits) without a sponsor who would pay it back, an application of the public-charge provision that contradicts plaintiffs' asserted unambiguous meaning of the term.

Plaintiffs similarly miss the import of the special rules that bar DHS from considering past receipt of benefits by battered aliens and aliens seeking adjustment of status under the 1986 amnesty bill. *See* 8 U.S.C. § 1182(s); *id.* § 1255a(d); AOB 27-28. Plaintiffs brush aside the special rule for battered aliens on the theory that such aliens are not subject to public-charge inadmissibility determinations at all. Br. 37. But the point is that the battered-alien exemption shows Congress's background understanding that an exemption was necessary.[2] As to the amnesty provision, plaintiffs note that the "special rule" "aligns with the interpretation that Plaintiffs advance here." Br. 38. That is precisely

[2] Plaintiffs are in any event wrong that the statutory exemption has no effect, as battered aliens who previously received benefits may subsequently cease to be a "qualified alien." *See* 8 U.S.C. § 1641(c).

the problem: plaintiffs' narrow definition of "public charge" is similar to the definition that Congress called a "special rule." 8 U.S.C. § 1255a(d).

Against this textual support for the Rule, plaintiffs cite (Br. 39) two failed legislative proposals as evidence that Congress rejected the Rule's definition. Failed legislative proposals are generally a dubious means of interpreting a statute, and that is particularly true here. Congress did not reject the 1996 and 2013 proposals in favor of alternative language. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987). Rather, in both instances, it left the term "public charge" undefined. "If anything, this legislative history proves only that Congress decided not to constrain the discretion of agencies in determining who is a public charge." *San Francisco*, 944 F.3d at 798 n.15.

Plaintiffs further assert that aliens cannot be considered public charges for using benefits "that Congress has affirmatively authorized" them to use. Br. 38 (emphasis omitted). That interpretation generally would make it impossible for an alien to be a public charge by relying on federal benefits, because all federal benefits are authorized by Congress. Plaintiffs themselves do not believe that to be true, as they

concede that Congress at least intended to exclude aliens who would be institutionalized or primarily dependent on cash benefits.

In any event, Congress's intent to exclude aliens who appear likely to rely on public assistance is consistent with its decision to assist certain aliens who end up needing assistance after admission; the dichotomy simply reflects that immigration officials cannot with perfect accuracy predict which aliens will become public charges. *Cf.* 8 U.S.C. § 1227(a)(5) (alien cannot be deported for "becom[ing] a public charge from causes" that "have arisen" after entry).

Plaintiffs misunderstand the government's argument when they say that Congress's 1996 legislation "[did] not alter the longstanding definition of public charge." Br. 39. It is not that Congress changed the definition of "public charge" in 1996; it is simply that those provisions show that Congress did not understand the term in the narrow way that plaintiffs define it, but instead had in mind a broad interpretation that easily encompasses the Rule's definition.

Plaintiffs' contention that the government "waived its argument that the 1996 statute changed the definition of 'public charge,'" Br. 20 (capitalization altered), is based on the same misapprehension. As

evidenced by the several passages that plaintiffs themselves quote, the government has consistently argued—both on appeal and in district court—that "[a]n unbroken line of predecessor statutes" have "'without exception' delegated [interpretive] authority to the executive branch." Br. 20 (quoting Dkt. 73 at 3); *see* Dkt. 73 at 13-14, 22. The government's consistent argument that interpretation of the term "public charge" has been left to the Executive Branch's discretion is not "gamesmanship," and cannot plausibly be equated to *Lott v. Levitt*, 556 F.3d 564 (7th Cir. 2009), where a party agreed in district court that Illinois law applied and then argued on appeal that Virginia law applied instead. *See id.* at 568.

Moreover, the government has never said that 1882 is the *only* time to consider. And in arguing that "public charge" has never had the meaning that plaintiffs assert, the government cited numerous twentieth-century authorities in its brief before the district court, including provisions enacted in 1996. *See* Dkt. 73 at 17-18, 20-24.

B. DHS Has Broad Discretion To Define The Term "Public Charge"

As discussed in the government's opening brief (AOB 37-40) and recognized by the Ninth Circuit, the common thread running through

Congress's enactment of various public-charge provisions has been its repeated and intentional decision to leave the term's definition to the Executive Branch's discretion, so that the Executive may "adapt" the public-charge provision to "change[s] over time" in "the way in which federal, state, and local governments have cared for our most vulnerable populations." *San Francisco*, 944 F.3d at 792. The Rule falls comfortably within that delegated authority.

Plaintiffs' principal argument to the contrary is that the Supreme Court's decision in *Gegiow v. Uhl*, 239 U.S. 3 (1915), rendered a "binding interpretation of the statute" which "is alone sufficient" to decide this case. Br. 29. The government has explained at length why that is wrong. *See* AOB 30-35. The one-paragraph analysis in *Gegiow* self-evidently did not establish that aliens must meet any threshold level of dependence to be a public charge—even with respect to the 1907 statute at issue in that case. If anything, the Supreme Court's application of the *ejusdem generis* canon in 1915 underscores that the term "public charge," standing alone, did not have an obvious meaning.

Moreover, as the government explained, Congress amended the public-charge statute in 1917 "to overcome" the decision in *Gegiow*.

S. Rep. No. 64-352, at 5 (1916); *see* AOB 33-35; *see also* Letter from Sec. of Labor to House Comm. on Immig. and Naturalization, H.R. Doc. No. 64-886, at 3 (1916) (asking Congress to amend the statute to supersede *Gegiow*). Plaintiffs reiterate the mistakes the district court made in disregarding that amendment. *See* AOB 34-35; Br. 26-27. They say, for instance, that the 1917 Act is irrelevant because it is not an interpretation of "public charge" in the nineteenth century, Br. 26, when *Gegiow* itself was a 1915 decision interpreting a 1907 statute. And their objection that the amendment could not have changed the degree of dependence required for an alien to be a public charge, Br. 26-27, merely highlights that *Gegiow* did not establish any test based on a degree of dependence.

Plaintiffs also rely (Br. 27-28) on several cases that refute their own theory. Several of those cases expressly state that the 1917 amendment overturned *Gegiow*'s holding. *See United States ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929) (the phrase public charge "is certainly now intended to cover cases like *Gegiow v. Uhl*"); *Coykendall v. Skrmetta*, 22 F.2d 120, 121 (5th Cir. 1927) ("It may be inferred that the change made in the location of the words in question indicated a legislative intention

that the determination of the meaning to be given to them should not be influenced by the words or provisions with which, in the earlier act, they were immediately associated."); *Ex parte Horn*, 292 F. 455 (W.D. Wash. 1923) ("The term 'likely to become a public charge' is not associated with paupers or professional beggars, . . . and is differentiated from the application in *Gegiow v. Uhl*."). And two of them attributed to *Gegiow* the same reasoning the government does, namely, "that an alien could not be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination was overstocked." *Hosaye Sakaguchi v. White*, 277 F. 913, 916 (9th Cir. 1922); *see also United States ex rel. De Sousa v. Day*, 22 F.2d 472, 473 (2d Cir. 1927) (stating that the *Gegiow* "opinion was based upon the ground that an alien could not be excluded because the labor market of the United States was overstocked" (quotation marks omitted)).

Similarly, none of those decisions articulate the test that plaintiffs urge here. *See e.g.*, *Ex parte Riley*, 17 F.2d 646, 646 (D. Me. 1926) ("[I]n order to become a public charge a man need not be a technical pauper . . . if he is likely to become a charge upon the public the requirements

of the statute are answered"), *rev'd sub nom. Riley v. Howes*, 24 F.2d 686 (1st Cir. 1928); *Hosaye Sakaguchi*, 277 F. 913 at 916 (describing "public charge" as "a charge on the public"); *Lam Fung Yen v. Frick*, 233 F. 393, 397 (6th Cir. 1916) (holding that alien could be found likely to "at least intermittently" become a public charge); *Iorio*, 34 F.2d at 922 (holding that a person accused of a crime was not a likely public charge because the term "suggests rather dependency tha[n] imprisonment"); *Coykendall*, 22 F.2d at 121 (describing "public charge" as "a condition of dependence on the public for support"). Nor is it relevant that some decisions referred to almshouses, *see* Br. 28 (citing *Howe v. United States*, 247 F. 292, 294 (2d Cir. 1917)), as those courts merely described the primary way in which aliens became public charges at that time and could not have taken into account the modern welfare state.

Plaintiffs' textual interpretation of the 1882 public-charge inadmissibility statute is likewise erroneous. Plaintiffs assert that, because the term "public charge" appeared in a list that included "idiots, insane persons," and "paupers," the term must have included only aliens who "required long-term state care or institutionalization." Br. 38. That interpretation, however, would in effect make "public

charge" coextensive with the other items on the list, impermissibly rendering the term "superfluous in all but the most unusual circumstances." *TRW, Inc. v. Andrews*, 534 U.S. 19, 29 (2001). The better reading is that "public charge" was a catch-all that referred to all persons whose care would impose an expense, or "charge," on the public. Plaintiffs themselves seem to perceive this, stating elsewhere in their brief that the other items on the list "provid[ed] examples for the larger umbrella term of 'persons likely to become a public charge.'" Br. 27 n.9.

Moreover, in the Immigration Act of 1917, Congress deliberately "change[d]" the "position" of the public-charge exclusion in the statute, to remove any inference that could be drawn from its prior placement. S. Rep. No. 64-352, at 5. And in 1952, Congress listed the public-charge ground for exclusion separately from other grounds for exclusion like the one for paupers. *See* Pub. L. No. 82-414, § 212 (1952). That history hardly suggests that those grounds were redundant.

Plaintiffs cite (Br. 29, 34) the tax that the 1882 Immigration Act imposed on shipowners bringing aliens to the United States as evidence that the term "public charge" then did not include those aliens who receive "short-term support and relief." Br. 29 (quotation marks

omitted). But the immigrant fund created by the 1882 tax was funded by those directly involved in and benefiting from the transport of aliens to the United States—*i.e.*, the shipowners, or, in some cases, the aliens themselves. *See* Pub. L. No. 47-376, §§ 1-2 (1882); Pub. L. No. 64-301, § 2 (1917). Unlike modern-day public benefits such as SNAP and Medicaid, it imposed no "charge" on the "public." In that regard, the immigrant-fund tax was analogous to the modern-day sponsorship provision: it was meant to *prevent* aliens from becoming a "charge" on the "public." In any event, even if Congress had provided *public* assistance, a decision to provide a safety net does not entail an intent to admit aliens who are likely to need it.

Neither do Plaintiffs advance their argument by selectively quoting nineteenth century dictionaries. They cite *one* definition of "charge" as a person "committed" to another's "custody, care, concern, or management." Br. 30 (quoting SA 25). But plaintiffs themselves do not argue that "public charge" includes only persons in government custody. Such an interpretation would be inconsistent with the government's practice for 138 years, including the 1999 Guidance which Plaintiffs approve.

The more apt definition is the one plaintiffs ignore. At the time, the "general sense" of the word "charge" was merely "an obligation or liability." 1 Stewart Rapalje *et al.*, Dictionary of American and English Law (1888); *see, e.g.*, Henry Campbell Black, A Dictionary of Law (1891). And that definition reflects the usage of the phrase in many decisions, including several on which plaintiffs rely. *See, e.g.*, *Ex parte Horn*, 292 F. 455 at 457 (defining "public charge" as one who "impose[s]" a "tax, duty, or trust" upon the "public"); *Hosaye Sakaguchi*, 277 F. 913 at 916 (referring to "public charge" as "a charge upon the public"); *Ex parte Mitchell*, 256 F. 229, 230 (N.D.N.Y. 1919) ("A 'person likely to become a public charge' is one who for some cause or reason appears to be about to become a charge on the public.").

Plaintiffs' reliance on a modern dictionary is no better. They cite a definition of "public charge" as "a person who is dependent upon the State for care or support." Br. 30. But they do not explain why a person who depends on public resources to meet basic needs like food, shelter, or health care cannot be characterized as "dependent on the State for . . . support."

Similarly unsuccessful is plaintiffs' attempt to set aside other authorities contrary to their position, *see* AOB 36-37—including two editions of Black's Law Dictionary. Plaintiffs' only objection to those sources is that they do not "address[] *Gegiow*." Br. 31. Yet that fact shows only that commentators closer in time did not regard *Gegiow* as having established plaintiffs' preferred definition of "public charge."

Nor are plaintiffs correct that "a consistent body of judicial and administrative authority has held that a 'public charge' is an individual with primary or long-term dependence on the government for care." Br. 31. In *Ex parte Turner*, 10 F.2d 816, 817 (S.D. Cal. 1926), for example, the court concluded that an alien was properly excludable as likely to become a public charge where there "[wa]s no assurance that he will earn or save sufficient [funds] to provide necessities *at all times* for himself, or his wife and children." *Id.* at 817 (emphasis added). Similarly, in *Guimond v. Howe*, 9 F.2d 412, 413 (D. Me. 1925), the court cited the fact that an alien's husband had been imprisoned for 60 days and 90 days, during which time the alien had to rely on "charitable aid," as evidence that the wife was likely to become a public charge again in the future.

Plaintiffs contend that those cases involved "substantial[] dependen[ce] upon government support for a significant period of time." Br. 32. But that is not the definition that plaintiffs attribute to *Gegiow*; instead, they insist upon a "*permanent* personal objection," Br. 25 (quoting *Gegiow*, 239 U.S. at 10) (plaintiffs' emphasis), and insist that it is insufficient that a person "receive[s] benefits, *whether modest or substantial*, due to being temporarily unable to support themselves entirely on their own," Br. 24 (quoting SA18) (emphasis added). Plaintiffs' characterization thus underscores that the term "public charge" is capacious enough to encompass individuals who rely on government benefits to meet their basic needs for a significant period of time. The Rule is entirely consistent with that meaning.

Past administrative practice similarly contradicts plaintiffs' definition. As an initial matter, plaintiffs' insistence on permanent conditions is inconsistent with the 1999 Guidance, whose legality they do not dispute. Moreover, as the government explained, AOB 35-36, the Attorney General long ago concluded that an alien's receipt of and failure to repay public benefits, even if such receipt was only temporary,

could render the alien deportable as a "public charge." *See Matter of B-*, 3 I. & N. Dec. 323 (BIA and AG 1948).

Plaintiffs' only response is that the decision in *Matter of B-* held that aliens could not be deported as public charges based on receipt of various benefits "for which no specific charge is made." Br. 33 (quoting 3 I. & N. Dec. at 324). But Plaintiffs do not suggest that the public-charge ground of inadmissibility (as opposed to deportability) hinges on whether a specific charge is made; if it did, the 1999 Guidance and many of the decisions on which plaintiffs rely would be invalid. The relevant point is that *Matter of B-* cannot be reconciled with plaintiffs' view that the term "public charge" unambiguously requires a particular threshold amount of dependence. Instead, the decision indicates that the alien in question would have been deportable as a "public charge" if her family had not repaid the government for the "clothing, transportation, and other incidental expenses" it had provided. *Matter of B-*, 3 I. & N. Dec. at 326-27.

Plaintiffs' contention (Br. 33 n.12) that the Rule is inconsistent with other administrative decisions is likewise mistaken. The Rule requires a finding that an alien be *likely* to become a public charge, 84 Fed. Reg.

41,292, 41,295 (Aug. 14, 2019); it does not render an alien inadmissible based on the mere *possibility* that an alien will receive benefits. Nor does the Rule allow healthy individuals in the prime of their working lives to be routinely declared likely public charges. To the contrary, DHS cited a hypothetical alien who is "young, healthy, employed, attending college, and not responsible for providing financial support for any household members" as an example of an individual who "would not be found inadmissible" under the Rule. 83 Fed. Reg. 51,114, 51,216 (Oct. 10, 2018).

Equally mistaken are plaintiffs' arguments that Congress did not grant DHS discretion to interpret the term "public charge," which plaintiffs acknowledge Congress has never defined. Br. 42. Plaintiffs make no effort to account for the Secretary of Homeland Security's express authority to "establish such regulations . . . as he deems necessary." 8 U.S.C. § 1103(a)(1), (3); *San Francisco*, 944 F.3d at 792. Moreover, as the government explained, AOB 38-39, the INA's legislative history makes clear that Congress both understood that the term lacked a fixed meaning and intentionally declined to cabin the Executive Branch's discretion by giving it one. Plaintiffs state that

"legislative history materials are generally not a reliable indicator of a statute's meaning." Br. 28 n.10. Yet they provide no reason to think that the 1950 Senate Judiciary Committee Report, which formed the basis for the INA a few years later, is not an especially reliable source here—particularly since Congress followed the report's recommendation by committing public-charge inadmissibility determinations to the "opinion of" the Executive Branch. *See* AOB 39.

Plaintiffs discount that discretion-granting statutory language on the theory that Congress merely "authorize[d] the agency to exercise discretion as to the circumstances of particular cases." Br. 42. But where a statute commits a decision to an agency's discretion, "[t]he standards by which the [agency] reaches [that] decision" are likewise committed to its discretion. *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018). Plaintiffs' unremarkable observation that public-charge determinations must be made "at the time at which an individual immigrant is subject to evaluation," Br. 43, does not affect that conclusion.

Plaintiffs relatedly claim that DHS is advocating for "boundless discretion" to redefine the term "public charge." Br. 39-40. Not so. All

agree that the term "public charge" refers to an alien who is dependent on Government assistance. DHS invokes only the narrow discretion to determine the level of dependence necessary for an alien to be found a public charge.

Plaintiffs contend that such discretion amounts to an "unconstitutional delegation of authority to the agency." Br. 40. But that argument cannot be squared with non-delegation case law. Congress may delegate significant discretion to the executive branch so long as it provides an "intelligible principle to guide the delegee's use of [that] discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). The public-charge inadmissibility provision easily satisfies that standard. The statute provides DHS with a non-exclusive list of factors that the agency "shall consider" in evaluating whether an individual is likely to become a public charge. 8 U.S.C. § 1182(B). And as discussed, Congress has also clearly articulated a "national policy concerning welfare and immigration." 8 U.S.C. § 1601(4)-(6).

C. Plaintiffs' Alternative Arguments Do Not Support Affirmance

In just over two pages near the end of their brief, plaintiffs make five alternative arguments for affirmance that the district court never

considered. Those arguments are insufficiently briefed for this Court's consideration, and in any event lack merit.

Plaintiffs assert in one sentence that "although the Final Rule pays lip service to the statutory multifactor test, in reality it substitutes this holistic analysis with a single-factor test." Br. 44. Plaintiffs do not specify what "single factor" they mean, but that assertion does not withstand even the most cursory reading of the Rule, which specifies numerous factors for officers to consider, and which dozens of times "directs officers to consider [various] factors in the totality of the alien's circumstances." 84 Fed. Reg. at 41,295; 83 Fed. Reg. at 51,178-51,207; *see e.g.*, 84 Fed. Reg. at 41,369, 41,501-04.

Similarly meritless are plaintiffs' contentions that the Rule is arbitrary and capricious. 5 U.S.C. § 706(2)(A). Under the deferential standard for arbitrary-and-capricious review, agency action will be upheld if the agency examined "the relevant data" and articulated a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Rule plainly meets that standard. Plaintiffs rely on the U.S. District Court for the Southern District of

New York's holding to the contrary. Br. 44. But the Supreme Court has now stayed the injunction in that case, thereby agreeing with the Ninth Circuit that the government is likely to succeed on the merits.

Plaintiffs say that the Rule lacks "a logical rationale" because its definition of "public charge" would, at the margins, include aliens who receive an amount of benefits that plaintiffs deem small. Br. 45. DHS determined that it could best achieve Congress's statutory purposes by setting a threshold of twelve months of enumerated benefits within a 36-month period. That is not, as plaintiffs suggest, a small or temporary level of support. To the extent plaintiffs disagree, moreover, judgments about the amount of public benefits that render an alien a public charge are precisely the kind of issue Congress delegated to DHS. *See Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 540 (1979) (recognizing that where a statute specifies that a determination be made "in the opinion of" an agency official, it confers "broad discretion" on the official). Especially given the importance Congress attached to ensuring that aliens will "not depend on public resources to meet their needs," 8 U.S.C. § 1601(2)(A), DHS's judgment about the appropriate threshold here is permissible.

That aside, DHS provided a rational explanation for its definition. It relied on various studies regarding patterns of benefits usage and determined that its definition would "provide[] meaningful flexibility to aliens who may require one or more of the public benefits for relatively short periods of time, without allowing an alien who is not self-sufficient to avoid facing public charge consequences." 84 Fed. Reg. at 41,360-61. DHS further reasonably concluded that—despite any fringe hypothetical applications of the Rule—the Rule's definition overall would provide more "meaningful guidance to aliens and adjudicators." *Id.* at 41,361.

Plaintiffs are likewise wrong that DHS "flatly refused to consider substantial evidence that the Rule would have a 'chilling effect.'" Br. 45. DHS specifically addressed potential dis-enrollment in benefits programs, and as the Ninth Circuit held, its explanation was sufficient. *See San Francisco*, 944 F.3d at 803; 84 Fed. Reg. at 41,313-14. DHS explained that it could not precisely predict the dis-enrollment impact, but noted savings that would accompany any costs, and also noted reasons why the costs might be less than some feared. 84 Fed. Reg. at 41,301, 41,212-13. In particular, the agency noted that the majority of

aliens subject to the Rule are ineligible for public benefits in the first place. 83 Fed. Reg. at 51,118; 84 Fed. Reg. at 41,312-13. And to the extent confusion over the Rule's coverage might cause further disenrollment, the agency reasoned that such disenrollment might be short-lived, as DHS planned to issue clear guidance and those individuals could re-enroll after realizing their mistake. 84 Fed. Reg. at 41,463.

Plaintiffs' remaining arguments that the Rule "contradicts the SNAP statute" and the Rehabilitation Act are meritless. By treating receipt of SNAP benefits as evidence that an alien is not self-sufficient, the Rule cannot rationally be characterized as "considering these benefits as income or resources." Br. 44 (citing 7 U.S.C. § 2017(b)). Indeed, the Rule specifically prohibits consideration of SNAP benefits as part of an alien's income or assets. *See* 84 Fed. Reg. at 41,375. Nor does DHS's consideration of disability as one factor among many violate the Rehabilitation Act's prohibition on denying benefits "solely by reason" of disability. 29 U.S.C. § 794(a); *see Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979). That is especially so because Congress directed that DHS "shall" consider "health" in determining whether an alien is

likely to become a public charge. 8 U.S.C. § 1182(a)(4)(B); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (A "specific statute will not be controlled or nullified by a general one."); *see also San Francisco*, 944 F.3d at 800 (rejecting Rehabilitation Act argument).

III. The Remaining Factors Weigh Against A Preliminary Injunction

The remaining preliminary-injunction factors also mandate reversal. Even if plaintiffs' alleged harms were cognizable, which they are not, *see supra* Part I, plaintiffs cannot show that they need a preliminary injunction to avoid them. The County's allegations regarding "long-term increases in cost" and possible "spread" of disease, Br. 47, show at most a risk of injury at some unspecified time in the future—not a likely and imminent injury sufficient to warrant injunctive relief during this litigation. Nor does the County explain why a reduction in cost reimbursements during litigation would harm it, in the absence of any costs to reimburse.

The Coalition, for its part, does not even suggest that a preliminary injunction would alter its alleged diversion of resources, which presumably would remain the same so long as the Rule could be implemented in the future. *See* Br. 47-48. To the contrary, the

Coalition's complaint states that it "will *continue* to divert a *comparable* amount of resources in the future to mitigate the harm caused by the Final Rule once implemented." A53 (emphasis added).

Plaintiffs likewise cannot show that the balance of the equities and the public interest support an injunction. Plaintiffs do not contest (Br. 48-49) that an injunction would lead to the likely irrevocable grant of lawful-permanent-resident status to aliens who are likely to become public charges as the Secretary would define that term. 8 U.S.C. § 1182(a)(4)(A). That certain harm outweighs the County's allegations of merely possible harms that it is unlikely to suffer during this litigation, as well as the mere possibility of a marginal increase in the Coalition's re-allocation of resources. It also outweighs "Plaintiffs' desire to maintain the decades-long regulatory status quo," Br. 49, as desires are not part of the balance, and the "regulatory status quo" would simply freeze a *prior* exercise of delegated authority to the detriment of DHS's *current* exercise of authority.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,447 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

s/ Joshua Dos Santos
Joshua Dos Santos

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I further certify that I will cause 15 paper copies of this brief to be received by the Clerk within seven days of the Notice of Docket Activity generated upon acceptance of the brief, in compliance with 7th Circuit Rule 31(b) and ECF Procedure (h)(2).

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