ETHAN P. DAVIS
Acting Assistant Attorney General
WILLIAM D. HYSLOP
United States Attorney
ALEXANDER K. HAAS
Branch Director
ERIC J. SOSKIN
Senior Trial Counsel
KERI L. BERMAN
KUNTAL V. CHOLERA
JOSHUA M. KOLSKY, DC Bar No. 993430
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch

Attorneys for Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STATE OF WASHINGTON, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants	No. 4:19-cv-5210-RMP NOTICE OF SUPPLEMENTAL AUTHORITY

U.S. DEPARTMENT OF JUSTICE
1100 L St. NW, Washington, DC, 20003
(202) 353-0533

Defendants respectfully submit this notice to inform the Court that the United States Courts of Appeals for the Second and Fourth Circuits recently issued decisions in the appeals of preliminary injunctions involving the same Department of Homeland Security rule that is at issue here. *See* Exhibits A and B attached hereto. Those opinions concern issues raised in Defendants' motion to dismiss.

The Fourth Circuit squarely held that "the DHS Rule is unquestionably lawful." Ex. A at 48. And the "process that DHS followed in promulgating the Rule was both thorough and procedurally sound." *Id*. at 15. Not only is the Rule "a permissible interpretation of the public charge provision," but "to hold otherwise would be a stark transgression of the judiciary's proper role." *Id*. at 7. The court rejected the plaintiffs' contention, also made by Plaintiffs' here, that the term "public charge" must refer only to someone who is "primarily dependent" on public resources. That definition "has no basis in the text or history of that statute." *Id*. at 45. The plaintiffs' argument "that their view of the public charge provision is the only correct one" "cannot be right." *Id*. at 29. "The term is broad and even elusive enough to accommodate multiple views and meanings, as indeed it has since it first appeared in immigration law." *Id*. The plaintiffs' arguments did *not* present "a close question," particularly under the *Chevron* standard. *Id*. at 45. "All told, the text, purpose, and structure of the INA make clear that the DHS Rule is premised on a permissible construction of the term 'public charge.' To hold otherwise is a serious error in statutory interpretation." *Id*. at 47.

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"More fundamentally, though, it is also a broadside against separation of powers and the role of Article III courts." *Id.* "[F]undamental separation of powers principles, and the concomitantly limited role of the federal courts over sensitive matters of immigration policy, only buttress what traditional tools of statutory interpretation make clear: the DHS Rule is a lawful one." *Id.* at 29. Indeed, "[t]o invalidate the Rule would visit palpable harm upon the Constitution's structure and the circumscribed function of the federal courts that document prescribes." *Id.* at 4.

The Fourth Circuit also addressed the impact of the Supreme Court's stays of preliminary injunctions of the Rule issued by the Southern District of New York and the Northern District of Illinois. "[E]very maxim of prudence suggests that we should decline to take the aggressive step of ruling that the plaintiffs here are in fact likely to succeed on the merits right upon the heels of the Supreme Court's stay order necessarily concluding that they were unlikely to do so. Such a step would require powerful evidence that the Supreme Court's stay was erroneously issued. Such evidence is absent here." *Id.* at 6.

The Fourth Circuit also explained that a deferential standard of review is appropriate "in light of the intricacies and sensitivities inherent in immigration policy." *Id.* at 4 (citing *Fiallo v. Bell*, 430 U.S. 787, 793 (1977)); *see also id.* at 47-48. That ruling bolsters Defendants' argument that the deferential standard of review described in *Fiallo* and *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) governs and requires dismissal of Plaintiffs' equal protection claims.

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In contrast to the Fourth Circuit, the Second Circuit affirmed the preliminary injunctions entered by the Southern District of New York. *See* Ex. B. But the Second Circuit recognized that its decision was inconsistent with the Ninth Circuit's opinion in this case, *see id*. at 67, which is controlling in this Circuit.

Dated: August 6, 2020

Respectfully submitted,

ETHAN P. DAVIS
Acting Assistant Attorney General

WILLIAM D. HYSLOP
United States Attorney

ALEXANDER K. HAAS
Branch Director

s/ Joshua Kolsky
ERIC J. SOSKIN
Senior Trial Counsel
KERI L. BERMAN
KUNTAL V. CHOLERA
JOSHUA M. KOLSKY, DC Bar No. 993430
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, D.C. 20005
Tel: (202) 305-7664
Fax: (202) 616-8470
joshua.kolsky@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all users receiving ECF notices for this case.

/s/ Joshua Kolsky

United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, D.C. 20005

Attorney for Defendants

Exhibit A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-2222

CASA DE MARYLAND, INC.; ANGEL AGUILUZ; MONICA CAMACHO PEREZ,

Plaintiffs – Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; CHAD WOLF, in his official capacity as Acting Secretary of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY; KENNETH T. CUCCINELLI, II, in his official capacity as Acting Director, U.S. Citizenship and Immigration Services; U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants – Appellants.

IMMIGRATION REFORM LAW INSTITUTE,

Amicus Supporting Appellants.

104 BUSINESSES AND ORGANIZATIONS; AMERICAN ACADEMY OF PEDIATRICS; MARYLAND CHAPTER, AMERICAN ACADEMY OF PEDIATRICS; VIRGINIA CHAPTER, AMERICAN ACADEMY OF PEDIATRICS; AMERICAN MEDICAL ASSOCIATION; MARYLAND STATE MEDICAL SOCIETY; AMERICAN COLLEGE OF PHYSICIANS; AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS; INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW; UNITED STATES HOUSE OF REPRESENTATIVES; LEGAL HISTORIANS; CENTER FOR REPRODUCTIVE RIGHTS; MEMBERS OF CONGRESS; JUDY CHU, Chair of the CAPAC; ADRIANO ESPAILLAT, CHC Whip; YVETTE D. CLARKE, Chair of the CBC Immigration Task Force; JOAQUIN CASTRO, Chair of the CHC; KAREN BASS, Chair of the CBC; PRAMILA JAYAPAL, Chair of the CAPAC Immigration Task Force; BARBARA LEE, Co-Chair of the CAPAC

Healthcare Task Force; NONPROFIT ANTI-DOMESTIC VIOLENCE AND SEXUAL ASSAULT ORGANIZATIONS; IMMIGRATION LAW PROFESSORS; FISCAL POLICY INSTITUTE; PRESIDENTS' ALLIANCE ON HIGHER EDUCATION AND IMMIGRATION; PUBLIC JUSTICE CENTER,

Amici Supporting Appellees.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Paul W. Grimm, District Judge. (8:19-cv-02715-PWG)

Argued: May 8, 2020 Decided: August 5, 2020

Before WILKINSON, NIEMEYER, and KING, Circuit Judges.

Reversed and remanded by published opinion. Judge Wilkinson wrote the opinion, in which Judge Niemeyer joined. Judge King wrote a dissenting opinion.

ARGUED: Gerard Joseph Sinzdak, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Jonathan Backer, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Appellees. Adam A. Grogg, UNITED STATES HOUSE OF REPRESENTATIVES, Washington, D.C., for Amicus Curiae. ON BRIEF: Joseph H. Hunt, Assistant Attorney General, Daniel Tenny, Joshua Dos Santos, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Robert K. Hur, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellants. Amy L. Marshak, Joshua A. Geltzer, Mary B. McCord, Institute for Constitutional Advocacy and Protection, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Appellees. Michael M. Hethmon, Lew Olowski, IMMIGRATION REFORM LAW INSTITUTE, Washington, D.C., for Amicus Immigration Reform Law Institute. Paul W. Hughes, Michael B. Kimberly, Matthew A. Waring, MCDERMOTT WILL & EMERY LLP, Washington, D.C., for Amici 104 Businesses and Organizations. Susan M. Krumplitsch, Elizabeth Stameskin, Priyamvada Arora, COOLEY LLP, Palo Alto, California, for Amici American Academy of Pediatrics; Maryland Chapter, American Academy of Pediatrics; Virginia Chapter, American Academy of Pediatrics; American Medical Association; Maryland State Medical Society; American College of Physicians; American College of Obstetricians and Gynecologists. Richard L. Revesz, Jack Lienke, Max Sarinsky, INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW, New York,

New York, for Amicus Institute for Policy Integrity at New York University School of Law. Robert M. Loeb, Thomas M. Bondy, Peter E. Davis, Emily Green, Washington, D.C., Rene Kathawala, Jessica Edmundson, Allison Epperson, New York, New York, M. Todd Scott, ORRICK, HERRINGTON & SUTCLIFFE LLP, San Francisco, California; Douglas N. Letter, General Counsel, Todd B. Tatelman, Principal Deputy General Counsel, Megan Barbero, Josephine Morse, Adam A. Grogg, William E. Havemann, Office of General Counsel, UNITED STATES HOUSE OF REPRESENTATIVES, Washington, D.C., for United States House of Representatives. Alexandra Wald, COHEN & GRESSER LLP, New York, New York; Elizabeth B. Wydra, Brianne J. Gorod, Dayna J. Zolle, CONSTITUTIONAL ACCOUNTABILITY CENTER, Washington, D.C., for Amici Legal Historians. Jenny Ma, Pilar Herrero, Amy Myrick, Elyssa Spitzer, CENTER FOR REPRODUCTIVE RIGHTS, New York, New York, for Amicus Center for Reproductive Rights. Gare Smith, Kristyn DeFilipp, Andrew London, Emily J. Nash, FOLEY HOAG, LLP, Boston, Massachusetts; Justin Lowe, Wendy Parmet, HEALTH LAW ADVOCATES, INC., Boston, Massachusetts, for Amici Health Law Advocates, Inc. and Other Organizations Interested in Public Health. Nilda Isidro, Amanda Burns, Christine Armellino, New York, New York, Caroline H. Bullerjahn, GOODWIN PROCTOR LLP, Boston, Massachusetts, for Amici Members of Congress Judy Chu, Chair of the CAPAC; Adriano Espaillat, CHC Whip; Yvette D. Clarke, Chair of the CBC Immigration Task Force; Joaquin Castro, Chair of the CHC; Karen Bass, Chair of the CBC; Pramila Jayapal, Chair of the CAPAC Immigration Task Force; Barbara Lee, Co-Chair of the CAPAC Healthcare Task Force, et al. Paul J. Lawrence, Alanna E. Peterson, PACIFICA LAW GROUP LLP, Seattle, Washington, for Amici Nonprofit Anti-Domestic Violence and Sexual Assault Organizations. Harry Lee, Mary Woodson Poag, Johanna Dennehy, STEPTOE & JOHNSON LLP, Washington, D.C., for Amici Immigration Law Professors. Monisha Cherayil, Sally Dworak-Fisher, Tyra Robinson, PUBLIC JUSTICE CENTER, Baltimore, Maryland, for Amicus Public Justice Center. Sadik Huseny, Brittany N. Lovejoy, Joseph C. Hansen, Tess L. Curet, Alexandra B. Plutshack, LATHAM & WATKINS LLP, San Francisco, California, for Amici Fiscal Policy Institute & Presidents' Alliance on Higher Education and Immigration, et al.

WILKINSON, Circuit Judge:

The Immigration and Nationality Act ("INA") says that any alien who is "likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A).[1] Congress has included some version of a "public charge" provision in the nation's immigration laws since 1882, but it has never defined the term, instead leaving its implementation to the executive branch. Recently, the Department of Homeland Security ("DHS") sought via rulemaking to define "public charge" as an alien who was likely to receive certain public benefits, including many cash and noncash benefits, for more than 12 months in the aggregate over any 36-month period ("DHS Rule" or "Rule"). The district court here enjoined the Rule nationwide.

In this case, statutory interpretation meets the separation of powers. To invalidate the Rule would visit palpable harm upon the Constitution's structure and the circumscribed function of the federal courts that document prescribes. Striking the Rule would also entail the disregard of the plain text of a duly enacted statute, all in an area where the Constitution commands "special judicial deference" to the political branches in light of the intricacies and sensitivities inherent in immigration policy. *Fiallo v. Bell*, 430 U.S. 787, 793 (1977). Finally, we are asked here to endorse a particular remedy—a nationwide injunction of the Rule—that reaches expansively beyond any proper conception of the judicial role.

[1] Consistent with the INA, the DHS Rule, and our dissenting colleague, we employ the term "alien" throughout this opinion. *See* 8 U.S.C. § 1101(a)(3) (defining the term "alien" as "any person not a citizen or national of the United States"); Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019).

The above does not mean that the plaintiffs' view of the public charge provision is definitively wrong. Nor does it mean that the government's view of the public charge provision is definitively right. Rather, the public charge provision has led for almost a century and a half a long and varied life, with different administrations advancing varied interpretations of the provision, depending on the needs and wishes of the nation at a particular point in time. To be sure, the public charge provision ties alien admissibility to prospective alien self-sufficiency. But within that broad framework, Congress has charged the executive with defining and implementing what can best be described as a purposefully elusive and ambiguous term. Congress has assiduously resisted giving the term the kind of fixed and definite meaning that the plaintiffs to this lawsuit seek, and we are reluctant to step in and perform that task ourselves, thus transferring primacy in national immigration policy from the democratically accountable branches where it has long been thought to reside.

There is a further and daunting obstacle to invalidating the Rule. In the course of prolonged litigation in the lower federal courts, the Second and Seventh Circuits declined to stay injunctions issued by trial courts precluding enforcement of the Rule. *See New York v. Dep't of Homeland Sec.*, No. 19-3591, 2020 WL 95815 (2d Cir. Jan. 8, 2020); Order, *Cook Cty., Illinois v. Wolf*, No. 19-3169 (7th Cir. Dec. 23, 2019). The Supreme Court thereupon granted the government's emergency request to stay the preliminary injunctions, an action which would have been improbable if not impossible had the government, as the stay applicant, not made "a strong showing that it was likely to succeed on the merits." *See Wolf v. Cook Cty., Illinois*, 140 S. Ct. 681 (2020); *Dep't of Homeland Sec. v. New York*,

140 S. Ct. 599 (2020); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009). We may of course have the technical authority to hold that, notwithstanding the Supreme Court's view, the plaintiffs are likely after all to succeed on the merits of their challenge. But every maxim of prudence suggests that we should decline to take the aggressive step of ruling that the plaintiffs here are in fact likely to succeed on the merits right upon the heels of the Supreme Court's stay order necessarily concluding that they were unlikely to do so. Such a step would require powerful evidence that the Supreme Court's stay was erroneously issued. Such evidence is absent here.

It is surprising that the dissenting opinion makes light of the Supreme Court's action in these parallel cases. *See* Dissenting Op., *post* at 107 n.16. The Supreme Court does not ordinarily issue such stays. *See Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring) (finding the case not "one of those rare and exceptional cases in which a stay pending appeal is warranted"). Moreover, those two cases were more than ordinary cases. They involved the exact same issue before us today. It is curious, to say the least, that we might even suggest that the Supreme Court gave scant attention to the stay request and thus treat the stay order as merely "perfunctory." Dissenting Op., *post* at 108 n.16.

The stays here were granted by the whole court, not a single Justice. *See Cook Cty.*, 140 S. Ct. at 681 (referring stay application presented to Justice Kavanaugh to whole court); *New York*, 140 S. Ct. at 599 (referring stay application presented to Justice Ginsburg to whole court). In such cases, "the affirmative votes of a majority of the participating Justices are required to grant it." Stephen M. Shapiro et al., *Supreme Court Practice* 892

(10th ed. 2013) (collecting cases). Thus, this case is not a situation in which "matters cannot be predicted with certainty," such that one Justice must weigh whether "it is more likely than not that at least five Justices will agree with the" judgment below. *Araneta v. United States*, 478 U.S. 1301, 1304 (1986) (Burger, C.J., in chambers). Rather, five Justices necessarily "conclude[d] there [wa]s a 'fair prospect' that a majority of this Court w[ould] decide the issue in favor of the applicants" in order to grant the stay. *Id.* This stay gives us a window into the Supreme Court's view of the merits. Our court should not cultivate the appearance of denying the Supreme Court action its obvious and relevant import.

We are of course duty-bound to give this appeal a thorough and conscientious review. For the reasons that follow, we think the Rule is a permissible interpretation of the public charge provision, and that to hold otherwise would be a stark transgression of the judiciary's proper role. Accordingly, we reverse the judgment and remand for further proceedings consistent with this opinion.

I.

A.

We begin with a brief overview of the public charge provision's long history. Though, as discussed below, the provision has been amended numerous times over the past 138 years, its motivating purpose has remained the same—to prevent the admission of aliens who, to one degree or another, would depend on the public for their support and care.

Congress first enacted a public charge provision in 1882. *See* Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214. The 1882 Immigration Act specified in relevant part that no

"person unable to take care of himself or herself without becoming a public charge" would "be permitted to land" in the United States. *Id.* The 1882 Act did not define the term "public charge," nor did it specify the amount or type of public support that would render an alien inadmissible on that basis.

Instead, the interpretation and application of the public charge provision was entrusted to the executive branch. The 1882 Act charged the Secretary of the Treasury "with the duty of executing the provisions of this act and with supervision over the business of immigration to the United States," 22 Stat. 214, and vested him with the power to "establish such regulations and rules . . . for carrying out the provisions of this act and the immigration laws of the United States," *id.*

In 1891, Congress revised the federal immigration laws, including the public charge provision. *See* Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084. Specifically, the 1891 amendment divided the 1882 Act's general bar on admitting public charges into two complementary provisions, the "inadmissibility provision" and the "deportation provision." The inadmissibility provision called for a prospective assessment of whether an alien seeking to enter the United States was "likely to become a public charge" and prohibited the admission of all such aliens. *Id.* § 1. The deportation provision, on the other hand, required a retrospective assessment of whether an alien who had already been admitted to the United States had "become[] a public charge within one year after his arrival in the United States from causes existing prior to his landing therein." *Id.* § 11. If so, the Act provided that such an alien could be deported. These two provisions were designed to work hand-in-hand: the latter served as a backstop when immigration officials

applying the former failed to accurately predict that a given alien was likely to become a "public charge." And this bifurcation in the law persists today. 8 U.S.C. §§ 1182(a)(4), 1227(a)(5). The 1891 amendment, like the 1882 Act, did not define the term "public charge." But the 1891 amendment, like the 1882 Act, confirmed that the executive would be responsible for enforcing this component of national immigration policy. *See* § 8, 26 Stat. 1084, 1085.

Between 1891 and 1917, Congress amended the federal immigration statute three times. *See* Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213; Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898; Act of Mar. 26, 1910, ch. 128, 36 Stat. 263. Three points bear noting. First, none of these amendments provided a definition of "public charge." Second, Congress retained both the inadmissibility and deportation provisions in each amendment. Third, Congress continued to afford the executive wide latitude in enforcing the relevant grounds for inadmissibility, including interpretation of the public charge provision. *See, e.g.*, §16, 34 Stat. 898, 903.

In 1915, a Supreme Court decision prompted yet another set of amendments. That year, the Court issued its first decision directly interpreting the public charge provision. *See Gegiow v. Uhl*, 239 U.S. 3 (1915). The "single question" presented in *Gegiow* was "whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked." *Id.* at 9–10. The Supreme Court said no. It noted that "[t]he statute deals with admission to the United States, not to" a particular locality. *Id.* at 10. And it reasoned that the term "public charge" should "be read as generically similar to the others mentioned before and after" it in the

1910 Act, which then included "paupers and professional beggars." *Id.* As such, the Court concluded that public charge determinations should be made "on the ground of permanent personal objections" to the alien, rather than "local [labor] conditions." *Id.* at 10.

In 1917, Congress responded to the *Gegiow* decision. Specifically, it moved the public charge provision to the end of a list of factors rendering an alien inadmissible. The revised statute made inadmissible, among others,

> persons . . . who are . . . mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or . . . persons likely to become a public charge.
> Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 875–76.

The legislature amended the statute in this manner "in order to indicate the intention of Congress that aliens shall be excluded upon [the public charge] ground for economic as well as other reasons" and did so, specifically, "to overcome[e] the decision of the Supreme Court in [*Gegiow*]." *See* 70 Cong. Rec. 3620 (1929). While Congress moved the placement of the public charge provision to respond to *Gegiow*, it still did not define the term, leaving the application of the provision in the hands of immigration officials and the executive branch.

For its part, the executive branch regarded the public charge provision as a flexible one, varying its interpretation and enforcement strategy in light of its policy objectives and prevailing national conditions. For example, in the early 20th century, immigration officers often utilized the provision as a "catchall," excluding aliens on public charge grounds when no other basis for inadmissibility seemed applicable. *See* Jane Perry Clark, *Deportation of*

Aliens from the United States to Europe 104 (1931). Later, in response to high levels of unemployment brought on by the Great Depression, President Hoover ordered that the provision be enforced more stringently, such that all aliens who would "probably be a public charge at any time, even during a considerable period subsequent to [their] arrival" would be inadmissible. *See* Roger Daniels, *Guarding the Golden Door: American Immigration Policy and Immigrants Since 1882*, at 60–62 (2004). The executive eventually began to develop more formal standards to govern public charge determinations. For example, the Board of Immigration Appeals promulgated a three-part test for an alien to be found deportable as a "public charge" in 1948. *Matter of B-*, 3 I. & N. Dec. 323 (BIA 1948). Specifically, the BIA concluded that in order for someone to be designated a deportable public charge, "(1) the State or other governing body must, by appropriate law, impose a charge for the services rendered to the alien . . . (2) make demand for payment of the charges[,] . . . [and] (3) there must be a failure to pay for the charges." *Id.* at 326.

In 1952, Congress comprehensively reformed federal immigration law. Since then, "[t]he foundation of our laws on immigration and naturalization [has been] the Immigration and Nationality Act." *Kansas v. Garcia*, 140 S. Ct. 791, 797 (2020). As relevant here, the INA included a revised public charge inadmissibility provision, which codified for the first time what was already well-established in practice: that the executive branch is accorded significant discretion in dealing with the provision. *See* Immigration and Nationality Act, Pub. L. No. 82-414, tit. II, ch. 2, § 212, 66 Stat. 163, 183 (1952). Importantly, the INA rendered inadmissible all aliens who "*in the opinion of the Attorney General* . . . are likely at any time to become public charges." *Id.* (emphasis added). The INA included a revised

deportation provision with similar language. *See id.* ch. 5, § 241(a)(8) (pegging such decisions to the "opinion of the Attorney General"). Congress once again declined to define the term "public charge," "but rather . . . establish[ed] the specific qualification that the determination of whether an alien falls into that category rests within the discretion of the" relevant executive branch immigration officials. S. Rep. No. 81-1515, 347, 349 (1950). It is this iteration of the inadmissibility provision, as amended, that the DHS Rule at issue here purports to interpret.

Congress subsequently amended the public charge inadmissibility provision twice more. First, in 1990, it eliminated various antiquated bases for inadmissibility, such as whether the alien was a "pauper[], professional beggar[], or vagrant[]." *See* 136 Cong. Rec. 36844 (1990). In their place, Congress retained the single generic phrase "likely to become a public charge." Immigration Act of 1990, Pub. L. No. 101-649, tit. VI, § 601, 104 Stat. 4978, 5072. Then, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Omnibus Consolidated Appropriations Act, tit. V, § 531, 110 Stat. 3009 (1996). That statute recodified the inadmissibility provision in its current form, specifying that "[a]ny alien who, in the opinion of the . . . Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." *Id.*; *see also id.* tit. III, § 308; 8 U.S.C. § 1182(a)(4)(A).[2] Moreover, although the IIRIRA did not define "public charge,"

[2] Specific classes of aliens, including asylum seekers and refugees, are not subject to the public charge provision. *See* 8 U.S.C. §§ 1157, 1158, 1159.

it specified five non-exclusive factors that executive branch officials were required to take into account when making public charge admissibility determinations: the alien's "age;" "health;" "family status;" "assets, resources, and financial status;" and "education and skills." *See* 8 U.S.C. § 1182(a)(4)(B).

While Congress continued to tweak the statutory language, the executive branch continually refined its working definition of "public charge." In 1974, the BIA announced that the three-part test for deportation determinations set forth in *Matter of B-* would not apply to public charge inadmissibility decisions. *See Matter of Harutunian*, 14 I. & N. Dec. 583, 585 (1974). Instead, whether an alien was likely to become a "public charge" for admissibility purposes would be based on the totality of the alien's circumstances, with an eye toward whether the alien would "need public support" to some unenumerated degree. *Id.* at 589–90. Then, in 1999, the Department of Justice initiated a rulemaking in which it sought to define the term "public charge" for purposes of both the inadmissibility and deportation provisions. *See* Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676 (May 26, 1999) (to be codified at 8 C.F.R. pts. 212 & 237). Specifically, the 1999 Rule would have defined "public charge" as "an alien who has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) primarily dependent on the Government for subsistence as demonstrated by either: (i) The receipt of public cash assistance for income maintenance purposes, or (ii) Institutionalization for long-term care at Government expense (other than imprisonment for conviction of a crime)." *Id.* at 28,681. Though it proposed to adopt a unified definition of "public charge," the 1999 Rule retained the "totality of the circumstances" and the three

step *Matter of B-* tests for assessing inadmissibility and deportability, respectively. *See id.* at 28,679–80.

The 1999 Rule was never finalized. Nevertheless, the Department of Justice issued a "field guidance" that instructed immigration officials to apply the "primarily dependent" definition set forth in the failed 1999 Rule to public charge determinations. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689–91 (May 26, 1999). Prior to the Rule at issue in this case, the 1999 Field Guidance has governed.

B.

1.

On October 10, 2018, DHS issued a notice of proposed rulemaking that signaled its intent to abandon the 1999 Field Guidance and adopt a new definition of "public charge" for purposes of admissibility determinations. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (October 10, 2018). DHS issued a final version of the Rule on August 14, 2019, *see* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (August 14, 2019), which was initially scheduled to take effect on October 15, 2019.

The Rule made three relevant changes to the administration of the inadmissibility prong of the public charge provision. First, it replaced the 1999 Field Guidance's definition of "public charge," which asked whether an alien was likely to become "primarily dependent" on government assistance, with a durational threshold. Specifically, under the Rule, a "public charge" is defined as "an alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period." 84 Fed. Reg. at

41,501. Second, the Rule jettisoned the 1999 Field Guidance's exclusive focus on cash benefits, instead providing that both cash and certain in-kind benefits count as "public benefits" and can be considered in making public charge determinations. *See id.* Thus, an alien's receipt of noncash benefits such as Section 8 housing, SNAP (*i.e.*, food stamps), and certain Medicaid benefits would each count towards the 12-month threshold. *Id.* Third, the Rule enumerated a host of factors that DHS officials are to consider, in addition to those set forth in the INA, before determining whether a given alien is likely to become a "public charge." *See id.* at 41,504.

The process that DHS followed in promulgating the Rule was both thorough and procedurally sound. After issuing the requisite notice of proposed rulemaking in October 2018, DHS received 266,077 public comments on the Rule in just sixty days. 84 Fed. Reg. at 41,297. DHS then spent the next ten months refining the Rule and responding to those comments. Many of the changes implemented during this period addressed specific comments DHS had received, and its detailed responses spanned nearly 200 pages of the Federal Register.

Importantly, in formulating the Rule's durationally specific definition of "public charge," DHS did not simply pluck the operative time period out of thin air. Instead, it relied on several empirical analyses regarding patterns of welfare use in the United States, including studies conducted by the Census Bureau, the Department of Health and Human Services, and DHS itself. *See id.* at 41,359–62. According to DHS, those studies indicate that a substantial portion of individuals who receive public benefits do so for fewer than 12-months, *id.* at 41,360, and that those who receive such benefits over a longer period are

more likely to become "long-term recipients" of welfare, *id.* at 41,360. Thus, DHS concluded that the 12-of-36-month threshold would best effectuate its three objectives in replacing the "primarily dependent" standard, namely "(1) provid[ing] meaningful guidance to aliens and adjudicators, (2) accomodat[ing] meaningful short-term and intermittent access to public benefits, and (3) . . . not excus[ing] continuous or consistent public benefit receipt that denotes a lack of self-sufficiency." *Id.* at 41,361.

Before proceeding, a few points regarding the scope of the Rule bear noting. First off, the Rule retains the prevailing test that "[t]he determination of an alien's likelihood of becoming a public charge at any time in the future must be based on the totality of the alien's circumstances." 84 Fed. Reg. at 41,502. Next, the Rule governs only public charge determinations made in the context of admissibility; deportations, by contrast, would still be decided under the 1999 Field Guidance and the three-part *Matter of B-* test. *See id.* at 41,462. And lastly, the Rule applies only to public charge inadmissibility determinations made by DHS, not the other two executive agencies (the Department of State and the Department of Justice) that are tasked with making public charge decisions in related contexts. *Id*. at 41,294 n.3.

2.

DHS's promulgation of a final version of the Rule launched a flurry of litigation. The crux of most of these challenges was that the Rule violated both the Administrative Procedure Act ("APA") and the Fifth Amendment to the United States Constitution.

Initially, these suits met with some success. In the Ninth Circuit, two district courts issued preliminary injunctions barring enforcement of the Rule, one of which applied

nationwide, *see Washington v. United States Dep't of Homeland Sec.*, 408 F. Supp. 3d 1191, 1224 (E.D. Wash. 2019), and the other of which applied only to persons residing in certain California counties as well as a number of states and the District of Columbia, *see City & Cty. of San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1129–30 (N.D. Cal. 2019). A district judge in the Southern District of New York also issued two preliminary nationwide injunctions against the Rule, *see Make the Rd. New York v. Cuccinelli*, 419 F. Supp. 3d 647, 667–68 (S.D.N.Y. 2019), while another judge in the Northern District of Illinois enjoined enforcement of the Rule only within Illinois, *see Cook Cty., Illinois v. McAleenan*, 417 F. Supp. 3d 1008, 1030–31 (N.D. Ill. 2019).

But this run of preliminary injunctions did not last long. On December 5, 2019, the Ninth Circuit stayed the injunctions within its jurisdiction, concluding that "DHS has shown a strong likelihood of success on the merits, that it will suffer irreparable harm, and that the balance of the equities and public interest favor a stay" pending appeal. *City & Cty. Of San Francisco v. USCIS*, 944 F.3d 773, 781 (9th Cir. 2019). Though the Second and Seventh Circuits declined to follow suit, the Supreme Court eventually granted the government's emergency requests to stay the preliminary injunctions issued by both the Southern District of New York and the Northern District of Illinois. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020); *Wolf v. Cook Cty., Illinois*, 140 S. Ct. 681 (2020). In so doing, five Justices of that Court necessarily concluded that the government had made "a strong showing that [it was] likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Such a stay

would have been unlikely if not impossible had that showing not been made. DHS began enforcing the Rule on February 24, 2020.

C.

In September 2019, plaintiffs CASA de Maryland, Inc. ("CASA"), Angel Aguiluz, and Monica Camaco Perez filed this lawsuit in the United States District Court for the District of Maryland. CASA is a non-profit organization based in Maryland that "offers a wide variety of social, health, job training, employment, and legal services to the immigrant communities in Maryland, Washington, D.C., Virginia, and Pennsylvania." J.A. 65. It claims to be the "largest membership-based immigrant rights organization in the mid-Atlantic region, with more than 100,000 members." *Id.* Aguiluz and Perez are both CASA members who immigrated to the United States as children. Defendants are federal officials charged with enforcing the Rule: Donald J. Trump, President of the United States; Chad Wolf, Acting Secretary of DHS; and Kenneth T. Cuccinelli II, Acting Director of United States Citizenship and Immigration Services. Each is sued in his official capacity.

Plaintiffs claim that the DHS Rule violates both the APA and the Fifth Amendment. Specifically, they assert that the Rule is "not in accordance with law" under § 706 of APA because (1) the term "public charge" "means 'primarily dependent on the government for subsistence,'" (2) this meaning is "unambiguous," and (3) as a result, "DHS lacks the statutory authority to reinterpret public-charge admissibility in a way that is contrary to that definition." J.A. 63. They also state the Rule is arbitrary and capricious, and violates the Due Process Clause and the Equal Protection Component of the Fifth Amendment.

In September 2019, plaintiffs moved for a preliminary injunction to block the Rule from going into effect, or, in the alternative, for an order pursuant to APA § 705 postponing the effective date of the Rule during the pendency of this litigation. Defendants opposed the motion and also argued that plaintiffs could not maintain this action because they lacked standing, fell outside the "zone of interests" protected by the public charge provision, and because their case was not ripe for adjudication. After briefing and oral argument, the district court granted plaintiffs' motion and enjoined defendants from enforcing the Rule nationwide. *Casa de Maryland, Inc. v. Trump*, 414 F. Supp. 3d. 760, 767 (D. Md. 2019).

At the outset, the district court concluded that CASA was an appropriate party to challenge the Rule. The court first held that CASA had Article III standing because the Rule could potentially harm its members, and CASA was thus forced "to divert resources that otherwise would have been expended to improve the lives of its members" to combat the Rule's assertedly deleterious effects. *Casa de Maryland*, 414 F. Supp. 3d at 773. Since it concluded that CASA had adequately alleged organizational standing, the district court did not decide whether the individual plaintiffs had standing or whether CASA had representational standing to sue on their behalf. The court also found that the case was ripe for review and CASA fell within the relevant statutory zone of interests. *Id.* at 774–78.

Turning to the merits, the district court held that CASA was likely to succeed on its APA claim that the Rule was "not in accordance with law."[3] In reaching this decision, it

[3] The district court accordingly did not consider plaintiffs' other APA or Fifth Amendment claims. *See Casa de Maryland*, 414 F. Supp. 3d at 784.

applied the familiar two-step *Chevron* framework for analyzing agency interpretations of statutory provisions. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). As part of this analysis, the district court considered various pieces of evidence regarding the meaning of the term "public charge," from the time that it first appeared in law in 1882 to the various legislative, executive, and judicial attempts to change or to interpret the provision in the many decades since. *Casa de Maryland*, 414 F. Supp. 3d at 784. According to the court, this evidence, taken together, established that "Congress has spoken directly to the issue here and precluded DHS's definition of Public Charge" such that the Rule failed at the first step of the *Chevron* analysis or, alternatively, that "the Public Charge Rule fails at *Chevron* Step II as an impermissible reading of the statute." *Id.* at 778. The district court also found that CASA satisfied the other requirements for preliminary injunctive relief under *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); specifically, that the organization was likely to suffer irreparable harm absent preliminary relief and, moreover, that the balance of equities and the public interest tipped in CASA's favor. *See Casa de Maryland*, 414 F. Supp. 3d at 785.

Finally, in terms of relief, the district court entered a preliminary injunction that applied nationwide, preventing defendants from enforcing the Rule against anyone. It provided three justifications for issuing such a broad remedy: (1) a nationwide injunction was necessary to provide complete relief to CASA because its members could be subject to public charge determinations outside of the district's geographic boundaries, (2) there is a particular need for uniformity in immigration law, and (3) that "the ordinary remedy in APA challenges to a rulemaking is to set aside the entire rule if defective." *Casa de*

Maryland, 414 F. Supp. 3d at 786–87. For these same reasons, the district court also granted CASA's request to stay the effective date of the Rule during the pendency of this litigation. *Id.* at 787–88.

On motion by the government, we stayed the district court's preliminary injunction by order dated December 9, 2019. This appeal followed.

II.

We begin with the question of plaintiffs' standing. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)). As such, before litigants can avail themselves of the judicial power, they must satisfy the familiar three-part test for standing. A "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). An organization like CASA "may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission." *Lane v. Holder*, 703 F.3d 668, 674 (4th Cir. 2012) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *see also Warth v. Seldin*, 422 U.S. 490, 511 (1975).

The district court held that CASA had alleged such an organizational injury here and, because the other elements of standing are not in dispute, was able to bring this suit. The court reasoned that the DHS Rule impeded CASA's efforts to carry out its mission because the organization was forced to reallocate resources and, in turn, shift from an

"affirmative advocacy posture" (*i.e.*, advocating for certain policies) to a "defensive one" (*i.e.*, advising members on the Rule's impact). *Casa de Maryland, Inc. v. Trump*, 414 F. Supp. 3d 760, 771–73 (D. Md. 2019). The court also intimated that CASA's choice to divert these funds was not really voluntary, as the Rule's "dramatically more threatening" nature effectively forced its hand. *Id.* at 773.

This was error. Basic Article III principles as well as precedent from this circuit and the Supreme Court all preclude the notion that CASA has organizational standing here. In holding otherwise, the district court countenanced a virtually limitless view of Article III injury that gives short shrift to the separation of powers values that standing doctrine preserves. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (noting that standing "is built on separation-of-powers principles [and] serves to prevent the judicial process from being used to usurp the powers of the political branches").[4]

For starters, the district court's opinion cannot be squared with our decision in *Lane*. There, a gun-rights organization whose activities included advocacy as well as "education, research, publishing and legal action," tried to challenge a federal firearm statute. *Lane*, 703 F.3d at 671. The group alleged that it had suffered an Article III injury because it needed to divert resources in order to help its members navigate the new law, and thus could not spend those funds on other goals. *Id.* We disagreed for the simple reason that

[4] The dissent's suggestion that we cannot consider CASA's standing is simply incorrect. *See* Dissenting Op., *post* at 76 n.2. The party in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, No. 19-431, 2020 WL 3808424, at *8 n.6 (U.S. July 8, 2020), was an intervenor at the appellate stage of the litigation, not a party on whose standing the district court erroneously predicated its jurisdiction.

voluntary "budgetary choices" like spending money on legal action instead of research are not cognizable Article III injuries. *Id.* at 675 (internal quotation marks omitted). A moment's reflection reveals why. "To determine that an organization that decides to spend its money on educating members, responding to members inquiries, or undertaking litigation in response to legislation suffers a cognizable injury would be to imply standing for organizations with merely 'abstract concern[s] with a subject that could be affected by an adjudication.'" *Id.* (quoting *Simon*, 426 U.S. at 26).

What held for the gun-rights organization in *Lane* holds for CASA here. Contrary to the district court's suggestion, the DHS Rule forced CASA to do absolutely nothing as a matter of law. As in *Lane*, CASA's unilateral and uncompelled response to the shifting needs of its members cannot manufacture an Article III injury.

To put a finer point on it, it is not relevant for Article III purposes whether CASA felt moved to act in a particular manner. It is axiomatic that "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy," *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 (1982), and that "a plaintiff's voluntary expenditure of resources to counteract governmental action that only indirectly affects the plaintiff does not support standing," *People for the Ethical Treatment of Animals v. U.S. Dept. of Agriculture*, 797 F.3d 1087, 1099 (D.C. Cir. 2015) (Millett, J., dubitante). Accordingly, we did not bother to ask in *Lane* whether the gun-rights organization's activities changed one way or the other. Many statutes and regulations may spur private organizations to react to them in some fashion. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992). And a voluntary budgetary decision,

however well-intentioned, does not constitute Article III injury, in no small part because holding otherwise would give carte blanche for any organization to "manufacture standing by choosing to make expenditures" about its public policy of choice. *Clapper*, 568 U.S. at 402. We have never taken the demands of standing, and the core separation of powers principles upon which the doctrine is based, to be so easily circumvented or so readily checked-off.

Moreover, the district court's view of organizational standing is fundamentally at odds with Supreme Court precedent—in particular, *Havens Realty*. In that case, a group dedicated to promoting equal housing opportunities (HOME) brought a claim against an apartment complex under the Fair Housing Act. HOME, which was covered by the Act as an "association," claimed that it had suffered an injury because the complex was showing apartments only to white people. HOME averred that this directly frustrated its mission to connect minorities with housing because the complex owner (that is, a supplier of housing) was simply refusing to abide by the law. The Supreme Court agreed. Critically, the Court held that HOME adequately alleged Article III injury because the complex "perceptibly impaired HOME's ability to provide counseling and referral services" and frustrated its "role of facilitating open housing." *Havens Realty*, 455 U.S. at 379 & n.21. While the Court noted that HOME needed to divert resources as a result of these discriminatory practices, it cast HOME's injury in terms of its ability to *function*.

The injury in *Havens Realty* was different in kind from what is at issue here. Organizational injury, properly understood, is measured against a group's ability to *operate* as an organization, not its theoretical ability to *effectuate* its objectives in its ideal world.

Quite simply, nothing in the Rule directly impairs CASA's ability to provide counseling, referral, or other services to immigrants. Of course, we respect the fact that CASA feels strongly that it must reallocate resources to best serve its members amidst a changing legal landscape and that it would prefer to operate in an environment where the Rule does not exist. But untold numbers of organizations regularly voice dissatisfaction with public laws and actions that may affect their ordering of priorities in some way. Resource reallocations motivated by the dictates of preference, however sincere, are not cognizable organizational injuries because no action by the defendant has directly impaired the organization's ability to operate and to function. *See Whitmore v. Arkansas*, 495 U.S. 149, 155–56 (1990).

The district court, by contrast, gave *Havens Realty* an essentially boundless reading that wrongly brought the case into stark tension with core precepts of standing doctrine. On its view, *Havens Realty* supports organizational standing any time a group (1) alleges that a governmental action undermines its policy mission, and (2) spends some money in response to that action. *See Casa de Maryland*, 414 F. Supp. 3d at 770–74. But the Supreme Court has made clear that standing demands the same of organizations as it does of individuals. *See Havens Realty*, 455 U.S. at 378–79. For this reason, "an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art[icle] III." *Simon*, 426 U.S. at 40. And, just like individuals, an organization cannot satisfy this "concrete injury" requirement through standalone philosophical objections to a law, *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972), gripes with how the law is enforced against other persons, *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), or decisions to voluntarily spend money to combat the effects

of a given policy, *Clapper*, 568 U.S. at 410–14. A reading of *Havens Realty* focused on operational harm—that is, the ability of an organization to function—comports with these principles. The district court's position, though, essentially waives them for any entity with a policy position and a dollar.

The "duty of . . . every judicial tribunal[] is limited to determining rights of persons or of property which are actually controverted in the particular case before it." *California v. San Pablo & T.R. Co.*, 149 U.S. 308, 314 (1893). In light of the above, it is plain that we cannot allow this case to proceed on the district court's theory of subject matter jurisdiction if we are to remain faithful to these fundamental principles. CASA has not suffered an organizational injury, and thus it lacks organizational standing to bring this case.

There remains the question of whether the two individual plaintiffs to this action possess standing to bring it or whether CASA has standing in a representational capacity. We could of course remand this issue for a determination on that score. That course of action, however, imposes large costs. It would impart to this case an up-and-down-the-ladder quality that would delay its resolution almost indefinitely on a matter where the district court itself reached the merits and where the parties have extensively briefed the issue and urged its timely resolution upon our court. The issue, moreover, is, as both the parties and the amici recognize, one of large importance and one on which we presume that we will not have the final word. The matter of the Rule's validity should be presented to the Supreme Court in as timely fashion as possible consistent with the considered views of an intermediate court.

With that in mind, we take stock of the fact that this court "review[s] judgments, not opinions" and therefore may affirm the district court's jurisdictional holding on alternative grounds. *Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013) (internal quotation marks omitted). In light of the above, we choose to do so here. The record of this case makes plain that the two individual plaintiffs have standing to challenge the DHS Rule. They are two Deferred Action for Childhood Arrivals (DACA) recipients who plan to adjust their status in the future, J.A. 38, 43–44, and, more importantly, are presently forgoing specific financial resources (such as applying for student loans), J.A. 40, 45, out of concern that doing so would render them "public charges" at that later point. Unlike with CASA, this is the sort of concrete and particularized harm necessary to establish an Article III injury. The plaintiffs have also alleged sufficient facts to show that this injury is sufficiently actual or imminent, as they have explained how the Rule is having an immediate effect on their lives today, as they make specific plans in anticipation of adjusting their status in the future. *See Clapper*, 568 U.S. at 414 n.5; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183–84 (2000). Lastly, the two plaintiffs meet the causation and redressability prongs of standing.[5] We therefore shall proceed to address the plaintiffs' arguments on the merits.

[5] We also find that the two plaintiffs fall within the relevant statutory zone of interests—an inquiry that the Supreme Court has stressed is "not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). As noncitizens presently residing in the United States who intend to adjust their status in the future, the individual plaintiffs are persons who will be directly regulated under the DHS Rule. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014).

III.

"A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 690–91 (2008) (internal quotation marks and citation omitted). To obtain a preliminary injunction, a plaintiff must "establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). We review a district court's decision to grant an injunction for abuse of discretion. *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013). We believe that the district court erred in this case because, above all else, the plaintiffs are not likely to succeed on the merits. As explained above, the same assessment underlay the Supreme Court's issuance of a stay of the injunctions of the Rule, and we think after careful review that the grounds are not there for contradicting the Supreme Court's assessment.

A.

The INA states that any alien who the executive determines is "likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A). This case turns on the meaning of "public charge" and whether the Rule is based on a permissible construction of that term.

Plaintiffs maintain that it is not. In particular, they aver that "public charge" has always meant someone "primarily dependent" on the government for support, and that the DHS Rule would apply to aliens who fall well below that threshold. The government, by contrast, maintains that "public charge" has a broad meaning that has been flexibly

interpreted by the executive over time and can encompass individuals who rely on public benefits to meet their basic needs, even if those persons are not "primarily dependent" on welfare or other public aid. As noted, the district court sided with plaintiffs, reasoning that the Rule was "unambiguously foreclosed by Congress's intention." *Casa de Maryland v. Trump*, 414 F. Supp. 3d 760, 784 (D. Md. 2019) (internal quotation marks omitted). We think this was error.

Plaintiffs contend that their view of the public charge provision is the only correct one. But that cannot be right. The term is broad and even elusive enough to accommodate multiple views and meanings, as indeed it has since it first appeared in immigration law. The text, structure, and history of the INA in fact all indicate that the Rule before us rests on an interpretation of "public charge" that comports with a straightforward reading of the Act. Moreover, fundamental separation of powers principles, and the concomitantly limited role of the federal courts over sensitive matters of immigration policy, only buttress what traditional tools of statutory interpretation make clear: the DHS Rule is a lawful one.

1.

As always, we start with the text. While some version of a public charge provision has been a part of federal immigration law since 1882, Congress has never defined the term. When phrases used in a statute are undefined, "we look to the ordinary meaning of the term . . . at the time Congress enacted the statute." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Congress enacted the INA in 1952. The ordinary meaning of "public charge" in 1952 was "one who produces a money charge upon, or an expense to, the public for support and care." *Public Charge*, *Black's Law Dictionary* (4th ed. 1951) (defining as

used in 1917 Immigration Act); *Black's Law Dictionary* (3d ed. 1933) (same); *see also* Arthur Cook et al., *Immigration Laws of the United States* § 285 (1929) (defining as person who needs "any maintenance, or financial assistance, rendered from public funds, or funds secured by taxation"). And "charge," in this context, meant a "cost" or "expense." *See, e.g.*, *Charge*, *The New Century Dictionary* (2d ed. 1946); *Webster's New Century Dictionary of the English Language* (1941).

The district court, though, took up a different starting point. It looked to the meaning of "charge" in 1882, the first year a public charge provision was included in federal law. The court, relying mostly on two contemporary dictionaries, reasoned that "charge" meant a "person or thing committed or entrusted to the care, custody, or management of another," *Casa de Maryland*, 414 F. Supp. 3d at 779 (quoting *Charge*, *Webster's Dictionary* (1886 ed.)), so "public charge" therefore meant a person who "the Government has taken care, custody, or management of," *id.* at 779. Put otherwise, the district court said, a "public charge" in 1882 meant something akin to a "pauper," and it has meant the same thing ever since. *Id.*

For starters, we strongly doubt that "public charge" has been consistently understood as synonymous with "pauper." *See, e.g.*, *Lam Fung Yen v. Frick*, 233 F. 393, 396 (6th Cir. 1916) ("It seems clear that the term 'persons likely to become a public charge' is not limited to paupers or those liable to become such."); *Matter of M-*, 2 I. & N. 131, 131 (BIA 1944) (holding someone *was* a public charge but was *not* a pauper); *Public Charge*, *Black's Law Dictionary* (4th ed. 1951) ("As so used, the term [public charge] is not limited to paupers or those liable to become such."); Stewart Repalje et al., *Dict. of Am. and*

English Law (1888) (defining "charge" as "an obligation or liability"); *see also* Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. Rev. 1475, 1486 n.40 (1995) ("[T]he term 'public charge,' which was written into the statute over a hundred years ago, has had different meanings over this entire period of time."). Indeed, from 1891 to 1990, Congress listed both "public charge" and "pauper" in the same statutory provision. And it is a fundamental canon of statutory interpretation that courts, whenever possible, should give independent statutory terms independent meaning. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

In all events, the present structure of the INA confirms that "public charge" should be given its broad ordinary meaning, as understood when the INA was enacted in 1952. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). Most importantly, the INA is structured to give the executive discretion to administer the public charge provision, which undermines the idea that the term has the sort of fixed and circumscribed definition ascribed to it by the district court. As noted, the INA does not define the term "public charge," let alone contain anything like a "primarily dependent" standard within its text. Rather, it expressly entrusts the decision of who is a "public charge" to the "opinion of the [DHS Secretary]." 8 U.S.C. § 1182(a)(4)(A); *see also id.* § 1103(a)(1). Ordinarily, this sort of language indicates that the executive has extensive discretion over the relevant determination. *See Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 31–32 (1827) (Story, J.). Especially so here, where Congress has baked discretion into the statutory scheme many times over. For instance, the INA lays out five non-exclusive factors that executive officials should look to when making public charge determinations, but also states that such

factors should be considered "at a minimum." 8 U.S.C. § 1182(a)(4)(B)(i). This reinforces the point that it is the executive which has the ultimate discretion under the INA over who is a "public charge" and what is most relevant to that decision. *See also id.* § 1103(a)(3) (giving DHS Secretary rulemaking authority). In other words, nothing about these broad grants of power suggests that the term must be read more narrowly than its ordinary meaning.

Surrounding sections of the INA point in the same direction. Take the sponsorship-and-affidavit scheme that Congress designed to work in conjunction with the public charge provision. Under this scheme, as a necessary condition for avoiding a public charge designation, many aliens must obtain sponsors, be it a family member or employer, who will provide a legally-enforceable "affidavit of support" on their behalf. *See* 8 U.S.C. §§ 1182(a)(4)(C)–(D), 1183a. An alien's sponsor must pledge "to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line," *id.* § 1183a(a)(1)(A), and reimburse the relevant government agency if the alien uses "any means-tested public benefit," *id.* § 1183a(a)(1)(B). Failing to obtain a sponsor renders a covered alien automatically inadmissible as a public charge, no matter his personal financial circumstances. *See id.* §§ 1182(a)(4)(C)(ii), (D).

This sponsor-and-affidavit scheme affirms that "public charge" should be given its ordinary meaning. The content of what is required by the affidavit—including both its minimum income and reimbursement guarantees—coupled with the fact it is required for many aliens, underscores that the public charge provision is naturally read as extending beyond only those who may become "primarily dependent" on public support. Indeed,

adopting plaintiffs' definition, as the district court did, would create an odd gap between the public charge provision and the sponsorship-and-affidavit system designed to accompany it. The clear object and effect of the sponsorship-scheme is to guarantee that aliens will be *self-sufficient* and not impose any meaningful burden on the public. But, on plaintiffs' view, the same Congress that fashioned this system (as well as every Congress since 1882) also believed that the public charge provision only applied (and could only apply) to aliens likely to become *primarily dependent* on public support. This does not fit; that is, it does not make sense that Congress designed a sponsorship-scheme focused on self-reliance as a necessary part of complying with a statutory provision concerned exclusively with primary dependence. It would be like an amusement park having parents sign a form attesting that their kids are five feet tall in order for them to get on rides that only require persons to be three feet. Giving "public charge" its ordinary meaning, however, avoids this sort of incongruity and allows both provisions to work together.

What is more, related immigration statutes support this reading of the public charge provision. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539 (1947) ("Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes."). When Congress last amended the public charge provision, it also passed the Personal Responsibility and Work Opportunity Act of 1996 ("PRWOA"). The PRWOA barred most aliens from receiving many cash and noncash benefits for five to ten years, 8 U.S.C. §§ 1611–1613, 1641, and it established that an alien's income would include his sponsor's for the purposes of qualifying for other aid, *id.* § 1631(a)(1). Congress passed these provisions "in order to assure that aliens be self-

reliant" and "not burden the public benefits system." *Id.* §§ 1601(5), (4). Giving "public charge" its ordinary meaning brings that provision into line with this surrounding program and its stated goal that "aliens within the Nation's borders not depend on public resources to meet their needs." *Id.* § 1601(2)(A). Adopting plaintiffs' proposed definition, on the other hand, would give the public charge provision a notably more limited scope, distinct from similar provisions in related laws. We do not see anything in the text of these statutes to indicate that Congress understood the public charge provision to be such a circumscribed outlier.

In sum, the text, structure, and statutory context of the INA all confirm that "public charge" should be given its ordinary meaning; that is, someone who produces a money charge upon the public for support and care. Of course, this does not mean the public charge provision *must* apply as broadly as its ordinary meaning permits. Instead, as the text of the INA makes clear, the term enjoys, in practice, a certain ambiguity, giving the executive discretion over the type, amount, and duration of public assistance that will render someone a "public charge." But, at the same time, the term is unambiguous as to the statutory floor it sets for the executive; a floor that the judiciary is powerless to alter sua sponte.

In practical terms, what this means is that *both* the DHS Rule and the 1999 Field Guidance may be seen to rest on sound footing. While the two policies involve different levels of public benefits at which receipt would render someone a "public charge," both turn on, at the end of the day, aliens producing money charges upon the public for support and care. The fact that two administrations set this bar at different places does not bear on

the legality of each respective policy; rather, it underscores how the public charge provision's very flexibility was designed to work. In that light, the DHS Rule is plainly permissible. The Rule defines "public charge" as someone who is likely to receive certain public benefits for more than 12 months over any 36-month period; put otherwise, someone who is likely to produce a money charge upon the public for support over some period of time. This is all the INA requires.

Curiously, the district court seemed to put greater stock into what Congress did *not* pass. Specifically, the court relied heavily on two failed proposals that attempted to define "public charge": the first, from 1996, would have defined the term as an alien who received certain public benefits for 12 months over any 7-year period; and the second, from 2013, would have expressly extended the provision to include the use of noncash benefits. *See Casa de Maryland*, 414 F. Supp. 3d at 782–83. The DHS Rule, the court surmised, was essentially an attempt to get into law a definition of "public charge" that two prior Congresses had rejected. But the Supreme Court has often warned that "[f]ailed legislative proposals are particularly dangerous ground on which to rest an interpretation of a prior statute," and the district court's decision shows why. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169–70 (2001) (internal quotation marks omitted). The never-enacted 1996 and 2013 proposals relied upon by the district court cut as much in the other direction. Indeed, they equally support the idea that Congress has long resisted enumerating a fixed definition of "public charge," and has instead preferred to entrust the executive with implementing the provision flexibly in accordance with its ordinary meaning and the national interest.

Similarly, the district court erred when it held up the Supreme Court's decision in *Gegiow v. Uhl*, 239 U.S. 3 (1915), as support for its claim that "public charge" should be read narrowly. The court, in short, read *Gegiow* to stand for the proposition that "public charge" must mean something akin to a "pauper"; that is, someone "destitute and unable to work." *Casa de Maryland*, 414 F. Supp. 3d at 781 (internal quotation marks omitted).

This reading of *Gegiow* is untenable. Even on its own terms, *Gegiow* has nothing to do with this case. There, the Court decided a "single question," and held that an alien could not be designated a "public charge" based on the local labor market to which he was headed, rather than his personal characteristics. *Gegiow*, 239 U.S. at 9–10. The Rule, which involves a totality-of-the-circumstances individualized inquiry, entirely complies with this holding. In all events, there is considerable doubt as to *Gegiow*'s continuing relevance, as Congress amended the Immigration Act two years later "to nullify [*Gegiow*'s] restrictive interpretation of the statute." *Matter of Harutunian*, 14 I. & N. Dec. 583, 587 (BIA 1974).

We recognize that the Rule before us is controversial. As in all matters of controversy, there are passionate pros and cons. Our inquiry, however, concerns not the wisdom of the Rule but its legality. As to that, the text and structure of the INA yield a clear answer: the term "public charge" is naturally read as meaning just that—someone who produces a money charge upon the public for support or care. And the DHS Rule comports with this reading.

2.

Perhaps in light of what the text and structure of the INA seem to compel, plaintiffs urge that we take a different tack and look to the history. As touched on above, plaintiffs' core argument is that "public charge" has meant the same thing from 1882 to present day: someone primarily dependent, for one reason or another, on the public for subsistence. According to plaintiffs, when Congress repeatedly reenacted the public charge provision without adding a definition of "public charge," it implicitly ratified this widely-shared view of what the term meant and accordingly created an enforceable gloss upon the law's text.

Of course, plaintiffs are right that when a statutory phrase has been "given a uniform interpretation by inferior courts or the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012); *see also Stokeling v. United States*, 139 S. Ct. 544, 551 (2019). But the Supreme Court has also stressed that Congressional reenactment of a glossed term cannot alter or overcome its plain meaning. *See, e.g.*, *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

At any rate, these sorts of implicit ratification arguments are tall orders. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). Congress has never enacted the language plaintiffs now advance as the statute's sole and indisputable meaning. Before a court may infer an atextual gloss on a statute, the backdrop against which Congress was legislating must be settled and unambiguous. *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 349 (2005) (requiring, for judicial opinions, a "judicial consensus" that is "broad and unquestioned"); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986)

(requiring, for administrative practice, a "longstanding interpretation"). This condition flows directly from the separation of powers' command that the federal courts are to apply statutes, not build upon or augment them in some common law manner.

The district court overlooked this threshold requirement when it accepted plaintiffs' historical claim. The district court's core error was that it lost sight of fact that plaintiffs needed to show that "public charge" has had a uniform and fixed definition that amounted to "settled law" both when Congress enacted the INA and when it most recently amended the public charge provision. *Keene Corp. v. United States*, 508 U.S. 200, 212–13 (1993).

Plaintiffs cannot shoulder this concededly heavy burden. Indeed, executive and judicial practice from 1882 to the present rebuts any idea that "public charge" has been uniformly understood by either branch as pertaining only to those who are "primarily dependent" on public aid. We consider the practice of each in turn.

To begin with, if "public charge" had the sort of ubiquitous definition that plaintiffs claim, it seems that nobody told the branch tasked with implementing the provision. As then-INS General Counsel Charles Gordon put it in 1949, the provision has always been understood as "highly ambiguous" and, at times, has had the effect of "thrust[ing] upon the immigration officer's shoulders the mantle of prophecy." Charles Gordon, "Aliens and Public Assistance," *Immigration and Naturalization Service Monthly Review*, vol. VI, no. 9 (Mar. 1949), 116; *see also* Kim R. Anderson & David A. Gifford, *Consular Discretion in the Immigrant Visa-Issuing Process*, 16 San Diego L. Rev. 87, 124–25 (1978). And it seems that the practical ambiguity of the phrase remained constant for the next fifty years. For instance, even the 1999 Field Guidance, which is the rock upon which plaintiffs have

built their case, declared that the term was ambiguous and that guidance was "necessary" because of "confusion over the meaning of 'public charge.'" Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689 (May 26, 1999); *see also* Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,677 (May 26, 1999) (referring to the term as "ambiguous"). This is not good for plaintiffs' argument premised on everyone being in on the same understanding.

Further, as one would expect considering the evolving executive policies described above, *see* Part I.A *supra*, it is not possible to glean a longstanding "primarily dependent" standard from executive practice. For one, any express articulation of such a standard is conspicuously absent from pre-1999 immigration opinions. *See Matter of B-*, 3 I. & N. Dec. 323, 325 (1948) (noting that a definition of "public charge" was no more than "implicit" in two federal court decisions); *Matter of J-*, 2 I. & N. Dec. 99, 99 (1944) (emphasizing that an alien was "not shown to have been a recipient of public aid of any kind in the past"); *see also Matter of V-*, 2 I. & N. Dec. 78, 79–80 (1944); *Matter of H-*, 1 I. & N. Dec. 166, 167–68 (1941). And it does not seem that any such standard has been long followed on the ground, in the bulk of ordinary decisions that never reached judicial or formal executive review. *See* S. Rep. No. 99-132, at 47–48 (1985) (observing "the State Department and INS have interpreted 'public charge' to exclude persons receiving assistance through such programs as 'food stamps' and 'rent subsidies'"); Gordon, *supra*, at 116 (explaining "[n]o fixed standard thus can be established" for such decisions and "the standards applied [in 1949] are a bit more exacting, particularly during times of economic

dislocation"); Immigration Services, Annual Report of the Commissioner-General of Immigration to the Secretary of the Treasury 10 (1896) (recognizing "1,946 immigrants fell into temporary distress and became public charges").

All in all, before a federal court may infer that Congress has silently ratified an interpretation put forward by an executive agency, that interpretation must be discernible and longstanding. *See, e.g.*, *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 983 (1986). Here executive practice reveals that the public charge provision has enjoyed an enduring ambiguity, as different administrations have built upon the INA's statutory baseline in different ways at different times. *See City and Cnty. of San Francisco v. USCIS*, 944 F.3d 773, 796–97 (9th Cir. 2019).

We turn next to judicial precedent—and here too plaintiffs come up short. Preliminarily, we note that our focus—like that of the district court, parties, and amici—is on cases decided between the initial enactment of the public charge provision in 1882 and the passage of the INA in 1952. *See, e.g.*, *Casa de Maryland*, 414 F. Supp. 3d at 780–81; Appellant's Opening Br. 28–32; Appellee's Response Br. 34–35; Brief of Immigration Law Professors as Amicus Curiae 7–15; Brief of United States House of Representatives as Amicus Curiae 8–9. Obviously, only those judicial opinions published prior to the INA's enactment would have been available to Congress when drafting that statute. As such, for Congress to have implicitly ratified a settled judicial interpretation of "public charge," that interpretation must be evident in pre-1952 caselaw. What is more, very few cases dealing with the public charge provision have been decided since 1952. Congress's decision to entrust public charge determinations to "the opinion of" the executive naturally

limited robust judicial review. *See* Immigration and Nationality Act, Pub. L. No. 82-414, tit. II, ch. 2, § 212, 66 Stat. 163, 183 (1952). Likewise, Congress has stripped the federal courts of jurisdiction to review many discretionary decisions by immigration officials, *see, e.g.*, 8 U.S.C. § 1252(a)(2)(B), which, in addition to limiting the number of reported opinions interpreting the underlying provisions, further reinforces the point that Congress intended such decisions to be made by the executive, not the courts.

That said, there is a notable absence of any express articulation of a "primarily dependent" standard in reported decisions over the relevant time-period. *See, e.g.*, *Skrmetta v. Coykendall*, 16 F.2d 783, 784 (N.D. Ga. 1926) (describing "public charge" as persons who cannot "maintain themselves in society by the ordinary means"); *In re Keshishian*, 299 F. 804, 805 (S.D.N.Y. 1924) (noting that "there must be evidence that [an alien is] likely to be supported at the expense of the public"); *In re Feinknopf*, 47 F. 447, 447 (E.D.N.Y. 1891) (observing that an alien "ha[d] not received public aid or support" at all). In fact, it was not uncommon for federal courts to look to dictionary definitions of "public" and "charge" *separately* when interpreting the provision, which would be quite curious if there was a settled judicial construction of the term out there, as plaintiffs insist. *See, e.g.*, *Ex Parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923); *Ex Parte Machida*, 277 F. 239, 241 (W.D. Wash. 1921).

When courts *did* endeavor to define the term "public charge," they often adopted its ordinary meaning. *See, e.g.*, *Ex Parte Kichmiriantz*, 283 F. 697, 698 (N.D. Cal. 1922) ("[T]he words 'public charge,' as used in the Immigration Act [of 1917], mean just what they mean ordinarily; that is to say, a money charge upon, or an expense to, the public for

support and care."); *see also Dunn v. Bryan*, 299 P. 253, 256 (Utah 1931) (finding that "public charge" has this "well-defined meaning" from *Ex Parte Kichmiriantz*). And many scholars, noting these cases, followed suit. *See* Jane Perry Clark, *Deportation of Aliens from the United States to Europe* 110 (1931) ("The words 'public charge' mean a financial liability on, or expense to, the public for support and care."); Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 Colum. L. Rev. 309, 340 (1956); Leo M. Alpert, *The Alien and the Public Charge Clauses*, 49 Yale L.J. 18, 23 (1939).

Judicial decisions thus cut against the idea that courts have uniformly applied a "primarily dependent" standard in practice. In fact, simpatico with the executive's approach, courts have often held that failure to repay upon demand a single specific expense charged to the public fisc could render an alien a deportable "public charge." *See, e.g.*, *Zurbrick v. Woodhead*, 90 F.2d 991, 991–92 (6th Cir. 1937) (holding someone regularly employed without a "blot upon her character" was a "public charge" because she could not pay hospital expenses). Moreover, for the first half of the twentieth century, when judicial review of public charge determinations was still common, there was a *circuit split* about the term's meaning; specifically, whether someone who was imprisoned could be designated a "public charge." *United States ex re. Lehtola v. Magie*, 47 F.2d 768, 770 (D. Minn. 1931) (detailing split). This does not augur well for the notion that "public charge" had a settled judicial meaning, let alone one focused solely on primary dependence. Recall that for a court to infer that Congress silently adopted a judicial interpretation of a statutory phrase, that interpretation must be the product of a "judicial consensus [that is]

broad and unquestioned." *Jama*, 543 U.S. at 349. It is not even close whether such a consensus existed around the standard plaintiffs champion.

While legislative history holds a precarious position as a source for statutory interpretation, the Supreme Court has made clear that, in the context of arguments like the one plaintiffs make here, the absence of evidence might be the evidence of absence. That is, if Congress decided to ratify some settled administrative or judicial interpretation of a statutory phrase, one would expect there to be some sign of it. *See Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 336 n.7 (1971) (looking for "direct evidence" that Congress considered the interpretation). But the legislative record—in particular, the legislative history of the 1952 INA and the most recent public charge amendments—comes up empty. For plaintiffs, this is the ballgame. *See Brown v. Gardner*, 513 U.S. 115, 121 (1994).

Of course, Congress did enact the INA against some backdrop. But it was not the one that plaintiffs urge here, and the one that the district court adopted. Congress was expressly aware of many of the disagreements noted above and recognized that the public charge provision had been "left to the interpretation of the administrative officials and the courts." S. Rep. No. 81-1515, at 348–49 (1950). Critically, Congress understood that "courts have given varied definitions of the phrase" and "different consuls, even in close proximity with one another, have enforced standards highly inconsistent with one another." *Id.* at 347, 349 (internal quotation marks omitted). In light of *this* backdrop, the legislature made a conscious choice: keep "public charge" undefined and vest the executive branch with discretion as to how to best implement the provision, consistent with the national

interest. As the Senate Judiciary report for INA put it: "Since the elements constituting the likelihood of becoming a public charge are varied, there should be no attempt to define the term in the law, but rather to establish the specific qualification that the determination of whether an alien falls into that category rests with the discretion of the consular officers or the Commissioner." *Id.* at 349. Accordingly, Congress added in the 1952 INA that public charge determinations would turn on the "opinion" of the relevant executive officer. 8 U.S.C. § 1182(a)(4)(A).

The legislative history of the 1996 amendments to the public charge provision do nothing more for plaintiffs. It seems that at least some sponsors of the IIRIRA affirmatively rejected plaintiffs' "primarily dependent" definition. *See, e.g.*, 142 Cong. Rec. S4417 (daily ed. Apr. 30, 1996) (statement of Sen. Simpson) ("If the immigrant uses such taxpayer-funded assistance, he or she is a public charge. How else should the term 'public charge' be defined than someone who has received needs-based taxpayer-funded assistance?"). And the prior legislative debates do not reveal any indication that Congress was aware of plaintiffs' proffered interpretation. *See, e.g.*, 139 Cong. Rec. S1765 (daily ed. Feb. 18, 1993) (statement of Sen. Mitchell) ("Provisions in the act require applicants for visas to prove that they will not require public assistance or become a 'public charge.'"). Moreover, the Conference Report to the IIRIRA seems to endorse the ordinary meaning of "public charge," and insists that the provision had been *underenforced* in the context of deportations. *See* H.R. Rep. No. 104-828, at 241 (1996) (Conf. Rep.) ("Aliens who access welfare have been deportable as public charges since 1917. However, only a negligible number of aliens who become public charges have been deported in the last decade."). Put

plainly, whatever value legislative history may have here, it only reinforces the lawfulness of the Rule.

The district court agreed with plaintiffs that "public charge" has retained a well-known and fixed meaning for the last 138 years, so much so that DHS's interpretation of that term was foreclosed by the "unambiguously expressed intent of Congress"—an intent that Congress expressed, we suppose, through repeated silence. *See Casa de Maryland*, 414 F. Supp. 3d at 778 (internal quotation marks omitted). We do not see it. The only constant feature of the public charge provision seems to be its mutability, a trait that Congress has purposefully codified as a *feature* of our immigration law, not a bug. Of course, none of this means that the executive has free reign to cram whatever policy it wishes into the public charge provision. Its discretion is still limited by the plain text of the INA. But the executive's discretion over this provision cannot be restrained by adopting a fixed "primarily dependent" standard that has no basis in the text or history of that statute.

3.

The DHS Rule thus comports with the best reading of the INA—namely that Congress actively sought variability over time as different administrations responded to different exigencies and circumstances. To whatever extent this appeal presents a close question—and, again, we think it does not—*Chevron* makes the outcome clear. Under *Chevron*, courts must uphold an agency interpretation as long as it is a "permissible construction of the statute." 467 U.S. 837, 843 (1984). The DHS Rule satisfies this test.

As noted, the Rule made two substantive changes to the 1999 Field Guidance that was previously in place. First, it replaced the "primarily dependent" standard with a more concrete metric, defining "public charge" as an alien who "receives one or more public benefits for more than 12 months in the aggregate within any 36-month period." Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,297 (August 14, 2019). Second, the DHS Rule incorporated for the first time certain noncash federal benefits as part of its definition of "public benefit." *Id.*

These changes follow from a permissible construction of the INA. DHS's definition of "public charge" is clearly consistent, as mentioned, with at least "an ordinary understanding" of the term. *Babbitt v. Sweet Home Chapter of Comm's for a Great Or.*, 515 U.S. 687, 697 (1995). Further, the Rule facilitates the broader congressional policy goals contained in the INA and related immigration statutes: in particular, Congress's stated desire that "aliens within the Nation's borders not depend on public resources to meet their needs." 8 U.S.C. § 1601(2)(A); *see also Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142–44 (2016). Lastly, the DHS Rule fits comfortably with the surrounding structure of the INA. *See MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228–29 (1994). For example, in addition to the sections noted above, the Rule's decision to cover noncash benefits is supported by the fact that another provision of the INA bars DHS from "consider[ing] any benefits that the alien may have received" as part of its public charge determination if an alien "has been battered or subjected to extreme cruelty in the United States." 8 U.S.C. §§ 1182(s), 1641(c)(1)(A). Congress's use of "any" here would be odd if DHS *only* were permitted to consider cash benefits in its analysis.

All told, the text, purpose, and structure of the INA make clear that the DHS Rule is premised on a permissible construction of the term "public charge." To hold otherwise is a serious error in statutory interpretation. More fundamentally, though, it is also a broadside against separation of powers and the role of Article III courts.

The separation of powers concerns underlying *Chevron* are at their zenith in the context of immigration, a field that the Constitution assigns to the political branches. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 596–97 (1952) (Frankfurter, J., concurring). The exercise of the federal immigration power is a "fundamental act of sovereignty," *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), vested preeminently in and shared by the political branches. Specifically, this fount of authority "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation," *id.*, such that when "Congress prescribes a procedure concerning the admissibility of aliens . . . it is not dealing alone with a legislative power" but is also "implementing an inherent executive power," *id.* When Congress chooses to delegate power to the executive in the domain of immigration, the second branch operates at the apex of its constitutional authority. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936).[6]

[6] To be sure, *Chevron* has been overused to enlarge the power of the administrative state, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151–58 (10th Cir. 2016) (Gorsuch, J., concurring), and to incentivize open-ended delegations of power from Congress to the Executive, Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015). But deference is plainly appropriate here where Congress has expressly and specifically delegated power to the executive in an area that overlaps with the executive's traditional constitutional function.

The other side of this coin is that the judicial role in overseeing the political branches' exercise of the federal immigration power is circumscribed. The Supreme Court has repeatedly emphasized that "[j]udicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations,'" *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)), while federal judges possess inherently limited competencies over this subject matter, *see Fiallo v. Bell*, 430 U.S. 787, 796 (1977). Immigration policy concerns not only the physical security of the country, but also the character and identity of the nation. Federal judges, drawn from one profession and lacking even a patina of democratic sanction, are ill-suited to supervise these issues and the difficult balances that inhere in them. Accordingly, we should be reluctant to disturb the authority expressly delegated to executive officials by Congress in this field. *See Knauff*, 338 U.S. at 542. Yet plaintiffs would have us barrel ahead as if we were sub silentio exempted from these settled axioms.

Properly evaluated, the DHS Rule is unquestionably lawful. Congress has delegated to the executive the power to implement a purposefully undefined provision of law in an area where the executive possesses inherent constitutional powers and unique structural competencies. To whatever extent the federal courts are empowered to review how the executive discharges this duty, the separation of powers demands careful deference from the judiciary and intervention, if at all, only in truly exceptional situations. This is not one of them.

B.

In his fine dissenting opinion Judge King refers warmly to the Seventh Circuit's recent holding that the Rule is likely contrary to law. *See*, *e.g.*, Dissenting Op., *post* at 80 & n.4 (citing *Cook Cty. v. Wolf*, 962 F.3d 208 (7th Cir. 2020)). At the outset, both our sister circuit and our dissenting colleague make a critical concession that the term "public charge" is an ambiguous one. Dissenting Op., *post* at 80; *Cook Cty.*, 962 F.3d at 226. Ordinarily, such an acknowledgement of ambiguity would lead to considerable deference to the agency charged with implementing the statutory directive. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984). Far from following the usual course, however, those opinions declare that while the term "public charge" is ambiguous, it is somehow not ambiguous enough. *See* Dissenting Op., *post* at 98–99; *Cook Cty.*, 962 F.3d at 229. Our dissenting colleague's approach suggests different categories of ambiguity—a *Chevron* Step III for courts to determine whether maximum or moderate ambiguity is present in a given case. This multi-layering of ambiguity adds an additional element of complexity and subjectivity to a doctrinal area that has suffered no shortage of either.

The Seventh Circuit, in proceeding to *Chevron* Step II, identified a litany of faults with the Rule; but far from revealing the Rule as flawed, both our dissenting colleague's and the Seventh Circuit's opinions only underscored the significant difficulties with their own approaches. Indeed, Judge King's praise of the Seventh Circuit's reasoning is unsurprising as the two opinions suffer from many of the same infirmities.

Those difficulties are at least three in number. The first complication is that both opinions create more inconsistencies than they resolve and manufacture "floors" that are untethered from the statutory text. Second, both our dissenting colleague and the Seventh Circuit engage in sheer speculation about potential rules that do not exist, and the Seventh Circuit imagines prejudiced implementation that has not occurred. And third, they mistake policy unreasonableness for statutory unreasonableness. We address each of these problems in turn.

First, both the Seventh Circuit and dissenting opinions pick and scratch at the Rule in an effort to identify tensions with other provisions of immigration law and federal law generally. *See* Dissenting Op., *post* at 105–06; *Cook Cty.*, 962 F.3d at 227. Of course, there is no end of conceivable "tensions" one may find while rummaging through the vast and complicated array of federal enactments. Under that approach, there would never be a perfectly seamless whole as every rule creates some conceivable "tension" that determined judges can discover. To dig at the Rule and unearth tension is to announce that every rule will be doomed to fall short from the start.

Worse still, both opinions, that of Judge King and the Seventh Circuit, skate blithely over the tensions and inconsistencies that their own positions create. The dissent embraces the Seventh Circuit's divination of "a floor inherent in the words 'public charge.'" Dissenting Op., *post* at 98 (quoting *Cook Cty.*, 962 F.3d at 229). But this "floor" of benefits below which no one may be deemed a public charge is simply nowhere in the text itself. The statute contains no threshold of benefits—quantitative, qualitative, or durational—that one must accept before qualifying as a public charge. And even assuming that this floor

can be properly divined, it is unclear how an agency could determine what the floor even is or whether an alien is "significantly dependent" on the government. The exercise our dissenting friend envisions is one of pure guesswork.

Furthermore, the Seventh Circuit scarcely mentions what is in the text—such as the sponsorship-and-affidavit scheme, *Cook Cty.*, 962 F.3d at 222—which evinces Congress's intent "to aggressively protect the public fisc" and "is at odds with the view that [Congress] used the term 'public charge' to refer exclusively to primary and permanent dependence," *id.* at 246 (Barrett, J., dissenting). In emphasizing that immigration law allows aliens to receive *some* benefits at *some* points, both the Seventh Circuit and our dissenting colleague rush over statutory text and nuance in a hurry to invalidate the Rule. *See* Dissenting Op., *post* at 105–06 (citing *Cook Cty.*, 962 F.3d at 228 (majority opinion)). For example, aliens are in fact barred from receiving many benefits for their first five to ten years in the country. 8 U.S.C. §§ 1611–1613, 1641; *see also Cook Cty.*, 962 F.3d at 247 (Barrett, J., dissenting). And the benefits available to aliens before five years of residency—that the opinions allege create tension—are largely irrelevant to the public charge determination under the Rule. *See Cook Cty.*, 962 F.3d at 235 n.1.

The statutory availability of some, but not all, benefits is readily reconcilable with the Rule: Congress tasked the executive with barring entry to those who are likely to need public benefits but also provided a backstop for those who face setbacks that were unforeseeable on the front end. *See id.* at 247 (citing 8 U.S.C. § 1227(a)(5); Act of Mar. 3, 1891, ch. 551, § 11, 26 Stat. 1084, 1086); *see also id.* at 235 n.1 (citing Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,312 (Aug. 14, 2019) ("[The Rule's]

definition does not include benefits related exclusively to emergency response, immunization, education, or social services. . . .")); Inadmissibility, 84 Fed. Reg. at 41,482 ("[T]he [R]ule's definition of public benefit does not include emergency aid, emergency medical assistance, or disaster relief.")). Moreover, the dissent and the Seventh Circuit paint with far too broad a brush in defining what constitutes a benefit. *See* Dissenting Op., *post* at 105 n.14 (citing *Cook Cty.*, 962 F.3d at 232 (majority opinion)). The term "charge" has never involved government services like fire protection or public education, but rather has "always been associated with dependence on a particular category of government programs: those available based on financial need." *Cook Cty.*, 962 F.3d at 250 (Barrett, J., dissenting).

In short, the "tensions" that the Seventh Circuit and our dissenting colleague manage to come up with are of a decidedly tangential variety, and inconsistencies in both approaches, not to mention the plain statutory language, are probative of the Rule's validity.

The second drawback to the dissent's and Seventh Circuit's approach lies in their willingness to indulge in speculation. The Seventh Circuit suggests without a shred of evidence that the executive will apply the statutory factors—"age," "health," "family status," "assets, resources, and financial status," and "education and skills," 8 U.S.C. § 1182(a)(4)(B)—on the basis of racial or ethnic stereotypes. *Cook Cty.*, 962 F.3d at 232. And both that court and our dissenting colleague speculate on the horrors of the executive designating someone who receives "a single benefit on one occasion" as a public charge, *id.* at 229; *see also* Dissenting Op., *post* at 99–100, notwithstanding the fact that the Rule

is both durationally and quantitatively far removed from the sort of public charge penny recipient about which those opinions speculate in their hypotheticals. Indeed, such a rule is not before this court, and we reserve discussion of its legality if and when it is presented.

The third difficulty with the analyses is their confidence in themselves as experts in immigration policy. The Seventh Circuit in fact begins with a description of the values that an ideal rule, in that majority's view, ought to encapsulate. *Cook Cty.*, 962 F.3d at 214–15. Both opinions fault the Rule for DHS's ability to "stack benefits" and categorize non-cash public aid as a public charge. *Id.* at 229; *see also* Dissenting Op., *post* at 101. But there is nothing in the statutory language that precludes stacked or non-cash benefits from counting as public assistance. And history belies the notion that the form of benefit matters—in early twentieth-century cases, one kind of public assistance with which the public charge provision was concerned was institutionalization, a type of non-cash benefit. *See, e.g.*, *United States ex rel. Brugnoli v. Tod*, 300 F. 913 (S.D.N.Y. 1923), *aff'd*, 300 F. 918 (2d Cir. 1924) (considering institutionalization in the Manhattan State Hospital). Moreover, the Seventh Circuit feels that the Rule "unreasonably imposes substantially disproportionate consequences for immigrants[] compared to the supposed drain on the public fisc they cause." *Cook Cty.*, 962 F.3d at 229.

These observations as to the Rule's efficacy may or may not be valid, but they are blunt policy prescriptions that belong in a legislative hearing or notice-and-comment rulemaking, not in a judicial assault upon the Rule's validity. *See Kerry v. Din*, 135 S. Ct. 2128, 2136 (2015) (recognizing that immigration distinctions "are 'policy questions entrusted exclusively to the political branches of our Government'" (quoting *Fiallo v. Bell*,

430 U.S. 787, 798 (1977))). At bottom, our sister circuit's and dissenting colleague's claim of *statutory* unreasonableness is really a claim of *policy* unreasonableness, designed to position the courts as singular arbiters in a field for which their expertise is limited and their democratic imprimatur is non-existent.

In combination, these drawbacks confirm every fear that the judiciary is on its way to projecting a major voice in a field of law that has long been reserved to the politically accountable branches the Founders established in Articles I and II. *Cf. Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (recognizing that "the very nature of executive decisions as to foreign policy is political, not judicial," and thus they "are wholly confided by our Constitution to the political departments of the government, Executive and Legislative"). The Seventh Circuit and the dissent envision an immigration policy that, quite apart from its conformity to the preferred policy of a particular court, is static rather than dynamic. They take an ambiguous term and attempt to apply a singular meaning to it, when in fact their analyses admit multiple—and indeed possibly revolving—meanings.

Congress envisioned that the executive would be able to adapt immigration policy to political expressions and changing circumstances. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (describing immigration as a field requiring "flexibility and the adaptation of the congressional policy to infinitely variable conditions" (quoting *Lichter v. United States*, 334 U.S. 742, 785 (1948))). The Seventh Circuit and the dissent ignore this arrangement and wring all flexibility out of national immigration policy. It is difficult to think that any approach more restrictive than the "primarily dependent" or

"significantly dependent" standard will ever be acceptable. Only more permissive will do. But this misses Congress's intention that there be room for both. Instead of the term's ambiguity allowing for flexibility on the part of the executive, our dissenting colleague and the Seventh Circuit artificially constrict the term and install rigidity, along with an incipient judicial primacy, as the burgeoning hallmark of federal immigration policy.

C.

The plaintiffs are therefore unlikely to succeed on the merits because the DHS Rule is lawful. As the Supreme Court has noted, a likelihood of success on the merits is the most critical factor supporting issuance of a preliminary injunction, and that likelihood simply is not present here. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009). This is enough to reverse the district court's grant of a preliminary injunction. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). It is worth noting also that the other *Winter* factors reinforce the conclusion that the district court erred in granting the injunction here. *See Winter*, 555 U.S. at 20.

For one, CASA did not establish that it would be irreparably harmed in the absence of an injunction. As noted, CASA's purported injuries were not the product of the Rule's dictates, but of its own priorities and choices. This is not "irreparable harm" in any judicially-cognizable sense. The final two *Winter* factors also did not assist CASA's case. When the government is a party, these factors—the balance of the equities and the public interest—merge. The key flaw in the district court's reasoning here was its implicit assumption that the individual interest must always trump the general. But whether one agrees with the Rule or not, the government is asserting the significant interest of not

burdening the public fisc by admitting public charges—an interest that would be meaningfully harmed because of the difficulty, if not impossibility, of undoing the grants of permanent resident status that both Congress and the executive have found to be against the national interest. In this field of immigration and border integrity, the public interest can be vitiated when the legitimate expressions of the two political branches of government are disregarded by the branch whose experience and expertise is relatively slim and whose policy perspectives lack any democratic imprimatur.

* * *

We have no doubt that the "public charge" bar has been applied more narrowly in the past. After all, DHS engaged in an extensive notice-and-comment rulemaking to bring about a change in extant policy. But change in whatever direction is what Congress anticipated when it steadfastly refused to define or particularize the public charge provision. The only question before us is not whether DHS *should* have used its power in this fashion, but rather whether it *could* have. For the foregoing reasons, the answer to this question is clearly yes.

IV.

Alas, we wish we could say that this was the whole megillah. But the district court also erred in its choice of remedy. On this front, we review a decision to grant a preliminary injunction under a "particularly exacting" version of the abuse of discretion standard. *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) (internal quotation marks omitted). And, critically, "an overbroad injunction is an abuse of discretion." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (internal quotation marks omitted).

The injunction issued in this case was plainly overbroad. Rather than enjoin the defendants from applying the Rule to CASA and its members, the district judge instead chose to enter a so-called "nationwide" injunction, preventing enforcement of the Rule against *anyone*. It should not have done this.

A.

A nationwide injunction is a drastic remedy and it was plainly improper here.

The federal courts exercise "[t]he judicial power of the United States." U.S. Const. Art. III § 1. This is a significant but carefully circumscribed authority, the limits of which are cabined by both the Constitution and Congress. *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 10 (1799). Nationwide injunctions, by which a single district judge completely blocks the enforcement of a federal policy against everyone, transgress the bounds of that authority at least thrice over. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 420–21 (2017) (hereinafter "Bray"). First, this capacious remedy, which has become common only recently, seriously contravenes traditional notions of the judicial role. Second, nationwide injunctions likely exceed the constitutional and statutory limits on the federal equity power. Finally, the third branch of our government is in the end a diverse and collective enterprise. A single trial judge of course most often makes the initial call, but to imbue that call with nationwide scope and power, even temporarily, elevates the individual over the collective in a fashion that shuts off other voices to the detriment of sound resolutions and decisionmaking.

1.

As the Supreme Court has emphasized, our "constitutionally prescribed role is to vindicate the individual rights of the people appearing before [us]." *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). Of course, specific cases can have general implications. But the sole duty of the federal courts is not to decide general questions for everyone, but rather to settle particular "cases" or "controversies" between particular parties. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132 (2011) ("Under Article III, the Federal Judiciary is vested with the 'Power' to resolve not questions and issues but 'Cases' or 'Controversies.'"); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009).

Our power to grant equitable remedies is commensurate with this duty. As Justice Gorsuch recently explained, "[e]quitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit." *Dep't of Homeland Security v. New York*, 140 S. Ct. 599, 600 (2020) (Mem.) (Gorsuch, J., concurring). As such, Article III requires that injunctions be tailored to protect only the plaintiffs in a specific case from the defendants to that suit. *See* Bray at 469. And while it is true that even such plaintiff-protective injunctions may benefit non-parties, these benefits are purely "collateral[]" because the "judicial power exists only to redress or otherwise to protect against injury to the complaining party." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Nationwide injunctions are plainly inconsistent with this conception of the judicial role and the proper scope of the federal courts' remedial power. A nationwide injunction, by its nature, extends relief far beyond the parties to an individual case. Indeed, by issuing such an injunction, a single district court, whose decisions are non-precedential in its own

circuit, does not simply resolve a given lawsuit, but rather decides a general question for the entire nation. And far from being precisely tailored to redress a particular plaintiff's injuries, the very purpose of a nationwide injunction is to protect *everyone* from the challenged policy. It is, to put it mildly, "hard to see how the court could still be acting in the judicial role of resolving cases or controversies" when it issues such a far-reaching and pervasive equitable remedy. *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring).[7]

2.

Nationwide injunctions also run afoul of the prescribed scope of our equitable power. Since the Judiciary Act of 1789 gave the federal courts jurisdiction over "all suits . . . in equity," 1 Stat. 73 § 11, the Supreme Court has consistently understood general statutory grants of equity jurisdiction to confer "authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)). Any inherent equitable authority that the courts possess under Article III is likely bounded by the same. *Hawaii*, 138 S. Ct. at 2425–26 (Thomas, J., concurring); 1 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 294 (A.L. Bancroft & Co. 1881).

[7] A geographically-focused injunction is not a sound alternative to a nationwide injunction. *See* Bray at 422 n.19. A geographically-limited injunction suffers from the same infirmities as a nationwide injunction, albeit on a smaller scale, *i.e.*, it protects non-parties and purports to decide a general question of law rather than a specific dispute.

In practice, this means that the core doctrines of American equity—namely, principles of equity jurisdiction, procedure, and remedies—must be rooted in English tradition. *See Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1868) (holding that "the equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses"); *Russell v. Farley*, 105 U.S. (15 Otto.) 433, 437 (1881) (noting that the default procedures to be applied in suits in equity are "the practice[s] of the High Court of Chancery in England"); *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 658 (1832) (holding that remedies must link back "to the practice of courts of equity in the parent country"). Thus, as relevant here, a federal court sitting in equity is empowered to grant only those remedies that could have been issued by the English Chancellor in 1789 or that have some clear analogue in traditional equity practice. *See Grupo Mexicano*, 527 U.S. at 318–19.

Nationwide injunctions are irreconcilable with these limitations, as they lack any basis in traditional equity practice. *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring). In eighteenth-century English equity "there were no injunctions against the Crown," or anything like a nationwide injunction. Bray at 425; *accord* 3 W. Blackstone, *Commentaries on the Laws of England* 428 (1768). At the Founding, the English Chancellor would issue injunctions to protect the immediate parties, and, at times, equity would extend relief to a "small and cohesive" group of persons who shared a common interest. Bray 425–27. But that was it. The thought that an injunction could extend to protect scores of non-parties was not contemplated; indeed, it was resolutely avoided. *Conway v. Taylor's Ex'r*, 66 U.S. (1 Black) 603, 632 (1861) (noting that a court of equity will not "go beyond the case before it").

Both Article III and federal statutes incorporated these limitations on the equity power. *See Hawaii*, 138 S.Ct. at 2427 (Thomas, J., concurring); *see also* Joseph Story, *Commentaries on Equity Pleadings* § 69 (1838). It is unsurprising then that nationwide injunctions have not existed in American jurisprudence for most of our history. Instead, until the mid-twentieth century, federal judges recognized that their ability to grant equitable relief was limited to the parties before them. *See* Bray at 428–37. And attempts by litigants to extend the judiciary's power to encompass universal relief were uniformly rebuffed. *See, e.g.*, *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 117, 123 (1940); *Frothingham v. Mellon*, 262 U.S. 447, 487–89 (1923). As the Supreme Court explained in *Scott v. Donald*, 165 U.S. 107, 115 (1897), "[t]he theory . . . that the plaintiff is one of a class of persons whose rights are infringed and threatened, and that he so represents such class that he may pray an injunction on behalf of all persons that constitute it . . . is too conjectural to furnish a safe basis upon which a court of equity ought to grant an injunction."

The recent proliferation of nationwide injunctions plainly cannot be squared with these longstanding precepts, which are meant to cabin our discretion and limit application of the judicial power to actual legal disputes rather than overarching policy questions. And their widespread use also cannot be squared with the constitutional and statutory limitations on our equitable authority.

3.

The fundamental infirmity of the nationwide injunction is confirmed by how poorly it fits alongside related doctrines that also flow from the concept of "judicial power."

Take, for starters, Article III standing. To maintain a cause of action in federal court, "a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized," and that threat must be "actual and imminent, not conjectural or hypothetical." *Summers*, 555 U.S. at 493. Moreover, every plaintiff "bears the burden of showing that he has standing for each type of relief sought." *Id.* Nationwide injunctions effectively vitiate this requirement by permitting a single plaintiff to obtain equitable relief on behalf of countless non-parties, wholly without inquiry into whether they have suffered or will imminently suffer any injury-in-fact. But standing is not a clown car into which all interested parties may pile, provided the driver-cum-plaintiff has met its requirements. On the contrary, "Article III does not give federal courts the power to order relief to any uninjured plaintiff." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring). That nationwide injunctions almost certainly result in the federal courts doing just that should, at a minimum, raise doubts as to their propriety.

Relatedly, nationwide injunctions are incompatible with the well-recognized bar against litigants raising the rights of others. Pursuant to third-party standing doctrine, "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties." *Warth*, 422 U.S. at 499. But by requesting a nationwide injunction, a plaintiff is by definition seeking to vindicate the legal rights of *all* third-parties who may be subject to the challenged policy.

A similar point is true with respect to the doctrines of ripeness and mootness. Generally, federal courts adjudicate only those cases that are ripe, in that the relevant

"administrative decision has been formalized and its effects felt in a concrete way by the challenging parties," *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (internal quotation marks omitted), and that are not moot, which obtains "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (internal quotation marks omitted). Once again, nationwide injunctions allow non-parties to slip the bonds of these requirements, as a single plaintiff who obtains nationwide relief has done so on behalf of innumerable non-parties whose claims may very well have been premature or long stale.

But the list of doctrinal inconsistencies does not end there. Not only do nationwide injunctions conflict with the foregoing justiciability rules, but they also cannot be reconciled with congressional policy regarding the availability of aggregate equitable relief in the federal courts. Congress has already created an avenue by which a group of litigants that share a common interest can obtain an injunction protecting the entire group—a class-action pursuant to Federal Rule of Civil Procedure 23(b)(2). Quite obviously, class actions are the appropriate way to resolve the small subset of cases in which an injunction protecting only the plaintiff could prove too narrow. *See Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996) (recognizing "injunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification"). And, unlike nationwide injunctions, Rule 23 injunctions have a clear analogue in traditional equity practice. Bray at 426 (analogizing to the device known as a "bill of peace"); *see also* 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1751, at 11 (3d ed. 2005).

The ready availability of nationwide injunctions is difficult to square with the policy choices embodied in Rule 23. Only those who can satisfy the rigorous requirements Congress imposed for class certification are eligible to avail themselves of Rule 23 injunctions. But nationwide injunctions allow plaintiffs to obtain the benefits of class-wide relief without ever satisfying these criteria. *See* Bray at 476. This makes no sense. Indeed, as the Seventh Circuit aptly put it, "[a] wrong done to plaintiff in the past does not authorize prospective class-wide relief unless a class has been certified. Why else bother with class actions?" *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997).

B.

Even if the federal trial courts somehow possessed the power to issue nationwide injunctions, the attendant practical consequences of this drastic and extraordinary remedy should restrict its use to the most exceptional circumstances. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S 139, 165 (2010). There is no doubt that "[t]hese injunctions are beginning to take a toll on the federal court system." *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring); *see also New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring) (describing as "patently unworkable"). A survey of some of the bad effects brought about by the rise of nationwide injunctions shows just how ill-advised a remedy they have become.

To begin with, nationwide injunctions limit valuable "percolation" of legal issues in the lower courts. By entering a nationwide injunction, a district judge precludes the government's ability to bring enforcement actions pursuant to the challenged policy and simultaneously reduces prospective plaintiffs' incentives to file additional suits challenging that policy. In tandem, these effects reduce the likelihood that a given question

will be debated widely. But as the Supreme Court has recognized, it is generally "preferable to allow several courts to pass on a given [issue] in order to gain the benefit of adjudication by different courts in different factual contexts." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). And the value of percolation is at its apex where, as here, "a regulatory challenge involves important or difficult questions of law." *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011). Nationwide injunctions limit dialogue in the lower courts, favoring quick and uniform answers to the more deliberate—and likely more accurate—method of doctrinal development that is intended under our judiciary's very design. The class is called "The Federal Courts and the Federal System" for a reason.

Relatedly, nationwide injunctions promote sprints to the courthouse and rushed judicial decisionmaking, often under immense time pressure, based on expedited briefing, and in the absence of a factual record. *See New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring). Nationwide injunctions are often issued early in the litigative process, meaning that both the district judge's initial decision to grant the injunction and any subsequent appeals of that decision will take place without a record. *See* Bray at 461–62. Moreover, an injunction completely blocking the implementation of a federal policy can wreak havoc on the executive's agenda, which in turn incentivizes immediate, emergency stay requests. And the urgent need for resolution of such consequential questions often forces the Supreme Court to initially consider a given legal issue on a stay motion. *Id.* Again, this is exactly what happened on this very question. *New York*, 140 S. Ct. at 599 (granting stay of nationwide injunction).

This helter-skelter behavior is not what our legal system was designed to encourage. Indeed, as much becomes obvious when one considers the structure of the federal judiciary itself. For starters, Congress deliberately created a system of regional courts of appeals whose decisions are not binding on one another. *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001). The Supreme Court has recognized that the motivation behind limiting intercircuit stare decisis was to avoid the possibility that "the indiscreet action of one court might become a precedent," such that "the whole country [would be] tied down to an unsound principle." *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900). The doctrine of intercircuit nonacquiescence, which permits executive branch officials to continue enforcing a policy outside of a circuit in which it has been invalidated, flows directly from this rule. *See, e.g.*, *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992). The Supreme Court has likewise recognized that the federal government is generally free to relitigate issues it has already lost, except against parties to such prior litigation. *See United States v. Mendoza*, 464 U.S. 154, 160–63 (1984). Finally, as for the district courts, a "decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Green*, 563 U.S. 692, 709 n.7 (2011) (internal quotation marks omitted).

As should be apparent, these structural principles prioritize percolation, considered decisionmaking, and intercircuit dialogue over haste and uniformity. But nationwide injunctions lay waste to this finely reticulated system, transforming the non-precedential decision of a lone district judge into the law of the land, for circuits and citizens alike.

Perhaps most importantly, the growth of the nationwide injunction also risks the perception of the federal courts as an apolitical branch. The availability of this sweeping remedy has enabled litigants to challenge nearly every major executive branch policy in federal court. In effect, nationwide injunctions have "turn[ed] every individual plaintiff into a roving private attorney general," Michael T. Morley, *De Facto Class Actions?*, 39 Harv. J.L. & Pub. Pol'y 487, 527 (2016), which has, in turn, left the executive beholden to the whim of any single district judge, freed even from the constraints of collegial deliberation.

Unsurprisingly, given the enormous stakes associated with such lawsuits, plaintiffs seeking to block executive action via nationwide injunction are incentivized to forum shop with abandon. *See Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring); Bray at 457–61. This patently political manipulation of the judiciary undermines the public's confidence in the federal courts and casts judges as advocates for their favored policy outcomes. What is more, because "plaintiffs generally are not bound by adverse decisions in cases to which they are not a party, there is a nearly boundless opportunity to shop for a friendly forum to secure a win nationwide." *New York*, 140 S. Ct. at 601 (Gorsuch, J., concurring). In other words, while the government must win every challenge brought against a policy to ensure its implementation, prospective plaintiffs need only find a single sympathetic audience of one in order to secure complete victory.

This is nothing more than "government by injunction," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (internal quotation marks omitted), and a clear violation of the traditional judicial understanding that we are not "continuing

monitors of the wisdom and soundness of Executive action," *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 612 (2007) (opinion of Alito, J.) (quoting *Allen v. Wright*, 468 U.S. 737, 760 (1984)). And that is not all. Indeed, along with what has been discussed, the list of negative consequences associated with nationwide injunctions seems virtually endless. *See, e.g.*, *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018) (noting that nationwide injunctions may harm "non-parties who are deprived the right to litigate in other forums"); *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 773 (9th Cir. 2008) (discussing risks to judicial comity); Getzel Berger, *Nationwide Injunctions Against the Federal Government*, 92 N.Y.U. L. Rev. 1068, 1087–90 (2017) (enumerating still more downsides). Among the greatest victims of this unfortunate practice will be the courts themselves.

C.

In light of the above costs, it is clear that, even assuming the federal courts have the power to issue nationwide injunctions, they should be handed down only in extraordinary circumstances. The district court rejected this limit by issuing such a remedy in this case.

To begin with, it is plain that a nationwide injunction would be wholly unnecessary to protect the rights of the only plaintiffs to this lawsuit who have standing, namely Aguiluz and Perez. As the Supreme Court has repeatedly cautioned, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill*, 138 S. Ct. at 1934. Here, it is the real prospect of the Rule being enforced against them individually that gives rise to Aguiluz and Perez's Article III injuries. *See* Part II *supra*. Thus, an injunction preventing DHS from applying the Rule to either of them would fully redress their injuries. Blocking

the enforcement of the Rule against everyone provides absolutely no additional protection to the individual plaintiffs to this suit and would clearly be overbroad.

And even on the district court's view that CASA had standing to challenge the Rule, the decision to grant a nationwide injunction was still wrong. There is no reason—none—that the district court, if it felt the Rule unlawful, could not have issued a narrower injunction barring the federal government from enforcing the DHS Rule against CASA's members. And the arguments advanced to the contrary are unpersuasive. At bottom, the district court justified its remedy on the ground that uniformity is important to immigration law and anything other than a nationwide injunction would be impractical. This rationale is unpersuasive. First off, it lacks any limiting principle; after all, if a general interest in uniformity could sustain a nationwide injunction, then it would justify such a remedy in all cases when federal law is implicated. Further, the district court improperly stepped into the shoes of DHS and displaced our democratic process of governance when it insisted that a nationwide injunction was necessary for pragmatic reasons. This would be troubling enough in any context, but especially so in the area of immigration, where the executive branch holds inherent constitutional powers and the judiciary does not.[8]

[8] Equally unpersuasive is the district court's suggestion that the APA justifies its choice of remedy. True, the APA authorizes courts to "hold unlawful and set aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2)(A). But we have squarely rejected the view that this provision mandates the issuance of a nationwide injunction whenever a federal rule is held unlawful. *See Virginia Soc'y*, 263 F.3d at 393–94. In any event, the position that § 706 even authorizes, much less compels, nationwide injunctions is baseless. *See* Bray at 438 n.121; *see also* John Harrison, "Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies," *Yale Journal on Regulation*, Notice & Comment (Apr. 12, 2020),

In sum, the district court compounded its error of granting relief with its choice of remedy. It could have awarded complete relief on its view of the merits with a far narrower remedy. It is beyond the power of any one person to set himself up as the arbiter of law in these entire United States. The trial court sits as the judge for the District of Maryland, a court that on its own terms and in its own right has earned the greatest respect. But it is not the district court for the District of the United States.

V.

This case is not about the propriety of any policy, but rather about the power of the federal courts. Immigration is a complex and controversial topic that arouses intense emotions on the part of many. On the one hand, immigration is indispensable to cultural diversity and national renewal, an economic engine that can serve to rejuvenate an aging workforce and to fulfill critical societal needs. On the other hand, it can in unrestricted numbers overwhelm the nation's capacity for assimilation and, if unlawful, undermine an indispensable sense of national sovereignty and a commitment to the rule of law. Where to strike the balance between these two valid and competing perspectives is no easy task—but a task that the Constitution principally assigns to the political branches.

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https://www.yalejreg.com/nc/section-706-of-the-administrative-procedure-act-does-not-call-for-universal-injunctions-or-other-universal-remedies-by-john-harrison/. The APA was passed in 1946, seventeen years before the first nationwide injunction was issued by a federal court. That Congress would have implicitly codified such a radical departure from settled equity practice is quite illogical. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) ("[A] major departure from the long tradition of equity practice should not be lightly implied.").

Those representative branches of government have struck this careful balance in the public charge provision of the INA. Congress made the decision that the executive was best positioned to define and implement the public charge provision, consistent with the term's ordinary meaning and the national interest. The essence of this choice turns on Congress's view that the public charge provision should function, at heart, like an accordion; to expand or contract depending on the nation's needs and a given administration's policy. At times a policy like the 1999 Field Guidance might be best; and, at other times, the DHS Rule might be preferable. But this is a call for the executive. For the judiciary to seize this decision for itself, and insist, where Congress did not, upon a crystalline meaning of "public charge" is not only to stretch our limited competencies beyond their bounds, but also, more fundamentally, to nullify the careful judgments of the people's representatives.

Of course, we take no position on the merits of the DHS Rule. Nor could we. The question before us today is whether the challenged action comports with law. It is plain that the answer here is yes. For the above reasons, we reverse the judgment and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED

KING, Circuit Judge, dissenting:

The Massachusetts Constitution of 1780, in recognizing the critical importance of separation of powers, coined a phrase that has become a mantra of our constitutional republic: The government should be "of laws, and not of men." *See* Mass. Const. pt. 1, art. XXX (1780). The Constitution of the United States enshrines that indispensable ideal by creating a three-branch government with power divided among the branches. As part of that ingenious scheme of separated power, the Constitution vests legislative power solely in Congress. That means Congress alone — not the President and not the judiciary — holds the power to enact new statutes or alter existing ones.

Nevertheless, in these proceedings, the President, the Department of Homeland Security, and the other defendants (collectively, "DHS") have redefined the statutory term "public charge" — far beyond the limits set by Congress — to narrow the protections afforded by our immigration system. That executive overreach led the district court to preliminarily enjoin the implementation of DHS's new definition of "public charge." *See Casa de Maryland, Inc. v. Trump*, 414 F. Supp. 3d 760 (D. Md. 2019). Our panel majority, however, has now acquiesced in DHS's new definition of "public charge" and condemned the district court for its efforts to keep DHS in check.

The majority expresses reticence to question DHS on this immigration matter, decreeing that unelected federal judges lacking expertise in such matters should steer clear. But this is not a matter of political choice regarding immigration policy; it is a matter of statutory interpretation, which falls within the exclusive bailiwick of the judiciary. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province

and duty of the judicial department to say what the law is."). And when interpreting statutes, it is our duty to ensure that the coequal branches of our government do not transgress the bounds of their authority. To be sure, whether the national interest is best served by a broad or narrow reading of the term "public charge" is not our concern. But whether the executive has ventured beyond the statutory bounds staked out by the legislative branch is emphatically our concern. In the circumstances of this case, the judiciary is duty bound to support the separation of powers. I therefore write separately and dissent.

I.

In August 2019, DHS promulgated an administrative rule (the "DHS Rule" or the "Rule") — pursuant to its rulemaking authority under the Immigration and Nationality Act (the "INA") and the Administrative Procedure Act (the "APA") — purporting to interpret and apply an INA provision that governs the ability of an "alien" deemed "likely at any time to become a public charge" to gain admission to the United States or to adjust an immigration status. *See* 8 U.S.C. § 1182(a)(4) (the "Public Charge Statute").[1] Historically, public charge provisions, including the Public Charge Statute, applied only to aliens likely to be significantly dependent on the government. In other words, the acceptance of

[1] I use "Public Charge Statute" to refer to the current public charge provision in the INA. Other references to public charge provisions relate to earlier iterations thereof. And in keeping with the language of the INA, I use the term "alien" to describe those noncitizens subject to the Public Charge Statute. *See* 8 U.S.C. § 1101(a)(3) (defining the term "alien" as "any person not a citizen or national of the United States").

temporary, supplemental benefits was insufficient to render an alien excludable as a public charge.

But the DHS Rule changed that settled understanding by dramatically redefining the term "public charge." Under the Rule, an alien who might receive, at any point in his life, certain supplemental public assistance for 12 months within a 36-month period is excludable from this country as an alien likely to become a public charge. In addition, each discrete benefit received is counted as a full month of benefits, so that accepting three different types of benefits in a single month (e.g., housing, nutrition, and medical benefits) is counted as accepting three months of benefits. Accordingly, an alien will be declared likely to become a public charge if he might receive just a few months' worth of supplemental benefits at any point in his life.

In light of the DHS Rule's 2019 redefinition of the term "public charge," the plaintiffs filed this case in the District of Maryland. The plaintiffs include Angel Aguiluz and Monica Camacho Perez, two individuals who immigrated to the United States as children, plus CASA de Maryland, Inc., an immigrant rights organization with over 100,000 members that focuses on proactive outreach to improve the quality of life in immigrant communities of Maryland, Virginia, the District of Columbia, and Pennsylvania. In their complaint, the plaintiffs challenge the Rule on the ground that its redefinition of "public charge" is antithetical to the Public Charge Statute and should thus be set aside as not "in accordance with law" under the APA. *See* 5 U.S.C. § 706(2)(A). More specifically, the plaintiffs allege that all the typical tools of statutory construction

reveal that the term "public charge," as used in the Public Charge Statute, has a well-understood meaning that conflicts with the Rule.

Contemporaneous with the filing of their complaint, the plaintiffs moved the district court to preliminarily enjoin DHS from implementing the Rule. The plaintiffs contended that they satisfied each of the four factors essential to securing a preliminary injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."). After confirming that CASA has Article III standing as an organization to pursue the plaintiffs' APA claim, the court determined that the Rule should be preliminarily enjoined on a nationwide basis.

DHS noted this interlocutory appeal and launches a dual attack against the preliminary injunction. First, DHS contends that the injunction is ultra vires because CASA lacks standing to sue and CASA's interests fall outside of the zone of interests protected by the Public Charge Statute. Second, DHS argues that the district court erred in enjoining the Rule because its definition of the term "public charge" is lawful and, in any event, the award of injunctive relief is overbroad.

The panel majority today rules that CASA lacks Article III standing to contest the DHS Rule. On the other hand, the majority recognizes that the individual plaintiffs possess the necessary Article III standing. The majority also reverses the preliminary injunction, sanctioning the Rule's redefinition of "public charge" and concluding that the plaintiffs

have satisfied none of the four preliminary injunction factors. Finally, after invalidating the injunction, the majority criticizes the injunction's nationwide scope.

II.

In reversing the district court, the panel majority erroneously decides numerous legal issues. First, the majority has erroneously ruled that CASA lacks Article III standing. Second, my colleagues have improperly defined the statutory term "public charge," thereby erroneously ruling that the plaintiffs are not likely to succeed on the merits. Third, the majority has erroneously concluded that the plaintiffs have not satisfied the remaining preliminary injunction factors and that the nationwide scope of the injunctive relief is improper. As explained below, I dissent from all of those rulings.

A.

At the outset, although the panel majority is correct to rule that the individual plaintiffs possess Article III standing, my friends err in concluding that CASA lacks standing.[2] Simply put, by alleging in the complaint that it must spend significant resources to counter the effects of the DHS Rule and that the Rule precludes it from undertaking its core advocacy mission, CASA sufficiently alleges a "concrete and demonstrable injury to [its] activities[,]" paired with a "consequent drain on [its] resources." *See Havens Realty*

[2] Aside from erring in its analysis of CASA's Article III standing, the majority errs by considering that issue at all, having recognized the individual plaintiffs' standing. *Cf. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, No. 19-431, slip op. at 13 n.6 (U.S. July 8, 2020) (ruling that court erred in inquiring into Article III standing of intervenor organization, in that another party seeking same relief possessed standing).

Corp. v. Coleman, 455 U.S. 363, 379 (1982); *see also Cook Cty., Ill. v. Wolf*, 962 F.3d 208, 218-19 (7th Cir. 2020) (concluding that Illinois immigrant rights organization claiming similar organizational injuries possessed Article III standing to challenge DHS Rule). The Supreme Court requires nothing more — particularly at this stage of the proceedings, when CASA's standing-related allegations must be accepted as true. *See Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 187 (4th Cir. 2018).

In reaching its improper conclusion that CASA lacks Article III standing, the majority twice errs. First, the majority misconstrues the Supreme Court's *Havens Realty* decision. In so doing, the majority excoriates the district court for giving *Havens Realty* an "essentially boundless reading" that would support "organizational standing any time a group (1) alleges that a governmental action undermines its policy mission, and (2) spends some money in response to that action." *See ante* 25. But the test decried by my good friends of the majority is the very test for organizational standing devised by the *Havens Realty* Court. As the Court related, a "concrete and demonstrable injury to the organization's activities — with the consequent drain on the organization's resources — constitutes far more than simply a setback to the organization's abstract social interests." *See Havens Realty*, 455 U.S. at 379. In such a situation, the Court explained, there is "no question that the organization has suffered injury in fact." *Id.* So, despite what the majority says, if an organization's core policy mission is undermined by allegedly unlawful governmental action and it must spend money in response thereto, the organization has suffered a cognizable Article III injury.

Second, the majority minimizes CASA's injuries to bring them in line with our decision in *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012). To be sure, we ruled in *Lane* that the plaintiff organization did not suffer an organizational injury for purposes of standing because its sole allegation was that a new federal law caused a drain on its resources. *Id.* at 675. In so ruling, we explained that a "mere expense" resulting from the voluntary shift in an organization's resources is not a sufficient injury to the organization because it "results not from any actions taken by the defendant, but rather from the organization's own budgetary choices." *Id.* (internal quotation marks and alterations omitted). Importantly, however, we predicated our *Lane* decision on the fact that the organization had alleged *only* that the new law resulted in a voluntarily expenditure of its resources. *Id.* at 671. Put another way, the organization did not allege that the new law impaired its organizational mission.

In these proceedings, CASA claims that the DHS Rule both impairs its organizational mission *and* causes it to divert resources from that mission. Together, those harms yield a cognizable organizational injury sufficient for CASA's Article III standing. *See Havens Realty*, 455 U.S. at 379 (ruling that broad allegations of frustration of organizational purpose in complaint were sufficient to establish injury-in-fact at pleading stage).[3]

[3] Although the majority does not reach the issue, I am satisfied that CASA's interests fall within the zone of interests protected by the Public Charge Statute such that it can assert its claim against the DHS Rule under the APA. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (observing that the "zone of

B.

I now turn to the panel majority's reversal of the district court's preliminary injunction barring implementation of the DHS Rule. Like the majority, my focus today is primarily on the most important preliminary injunction factor — the likelihood that the plaintiffs will succeed on the merits of their claim that the Rule is "not in accordance with law" because it defines the term "public charge" contrary to the Public Charge Statute. *See* 5 U.S.C. § 706(2)(A).

In evaluating the DHS Rule's lawfulness, we employ the familiar two-step framework for evaluating federal agency rulemaking set forth by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Step one of *Chevron* requires using all the tools of statutory construction to evaluate whether the Public Charge Statute provides an unambiguous definition of the term "public charge." If so, we are bound to give effect to that definition and must set aside the Rule if it conflicts therewith. If not, however, we proceed to step two of *Chevron* and evaluate whether the Rule's definition of "public charge" is reasonable.

The district court concluded that the DHS Rule fails both *Chevron* steps and that the plaintiffs are thus likely to succeed on the merits of their claim that the Rule is unlawful. The majority, however, concludes that the plaintiffs are not likely to succeed on the merits because "[t]he term ['public charge'] is broad and even elusive enough to accommodate

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interests" test "is not meant to be especially demanding" and that Congress's "evident intent when enacting the APA [was] to make agency action presumptively reviewable" (internal quotation marks omitted)).

multiple views and meanings," *see ante* 29, and because "the text, purpose, and structure of the INA make clear that the DHS Rule is premised on a permissible construction of the term 'public charge,'" *id.* at 47. A contrary ruling, decrees the majority, would be a "serious error in statutory interpretation." *Id.*

Since 1882, however, the statutory term "public charge" has consistently described aliens significantly dependent on the government. Nevertheless, I am willing to assume for this appeal that some measure of ambiguity inheres in the meaning of "public charge," as used in the Public Charge Statute. I thus would not resolve the plaintiffs' challenge to the DHS Rule at *Chevron*'s first step and would instead proceed directly to its second step. There, I would rule that, in light of the statutory context and the history of the term "public charge," the Rule's definition is far too broad and ventures well outside the bounds of any reasonable construction of the term. Indeed, as the Seventh Circuit recently concluded, the Rule's definition of "public charge" "does violence to the English language and the statutory context." *See Cook Cty.*, 962 F.3d at 229.[4]

[4] As related by the well-reasoned *Cook County* majority opinion in early June, the DHS Rule has been contested in district courts in New York, California, Washington, and Illinois, plus in Maryland as part of these proceedings. *See* 962 F.3d at 217-18. Without exception, each district court to consider the Rule preliminarily enjoined its implementation. *Id.* at 217. And the Seventh Circuit affirmed the injunction entered by the district court in the Northern District of Illinois. *Id.* at 234. Against this authority, the majority today is the first court in the nation to overturn a preliminary injunction that prohibited implementation of the Rule.

1.

The Public Charge Statute provides, in relevant part, as follows: "Any alien who . . . in the opinion of the Attorney General at the time of application for admission or adjustment of status[] is likely at any time to become a public charge is inadmissible." *See* 8 U.S.C. § 1182(a)(4)(A).[5] It also specifies a non-exhaustive list of factors that immigration officials are obliged to consider in determining whether an alien is likely to become a public charge. Those factors include the alien's (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills. *Id.* § 1182(a)(4)(B)(i). And the Public Charge Statute allows those immigration officials to consider whether the alien has an "affidavit of support." *Id.* § 1182(a)(4)(B)(ii); *see also* 8 U.S.C. § 1183a(a)(1)(A) (providing that an "affidavit of support" is a legally enforceable contract in which a "sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line").

Although the Public Charge Statute does not explicitly define — and has never defined — the term "public charge," that circumstance does not give the term limitless meaning. After all, the Supreme Court has instructed the inferior courts to survey the full statutory landscape when seeking to discern Congress's intention regarding a given provision. *See Chevron*, 467 U.S. at 843 n.9. I now undertake that task.

[5] In 2002, Congress transferred the power to make inadmissibility determinations from the Attorney General to the Secretary of Homeland Security. *See* 8 U.S.C. § 1103(a).

a.

Congress first established a public charge provision in 1882.[6] Although the 1882 statute did not define the term "public charge," the text and history of the statute shed light on the meaning of the term. To that end, the 1882 statute allowed the authorities to examine vessels arriving in the United States and to prohibit from landing "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." *See* Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214, 214 (1882). On its face, the 1882 statute thus excluded from our country those noncitizen immigrants who would consume a significant amount of governmental resources — that is, noncitizen immigrants with a condition or status that rendered them unable to care for themselves or those subject to government confinement. As detailed below, that construction is confirmed by contemporary dictionary definitions, other statutory provisions, legislative history, and judicial decisions.

To begin, Webster's 1828 American Dictionary of the English Language provides two relevant definitions of the term "charge" — both of which indicate that the term described someone dependent on, or under the primary care of, another. Those definitions are: (1) "That which is enjoined, committed, entrusted or delivered to another, implying care, custody, oversight, or duty to be performed by the person entrusted"; and (2) "The

[6] The panel majority insists that a review of the statutory history should begin in 1952, the year Congress enacted the first iteration of the INA. But when Congress created the public charge provision in that legislation, it did not write on a clean slate. By 1952, the term "public charge" had already amassed seventy years' worth of meaning.

person or thing committed to anothers [sic] custody, care or management; a trust." *See Charge*, Webster's Dictionary (1828 online ed.), http://webstersdictionary1828 .com/Dictionary/charge (last visited June 30, 2020).

Importantly, Webster's 1828 dictionary provides the most contextually appropriate definition of "charge" — that is, a person being the charge of someone or something (as opposed to, for example, an individual who merely imposes a charge upon another). Moreover, Webster's 1828 dictionary is the gold standard, as that publication contained "approximately 70,000 entries and definitions that were models of clarity and conciseness." *See* Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 Buff. L. Rev. 227, 238 (1999) (internal quotation marks omitted); *see also* Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 Geo. Wash. L. Rev. 358, 389 (2014) (explaining that over time "the quality of [Webster's 1828 dictionary] became appreciated" and that the "Supreme Court cites this dictionary often as evidence of the original meaning of the Constitution").

The overall structure of the 1882 statute also indicates that the public charge provision was meant to exclude from the United States only those unable to care for themselves without significant government assistance, not simply those in need of some public aid. To that end, the statute provided for the collection of "a duty of fifty cents" for each noncitizen immigrant who arrived at a United States port. *See* Act of Aug. 3, 1882, ch. 376, § 1, 22 Stat. at 214. Once collected, that duty was to be paid "into the United States Treasury, and . . . used, [inter alia,] . . . for the care of immigrants arriving in the

United States, for the relief of such as are in distress." *Id.* The statute also authorized the Secretary of the Treasury to contract with state and local officials "to provide for the support and relief of such immigrants [arriving at United States ports] as may fall into distress or need public aid." *Id.* § 2, 22 Stat. at 214. Accordingly, the prospect of needing some public aid did not — standing alone — render an arriving immigrant an inadmissible public charge.

Relevant legislative history further confirms that a noncitizen immigrant could not be declared a public charge predicated solely on his acceptance of any quantum of public aid. For example, in an 1882 debate in the House of Representatives, New York Congressman John Van Voorhis, one of the architects of the 1882 statute, warned of a perceived and troubling trend in immigration. *See* Anne Fleming, *The Public Interest in the Private Law of the Poor*, 14 Harv. L. & Pol'y Rev. 159, 169 (2019). According to Van Voorhis, the decisions of other countries to send "[t]housands of paupers, idiots, lunatics, criminals, and accused persons [to the United States] . . . for the sole purpose of shifting onto this country the expense of supporting them" posed a grave danger. *See* 13 Cong. Rec. 5088, 5108 (June 19, 1882). But even as Van Voorhis warned of the perils inherent in admitting such individuals into the country, he explained — in advocating for the creation of the previously mentioned immigrant fund — that the United States has historically provided support to arriving immigrants. More specifically, Van Voorhis said that arriving immigrants "in distress . . . [will be] furnished with the needed aid . . . [and] provided for in a manner suitable to their several cases . . . [because it] is not the design of [the 1882 statute] to check immigration, but to continue the beneficent supervision

[thereof]." *Id.* Van Voorhis's statements thus explain that Congress intended the statute to exclude from the United States those subject to confinement or unable to care for themselves without significant dependence on the government, while simultaneously ensuring that arriving poor immigrants received any needed assistance.

Finally, judicial decisions from the late 1800s corroborate the aforementioned meaning of "public charge." For example, in an 1884 decision, the Supreme Court recognized that the 1882 statute — particularly the provision creating the immigrant fund — was meant to help poor immigrants upon their arrival to the United States. *See Edye v. Robertson*, 112 U.S. 580, 590-91 (1884) ("That the purpose of [the statute and those like it] is humane, is highly beneficial to the poor and helpless immigrant, and is essential to the protection of the people in whose midst they are deposited by the steam-ships, is beyond dispute.").

In short, the text, structure, legislative history, and judicial interpretations of the 1882 statute reveal that Congress — when it first used the term "public charge" — did not intend to label as a "public charge" any alien in need of some public aid. If it had, the statute would have been internally inconsistent, as numerous sources reveal that its provisions were meant to aid poor and helpless arriving immigrants — a category of persons highly likely to need some public aid. Rather, the term "public charge" was reserved for those unable to care for themselves without significant government assistance.

b.

As the years passed, Congress amended the public charge provision numerous times. For example, in 1891, Congress altered the methodology to be used in making

public charge determinations by adding the phrase "likely to become" before the term "public charge." In so doing, Congress empowered immigration officials to undertake a prospective examination to determine whether an arriving immigrant could become a public charge in the future. The 1891 amendments did not, however, alter the meaning of the term "public charge." *See United States v. Lipkis*, 56 F. 427, 428 (S.D.N.Y. 1893) (ruling that a woman had become a public charge because "she became insane, and was sent to the public insane asylum of the city . . . where only poor persons unable to pay for treatment are received, and she was there attended to for a considerable period at the expense of the municipality"). The court in *Lipkis* also explained that an immigrant who arrives with "little ready money" should not be declared likely to become a public charge. *Id.*

Other judicial decisions from the late 1800s likewise confirm that, as a general matter, the term "public charge" did not refer to those who merely accepted some public aid. *See Twp. of Cicero v. Falconberry*, 42 N.E. 42, 44 (Ind. App. 1895) ("The mere fact that a person may occasionally obtain assistance from the [local government] does not necessarily make such person a pauper or a public charge."); *Yeatman v. King*, 51 N.W. 721, 723 (N.D. 1892) (observing that a person can be kept "from becoming a public charge by affording [him] temporary relief").

In 1903, 1907, and 1910, Congress made additional changes to the public charge provision. As with the amendments in the late 1800s, none of the changes in the first decade of the 1900s altered the meaning of the term "public charge." The public charge provision thus continued to exclude from this country a narrow class of aliens who would

likely be unable to care for themselves without the government. Indeed, in 1916, only one percent of all arriving aliens were excluded on public charge grounds. *See* Br. of Legal Historians as Amicus Curiae 11-12.

In 1915, the Supreme Court assessed the 1910 version of the public charge provision in its decision in *Gegiow v. Uhl*, 239 U.S. 3 (1915). But *Gegiow* is not particularly helpful in the quest to discern the meaning of "public charge," as the Court evaluated only a narrow question: Whether an alien could be declared likely to become a public charge because "the labor market in the city of his immediate destination [was] overstocked." *Id.* at 9-10. And although the Court answered that question in the negative, Congress amended the public charge provision in 1917 to supersede *Gegiow*. *See* S. Rep. No. 352, at 5 (1916); *see also* An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29, § 3, 39 Stat. 874, 875-76 (1917).

The Supreme Court's *Gegiow* decision and the congressional amendments that followed did not, however, alter the meaning of the statutory term "public charge." Indeed, several contemporary judicial decisions confirm as much. *See Ex parte Mitchell*, 256 F. 229, 230 (N.D.N.Y. 1919); *see also Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922) (explaining that the post-*Gegiow* congressional amendments "d[id] not change the meaning that should be given [the term 'public charge']" and that the alien before the court was not likely to become a public charge because no evidence existed showing any "mental or physical disability or any fact tending to show that the burden of supporting the [alien] is likely to be cast upon the public"). Additionally, Judge Learned Hand, writing for the Second Circuit, explained that after the 1917 amendments, the public charge provision both

overlapped "other provisions; e.g., paupers, vagrants, and the like" and covered cases "where the occasion leads to the conclusion that the alien will become destitute, though generally capable of standing on his own feet." *See United States ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929). Meanwhile, the Fifth Circuit explained that even after the post-*Gegiow* amendments, the public charge provision yet applied only to those with "a condition of dependence on the public for support." *See Coykendall v. Skrmetta*, 22 F.2d 120, 121 (5th Cir. 1927).

Despite the consistency of the foregoing judicial decisions, my colleagues in the panel majority identify early decisions that they see as demonstrating the lack of an express articulation of a "primarily dependent" meaning for the term "public charge." *See ante* 40-43. Read *in toto*, however, those decisions demonstrate that the term "public charge" has always described an alien that is significantly dependent on the government. *See, e.g.*, *Skrmetta v. Coykendall*, 16 F.2d 783, 784 (N.D. Ga. 1926) ("I agree rather with the idea that Congress had in mind those who from infirmity, great age, or small age, want of property, shiftless habits, profligacy, or other things, were apparently such persons as would not maintain themselves in society by the ordinary means, and would thereby become a public charge."); *see also Dunn v. Bryan*, 299 P. 253, 257 (Utah 1931) (explaining that the term "public charge" has a "well-defined meaning," including a person whom "it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty" (internal quotation marks omitted)).

c.

Moving into the mid-20th century, the term "public charge" continued to describe those significantly dependent on the government. The several sources described below demonstrate that the term's meaning remained unchanged.

- A 1948 decision of the Board of Immigration Appeals (the "BIA") explained that an alien could not be deemed a public charge based solely on the receipt of generally available government benefits. *See Matter of B-*, 3 I. & N. Dec. 323, 324-25 (BIA 1948). In so ruling, the BIA emphasized that the "fact that the State or the municipality pays for the services accepted by the alien is not, then, by itself, the test of whether the alien has become a public charge." *Id.* at 325.[7]

- In 1952, when Congress first enacted the INA, it included a public charge provision similar to the one still in use today. A 1950 report from the Senate Judiciary Committee reveals that Congress, in passing the INA, did not desire to precisely delineate the circumstances to be considered by officials conducting a "likely to become a public charge" inquiry. *See* S. Rep. No. 81-1515, at 349 (1950) (stating that there should be "no attempt to define" the *phrase* "likely to become a public charge" in the statute because "the elements constituting likelihood of becoming a public charge are varied"). Of course, Congress's decision in that respect did not alter the baseline meaning of the term "public charge."

- In 1962, the Attorney General issued an opinion confirming that the term "public charge" continued to describe those with some level of significant dependence on the government. *See Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (Op. Att'y Gen. 1964) (explaining that, in order to declare a person a public charge, "[s]ome specific circumstance, such as mental or physical disability, advanced age, or other fact reasonably *tending to show that the burden of supporting the alien is likely to be cast on the public*, must be present" and that a

[7] *Matter of B-* is relevant to this appeal only insofar as it illuminates the BIA's view regarding the definition of the term "public charge." That is because the BIA later clarified that the test set forth in *Matter of B-* applied to deportations on public charge grounds and not inadmissibility determinations like those covered by the DHS Rule. *See Matter of Harutunian*, 14 I. & N. Dec. 583, 585 (BIA 1974).

"healthy person in the prime of life cannot ordinarily be considered likely to become a public charge" (emphasis added)).

- In 1974, the BIA reiterated its longstanding view that a public charge is an alien with significant dependence on the government. *See, e.g.*, *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974) (ruling that the "fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge"); *Matter of Harutunian*, 14 I. & N. Dec. 583, 586 (BIA 1974) (observing that in *Matter of B-*, the "words 'public charge' had their ordinary meaning, that is to say, a money charge upon or an expense to the public for support and care, *the alien being destitute*" (emphasis added)); *id.* at 589 ("Everything in the statutes, the legislative comments and the decisions points to one conclusion, that Congress intends that an applicant for a visa be excluded who is without sufficient funds to support himself, who has no one under any obligation to support him and who, being older, has an increasing chance of becoming dependent, disabled and sick."); *id.* (suggesting that although the receipt of "individualized public support to the needy" could render someone a public charge, acceptance of "essentially supplementary benefits, directed to the general welfare of the public as a whole," should not).

In short, although the public charge provision underwent several alterations in the mid-20th century, the meaning of the term "public charge" remained unchanged. Indeed, decision after decision — both from the BIA and the Attorney General — reiterated that which had been apparent since the term's initial use: An alien must be significantly dependent on the government, as opposed to a mere recipient of some public aid, to be considered a public charge.

d.

Arriving at the end of the 20th century, none of the various amendments to the INA during that period reveal a congressional desire to alter the established meaning of the term "public charge." In 1990, Congress passed a new immigration act containing a public

charge provision identical to the one in the 1952 INA. *See* Immigration Act of 1990, Pub. L. No. 101-649, tit. VI, § 601(a)(4), 104 Stat. 4978, 5072 (1990). Although Congress did not alter the language of the public charge provision, it did remove several of the enumerated classes of inadmissible persons, i.e., paupers, vagrants, and professional beggars. In so doing, Congress intended that the public charge provision would exclude those previously enumerated classes of inadmissible aliens. *See* 136 Cong. Rec. 36797, 36844 (Oct. 27, 1990).

Six years later, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which, inter alia, amended the INA to include the Public Charge Statute at issue in these proceedings. *See* Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, tit. V, § 531, 110 Stat. 3009, 3009-674 (1996). Simultaneous with its passage of the 1996 amendments to the INA, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which limited the ability of aliens living in the United States to access certain public benefits. *See* Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at 8 U.S.C. § 1601 *et seq.*) (the "Welfare Reform Act").

Although neither the Public Charge Statute nor the Welfare Reform Act altered the meaning of the term "public charge," Congress included a policy statement at the outset of the Welfare Reform Act explaining that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes." *See* 8 U.S.C. § 1601(1). And Congress expressed its desire that "aliens within the Nation's borders not depend on public resources to meet their needs" and that the "availability of

public benefits not constitute an incentive for immigration to the United States." *Id.* § 1601(2)(A)-(B). Despite the contrary insistence of the panel majority, the Welfare Reform Act has limited relevance to the term "public charge." To be sure, the Welfare Reform Act conveys that Congress aimed to curtail the widespread use of public benefits by aliens. But the Welfare Reform Act accomplishes that goal by limiting the public benefits for which aliens are eligible, not by redefining "public charge."

Simply put, nothing in the 1990 Immigration Act, the Public Charge Statute, the other 1996 amendments to the INA, or the Welfare Reform Act changed the longstanding meaning of the term "public charge." Accordingly, "public charge," as used today in the Public Charge Statute, continues to mean an alien significantly dependent on the government.

e.

Finally, recent administrative rulemaking proceedings clearly demonstrate that the term "public charge" has always meant an alien with significant dependence on the government. For instance, in 1999, the Immigration and Naturalization Service (the "INS"), then an agency of the Department of Justice, published a proposed regulation entitled "Inadmissibility and Deportability on Public Charge Grounds." *See* 64 Fed. Reg. 28,676 (May 26, 1999) (the "1999 Proposed Rule"). Confusion following the passage of the Welfare Reform Act necessitated the 1999 Proposed Rule, as some aliens had declined to accept public benefits for fear that they would be declared public charges.

The 1999 Proposed Rule defined the term "public charge" as, inter alia, "an alien . . . who is likely to become . . . primarily dependent on the Government for subsistence,

as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at Government expense." *See* 64 Fed. Reg. at 28,677 (internal quotation marks omitted). The INS settled on the foregoing definition by relying on "the plain meaning of the word 'charge,' the historical context of public dependency when the public charge immigration provisions were first enacted more than a century ago, and . . . [the] factual situations presented in the public charge case law." *Id.* In addition to defining the term "public charge," the 1999 Proposed Rule also emphasized that the plain meaning of the term suggests "*a complete, or nearly complete, dependence on the Government* rather than the mere receipt of some lesser level of financial support." *Id.* (emphasis added).

Regarding the types of public benefits that could render an alien a public charge, the 1999 Proposed Rule explained that it has "never been [INS] policy that the receipt of any public service or benefit must be considered for public charge purposes." *See* 64 Fed. Reg. at 28,678. Indeed, the 1999 Proposed Rule explicitly stated that because "[n]on-cash benefits, such as [supplemental nutrition assistance programs], are by their nature supplemental and frequently support the general welfare," acceptance thereof should not be considered in public charge analyses. *Id.* Consequently, the 1999 Proposed Rule related that only the acceptance of "public cash assistance" or "institutionaliz[ation] for long-term care" should be factored into the public charge analysis. *Id.* Finally, the 1999 Proposed Rule adopted longstanding principles derived from the public charge precedents, such as the requirement that immigration officials employ a "totality of the circumstances" approach in "making a prospective public charge decision." *Id.* at 28,679.

Although the 1999 Proposed Rule provided new details regarding public charge determinations, nothing therein purported to change the established meaning of the term "public charge." On the contrary, the 1999 Proposed Rule actually sought to codify the definition derived from the term's historical usage. *See* 64 Fed. Reg. at 28,677. Ultimately, however, the 1999 Proposed Rule was not finalized.

Notwithstanding the failure to finalize the 1999 Proposed Rule, its definition of "public charge" was nevertheless implemented by the INS via a document entitled "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds." *See* 64 Fed. Reg. 28,689 (Mar. 26, 1999) (the "1999 Field Guidance"). The INS issued the 1999 Field Guidance two months before the 1999 Proposed Rule as a stopgap measure to clarify confusion surrounding the interplay between the Public Charge Statute and the Welfare Reform Act pending finalization of the 1999 Proposed Rule. To that end, the 1999 Field Guidance immediately adopted the definition of the term "public charge" contained in the 1999 Proposed Rule and barred immigration officials making public charge determinations from placing "any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance." *Id.* at 28,689. Importantly, like the 1999 Proposed Rule, the 1999 Field Guidance explicitly contemplated that its definition of "public charge" would not significantly alter public charge determinations. *Id.* at 28,692 (explaining that the 1999 Field Guidance's definition should not "substantially change the number of aliens who will be found . . . inadmissible as public charges"). After its adoption, the 1999 Field Guidance controlled public charge determinations until the promulgation of the DHS Rule in 2018.

* * *

In sum, this review of the history of the term "public charge" reveals a simple truth that the panel majority and DHS fail to acknowledge: since its first use in 1882, the term has consistently described aliens who are significantly dependent on the government. The text, structure, legislative history, and judicial interpretations of the various public charge provisions permit no other conclusion. It is against this consistent history that the DHS Rule must be evaluated.

2.

Turning now to the DHS Rule, DHS promulgated it on August 14, 2019, pursuant to its rulemaking authority under the INA and the APA. *See* 84 Fed. Reg. 41,501 (Aug. 14, 2019). Put simply, the Rule extraordinarily expands the definition of "public charge," resulting in a definition of staggering breadth.

The DHS Rule's expansive sweep can be gleaned from its definitions alone. To that end, the Rule says that a "public charge" is "an alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." *See* 84 Fed. Reg. at 41,501. And the term "public benefit," as used in the Rule, includes: (1) "[a]ny Federal, State, local, or tribal cash assistance for income maintenance (other than tax credits)"; (2) "Supplemental Nutrition Assistance Program (SNAP)"; (3) "Section 8 Housing Assistance"; (4) "Section 8 Project-Based Rental Assistance"; (5) certain Medicaid services; and (6) "Public Housing under section 9 of the U.S. Housing Act of 1937." *Id.* Moreover, the Rule provides specific guidance regarding how immigration

officials should conduct public charge assessments. To be sure, the Rule purportedly retains the totality-of-the-circumstances evaluation that has long applied to public charge determinations, but that evaluation is now singularly focused on whether an alien is "more likely than not at any time in the future to receive one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period." *Id.* at 41,502.[8] Owing to the confluence of the Rule's various provisions, an alien can now be deemed a public charge predicated on the potential acceptance of a small amount of government benefits for a short period of time.

3.

Having catalogued the history of the term "public charge" and the specifics of the DHS Rule, the question now is whether the Rule's definition of "public charge" contravenes the Public Charge Statute. Although I bypass *Chevron*'s first step predicated on the assumption that some ambiguity inheres in the meaning of "public charge," as used in the Public Charge Statute, it is clear that the Rule's definition of "public charge" is unreasonable and thus fails at *Chevron*'s second step.

[8] The DHS Rule instructs immigration officials, in assessing the totality of the circumstances, to consider a panoply of factors. Some of those factors are of questionable relevance. For example, the Rule instructs officials to consider "[w]hether the alien is proficient in English or proficient in other languages in addition to English." *See* 84 Fed. Reg. at 41,504. English proficiency had never been considered as part of the public charge inquiry, and the Rule does not indicate why English proficiency is now relevant. *See* Br. of U.S. House of Representatives as Amicus Curiae 20-21.

a.

As explained, the question at step two of the *Chevron* inquiry is whether the DHS Rule's definition of "public charge" is reasonable. *See Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 505 (4th Cir. 2011). That is because a court is obliged, at *Chevron*'s second step, to "afford 'controlling weight' to [a] . . . reasonable interpretation even where [the court] would have, if writing on a clean slate, adopted a different interpretation." *Id.* (quoting *Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998)); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005).

Importantly, however, the deference afforded to an agency's reasonable interpretation of a statute at *Chevron*'s second step is not an open invitation to the agency to conjure up any interpretation. Indeed, even statutory terms lacking an unambiguous meaning at *Chevron*'s first step can have definitional limits beyond which the agency may not venture for purposes of *Chevron*'s second step. *See Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 525 (2009) (explaining that "the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of" the statute at issue). The Supreme Court explained that principle in its *Cuomo* decision, clarifying that when there is "necessarily some ambiguity as to the meaning of [a] statutory term," an executive branch agency "can give authoritative meaning to the statute *within the bounds of that uncertainty*." *Id.* (emphasis added). And to discern the scope of the ambiguity beyond which the agency may not venture, a court is obliged to consider, inter alia, "[e]vidence from the time of the statute's enactment," "[court] cases," and "normal principles of construction." *Id.* Put another way, "even through the clouded lens of history," typical

tools of statutory construction allow courts to "discern the outer limits of [a statutory] term." *Id.*[9]

b.

Bearing in mind the principles espoused in *Cuomo*, the statutory context and history of the term "public charge" reveal that the term has an outer limit beyond which DHS may not traverse. As Chief Judge Wood of the Seventh Circuit recently put it: "There is a floor inherent in the words 'public charge,' backed up by the weight of history." *See Cook Cty.*, 962 F.3d at 229. That floor requires a public charge finding to be predicated on some sort of significant dependence upon public benefits — even if the level of dependence falls somewhere below "primary dependence." To say otherwise simply ignores the statutory context and extensive history of the term "public charge."

But the panel majority, apparently content to brush aside statutory structure and history, opts to use the most broad and generic definition of the word "charge." In my

[9] The panel majority maintains that the Public Charge Statute's use of the phrase "in the opinion of" confers some extraordinary discretion upon DHS regarding its ability to define the term "public charge." *See* 8 U.S.C. § 1182(a)(4)(A) ("Any alien who . . . *in the opinion of* the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." (emphasis added)); *see also ante* 31. The location of the "in the opinion of" phrase demonstrates, however, that it affords discretion in determining — based on the totality of the circumstances — whether a given alien is "likely at any time to become a public charge." *See Matter of Harutunian*, 14 I. & N. Dec. at 588 (observing that "Congress inserted the words 'in the opinion of' . . . with the manifest intention of putting borderline adverse determinations beyond the reach of judicial review"); *see also* S. Rep. No. 81-1515, at 349 (explaining that because there is "no definition of the term 'likely to become a public charge' in the statutes, its meaning has been left to the interpretation of the administrative officials and the courts"). The phrase clearly does not expand DHS's authority to define the term "public charge."

colleagues' view, any alien who is likely to produce any "money charges upon the public for support and care" can be a public charge. *See ante* 34. The majority sees the word "charge" in the Public Charge Statute as akin to the type of charge people routinely encounter — a charge for a meal at a restaurant or for an airline ticket. The statutory context and the weight of history, however, plainly counsel that this cannot be the proper definition. Rather, the word "charge," as used in the Public Charge Statute, defines a person dependent on someone or something else — that is, a person who is the charge of another.

Several indicators confirm that this latter meaning is the proper one. For one thing, since its earliest appearance in the immigration statutes, the term "public charge" has always accompanied other terms defining classes of persons — such as, "idiots, insane persons, [and] paupers." *See* An Act in Amendment to the Various Acts Relative to Immigration, Ch. 551, § 1, 26 Stat. 1084, 1084 (1891). That circumstance strongly suggests that the word "charge," as used in the Public Charge Statute, should not be given its broadest possible meaning, but rather should be read as describing a type of person — one who is the charge of another. *See S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006) (explaining that, in statutory interpretation, "a word is known by the company it keeps" (internal quotation marks omitted)).

Additionally, as mentioned, the majority's construction of the Public Charge Statute renders any alien who imposes a charge upon the public a "public charge." But the Public Charge Statute does not sweep so broadly. It does not exclude from the country any alien likely to accept a public benefit and thereby impose a charge on the public; rather, it

excludes aliens who are likely to become "a public charge." If Congress wanted to exclude the former category, it could have done so. Indeed, other INA provisions — for example, the affidavit-of-support provision — reveal that Congress knows how to assign immigration consequences to those who accept *any public benefit*. *See* 8 U.S.C. § 1183a(b)(1)(A) (stating that sponsored alien must repay government for acceptance of "any means-tested public benefit" and specifying consequences for failure to repay). But Congress did not exclude via the Public Charge Statute aliens who receive any public benefit; it excluded those likely to become "a public charge." And that choice carries meaning. *Cf. Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 341 (2005) (explaining that courts do not "lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply" and that the "reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest").

At bottom, the statutory structure, when paired with the history of the term "public charge," confirms that the term does not extend to cover any alien who may impose a money charge upon the government, but rather reaches only those who are significantly dependent on the government in some manner. Accordingly, the majority's contention that DHS will struggle to discern the floor inherent in the term is wholly unfounded. As heretofore explained, the floor is a conspicuous one that DHS simply chose to flout.[10]

[10] My colleagues criticize this dissent for concluding that the term "public charge" has a definitional outer limit, but even they tacitly acknowledge that "public charge" has a

c.

Having identified the outer limits of the term "public charge" — that is, a significant level of dependence on the government — the remaining question is whether the DHS Rule's definition of the term falls within those outer limits. And it plainly does not. Accordingly, the Rule's boundless definition of "public charge" is unreasonable and fails at *Chevron*'s second step.

Initially, a cursory examination of the DHS Rule's definition of "public charge" makes clear that the Rule has ventured beyond the outer limits of the statutory meaning of the term. Historically, an alien could be deemed a public charge only if that person was, in some way, significantly dependent on the government. No longer. Under the Rule, any alien who receives 12 months' worth of benefits in a 36-month period is a public charge. And those benefits stack, meaning that the acceptance of multiple discrete benefits in a single month equals multiple months' worth of benefits. The Rule does not stop there, as it mandates that immigration officials consider the acceptance of supplemental public benefits that never before played a role in public charge determinations — like SNAP assistance, Section 8 Housing assistance, and Medicaid services. Additionally, the Rule goes even a step further by placing no minimum requirement on the amount of benefits accepted. The various features of the Rule thus work in concert to render any alien who receives a de minimis amount of public benefits for a de minimis period of time a "public

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definitional floor. *See ante* 52-53 (reserving for another day question of precise floor of term).

charge." *See Cook Cty.*, 962 F.3d at 229. But an alien who receives such a miniscule amount of benefits cannot reasonably be declared significantly dependent on the government. *Id.* at 232 (explaining that the benefits covered in the Rule "are largely *supplemental* and not intended to be, or relied upon as, a primary resource for recipients" and that "[m]any recipients could get by without them, though as a result they would face greater health, nutrition, and housing insecurity").[11]

Additionally, the consequences of the DHS Rule's redefinition of "public charge" underscore its unreasonableness. *See Cuomo*, 557 U.S. at 529 ("The consequences of the regulation also cast doubt upon its validity."). To capture the scope of the change caused by the Rule, consider the following real-world example regarding SNAP benefits. In order to qualify for the SNAP program, an individual must make less than $16,248 per year.[12] Individuals who qualified for the program in 2019 — approximately 35.7 million people per month — received an average monthly benefit of $129.83.[13] Accordingly, under the

[11] The majority insists that it is fanciful to conclude that an alien who is likely to receive a small amount of supplemental public benefits for a short period of time will be declared likely to become a public charge under the DHS Rule. *See ante* 52-53. But that conclusion flows directly from the plain text of the Rule. *See* 84 Fed. Reg. at 41,501. In reality, it is my friends who have resorted to speculation in predicting that DHS will not — for reasons left unexplained — apply the Rule according to its plain text.

[12] For additional context, according to calculations from the Center for Poverty Research at the University of California, Davis, an individual in the United States working full-time for minimum wage earns $15,080 per year. *See* https://poverty.ucdavis.edu/faq/what-are-annual-earnings-full-time-minimum-wage-worker (last visited June 30, 2020).

[13] The data regarding SNAP benefit usage was obtained from the website of the Food and Nutrition Service, an agency of the Department of Agriculture. The full data set can be found at: https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAPsummary-6.pdf (last visited June 30, 2020).

Rule, any alien applying for admission or adjustment of status who is more likely than not, at any point in his lifetime, to receive a monthly benefit of $129.83 for 12 out of 36 months is excludable from the country on public charge grounds. And if that alien happens to also receive housing and Medicaid assistance, in any amount, it would only take that person a mere four months to become a public charge. Such a person, however, cannot reasonably be declared significantly dependent on the government.

The DHS Rule's unreasonableness is further compounded by the fact that the Rule's definition of "public charge" is cut from whole cloth. DHS and the panel majority assure us, however, that the Rule's definition is actually based on data demonstrating that "a substantial portion of individuals who receive public benefits do so for fewer than 12-months and that those who receive such benefits over a longer period are more likely to become 'long-term recipients' of welfare." *See ante* 15-16 (citation omitted); *see also* 84 Fed. Reg. 41,292, 41,359-41,362 (Aug. 14, 2019). But the Rule does not define a public charge as an individual who receives public benefits for 12 months or more; the Rule defines a public charge as any alien who receives 12 months' worth of public benefits — *in the aggregate* — in a 36-month period. Accordingly, under the Rule's definition, an alien who receives a miniscule amount of three supplementary public benefits for four months is a public charge. So, data indicating that the likelihood of long-term benefit usage increases for those persons who receive public benefits for 12 months or more are quite beside the point. If anything, the mismatch between the data DHS relied on to craft the Rule and the provisions of the Rule itself only underscore the unreasonableness of the Rule's "public charge" definition. *See Cook Cty.*, 962 F.3d at 229-33 (declaring Rule likely

arbitrary and capricious because of serious mismatch between Rule and both data DHS relied upon in crafting Rule and text of Public Charge Statute); *see also Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (explaining overlap between arbitrary and capricious evaluation and inquiry at *Chevron*'s second step).

The majority also seeks to justify the DHS Rule by way of the Welfare Reform Act, which restricts the public benefits that aliens may receive. In the majority's view, the Rule's definition of "public charge" must be reasonable because it harmonizes with the policy statement at the outset of the Welfare Reform Act, which expresses Congress's desire that aliens be self-sufficient. My good friends are mistaken. To begin, a policy statement is always of limited persuasiveness. *Cf. Comcast Corp. v. F.C.C.*, 600 F.3d 642, 654 (D.C. Cir. 2010) ("Policy statements are just that — statements of policy."). And that persuasive power further fizzles when considering that this policy statement accompanies the Welfare Reform Act, which is not at issue in these proceedings and says nothing about the Public Charge Statute or the term "public charge." *See Cook Cty.*, 962 F.3d at 228. Additionally, to the extent that Congress expressed its concern about the self-sufficiency of aliens in the Welfare Reform Act, it addressed that concern therein by restricting the benefits for which aliens are eligible. *Id.* Accordingly, relying on the Welfare Reform

Act's policy statement to justify a boundless construction of the term "public charge," or to countenance the Rule's cavernous definition thereof, is inappropriate.[14]

Finally, the unreasonableness of the DHS Rule is plainly apparent when considering the overall statutory context, as the Rule "creates serious tensions, if not outright inconsistencies, within the statutory scheme." *See Cook Cty.*, 962 F.3d at 228. Specifically, the Rule allows DHS to consider an alien's acceptance of benefits that he is eligible to receive under both the Welfare Reform Act, *see* 8 U.S.C. §§ 1611, 1621, and the Farm Security and Rural Investment Act of 2002, *see* Pub. L. No. 107-171, 116 Stat. 134 (2002). Accordingly, under the Rule, an alien can be deemed likely to become a public

[14] In its recent *Cook County* decision, the Seventh Circuit explained the proper interplay between the Welfare Reform Act, the Public Charge Statute, and the DHS Rule. As Chief Judge Wood related:

> The INA does not call for total self-sufficiency at every moment; it uses the words "public charge." DHS sees "lack of complete self-sufficiency" and "public charge" as synonyms: in its view, receipt of any public benefit, particularly one related to core needs such as health care, housing, and nutrition, shows that a person is not self-sufficient. This is an absolutist sense of self-sufficiency that no person in a modern society could satisfy; everyone relies on nonmonetary governmental programs, such as food safety, police protection, and emergency services. DHS does not offer any justification for its extreme view, which has no basis in the text or history of the INA. As we explained earlier, since the first federal immigration law in 1882, Congress has assumed that immigrants (like others) might face economic insecurity at some point. Instead of penalizing immigrants by denying them entry or the right to adjust status, Congress built into the law accommodations for that reality.

See Cook Cty., 962 F.3d at 232 (citation omitted).

charge because that alien might accept public benefits that Congress explicitly authorized him to receive. To put it mildly, that result verges on the absurd. *See Cook Cty.*, 962 F.3d at 228 (explaining that the Rule sets a "trap for the unwary by penalizing people for accepting benefits Congress made available to them" (internal quotation marks omitted)). And it provides strong evidence that the Rule's definition of "public charge" is unreasonable. *Cf. Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (explaining that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available").[15]

At bottom, the Public Charge Statute does not exclude from the country any alien who is likely to need public assistance during his time in the country, it excludes those "likely at any time to become a public charge." *See* 8 U.S.C. § 1182(a)(4)(A). And the history of the term "public charge" reveals that the term means an alien who is somehow

[15] The majority attempts to minimize the tension between the DHS Rule and the federal immigration laws by accusing this dissent of "pick[ing] and scratch[ing] at the Rule" to unearth tangential inconsistencies. *See ante* 50. But discerning that the Rule is in outright conflict with both the Public Charge Statute and the Welfare Reform Act does not require any mental gymnastics. Indeed, a careful, straightforward examination of the statutory context and history of the term "public charge" — an examination free from the taint of any grand pronouncements about a preferred policy outcome — lays bare the irreconcilable conflict between the Rule and our immigration statutes. And that conflict dooms the Rule. *See Dixon v. United States*, 381 U.S. 68, 74 (1965) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." (internal quotations marks omitted)).

significantly dependent on the government. *See Cook Cty.*, 962 F.3d at 229. If Congress wanted to expand the exclusion by declaring inadmissible not just those likely to be significantly dependent on the government, but also those who might receive any quantum of public assistance, it could have done so. But DHS cannot unreasonably interpret a statutory term so that it may do by executive fiat what Congress has declined to do. The DHS Rule is a textbook example of executive branch overreach that is forbidden in our constitutional system. *Cf. ante* 70 ("It is beyond the power of any one person to set himself up as the arbiter of law in these entire United States.").

In the face of the extensive history accompanying the term "public charge," to conclude that the DHS Rule's definition of "public charge" is reasonable makes a mockery of the term "public charge," "does violence to the English language and the statutory context," and disrespects the choice — made consistently by Congress over the last century and a quarter — to retain the term in our immigration laws. *See Cook Cty.*, 962 F.3d at 229. For those reasons, the Rule's "public charge" definition ventures far beyond any ambiguity inherent in the meaning of the term "public charge," as used in the Public Charge Statute, and thus fails at *Chevron*'s second step. In light of the foregoing, the plaintiffs are likely to succeed on the merits of their claim that the Rule is unlawful, and the majority is wrong to conclude otherwise.[16]

[16] During the pendency of this appeal, the Supreme Court — on emergency request of the government — stayed injunctions entered by district courts in the Northern District of Illinois and the Southern District of New York that prohibited implementation of the DHS Rule. *See Wolf v. Cook Cty., Ill.*, 140 S. Ct. 681 (Feb. 21, 2020); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (Jan. 27, 2020). Although my colleagues in the majority

C.

1.

Having concluded that the plaintiffs are likely to succeed on the merits of their claim against the DHS Rule, the next assessment is whether the other preliminary injunction factors weigh in favor of preliminarily enjoining implementation of the Rule. Those factors are whether (1) CASA is "likely to suffer irreparable harm in the absence of preliminary relief"; (2) "the balance of equities tips in [CASA's] favor"; and (3) "an injunction is in the

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believe that the Court's stay orders put a thumb on the scale in favor of DHS, *see ante* 5-7, I do not agree. In my view, assigning such significance to perfunctory stay orders is problematic. *See Wolf*, 140 S. Ct. at 683-84 (Sotomayor, J., dissenting) (observing that decisions rendered pursuant to emergency stay requests force the Court "to consider important statutory and constitutional questions that have not been ventilated fully in the lower courts, on abbreviated timetables and without oral argument"). That is particularly so because, as Justice Sotomayor recently explained, such stays — which were once reserved for the rarest of cases — have become commonplace. *Id.* at 683 (explaining that the government, "[c]laiming one emergency after another," has "come to treat the exceptional mechanism of stay relief as a new normal" and has "recently sought stays in an unprecedented number of cases" (internal quotation marks and alteration omitted)). If the Court's decision to grant a stay could be understood to effectively hand victory to the government regarding the propriety of a preliminary injunction, there would be little need for an intermediate appellate court to even consider the merits of an appeal in which the Court has granted a stay. *See Cook Cty.*, 962 F.3d at 234 ("The stay . . . preserves the status quo while . . . case[s] . . . percolate up from courts around the country. There would be no point in the merits stage if an issuance of a stay must be understood as a *sub silentio* disposition of the underlying dispute."). Indeed, even the Court's orders staying the aforementioned preliminary injunctions contemplate full hearings on the merits by the courts of appeals. *See Wolf*, 140 S. Ct. at 681; *New York*, 140 S. Ct. at 599. Accordingly, the Court's stay orders do not control our evaluation of the merits of the preliminary injunction at issue in these proceedings.

public interest." *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).[17] Despite the panel majority's rulings to the contrary, each of those factors weighs in favor of preliminarily enjoining implementation of the Rule.

a.

Beginning with whether CASA will face irreparable harm in the absence of a preliminary injunction, we are obliged to consider whether "irreparable injury is *likely* in the absence of an injunction." *See Winter*, 555 U.S. at 22; *see also Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (explaining that "more than just a 'possibility' of irreparable harm" is necessary). To carry its burden, CASA must make a "clear showing that it will suffer harm that is neither remote nor speculative, but actual and imminent." *See Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 216 (4th Cir. 2019) (internal quotation marks omitted). Additionally, the harm must be truly irreparable, meaning that it must be incapable of being "fully rectified by the final judgment after trial." *Id.* (internal quotation marks omitted).

In my view, the district court did not abuse its discretion in determining that CASA is likely to suffer irreparable harm if the DHS Rule is not enjoined. CASA claims that, because of the Rule, it must divert resources away from its core legislative advocacy mission and toward efforts to counsel its members about the effects of the Rule. And according to CASA, those advocacy efforts cannot be adequately undertaken at a different

[17] In assessing the remaining preliminary injunction factors, my focus, like that of the panel majority and the district court, is on CASA (as opposed to the individual plaintiffs).

time because they are dependent on political will and the legislative cycle. Such allegations demonstrate irreparable harm. *See Mountain Valley Pipeline, LLC*, 915 F.3d at 217; *Mountain Valley Pipeline, LLC v. W. Pocahontas Props. Ltd. P'ship*, 918 F.3d 353, 366 (4th Cir. 2019); *see also League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (explaining that because decisions of the defendant "unquestionably ma[d]e it more difficult for the [plaintiff organization] to accomplish [its] primary mission," the organization suffered injury sufficient for purposes of both "standing and irreparable harm").

b.

The remaining pieces of the preliminary injunction puzzle to consider are whether the balance of equities and the public interest weigh in favor of granting relief. Because the government is a party in these proceedings, those two factors can be considered together. *See Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016); *see also Nken v. Holder*, 556 U.S. 418, 435 (2009).

In the panel majority's view, DHS's interest in "not burdening the public fisc by admitting public charges" is more important than the harm CASA will face from the impairment of its organizational mission and the diversion of its resources. *See ante* 55-56. I disagree. Absent a preliminary injunction, CASA's organizational mission will undoubtedly continue to be frustrated and its resources diverted. Moreover, the public interest will be harmed if aliens living in the United States disenroll from public benefits for which they are eligible due to fear of immigration consequences stemming from the

DHS Rule. On the other hand, DHS's purported interests — when weighed against the significant harms CASA faces — fail to measure up.

At the end of the day, DHS contends that it has an overriding interest in immediately implementing its preferred policy and that such an interest tips the balance of equities and the public interest in its favor. Although the majority dutifully accepts that contention, I do not. If immediate implementation of a preferred policy were sufficient to tilt the balance of equities and public interest in favor of DHS, every plaintiff seeking a preliminary injunction against governmental action would be on a fool's errand. Accordingly, the harm CASA will suffer absent a preliminary injunction far outweighs any interest DHS may have in immediately implementing its preferred policy. The majority errs in concluding otherwise.

2.

Finally, the panel majority launches a broadside against the propriety of nationwide preliminary injunctions. In the context of its other rulings, however, the majority's attack is dicta. And in any event, my friends are wrong in their criticism of the scope of the district court's injunction. To be sure, a nationwide preliminary injunction is a strong remedy. But district courts are entitled to wide discretion in fashioning injunctive relief. *See South Carolina v. United States*, 907 F.3d 742, 753 (4th Cir. 2018). And here, the district court's decision to preliminarily enjoin implementation of the DHS Rule nationwide is a perfectly appropriate exercise of that considerable discretion. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.");

see also Texas v. United States, 809 F.3d 134, 187-88 (5th Cir. 2015) (affirming nationwide injunction barring implementation of immigration policy and emphasizing that immigration policy should be uniform throughout the country).

* * *

In sum, the Public Charge Statute excludes aliens from this country and prohibits aliens already living in the country from adjusting their immigration statuses if they are likely to become public charges. Although the Public Charge Statute does not define the term "public charge," the usual tools of statutory construction reveal that "public charge" has always described an alien likely to be significantly dependent on the government. The DHS Rule, however, alters that definition, declaring that any alien likely to receive a de minimis amount of supplemental public benefits for a de minimis period of time is excludable as a public charge. Under any reasonable construction, a person receiving such a miniscule amount of benefits cannot be said to be significantly dependent on the government. Because the Rule fixes a boundless definition of "public charge," it lands far afield of any reasonable interpretation of the Public Charge Statute. Accordingly, the plaintiffs are likely to succeed on the merits of their challenge to the lawfulness of the Rule. And because the remaining preliminary injunction factors weigh in favor of granting relief, the district court did not abuse its discretion in preliminarily enjoining implementation of the Rule, even on a nationwide basis.

III.

Pursuant to the foregoing, I would affirm the preliminary injunction entered by the district court. I therefore respectfully dissent.

Yale Journal on Regulation

Notice & Comment

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Made possible in part by the support of Davis Polk & Wardwell LLP

NOTICE & COMMENT

Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies, by John Harrison

– April 12, 2020

No. 19-2222, viewed 08/05/2020

The Supreme Court recently granted certiorari in *Trump v. Pennsylvania*,[1] agency regulations under the Affordable Care Act. The district court granted, and the Third Circuit affirmed, a universal injunction: the court ordered the agencies not to enforce the regulation as to anyone, not just the plaintiffs. In support of the universal scope of the injunction, the Third Circuit relied on 5 U.S.C. 706, part of the Administrative Procedure Act. The government's petition for certiorari objected to the universal scope of the injunction.[2] That objection is in keeping with litigation guidelines issued by the Attorney General in 2018. Those guidelines say that universal remedies are inappropriate, and that the APA does not authorize the universal vacatur of agency regulations.[3]

Section 706 says that courts conducting judicial review are to "hold unlawful and set aside" agency action that fails the tests it sets out, like agency action that is arbitrary or capricious. In approving the universal injunction, the Third Circuit found that when section 706 tells courts to set aside agency action, it means that they are to give a remedy that renders the action wholly inoperative. Appellate courts issue such orders when they reverse or vacate the judgments of lower courts; the appellate court's order causes the lower court's judgment to become legally inoperative. According to the Third Circuit, when a regulation is challenged and found to be unlawful, section 706 instructs the reviewing court to "vacate" it in that sense.[4]

The view that section 706 directs that courts give a remedy that sets aside agency action appears to be quite common. That view is wrong. Section 706 operates at a point in the court's decision process before the remedy is considered. When that provision tells courts to set agency action aside, it instructs them not to decide the case according to that action. The court is to put the agency action off to the side, in a manner of speaking. The remedial consequences of not deciding the case according to the agency action depend on the form of proceeding for judicial review being used in the case. In an enforcement proceeding, setting the agency action aside means treating it as legally ineffective, so that it does not impose any obligations on the defendant. In a proceeding in which the court acts like an appellate tribunal with respect to the agency, setting the action aside may entail rendering it wholly ineffective. The Third Circuit erred in *Trump v. Pennsylvania* by attributing one of the possible remedial consequences of section 706 to that provision itself. Section 706, however, applies in every form of proceeding for judicial review and does not call for any specific remedy. Questions of remedy come up, not under section 706, but under section 703.

That conclusion follows from the text of section 706 and the structure of the APA's provisions for judicial review. "Set aside" can refer to more than one step a court can take. When an appellate court reverses or vacates a lower-court judgment, the appellate court sets the judgment aside in the sense of causing it to be inoperative, where before it was operative. A court sets aside a statute on constitutional grounds in a different sense. When a court concludes that the statute is contrary to the Constitution and inoperative, it disregards the statute in deciding the case. Both ways of using "set aside" were known at the time of the APA and are known today.[5]

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If section 706 uses "set aside" in the appellate-review sense, it directs courts to give a remedy. If it uses "set aside" in the constitutional-review sense, it gives an instruction about courts' reasoning process: they are not to follow what the agency has done. A court can follow the latter instruction in different kinds of cases. When it is acting as an appellate tribunal with respect to an agency, a court can decide the case without following what the agency has done by reversing or vacating the agency decision. In an enforcement proceeding, a court can decide the case without following what the agency has done by treating the agency action as legally ineffective, so that no sanction is imposed on the defendant.

Section 706 must be read along with section 703. Unlike the former provision, the latter does deal with different kinds of judicial review proceedings and the remedies appropriate to them. Section 703, titled "Form and venue of proceeding," provides: "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. . . . Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

One mode of judicial review contemplated by section 703, enforcement proceedings, does not produce any affirmative remedy at all. If a private defendant argues successfully that a regulation should have been promulgated with notice and comment but was not, the defendant prevails but the court gives no affirmative remedy. If section 706 directs courts to give a remedy of setting aside, it cannot operate in enforcement proceedings. But section 706 deals with the scope of judicial review generally, and must operate in all the proceedings referred to by section 703.

Some of the other modes of judicial review contemplated by section 703 do involve an affirmative remedy, but not one that sets agency action aside the way an appellate court sets a judgment aside. A successful petitioner in habeas obtains an order of release from custody, but nothing else. A private plaintiff who obtains an injunction against the institution of enforcement proceedings, and thereby anticipates the defense that would be available were the regulation enforced, obtains the injunction but no more. In neither of those modes of judicial review does the court give an affirmative remedy making the agency action inoperative. If section 706 directs courts to give such orders, it cannot apply in habeas or anti-enforcement proceedings.[6]

If by "set aside" section 706 means, put to the side in deciding the case and so do not follow the agency action, section 706 provides a principle that can be applied in all the modes of judicial review contemplated by section 703. In an enforcement proceeding, not deciding according to the agency action means deciding in favor of the defendant. In habeas and anti- enforcement proceedings, it means giving affirmative relief that follows from the principle that the agency action is not legally binding, which follows from not deciding according to it. In appellate-type proceedings, deciding not according to the agency action means overturning the action, if the court is authorized to do so by the applicable special review statute.

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The reading of section 706 adopted by the Third Circuit in *Pennsylvania v. Trump* is not compatible with the APA because it is not compatible with section 703. The reading according to which section 706 does not address remedies, but rather addresses the proper treatment of agency action in the court's reasoning process, is compatible with section 703 and thus the structure of the APA.

Section 706 does not instruct or authorize reviewing courts to give a remedy that operates on the effectiveness of the agency action under review. Any instruction or authorization along those lines must come from the form of proceeding applicable pursuant to section 703. Judges, lawyers, and administrative law scholars may have become so used to appellate-type proceedings that they have forgotten that section 706 is not written exclusively for that kind of suit.[7] It is more general than that, however, and applies in proceedings in which the court is not called on to set agency action aside in the way in which an appellate court sets a judgment aside.[8]

John Harrison is the James Madison Distinguished Professor at the University of Virginia School of Law. A

longer version of this piece by Professor Harrison is on our Bulletin and can be found here (https://www.yalejreg.com/bulletin/section-706-of-the-administrative-procedure-act-does-not-call-for-universal-injunctions-or-other-universal-remedies/).

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American Dictionary of the English Language

Dictionary Search

Charge

CHARGE, *verb transitive*

1. To rush on; to fall on; to attack, especially with fixed bayonets; as, an army charges the enemy.

2. To load, as a musket or cannon; to thrust in powder, or powder and ball or shot.

3. To lead or burden; to throw on or impose that which oppresses; as, to *charge* the stomach with indigestible food; or to lay on, or to fill, without oppressing; as, to *charge* the memory with rules and precepts; to *charge* the mid with facts.

4. To set or lay on; to impose as a tax; as, the land is charged with a quit rent; a rent is *charge* on the land.

5. To lay on or impose, as a task.

The gospel chargeth us with piety towards God.

6. To put or lay on; as, to *charge* a building with ornaments, often implying superfluity.

7. To lay on, as a duty; followed by with.

The commander charged the officer with the execution of the project. See Genesis 40:4

8. To entrust to; as, an officer is charged with dispatches.

9. To set to, as a dept; to place on the debit side of an account; as, to *charge* a man with the price of goods sold to him.

10. To load or lay on in words, something wrong, reproachful or criminal; to impute to; as, to *charge* a man with theft.

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11. To lay on in words; to impute to; followed by on before the person; as, to *charge* a crime on the offender; to *charge* evil consequences on the doctrines of the stoics.

12. To lay on, give or communicate, as an order, command or earnest request; to enjoin; to exhort.

In all this, Job sinned not, nor charged God foolishly. Job 1:22.

13. To lay on, give or communicate, as an order, command or earnest request; to enjoin; to exhort.

CHARGE them that are rich in this world, that they be not high-minded. 1 Timothy 6:17.

In this sense, when the command is given in the name of God, or with an oath, the phrase amounts to an adjuration.

To adjure; to bind by an oath. 1 Samuel 14:28.

14. To give directions to; to instruct authoritatively; as, the judge charged the grand jury to inquire respecting breaches of the peace.

15. To communicate electrical matter to, as to a coated vial, or an electrical battery.

CHARGE, *verb intransitive* To make an onset. Thus Glanville says, like your heroes of antiquity, he charges in iron; and we say, to *charge* with fixed bayonets. But in this application, the object is understood; to *charge* the enemy.

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CHARGE, *noun*

1. That which is laid on or in; in a general sense, any load or burden. It is the same word radically as cargo.

2. The quantity of powder, or of powder and ball or shot, used to load a musket, cannon or other like instrument.

3. An onset; a rushing on an enemy; attack; especially by moving troops with fixed bayonets. But it is used for an onset of cavalry as well as of infantry.

4. An order, injunction, mandate, command.

Moses gave Joshua a *charge* Numbers 27:19.

The king gave *charge* concerning Absalom. 2 Samuel 18:5.

5. That which is enjoined, committed, entrusted or delivered to another, implying care, custody, oversight, or duty to be performed by the person entrusted.

I gave Hanani *charge* over Jerusalem. Nehemiah 7:2.

Hence the word includes any trust or commission; an office, duty, employment. It is followed by of or over; more generally by of. Hence,

6. The person or thing committed to anothers custody, care or management; a trust. Thus the people of a parish

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are called the ministers *charge*

The starry guardian drove his *charge* away to some fresh pasture.

7. Instructions given by a judge to a jury, or by a bishop to his clergy. The word may be used as synonymous with command, direction, exhortation or injunction, but always implies solemnity.

8. Imputation in a bad sense; accusation.

Lay not this sin to their *charge* Acts 7:60.

9. That which constitutes debt, in commercial transactions; an entry of money or the price of goods, on the debit side of an account.

10. Cost; expense; as, the charges of the war are to be borne by the nation.

11. Imposition on land or estate; rent, tax, or whatever constitutes a burden or duty.

12. In military affairs, a signal to attack; as, to sound the *charge*

13. The posture of a weapon fitted for an attack or combat.

Their armed slaves in *charge*

14. Among farriers, a preparation of the consistence of a thick decoction, or between an ointment and a plaster, used as a remedy for sprains and inflammations.

15. In heraldry, that which is borne upon the color; or the figures represented on the escutcheon, by which the bearers are distinguished from one another.

16. In electrical experiments, a quantity of electrical fluid, communicated to a coated jar, vial or pane of glass.

A *charge* of lead, is thirty-six pigs, each containing six stone, wanting two pounds.

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What are the annual earnings for a full-time minimum wage worker?

Minimum wage basic calculations and its impact on poverty

Since it was first instituted in 1938, the federal minimum wage has established a floor for wages. While not every worker is eligible, it provides a minimum of earnings for the lowest-paid workers.

What are full-time annual earnings at the current minimum wage

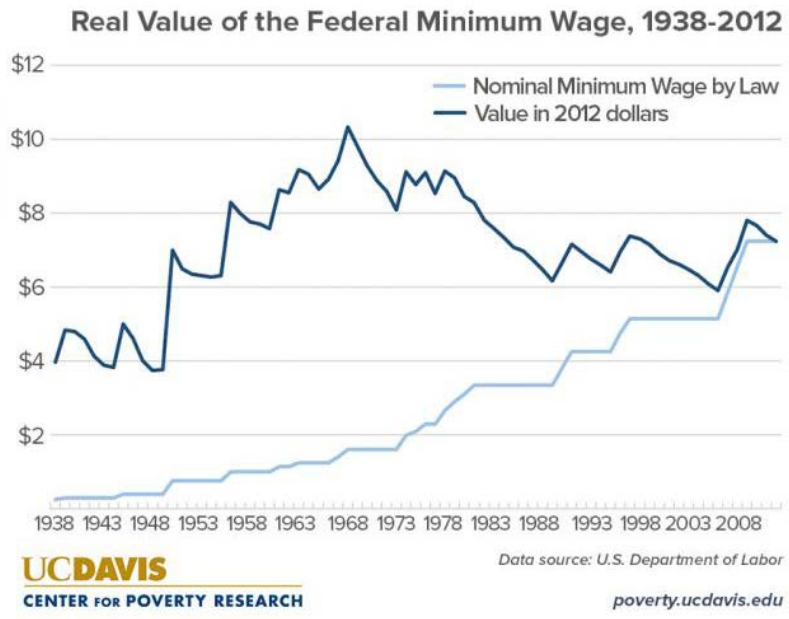
The annual earnings for a full-time minimum-wage worker is $15,080 at the current federal minimum wage of $7.25. Full-time work means working 2,080 hours each year, which is 40 hours each week. However, many states have their own minimum wages, including 29 that are currently higher than the federal rate.

Minimum wages from state to state vary widely, from those with minimums that default to the federal rate to states with minimums that are higher. Washington and Massachusetts have the highest current state minimum wage at $11 per hour.

Some states with minimums higher than the federal wage—such as New Jersey, Arizona and Washington—have also chosen to adjust their minimum wage annually for inflation. Some municipalities, including Washington D.C., currently have a minimum wage for some employees that is even higher than minimums in any state.

How much is the federal minimum wage really worth?

Despite these recent increases in state minimum wages, minimum wages at the federal and most state levels are still below the peak of its real value in 1968. Adjusting the real value for inflation based on 2017 dollars, the 1968 minimum wage of $1.60 was worth $11.39 in 2017 dollars. Since then, the minimum wage's real value has largely been in decline.



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Low-wage Work Uncertainty often Traps Low-wage Workers

by Victoria Smith and Brian Halpin, UC Davis

Will a minimum wage job keep workers out of poverty?

Whether full-time work at minimum wage keeps a worker out of poverty depends on their family size and whether others in the household work. Someone who works full time for minimum wage and lives alone will earn above their poverty threshold. For single parents who work minimum wage, however, staying above poverty can be particularly challenging, even with full-time work.

Poverty is determined by the U.S. Census Bureau's poverty thresholds. These thresholds, updated annually, determine how much income a household requires to meet basic needs, such as food and shelter. In 2016 in a household of two adults, a single full-time worker at minimum wage will earn only 94 percent of their poverty threshold of $16,070. A single parent with one child will earn 91 percent of their poverty threshold.

Poverty Thresholds for 2016 by Size of Family and Number of Related Children Under 18 Years

Size of family unit	Weighted average thresholds	Related children under 18 years								
		None	One	Two	Three	Four	Five	Six	Seven	Eight or more
One person (unrelated individu	12,228									
Under age 65	12,486	12,486								
Aged 65 and older	11,511	11,511								
Two people:	15,569									
Householder under age 65	16,151	16,072	16,543							
Householder aged 65 and old	14,522	14,507	16,480							
Three people	19,105	18,774	19,318	19,337						
Four people	24,563	24,755	25,160	24,339	24,424					
Five people	29,111	29,854	30,288	29,360	28,643	28,205				
Six people	32,928	34,337	34,473	33,763	33,082	32,070	31,470			
Seven people	37,458	39,509	39,756	38,905	38,313	37,208	35,920	34,507		
Eight people	41,781	44,188	44,578	43,776	43,072	42,075	40,809	39,491	39,156	
Nine people or more	49,721	53,155	53,413	52,702	52,106	51,127	49,779	48,561	48,259	46,400

Source: U.S. Census Bureau.

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This means that in order to have earnings above their poverty threshold, a single parent with one child, for example, would have to earn at least $7.95 per hour working full-time. At the current federal minimum wage of $7.25, this single parent would have to work at least 2,282 hours during the year, or an average of about 43.8 hours each week.

The larger the family, the more hours of work are required to stay above poverty with a single minimum-wage income. A single parent working at the current minimum wage with two children would have to work at least 2,668 hours annually—more than 50 hours each week—to keep the household above poverty.

Do workers at the minimum wage still need government assistance?

With a minimum wage income, even working full time, many workers will qualify for most federal safety net programs in the United States. Eligibility guidelines for government assistance are based on the Census Bureau thresholds, but are developed and updated annually by the U.S. Department of Health and Human Services. Those with incomes below a certain percentage of their poverty guideline will qualify.

Federal assistance programs all have eligibility requirements that are in part based on the proportion of household income to the federal poverty guideline. For example, the SNAP nutritional assistance program is available to those with a gross household income of up to about 130 percent of their federal poverty guideline.

For a family of three, this means an annual income of $26,556 or less will qualify them for SNAP benefits. A full-time worker supporting this household alone will have to earn $12.78 hourly working 40 hours each week—or about 70 hours each week at the current $7.25 minimum wage—before the household loses eligibility for benefits.

Updated 1/12/18

For more information:

U.S. Census Bureau. 2017. "Poverty Thresholds."

U.S. Department of Agriculture. 2018. "Supplemental Nutrition Assistance Program (SNAP): Eligibility."

U.S. Department of Health and Human Services. 2018. "Poverty Guidelines."

U.S. Department of Labor. 2017 "Minimum Wage Laws in the United States – January 1, 2018."

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Supplemental Nutrition Assistance Program Participation and Costs

(Data as of June 12, 2020)

Fiscal Year	Average Participation	Average Benefit Per Person [1]	Total Benefits	All Other Costs [2]	Total Costs
	--Thousands--	--Dollars--	----------Millions of Dollars----------		
1969	2,878	6.63	228.80	21.70	250.50
1970	4,340	10.55	549.70	27.20	576.90
1971	9,368	13.55	1,522.70	53.20	1,575.90
1972	11,109	13.48	1,797.30	69.40	1,866.70
1973	12,166	14.60	2,131.40	76.00	2,207.40
1974	12,862	17.61	2,718.30	119.20	2,837.50
1975	17,064	21.40	4,385.50	233.20	4,618.70
1976	18,549	23.93	5,326.50	359.00	5,685.50
1977	17,077	24.71	5,067.00	394.00	5,461.00
1978	16,001	26.77	5,139.20	380.50	5,519.70
1979	17,653	30.59	6,480.20	459.60	6,939.80
1980	21,082	34.47	8,720.90	485.60	9,206.50
1981	22,430	39.49	10,629.90	595.40	11,225.20
1982 [3]	21,717	39.17	10,208.30	628.40	10,836.70
1983	21,625	42.98	11,152.30	694.80	11,847.10
1984	20,854	42.74	10,696.10	882.60	11,578.80
1985	19,899	44.99	10,743.60	959.60	11,703.20
1986	19,429	45.49	10,605.20	1,033.20	11,638.40
1987	19,113	45.78	10,500.30	1,103.90	11,604.20
1988	18,645	49.83	11,149.10	1,167.70	12,316.80
1989	18,806	51.71	11,669.78	1,231.81	12,901.59
1990	20,049	58.78	14,142.79	1,304.47	15,447.26
1991	22,625	63.78	17,315.77	1,431.50	18,747.27
1992	25,407	68.57	20,905.68	1,556.66	22,462.34
1993	26,987	67.95	22,006.03	1,646.94	23,652.97
1994	27,474	69.00	22,748.58	1,744.87	24,493.45
1995	26,619	71.27	22,764.07	1,856.30	24,620.37
1996	25,543	73.21	22,440.11	1,890.88	24,330.99
1997	22,858	71.27	19,548.86	1,958.68	21,507.55
1998	19,791	71.12	16,890.49	2,097.84	18,988.32
1999	18,183	72.27	15,769.40	2,051.52	17,820.92
2000	17,194	72.62	14,983.32	2,070.70	17,054.02
2001	17,318	74.81	15,547.39	2,242.00	17,789.39
2002	19,096	79.67	18,256.20	2,380.82	20,637.02
2003	21,250	83.94	21,404.28	2,412.01	23,816.28
2004	23,811	86.16	24,618.89	2,480.14	27,099.03
2005	25,628	92.89	28,567.88	2,504.13	31,072.01
2006	26,549	94.75	30,187.35	2,715.72	32,903.06
2007	26,316	96.18	30,373.27	2,800.25	33,173.52
2008	28,223	102.19	34,608.40	3,031.25	37,639.64
2009	33,490	125.31	50,359.92	3,260.00	53,619.92
2010	40,302	133.79	64,702.16	3,581.30	68,283.47
2011	44,709	133.85	71,810.92	3,875.62	75,686.54
2012	46,609	133.41	74,619.34	3,791.75	78,411.10
2013	47,636	133.07	76,066.32	3,792.71	79,859.03
2014	46,664	125.01	69,998.84	4,061.49	74,060.33
2015	45,767	126.81	69,645.14	4,301.03	73,946.17
2016	44,220	125.40	66,539.27	4,374.28	70,913.55
2017	42,317	125.47	63,711.05	4,463.67	68,174.72
2018	40,776	124.50	60,916.85	4,534.99	65,451.84
2019	35,703	129.83	55,621.88	4,735.46	60,357.34

All data are subject to revision.

1] Represents average monthly benefits per person.

2] Includes the Federal share of State administrative expenses, Nutrition Education, and Employment and Training programs. Also includes other Federal costs (e.g., Benefit and Retailer Redemption and Monitoring, Payment Accuracy, EBT Systems, Program Evaluation and Modernization, Program Access, Health and Nutrition Pilot Projects).

3] Puerto Rico initiated Food Stamp operations during FY 1975 and participated through June of FY 1982. A separate Nutrition Assistance Grant began in July 1982.

No. 19-2222, Viewed 06/30/2020

Exhibit B

19-3591, 19-3595
New York v. United States Department of Homeland Security, Make the Road New York v. Cuccinelli

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2019

Argued: March 2, 2020 Decided: August 4, 2020

Docket Nos. 19-3591, 19-3595

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 SERVICES, UNITED STATES OF AMERICA,

Defendants-Appellants.*

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* The Clerk of the Court is respectfully directed to amend the caption as set forth above.

MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, ASIAN AMERICAN FEDERATION, CATHOLIC CHARITIES COMMUNITY SERVICES, (ARCHDIOCESE OF NEW YORK), CATHOLIC LEGAL IMMIGRATION NETWORK, INC.,

Plaintiffs-Appellees,

— v. —

KENNETH T. CUCCINELLI, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, CHAD F. WOLF, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF HOMELAND SECURITY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants-Appellants.

B e f o r e:

LEVAL, HALL, and LYNCH, *Circuit Judges.*

The Department of Homeland Security appeals from two orders of the United States District Court for the Southern District of New York (Daniels, *J.*) granting motions for preliminary injunctions in these cases. Two sets of Plaintiffs-Appellees – one a group of state and local governments and the other a group of non-profit organizations – filed separate suits under the Administrative Procedure Act, both challenging the validity of a Department of Homeland Security rule interpreting 8 U.S.C. § 1182(a)(4). This statutory provision renders inadmissible to the United States any non-citizen deemed likely to become a

public charge. The district court concluded that Plaintiffs-Appellees demonstrated a likelihood of success on the merits of their claims that the rule is contrary to the Immigration and Nationality Act and that it is arbitrary and capricious. After finding that the other preliminary injunction factors also weighed in favor of granting relief, the district court entered orders in both cases to enjoin implementation of the rule nationwide. We agree with the district court that a preliminary injunction is warranted, but modify the scope of the injunctions to cover only the states of New York, Connecticut, and Vermont. The orders of the district court are thus **AFFIRMED AS MODIFIED**.

JUDITH N. VALE, Senior Assistant Solicitor General, State of New York, New York, NY (Letitia James, Attorney General, Barbara D. Underwood, Solicitor General, Steven C. Wu, Deputy Solicitor General, Matthew Colangelo, Chief Counsel for Federal Initiatives, Elena Goldstein, Deputy Bureau Chief, Civil Rights, Ming-Qi Chu, Section Chief, Labor Bureau, State of New York, New York, NY, William Tong, Attorney General, State of Connecticut, Hartford, CT, Thomas J. Donovan, Jr., Attorney General, State of Vermont, Montpelier, VT, James E. Johnson, Corporation Counsel, City of New York, New York, NY, *on the brief*), *for Plaintiffs-Appellees State of New York, City of New York, State of Connecticut, State of Vermont.*

JONATHAN H. HURWITZ, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY (Andrew J. Ehrlich, Elana R. Beale, Robert J. O'Loughlin, Daniel S. Sinnreich, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY, Ghita R. Schwarz, Brittany Thomas, Baher A. Azmy, Center for Constitutional Rights, New York, NY, Susan E. Welber, Kathleen Kelleher, Susan Cameron, Hasan Shafiqullah, The Legal Aid Society of New York, New York, NY, *on the brief*), *for Plaintiffs-Appellees Make the*

Road New York, African Services Committee, Asian American Federation, Catholic Charities Community Services, (Archdiocese of New York), Catholic Legal Immigration Network, Inc.

GERARD SINZDAK, Appellate Staff Attorney, Civil Division, United States Department of Justice, Washington, DC (Joseph H. Hunt, Assistant Attorney General, Civil Division, United States Department of Justice, Washington, DC, Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY, Daniel Tenny, Joshua Dos Santos, Appellate Staff Attorneys, Civil Division, United States Department of Justice, Washington, DC *on the brief*), *for Defendants-Appellants United States Department of Homeland Security, Acting Secretary Chad F. Wolf, United States Citizenship and Immigration Services, Acting Director Kenneth T. Cuccinelli, United States of America*.

WILLIAM E. HAVEMANN, Office of General Counsel, United States House of Representatives, Washington, DC (Douglas N. Letter, General Counsel, Todd B. Tatelman, Principal Deputy General Counsel, Megan Barbero, Josephine Morse, Adam A. Grogg, Office of General Counsel, United States House of Representatives, Washington, DC, Robert M. Loeb, Thomas M. Bondy, Peter E. Davis, Orrick, Herrington & Sutcliffe LLP, Washington, DC, Rene Kathawala, Orrick, Herrington & Sutcliffe LLP, New York, NY, *on the brief*), *for Amicus Curiae* United States House of Representatives, *in support of Plaintiffs-Appellees*.

Additional amici curiae listed in Appendix A.

GERARD E. LYNCH, *Circuit Judge*:

In August 2019, the Department of Homeland Security ("DHS") issued a final rule setting out a new agency interpretation of a longstanding provision of our immigration law that renders inadmissible to the United States any non-citizen who is likely to become a "public charge." *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("the Rule" or "the Final Rule"). The Rule expands the meaning of "public charge," with the likely result that significantly more people will be found inadmissible on that basis. Lawsuits challenging the lawfulness of the Rule were quickly filed around the country, including two cases in the Southern District of New York, which we now consider in tandem on appeal.

These two cases – one brought by New York State, New York City, Connecticut, and Vermont, and the other brought by five non-profit organizations that provide legal and social services to non-citizens – raise largely identical challenges to the Rule, centering on the Rule's validity under the Administrative Procedure Act. After hearing combined oral argument on the Plaintiffs' motions for preliminary injunctions filed in both cases, the district court (George B.

Daniels, *J.*) concluded that the Plaintiffs had demonstrated a likelihood of success on the merits of their claims and that the other preliminary injunction factors also favored interim relief. The district court enjoined DHS from implementing the Rule throughout the United States in the pair of orders from which DHS now appeals.

We agree that a preliminary injunction is warranted in these cases, but modify the scope of the injunctions to cover only the states of New York, Connecticut, and Vermont. The orders of the district court are thus AFFIRMED AS MODIFIED.

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BACKGROUND

The Immigration and Nationality Act ("INA") contains ten grounds of inadmissibility, each listing various bases on which a non-citizen can be denied admission to the United States. *See* 8 U.S.C. § 1182(a)(1)-(10). These appeals

concern the public charge ground, a constant feature of our immigration law since 1882, which renders inadmissable any non-citizen who "is likely at any time to become a public charge." *Id.* § 1182(a)(4)(A). The statute itself does not define "public charge," and its precise meaning is the hotly contested question in this litigation. In general terms, however, "public charge" has historically been understood to refer to a person who is not self-sufficient and depends on the government for support. *See, e.g.*, 84 Fed. Reg. at 41,295.

The grounds of inadmissibility are assessed not only when a person is physically entering the country, but at multiple points in the immigration process. Consequently, the public charge ground of inadmissibility is applied by three agencies that oversee different aspects of our immigration system. The Department of State considers whether non-citizens are inadmissible as likely public charges when adjudicating visa applications overseas. U.S. Customs and Border Protection ("CBP"), a unit of DHS, assesses the public charge ground when it inspects non-citizens arriving at airports or other ports of entry. And U.S. Citizenship and Immigration Services ("USCIS"), another component of DHS, applies the ground when adjudicating applications for adjustment of status, the

process by which a non-citizen who is already present in the United States in a temporary immigration status can become a lawful permanent resident ("LPR"), authorized to live and work in the United States indefinitely.[1] *See id.* at 41,294 n.3.

The Department of Justice also has a role to play when it comes to public charge adjudications, albeit on a different statutory basis. In addition to the public charge ground of inadmissibility, the INA also contains a public charge ground of removal.[2] 8 U.S.C. § 1227(a)(5). That provision authorizes the government to remove non-citizens who have already been admitted to the country but who became public charges within five years of their date of entry. *Id.* The public charge ground of removal is primarily applied by the Executive Office for Immigration Review, a component agency of the Department of Justice that houses the immigration courts.

While multiple agencies are tasked with interpreting and applying the public charge grounds of inadmissibility and removal, the Rule at issue in these cases is an interpretation by DHS of the ground of inadmissibility. Accordingly,

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[1] LPRs are frequently referred to in popular discussion as "green card holders."

[2] "Removal" is the current legal term for the process popularly known as "deportation." *See Karageorgious v. Ashcroft*, 374 F.3d 152, 154 (2d Cir. 2004).

the Rule governs only public charge determinations carried out by CBP and USCIS, as component agencies of DHS.[3] 84 Fed. Reg. at 41,294 n.3. As a practical matter, moreover, the Rule is likely to be applied primarily by USCIS as it adjudicates applications for adjustment of status, as the lengthy application process provides more opportunity for a full consideration of the Rule's provisions than a CBP screening at a port of entry. *See id.* at 41,478.

I. 1999 Public Charge Guidance

For twenty years preceding the publication of the Rule at issue in these cases, the governing agency interpretation of the public charge ground was guidance published in 1999 ("the 1999 Guidance") by the Immigration and

[3] In October 2019, the State Department issued an interim final rule aligning its interpretation of "public charge" with the Rule. *See* Visas: Ineligibility Based on Public Charge Grounds, 84 Fed. Reg. 54,996 (Oct. 11, 2019). Litigation challenging the State Department interim final rule is underway in the Southern District of New York. *See Make the Road New York v. Pompeo*, No. 1:19-cv-11633 (S.D.N.Y.). The Department of Justice has drafted a proposed rule that likewise is intended to adopt a conforming interpretation of the public charge ground of removal, which has been sent to the Office of Management and Budget for review, but no actual text of such a rule has yet been published. *See* Inadmissibility and Deportability on Public Charge Grounds, RIN 1125-AA84, Office of Mgmt. & Budget, Spring 2020 Unified Agenda of Regulatory and Deregulatory Actions.

Nationality Service ("INS"), the predecessor agency of DHS.[4] *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999). The 1999 Guidance was issued in response to two pieces of legislation passed by Congress in 1996 that had significant impact on the public charge ground.

The first was the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), a sweeping set of reforms to various public benefits programs. *See* Pub. L. No. 104-193, 110 Stat. 2105 (1996). Among other changes, PRWORA greatly restricted non-citizen access to public benefits in response to concerns that non-citizens were "applying for and receiving public benefits . . . at increasing rates." 8 U.S.C. § 1601(3). The resulting benefits eligibility scheme for non-citizens is complex, to say the least. It suffices for present purposes to say that non-citizens who are present in the United States illegally or who are admitted in a lawful non-immigrant (i.e., temporary) status are ineligible for almost all federal benefits, *see* 8 U.S.C. §§ 1611(a), 1641(b), while

[4] INS was dissolved, and many of its responsibilities were transferred to DHS, by the Homeland Security Act of 2002. *See* Pub. L. No. 107-296, §§ 402(3), 471, 116 Stat. 2135, 2205, 2178.

those who are in LPR status, which is permanent, are ineligible for means-tested federal benefits for their first five years as an LPR, *see* 8 U.S.C. §§ 1613(a), 1641(b). At the conclusion of this five-year waiting period, LPRs become eligible to receive benefits for which they otherwise qualify.[5]

A little over a month after enacting PRWORA, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). *See* Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996). In IIRIRA, Congress revisited the public charge ground to add five factors that adjudicators must consider when determining whether a non-citizen is likely to become a public charge: the non-citizen's "[(1)] age; [(2)] health; [(3)] family status; [(4)] assets, resources, and financial status; and [(5)] education and skills." 8 U.S.C. § 1182(a)(4)(B)(i). IIRIRA also required non-citizens seeking to immigrate to the United States based on

[5] The majority of the public benefits to which the Rule applies are means-tested benefits, that is, there are income and asset limits for eligibility. However, the housing programs administered by the Department of Housing and Urban Development are not considered means-tested benefits and there is thus no five-year waiting period before LPRs can access these services. *See* Eligibility Restrictions on Noncitizens: Inapplicability of Welfare Reform Act Restrictions on Federal Means-Tested Public Benefits, 65 Fed. Reg. 49,994 (Aug. 16, 2000).

their family ties[6] to obtain affidavits of support, in which a sponsor agrees to maintain the non-citizen at an income of no less than 125% of the federal poverty guidelines ("FPG"), and instructed adjudicators to consider those affidavits as a discretionary sixth factor in their analysis. 8 U.S.C. §§ 1182(a)(4)(c), 1183a(a)(1).

After the passage of PRWORA and IIRIRA, INS observed widespread "confusion about the relationship between the receipt of federal, state, [and] local public benefits and the meaning of 'public charge' under the immigration laws." 64 Fed. Reg. at 28,689. Concerned that this confusion was "deterr[ing] eligible aliens and their families, including U.S. citizen children, from seeking important health and nutrition benefits that they [we]re legally entitled to receive," INS issued the 1999 Guidance, thus for the first time publishing its interpretation of "public charge" in the Federal Register.[7] *Id.* at 28,692.

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[6] Persons seeking to immigrate to the United States are eligible for admission as immigrants on various bases, including having certain familial relationships to United States citizens or LPRs.

[7] The 1999 Guidance was not a final rule, but was published in the Federal Register as an interim measure to establish the agency's "public charge" definition while INS went through the rulemaking process. 64 Fed. Reg. at 28,689. The Guidance was a reproduction of INS's field guidance, making public the internal directive of the agency to its officials tasked with applying the "public charge" standard. INS did publish a proposed rule alongside the 1999 Guidance,

The 1999 Guidance defined "public charge" to mean a person who is "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." *Id.* at 28,689 (internal quotation marks omitted). The Guidance identified four public benefits that could be taken as evidence of primary dependence: Supplemental Security Income ("SSI"), which "guarantees a minimum level of income" for older adults and people who are blind or disabled; Temporary Assistance for Needy Families ("TANF"), which provides cash assistance to families living in poverty;[8] state and local cash assistance programs, often called "General Assistance" programs; and any program (including Medicaid) supporting people institutionalized for long-term care. *Id*. at 28,692, 28,687; *see* 45 C.F.R. § 260.20.

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but it was never finalized. *See* Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676 (May 26, 1999). The 1999 Guidance remained the operative agency interpretation until 2019.

[8] TANF also funds various forms of non-cash assistance, e.g., subsidized child care. These additional forms of support were excluded from consideration under the Guidance. *See* 64 Fed. Reg. at 28,692 n.17.

INS explained that the nature of these benefits suggested that recipients may be dependent on the government for subsistence, explicitly distinguishing non-cash benefits that are "by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or family." 64 Fed. Reg. at 28,692.[9] The Guidance instructed that the ultimate determination as to whether a non-citizen was primarily dependent on the government was to be made by considering the totality of the circumstances: neither current nor past "receipt of cash income-maintenance benefits . . . automatically ma[de] an alien inadmissible as likely to become a public charge." *Id.* at 28,690.

II. 2019 Public Charge Rule

A. The Proposed Rule

Nearly two decades after INS issued its 1999 interpretation of "public charge," DHS published a notice of proposed rulemaking ("the Proposed Rule") announcing its intention to change the agency's interpretation of the public charge ground. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114

[9] The 1999 Guidance explicitly stated that adjudicators "should not place any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance." 64 Fed. Reg. at 28,689.

(Oct. 10, 2018). Among other provisions, the Proposed Rule suggested redefining "public charge" to mean "an alien who receives one or more public benefit" at certain defined usage thresholds, and listed a broader set of benefits as relevant to the public charge definition. *Id.* at 51,289-90.[10]

The Proposed Rule divided its list of relevant benefits into two groups – monetizable and non-monetizable – and set usage thresholds for each. The monetizable benefits (e.g., SSI) were to be considered in the public charge analysis if the cumulative value of the benefits received in one year exceeded 15% of FPG for a household of one. *Id.* The non-monetizable benefits (e.g., Medicaid) were counted if the non-citizen received the benefit "for more than 12 months in the aggregate within a 36 month period." *Id.* at 51,290. The Proposed Rule garnered 266,077 comments during the notice and comment period, "the vast majority of which opposed the rule."[11] 84 Fed. Reg. at 41,297.

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[10] Technically, the Proposed Rule defined public charge to mean any non-citizen who received any "public benefit," but then further defined "public benefit" to mean one of the listed benefits if usage exceeded the prescribed threshold level, as described in the next paragraph.

[11] We note that these appeals have also generated significant public interest and acknowledge with appreciation the contributions of the amici curiae appearing before us. The twenty amicus briefs we received (nineteen of which support the

B. Revised Definition and Relevant Public Benefits

In August 2019, DHS published its Final Rule, which made a number of changes from the Proposed Rule. Most relevant for our purposes, the Rule enacts a different definition of "public charge," interpreting the term as a person "who receives one or more public benefits, as defined in [a subsequent] section, for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." *Id.* at 41,501. While the Final Rule incorporates the same expanded list of relevant public benefits as the Proposed Rule, it did away with the categorization of "monetizable" versus "non-monetizable" benefits, eliminated the 15% of FPG threshold requirement for monetizable benefits, and elevated the 12-month threshold requirement for non-monetizable benefits into the definition of public charge itself, thus making it the usage threshold for all of the listed benefits. *Id.* at 41,501-02.

Plaintiffs, and one of which supports the government) represent the views of a diverse collection of more than four hundred organizations, businesses, and scholars and provided helpful nuance on many aspects of the complex questions before us.

With respect to the relevant benefits, the Final Rule retains those benefits INS made relevant to the public charge determination in 1999 – SSI, TANF, and state or local cash assistance programs – and adds a number of other benefits: Medicaid;[12] the Supplemental Nutrition Assistance Program ("SNAP"), commonly referred to as food stamps; the Section 8 Housing Choice Voucher Program; Section 8 Project-Based Rental Assistance; and public housing. *Id.* at 41,501. Thus, under the Final Rule, use of any quantity of one of these benefits in a given month counts as one month towards the 12-months-within-36 months limit beyond which one is considered a public charge. And because the definition aggregates benefits usage, use of two benefits in a single month counts as two months (and three benefits in a single month counts as three months, etc.), with the result that a person could reach the 12-month threshold in six months or fewer. The 12-month threshold is thus deceptive: an industrious, self-sufficient

[12] The 1999 Guidance identified Medicaid as a relevant public benefit only when it was used to fund long-term institutionalization, but the Rule broadens the consideration to include Medicaid used to fund most forms of routine healthcare. The Rule does not count Medicaid benefits only when they are used for emergency medical conditions, for services provided under the Individuals with Disabilities Education Act, for school-based services, and by children or pregnant and newly postpartum women. 84 Fed. Reg. at 41,501.

person who, by reason of a temporary injury or illness, used three benefits per month for four months would thereby be conclusively established as a public charge.

The Rule's public charge definition would be complex to apply even to assess past or current benefits usage. But lest we forget the context in which the Rule operates, we highlight that the vast majority of non-citizens will not have been eligible to receive any of the relevant public benefits (and therefore presumably will not have received such benefits) at the time the Rule is applied and their likelihood of becoming a public charge is assessed.[13] Recall that the Rule applies primarily to non-citizens seeking to adjust status to *become* LPRs but that, in general, non-citizens are not eligible to receive the relevant public benefits until five years *after* they obtain LPR status. Accordingly, very few non-citizens will have a history of public benefits usage at the time the forward-looking public charge ground is applied. Under the revised public charge definition, the Rule

[13] We note that PRWORA allows states flexibility to determine non-citizen eligibility for state-funded benefits programs and some states have chosen to fund benefits for those who do not yet have LPR status. *See* 83 Fed. Reg. at 51,131; *see also* 8 U.S.C. § 1621(d). However, as counsel for the government acknowledged at oral argument, it would be the rare exception if a non-citizen received benefits prior to the public charge determination. Oral Argument at 32:00-33:30.

thus requires adjudicators to predict whether, five years or more into the future, the non-citizen is likely to use one of the enumerated benefits for more than twelve months, or to use two of the enumerated benefits for more than six months, and so on, within a thirty-six-month period. *Id.* at 41,502.

C. Adjudicative Framework

To support adjudicators in making what might seem an impracticable prediction about future benefits usage, the Rule lays out an adjudicative framework. This framework fleshes out the five factors adjudicators are statutorily required to consider – age, health, family status, finances, and education – and explains how each should be analyzed to decide whether a non-citizen is a likely future user of public benefits. The Rule further instructs adjudicators how to assess the sixth, discretionary factor – the affidavit of support – and adds a seventh factor for consideration, the immigration status sought. As laid out below, the framework identifies the particular characteristics adjudicators should look for with each factor and, for some, lists the forms of evidence the non-citizen must submit.

Age. Adjudicators are to assess whether a non-citizen's age affects his ability to work. The Rule suggests that preference be given to non-citizens between eighteen and sixty-one years of age. Being under eighteen or over sixty-one is treated as making it more likely that the applicant will become a public charge. 84 Fed. Reg. at 41,502.

Health. Adjudicators are to be on the lookout for non-citizens with medical conditions that are "likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide and care for himself or herself, to attend school, or to work." *Id.*

Family Status. Adjudicators are to assess whether a non-citizen's household size makes him more likely to utilize the listed benefits. Large families are thus more suspect. *Id.*

Assets, Resources, and Financial Status. Adjudicators are to consider whether the non-citizen's household has a gross income above 125% of FPG or has significant assets, whether the household assets and resources would cover any reasonably foreseeable medical costs, any outstanding financial liabilities, and whether the non-citizen has ever in the past applied for or received any of the

enumerated public benefits. *Id.* at 41,502-03. Non-citizens are to evidence this factor by submitting, *inter alia*, their tax returns, bank statements, credit history and score, and proof of private health insurance. *Id.* at 41,503.

Education and Skills. Adjudicators are to consider whether the non-citizen has adequate education and skills to obtain lawful employment with an income sufficient to avoid becoming a public charge. *Id.* Non-citizens are directed to evidence this factor by submitting, *inter alia*, their employment history, tax returns, proof of degrees or licenses, and proof of proficiency in English or any other languages. *Id.* at 41,503-04.

Affidavit of Support. For those non-citizens who must obtain an affidavit of support, the Rule directs adjudicators to consider "the likelihood that the sponsor would actually provide the statutorily-required amount of financial support," which is to be evidenced by proof of the sponsor's income and assets, the relationship between the non-citizen and sponsor, and the number of other non-citizens for whom the sponsor has executed affidavits of support. *Id.* at 41,504.

Desired Immigration Status. The Rule newly requires adjudicators to consider the immigration status sought by the non-citizen, "as it relates to the

alien's ability to financially support[ ] himself or herself during the duration of the alien's stay." *Id.* After the publication of the Rule, USCIS updated its policy manual to clarify that it would generally treat seeking LPR status as a negative factor, given that LPRs are eligible for public benefits after the five-year waiting period has elapsed. *See* USCIS, POLICY MANUAL vol. 8, pt. G, ch. 12 (2020). We note that the vast majority of non-citizens who are subject to the Rule are being assessed precisely *because* they are seeking LPR status; this provision therefore would appear to automatically assign a negative factor to any applicant for lawful immigration to the United States.

After addressing these factors, the Rule concludes by identifying a number of heavily weighted negative and positive circumstances that adjudicators should consider in deciding a case. While cautioning that no single factor is dispositive, the Rule directs adjudicators to give particular emphasis to four heavily weighted negative factors: (1) lacking a current or recent employment history, (2) receiving a relevant public benefit for more than twelve months in the preceding three years, (3) lacking health insurance while having a diagnosed medical condition likely to require extensive treatment or institutionalization, and (4) having been

found inadmissible or removable on public charge grounds in the past. 84 Fed. Reg. at 41,504. In contrast, the Rule also identifies the following heavily weighted positive factors: (1) having a household income that exceeds 250% of FPG, (2) being employed with an income exceeding 250% of FPG, and (3) having private health insurance that was not purchased using Affordable Care Act premium tax credits. *Id.*

III. Procedural Posture

Shortly after DHS issued the Final Rule in August 2019, the two cases at issue in these appeals were filed in the Southern District of New York. New York, Vermont, Connecticut, and New York City (collectively "the States") filed suit first, followed a few days later by Make the Road New York, African Services Committee, Asian American Federation, Catholic Charities Community Services (Archdiocese of New York), and Catholic Legal Immigration Network, Inc. (collectively, "the Organizations"). The two groups of plaintiffs (collectively, "the Plaintiffs") raise largely similar challenges to the Rule, arguing that it is invalid under the Administrative Procedure Act ("APA") as well as the Fifth Amendment's due process clause. The Organizations also challenge the Rule

under the Fifth Amendment's guarantee of equal protection. Both the States and the Organizations moved for a preliminary injunction, and the district court heard combined oral argument.

On October 11, 2019, four days before the Rule was scheduled to take effect, the district court granted both motions for preliminary injunctions in largely identical decisions and orders. After concluding that both the States and the Organizations had standing to challenge the Rule, the district court found that they had demonstrated a likelihood of success on the merits of their claims that the Rule was contrary to law as well as arbitrary and capricious, and that the other preliminary injunction factors supported injunctive relief. The district court thus enjoined DHS from enforcing the Rule nationwide.[14]

DHS timely appealed the district court's grant of the preliminary injunctions and moved for a stay pending appeal. A motions panel of this Court denied DHS's motion to stay. DHS then filed an application for a stay with the Supreme Court, requesting that the preliminary injunctions be stayed through the resolution of the merits of this appeal and the disposition of any petition for a

[14] The district court also ordered that the effective date of the Rule be stayed pursuant to 5 U.S.C. § 705.

writ of certiorari. The Supreme Court granted the application in January 2020. *DHS v. New York*, 140 S. Ct. 599 (2020). With the district court's preliminary injunctions thus stayed, the Rule went into effect nationwide on February 24, 2020.[15]

DISCUSSION

We review a district court's decision to grant a preliminary injunction for abuse of discretion, examining the legal conclusions underpinning the decision

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[15] Five similar cases challenging the Rule were brought in the District of Maryland, the Northern District of Illinois, the Northern District of California, and the Eastern District of Washington. *See CASA de Maryland, Inc. v. Trump*, No. 19-cv-2715 (D. Md.); *Cook Cty. v. Wolf*, No. 19-cv-6334 (N.D. Ill.); *City and Cty. of San Francisco v. USCIS*, No. 19-cv-4717 (N.D. Cal.); *California v. DHS*, No. 19-cv-4975 (N.D. Cal.); *Washington v. DHS*, No. 19-cv-5210 (E.D. Wash.). All five district courts granted plaintiffs' motions for preliminary injunctions. DHS appealed in all cases and, as here, requested that the Fourth, Seventh, and Ninth Circuits stay the district courts' preliminary injunctions pending appeal. The Fourth and a divided panel of the Ninth Circuit granted DHS's motions to stay, the Ninth Circuit doing so in a lengthy published opinion. *See City & Cty. of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019). The Seventh Circuit denied DHS's motion to stay, but DHS successfully sought a stay from the Supreme Court for the preliminary injunction at issue in that case, which was limited in scope to the state of Illinois. *See Wolf v. Cook Cty.*, 140 S. Ct. 681 (2020). The Seventh Circuit has since decided the merits of the case before it, holding that plaintiffs were likely to succeed on the merits of their challenge to the Rule and affirming the preliminary injunction entered by the Northern District of Illinois. *See Cook Cty. v. Wolf*, 962 F.3d 208 (7th Cir. 2020).

de novo and the factual conclusions for clear error. *Cty. of Nassau v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008). The scope of the injunctive relief ordered by the district court is evaluated for abuse of discretion. *Id.*

These appeals fall under the preliminary injunction framework laid out in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). *Winter* instructs that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. Where, as here, the government is a party to the suit, the final two factors merge. *Cf. Nken v. Holder*, 556 U.S. 418, 435 (2009); *see California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018). Before we turn to the merits of these appeals, however, we address two threshold arguments raised by DHS.

I. Threshold Arguments

DHS first argues that neither the States nor the Organizations meet the "irreducible constitutional minimum of standing" and thus cannot be permitted to challenge the Rule. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). DHS

further argues that the Plaintiffs may not bring suit because they do not fall within the zone of interests protected by the public charge statute. *See Lexmark Int'l Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). We disagree with DHS on both counts.

A. Standing

At the preliminary injunction stage, "a plaintiff's burden to demonstrate standing will normally be no less than that required on a motion for summary judgment. Accordingly, to establish standing for a preliminary injunction, a plaintiff cannot rest on . . . mere allegations . . . but must set forth by affidavit or other evidence specific facts" that establish the "three familiar elements of standing: injury in fact, causation, and redressability." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (internal quotation marks and citation omitted). Here, DHS argues that the States and Organizations have failed to establish injury in fact, which requires the Plaintiffs to show they have suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted).

The States allege that they are injured because the Rule will cause many of their residents to forgo use of public benefits programs, thereby decreasing federal transfer payments to the states, reducing Medicaid revenue, increasing overall healthcare costs, and causing general economic harm. DHS argues that these projected harms do not suffice to show injury in fact because the facts asserted by the States at most establish a possible, rather than imminent, future injury, and because any economic losses will be offset by the money saved by not providing public benefits to those who disenroll. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

We are satisfied that the States have sufficiently established actual imminent harms. DHS itself anticipates that a significant number of non-citizens will disenroll from public benefits as a result of the Rule's enactment, including many who are not in fact subject to the Rule but who would be fearful of its consequences nonetheless. *See* 84 Fed. Reg. at 41,300-01, 41,463. When an agency action has a "predictable effect . . . on the decisions of third parties," the consequences of those third party decisions may suffice to establish standing, even when the decisions are illogical or unnecessary. *See Dep't of Commerce v. New*

York, 139 S. Ct. 2551, 2566 (2019). Contrary to its disparagement before us of the likelihood of harm to the States from disenrollment, DHS acknowledged in its own explication of the costs and benefits considered in adopting the Rule that expected disenrollment will result in decreased federal funding to states, 84 Fed. Reg. at 41,485, decreased revenue for healthcare providers, *id*. at 41,486, and an increase in uncompensated care, *id*. at 41,384.

DHS's own predictions thus align with declarations submitted by the States documenting the Rule's chilling effect on non-citizen use of public benefits – which began even prior to the Rule taking effect – and its anticipated economic impacts.[16] Where the agency itself forecasts the injuries claimed by the States, we

[16] For example, the Commissioner of Health of the State of New York stated that "even before the Final Rule has gone into effect, consumers have been calling . . . [and] inquiring about canceling their Medicaid or other health insurance coverage because of the Final Rule." New York ("N.Y.") J. App. 512. The Commissioner further notes that "[i]ndividuals without coverage will still need and receive care" but without insurance "those costs will be borne by the healthcare delivery system." *Id.* The President and CEO of New York City Health and Hospitals Corporation provided specific examples of patients refusing care or requesting disenrollment because of the Rule, and estimated that in the best-case scenario, the Rule could result in a loss of $50 million in the first year for the municipal hospital system. *See* N.Y. J. App. 266-69; *see also* N.Y. J. App. 183 (Commissioner of the New York City Department of Social Services providing statistics evidencing a "striking and dramatic drop in non-citizen SNAP cases" since the public charge rule began to get media coverage); N.Y. J. App. 227, 233-34

agree with the Ninth Circuit that it is "disingenuous" for DHS to claim that the injury is not sufficiently imminent. *San Francisco*, 944 F.3d at 787 (finding state and local governments had standing to challenge the Rule).

We are also unpersuaded by DHS's argument that the States cannot establish injury in fact because any losses in funding will be offset by the savings accrued as fewer people seek public assistance. "[T]he fact that an injury may be outweighed by other benefits . . . does not negate standing."[17] *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006). In any event, this simplistic argument fails to account for the fact that the States allege injuries that extend well beyond reduced Medicaid revenue and federal funding to the States, including an overall

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(Commissioner-Designate of Connecticut Department of Social Services estimating economic harms and increased healthcare costs); N.Y. J. App. 385-86 (Acting Secretary of the Agency of Human Services in Vermont predicting increased use of state-funded services).

[17] For largely the same reason, we are not persuaded by DHS's argument that the States' losses will be offset by their continued receipt of Emergency Medicaid funds, a benefit not impacted by the Rule. We further note that Emergency Medicaid is limited to care provided after a "sudden onset of a medical condition manifesting itself by acute symptoms of sufficient severity" if immediate medical care is necessary to prevent serious health consequences. 42 C.F.R. § 440.255(b)(1), (c). That narrow definition is far from a blanket assurance that all or even most services rendered in an emergency-room setting will be covered.

increase in healthcare costs that will be borne by public hospitals and general economic harms. *See, e.g.*, N.Y. J. App. 185 (explaining that "the SNAP program has a direct economic multiplier effect: for every one dollar in SNAP benefits received, there is an approximate $1.79 in increased economic activity"); N.Y. J. App. 512-13. Again, DHS itself identified these same broader harms as likely outcomes of the Rule. *See, e.g.*, REGULATORY IMPACT ANALYSIS, INADMISSIBILITY ON PUBLIC CHARGE GROUNDS, RIN 1615-AA22, at 105-06 (2019) (calculating that reduced use of SNAP caused by the Rule will result in an estimated annual decrease of approximately $550 million in economic activity). We are satisfied that the States' alleged economic harms are sufficiently concrete and imminent to constitute injury in fact.

The Organizations allege injury on the grounds that the Rule has necessitated significant and costly changes in their programmatic work and caused increased demand on their social service programs. DHS contends that the Organizations have only shown harm to their "abstract social interests" and that increased costs of representing clients after the Rule is not sufficient to

confer standing. Appellants' Br. at 23 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

An organization need only show a "perceptible impairment" of its activities in order to establish injury in fact. *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993). Contrary to DHS's assertion that the Organizations have merely altered the subject matter of their existing outreach work, the declarations submitted by the Organizations make clear that the Rule has required significant diversion of resources. For example, over the course of three months Make the Road New York conducted almost forty workshops for community members devoted exclusively to the Rule, necessitating the hiring of two part-time staff members. *See* Make the Road ("M.T.R.") J. App. 319-20, 323. The complexities of the Rule required Catholic Charities to change its educational outreach from group sessions to time-intensive individual meetings and to institute a series of evening phone banks. *See* M.T.R. J. App. 344, 349-51. The African Services Committee is funding a campaign of radio-based public service announcements to disseminate information about the Rule and has documented an increased demand on its social service programs, as clients turn away from

public benefits programs.[18] *See* M.T.R. J. App. 466-67, 470.

"[A] nonprofit organization establishes an injury-in-fact if, as here, it establishes that it spent money to combat activity that harms its . . . core activities." *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 111 (2d Cir. 2017) (internal quotation marks omitted). The Organizations are dedicated to providing an array of legal and social services to non-citizens and they have expended significant resources to mitigate the Rule's impact on those they serve. In so doing, they have diverted resources that would otherwise have been available for other programming, a "perceptible opportunity cost" that suffices to confer standing. *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011).

The Rule will also impede the Organizations' abilities to carry out their responsibilities in a variety of ways. *Oyster Bay*, 868 F.3d at 110 (finding standing

[18] Similarly, the Asian American Federation has devoted resources to a press conference and media-based outreach campaign and plans to reallocate staff to implement new programmatic priorities in light of the Rule. *See* M.T.R. J. App. 487, 490-91. And the Catholic Legal Immigration Network has seen a three-fold increase in the volume of inquiries related to the public charge ground and anticipates redirecting staff currently assigned to other projects to respond to the Rule. *See* M.T.R. J. App. 502-04.

where an organization "face[d] increased difficulty in meeting with and organizing [day] laborers"). For example, the Asian American Federation, which "support[s] culturally appropriate health and human services for Asian American immigrants[,]" is preparing to establish a network of social service providers that will not ask for immigration status information in order to provide alternatives for non-citizens who will not access public benefits because of the Rule. M.T.R. J. App. 485-86, 490. And while Catholic Charities was previously able to assign adjustment of status cases to paralegals working under the supervision of accredited representatives or attorneys, it anticipates that most of the adjustment cases for its predominantly low-income clients will now need to be handled by an attorney and require in-person representation at adjustment interviews. M.T.R. J. App. 346-48.

These injuries constitute "far more than simply a setback to the [Organizations'] abstract social interests." *Havens Realty*, 455 U.S. at 379. Even before its entry into force, the Rule has caused a "perceptible impairment" of the Organizations' activities and further harms are imminent. *Oyster Bay*, 868 F.3d at

110 (internal quotation marks omitted). As with the States, we conclude that the injuries alleged by the Organizations suffice to confer Article III standing.

B. Zone of Interests

DHS also argues that neither group of Plaintiffs falls within the zone of interests of the public charge statute. The zone-of-interests test restricts the ability to bring suit to those plaintiffs whose interests are "arguably within the zone of interests to be protected or regulated by the statute that [they] say[] was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (internal quotation marks omitted). Because Congress intended to make agency action presumptively reviewable under the APA, that test is not especially demanding in the context of APA claims and may be satisfied even if there is no "indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). A plaintiff is precluded from bringing suit only where its "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." *Id*. at 399. Here, DHS argues that the Plaintiffs' interests fall outside the zone of

interests of the statute because the Plaintiffs seek to facilitate greater use of public benefits by non-citizens, which it views as inconsistent with the purpose of the public charge ground.

This argument mischaracterizes both the purpose of the public charge statute and the Plaintiffs' interests. DHS assumes the merits of its own argument when it identifies the purpose of the public charge ground as ensuring that non-citizens do not use public benefits. As we conclude *infra* in Section II.B.6, Congress enacted the public charge ground to refuse admission to non-citizens who will likely be unable to support themselves in the United States, which is not tantamount to ensuring that non-citizens do not access any public benefits.

Moreover, when we consider the role of the public charge ground within the broader context of the INA, a fuller picture of the interests implicated in the statute emerges. *See Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 529 (1991) (explaining the Supreme Court's reasoning in *Clarke* that, in the context of the National Bank Act "the zone-of-interests test was to be applied not merely in the light of § 36, which was the basis of the plaintiffs' claim on the merits, but also in the light of § 81, to which § 36 was an exception"). The public

charge statute delineates a category of persons who are to be denied adjustment of status (or another form of admission) to which they would otherwise have a claim. *See, e.g.*, 8 U.S.C. § 1255 (detailing requirements for adjustment of status). The grounds of inadmissibility are the fulcrum on which Congress balances its interest in allowing admission where it advances goals of family unity and economic competitiveness against its interest in preventing certain categories of persons from entering the country. *See* 84 Fed. Reg. at 41,306. DHS suggests that only those parties advocating increasingly harsher interpretations of the grounds of inadmissibility could fall within the zone of interests protected by the statute. That is too narrow a read of both the zone-of-interests test itself and the interests protected by the public charge ground. Understood in context, its purpose is to exclude where appropriate and to not exclude where exclusion would be inappropriate. *See Patchak*, 567 U.S. at 225-26.

As with the interests protected by the statute, DHS mischaracterizes the Plaintiffs' interests when it claims they seek only increased non-citizen enrollment in public benefits. The States actually seek to protect the economic benefits that result from healthy, productive, and engaged immigrant

communities. And the Organizations' interests stem from their assorted missions to increase non-citizen well-being and status, which they express in their work to provide legal and social services to non-citizens. An overbroad interpretation of the public charge ground, tipping the balance too far in the direction of exclusion at the expense of admission in the interest of family unity and economic vitality, imperils both these interests. *See Clarke*, 479 U.S. at 399 n.14 (finding zone of interests could apply to "those whose interests are directly affected by a broad or narrow interpretation of the [statute]" (internal quotation marks omitted)).

The Plaintiffs are among "those who in practice can be expected to police the interests that the statute protects[,]" namely, the admission of non-citizens who will be self-sufficient and the exclusion of those who will not. *Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 131 (2d Cir. 2020) (internal quotation marks omitted); *see Bank of Am. Corp. v. City of Miami,* 137 S. Ct. 1296, 1304 (2017). We conclude that the States and the Organizations have Article III standing to challenge the Rule and that they fall within the zone of interests of the public charge statute. We thus turn to the merits of these appeals.

II. Likelihood of Success on the Merits

We begin by considering whether the Plaintiffs are likely to succeed on the merits of their claims, the first preliminary injunction factor. *See Winter*, 555 U.S. at 20. The Plaintiffs challenge the Rule under the APA, which declares unlawful any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). Though the Plaintiffs contend that the Rule violates the APA for several reasons, we focus on the arguments that the Rule is unlawful because it is contrary to the INA and because it is arbitrary and capricious.

A. Legal Framework

"We evaluate challenges to an agency's interpretation of a statute that it administers within the two-step *Chevron* deference framework." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 507 (2d Cir. 2017). At the first step of *Chevron*, we consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Accordingly, we start our analysis

below by considering whether Congress has spoken to its intended meaning of the statutory term "public charge" and conclude that it has done so. Because the intent of Congress is clear, "*Chevron* leaves the stage" and we proceed to the central question of whether DHS's interpretation of "public charge" is consistent with this intent. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (internal quotation marks omitted). We conclude that the Rule is contrary to the INA and that the Plaintiffs have thus demonstrated a likelihood of success on the merits of this claim. *See* 5 U.S.C. § 706(2)(A).

We then move to the Plaintiffs' second argument, that the Rule is unlawful for the further reason that it is procedurally arbitrary and capricious. *See id*. We consider this argument under the familiar rubric laid out in *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), which asks whether the agency has "articulate[d] a satisfactory explanation for its action."[19] *Id.* at 43. We conclude

[19] As we noted in *Catskill Mountains*, there has been "[m]uch confusion" about the relationship between *Chevron* and the *State Farm* frameworks. 846 F.3d at 522. We distinguished the two, however, on the grounds that "*State Farm* is used to evaluate whether a rule is procedurally defective as a result of flaws in the agency's decisionmaking process" while *Chevron* "is generally used to evaluate whether the conclusion reached as a result of that process . . . is reasonable." *Id.* at

that DHS failed to provide a reasoned explanation for its changed definition and the expanded list of relevant public benefits and that the Plaintiffs are thus also likely to succeed on the merits of their claim that the Rule is arbitrary and capricious under 5 U.S.C. § 706(2)(A).[20]

Accordingly, because the Plaintiffs have shown a likelihood of success on these two arguments, they have established the first preliminary injunction factor in their favor.

B. The Rule is Contrary to the INA.

"In a statutory construction case, the beginning point must be the language of the statute[.]" *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). "If the statutory text is ambiguous, we also examine canons of statutory construction" to identify congressional intent. *Catskill Mountains*, 846 F.3d at 512; *see Chevron*, 467 U.S. at 843 n.9. Here, the Plaintiffs do not argue that "public

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521. On appeal, the Plaintiffs primarily raise procedural challenges to the Rule. We thus consider these arguments under the *State Farm* framework. *See also Nat. Res. Def. Council, Inc. v. U.S. EPA*, 961 F.3d 160, 170-71 (2d Cir. 2020).

[20] Because we find the Plaintiffs are likely to succeed on the merits of their two primary arguments, we need not address their additional argument that the Rule is contrary to the Rehabilitation Act or the Organizations' argument that the Rule violates equal protection.

charge" is unambiguous on its face, relying instead on the ratification canon to ascertain the clear intent of Congress.

The ratification canon provides that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). The Plaintiffs argue that Congress ratified the settled judicial and administrative interpretations of "public charge" as it repeatedly reenacted the public charge ground over the course of more than a century – most recently in 1996 – such that the current public charge statute unambiguously forecloses the Rule's new interpretation of the term. In response, DHS argues that its interpretation is not precluded by the historical interpretations of "public charge" and that other provisions of the INA show that the Rule is consistent with Congress's intended meaning of "public charge." Proper application of the ratification canon requires a thorough understanding of the evolution of the public charge statute, from its inception in 1882 to its enactment in its current form in 1996, as well as the accompanying body of administrative and judicial decisions interpreting the term. Accordingly, we begin with a historical review.

1. Origins of the Public Charge Ground

The public charge ground has its roots in concerns that arose in the late nineteenth century that foreign nations were addressing poverty within their own borders by funding passage to the United States for their poorer citizens. *See* 13 CONG. REC. 5,109 (1882). As one of the primary immigrant-receiving states, New York in particular was concerned that, upon arrival, these non-citizens "bec[a]me at once a public charge . . . get[ting] into our poor-houses and alms-houses." *Id.* In response to the costs of supporting new arrivals and other expenditures associated with its role overseeing the immigration process, New York attempted to impose various taxes and bonds on arriving immigrants, as well as the shipping companies providing their transport. *See id*. at 5,107. The Supreme Court, however, repeatedly struck down these state statutes as unconstitutional, on the grounds that the Constitution vested the power to "regulate commerce with foreign nations," U.S. CONST. art. I, § 8, cl. 3, in Congress. *See, e.g.*, *Henderson v. Mayor of New York*, 92 U.S. 259, 270 (1875).

New York thus turned to Congress for assistance, lobbying for the enactment of two provisions that ultimately became law with the Immigration Act of 1882: the public charge ground of exclusion and the immigrant fund. The

inaugural public charge statute directs immigration inspectors to board arriving ships and refuse permission to land to any passenger who is "unable to take care of himself or herself without becoming a public charge[.]" Immigration Act of 1882, Pub. L. No. 47-376, § 2, 22 Stat. 214, 214. While denying entry to those who could not care for themselves, the Act simultaneously established an "immigrant fund," which was to be used, *inter alia*, "for the care of immigrants arriving in the United States, [and] for the relief of such as are in distress." *Id.* § 1. By these provisions, the Act established a scheme that distinguished between those arriving immigrants who were "unable to take care of [themselves]" and those who were merely "in distress." *Id.* §§ 1, 2. The former were to be excluded; the latter provided with financial support. Representatives from New York spoke in favor of this two-part design, applauding the effort to exclude those who would depend on public assistance while offering words of praise for the immigrants who may arrive in need of some aid but ultimately go on to "learn our language, adapt themselves readily to our institutions, and become a valuable component part of the body-politic."13 CONG. REC. 5,108 (statement of Rep. Van Voorhis).

Early interpretations of the term "public charge" from this era come principally from state courts and treat the term as somewhat interchangeable with "pauper," distinguishable from those who were simply poor by the permanence of the condition. For example, the Massachusetts Supreme Court explained that a bond could be required for arriving immigrants who had "been paupers in a foreign land; that is, for those who have been a public charge in another country; and not merely destitute persons, who, on their arrival here, have no visible means of support[.]" *City of Boston v. Capen*, 61 Mass. 116, 121 (Mass. 1851). The court affirmed that the bond was necessary only from "those who, by reason of some permanent disability, are unable to maintain themselves" and who "might become a heavy and long continued charge to the city, town, or state, in this country[.]" *Id.* at 122; *see also State v. The S.S. Constitution*, 42 Cal. 578, 582 (Cal. 1872); *City of Alton v. Cty. of Madison*, 21 Ill. 115, 116 (Ill. 1859).

Congress amended the immigration laws in 1891, making slight revisions to the public charge ground of exclusion while adding for the first time a public charge ground of deportation. *See* Immigration Act of 1891, Pub. L. No. 51-551, §§ 1, 11, 26 Stat. 1084, 1084, 1086. Under the terms of the 1891 Act, "[a]ll idiots,

insane persons, [and] paupers or persons likely to become a public charge" were to be excluded from admission, *id.* § 1, while a non-citizen who became "a public charge within one year after his arrival in the United States" could be deported, *id.* § 11.

In 1907, Congress again made modest revisions to the public charge ground, amending the law to exclude "paupers; persons likely to become a public charge; [and] professional beggars[.]" Immigration Act of 1907, Pub. L. No. 59-96, § 2, 34 Stat. 898, 899. A few years after the 1907 Act, the Supreme Court weighed in on the meaning of "public charge" in its first and (as of yet) only interpretation of the term. In *Gegiow v. Uhl*, 239 U.S. 3 (1915), the Court considered the case of two Russian immigrants who had been found likely to become public charges because they arrived with little money; were bound for Portland, Oregon, where work was scarce; and had no one legally obligated to support them. *Id.* at 8. In its analysis, the Court emphasized that "public charge" was listed alongside "paupers" and "professional beggars" in the statute, reasoning that the term should "be read as generically similar to the others mentioned before and after." *Id.* at 10. Accordingly, the Court concluded that a "public charge," like the other

categories of persons mentioned, must be defined by some kind of "permanent personal objections." *Id.* Because the Russian immigrants had been deemed likely public charges based on the Portland labor market, rather than on any intrinsic and problematic characteristics of their own, the Court reversed the determination.

Citing *Gegiow*, we declared ourselves "convinced" in a subsequent decision that "Congress meant [public charge] to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future." *Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917). The Ninth Circuit adopted our interpretation in *Ng Fung Ho v. White*, 266 F. 765, 769 (9th Cir. 1920), *rev'd in part on other grounds,* 259 U.S. 276, 285 (1922). Other circuits adopted a somewhat broader interpretation of the term as encompassing "not only those persons who through misfortune cannot be self-supporting, but also those who will not undertake honest pursuits, and who are likely to become periodically the inmates of prisons[,]" *Lam Fung Yen v. Frick*, 233 F. 393, 396 (6th Cir. 1916) (internal quotation marks omitted); *see United States ex rel. Medich v. Burmaster*, 24 F.2d 57, 59 (8th Cir. 1928). But those interpretations as

well emphasized the habitual and persistent nature of the dependency that would render one a public charge.

2. The Immigration Act of 1917

In the wake of *Gegiow*, Congress sought to "overcome" the line of cases that "limit[] the meaning of [public charge] because of its position between other descriptions conceived to be of the same general and generical nature." S. COMM. ON IMMIGRATION, 64TH CONG., REP. ON H.R. 10384, at 5 (1916). Thus, in the Immigration Act of 1917, Congress relocated the public charge ground within the list of excludable persons so that it no longer appeared between paupers and professional beggars, but rather between contract laborers and people who had been deported previously. *See* Pub. L. No. 64-301, § 3, 39 Stat. 874, 876.

Notwithstanding Congress's efforts, "[s]everal courts promptly questioned the efficacy of the [1917] amendment and affirmed the interpretation that a 'person who is likely to become a public charge' is one who for some cause is about to be supported at public expense[.]" *Matter of Harutunian*, 14 I. & N. Dec. 583, 587 (B.I.A. 1974). The Ninth Circuit was the first to hold that "this change of location of the words does not change the meaning that should be given them,

and that it is still to be held that a person 'likely to become a public charge' is one who, by reason of poverty, insanity, or disease or disability, will probably become a charge on the public." *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922). A few years later, the Fifth Circuit affirmed that the public charge ground still "intended to refer to . . . a condition of dependence on the public for support." *Coykendall v. Skrmetta*, 22 F.2d 120, 121 (5th Cir. 1927). And in *United States ex rel. Iorio v. Day*, 34 F.2d 920 (2d Cir. 1929), we agreed that the change did not require overruling the interpretation we had previously adopted in *Howe*, noting that "[t]he language itself, 'public charge,' suggests . . . dependency." *Id.* at 922.

As the courts of appeals applied the public charge ground in this era, the inquiry usually turned on whether the non-citizen could earn a living, frequently out of a concern that a health condition might prevent the person from working.[21]

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[21] *See, e.g., Tod v. Waldman*, 266 U.S. 113, 120 (1924) (remanding based on "the absence from the record of any finding by the department on appeal as to the issue [of] whether the lameness of Zenia, one of the children, affected her ability to earn a living or made her likely to become a public charge"); *United States ex rel. Minuto v. Reimer*, 83 F.2d 166, 168 (2d Cir. 1936) (affirming public charge determination where non-citizen "was a woman seventy years old with an increasing chance of becoming dependent, disabled, and sick [and] [n]o one was under any obligation to support her"); *Tullman v. Tod*, 294 F. 87, 88 (2d Cir. 1923) (affirming public charge determination where the non-citizen "was found to be affected with deaf mutism, which, as was certified, might affect his ability to earn

Conversely, courts routinely found a non-citizen's ability and willingness to work sufficient to defeat a public charge finding.[22] Administrative interpretations

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a living"); *Wallis v. United States ex rel. Mannara*, 273 F. 509, 511 (2d Cir. 1921) ("A person likely to become a public charge is one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty. We think that the finding by the administrative authorities, showing a physical defect of a nature that may affect the ability of the relator and appellee to earn a living, is sufficient ground for exclusion [as a likely public charge]" (internal citation omitted)); *see also "Italia" Societa Anonima Di Navigazione v. Durning*, 115 F.2d 711, 713 (2d Cir. 1940).

[22] *See, e.g.*, *Ex parte Sturgess*, 13 F.2d 624, 625 (6th Cir. 1926) (reversing public charge determination where non-citizen was "39 years of age, in good health, a skilled carpenter, and had in his possession about $75 in money"); *Nocchi v. Johnson*, 6 F.2d 1, 1 (1st Cir. 1925) (reversing public charge determination where there was "no clear showing that the boy is so feeble-minded that he is not able to earn his own living" and his parents were wealthy); *United States ex rel. Mantler v. Comm'r of Immigration*, 3 F.2d 234, 236 (2d Cir. 1924) (reversing public charge determination where non-citizen "is 23 years of age, has been in the country now for 4 years, is in good physical condition, and by industry and frugality has saved a substantial portion of her earnings"); *Sakaguchi*, 277 F. at 916 (reversing public charge determination where there was no evidence "of mental or physical disability or any fact tending to show that the burden of supporting the appellant is likely to be cast upon the public" and the non-citizen was "an able-bodied woman of the age of 25 years, with a fair education . . . [and] a disposition to work and support herself"); *see also Thack v. Zurbrick*, 51 F.2d 634, 635 (6th Cir. 1931); *United States ex rel. De Sousa v. Day*, 22 F.2d 472, 473-74 (2d Cir. 1927); *Lisotta v. United States*, 3 F.2d 108, 111 (5th Cir. 1924).

issued in the early days of the Board of Immigration Appeals ("BIA") also focused on non-citizens' abilities to work and sustain themselves.[23]

In the context of the public charge ground of deportation, this era also saw growing consensus among the courts that non-citizens who had been institutionalized were deportable as public charges.[24] The BIA weighed in on the matter in one of its first published decisions to address either of the public charge grounds. In *Matter of B-*, 3 I. & N. Dec. 323 (B.I.A. 1948), the BIA considered the case of a non-citizen who was institutionalized in a psychiatric hospital run by the state of Illinois. The BIA held that a non-citizen who had become a public charge could not be deported on that basis unless the state had a law imposing a charge for the services rendered, a demand for repayment had been made, and

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[23] *See, e.g.*, *Matter of C-*, 3 I. & N. Dec. 96, 97 (B.I.A. 1947) ("In this case there is no likelihood that the beneficiary will become a public charge. . . . [H]e is in good health and is able and willing to go to work."); *Matter of V-*, 2 I. & N. Dec. 78, 81 (B.I.A. 1944) (reversing public charge determination where the respondent was employed and "has always been self-supporting" other than during a period of hospitalization).

[24] *See, e.g.*, *Canciamilla v. Haff*, 64 F.2d 875, 876 (9th Cir. 1933); *Fernandez v. Nagle*, 58 F.2d 950, 950 (9th Cir. 1932); *United States ex rel. Casimano v. Comm'r of Immigration*, 15 F.2d 555, 556 (2d Cir. 1926); *United States ex rel. La Reddola v. Tod*, 299 F. 592, 593 (2d Cir. 1924).

the non-citizen had failed to reimburse the state. *Id.* at 326. These procedural safeguards persist to this day in the public charge ground of deportation, which considers benefits received, but are not applied in the predictive public charge ground of inadmissibility. *See Harutunian*, 14 I. & N. Dec. at 589.

3. The Immigration and Nationality Act of 1952

Shortly after the *Matter of B-* decision, the Senate initiated "a full and complete investigation of [the] entire immigration system[,]" the results of which were released in a Senate Judiciary Committee Report published in 1950. SENATE JUDICIARY COMM., THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. NO. 81-1515, at 1 (1950). The investigation and report resulted in a proposed omnibus bill to overhaul the "patchwork" of the then-existing immigration and naturalization systems. *Id.* at 4. Thus was enacted the Immigration and Nationality Act of 1952, the foundation of our current immigration system.

The Judiciary Committee report devotes several pages to a review of the public charge ground. The report notes that "courts have given varied definitions of the phrase 'likely to become a public charge,'" but summarizes the caselaw as

focusing on four characteristics that indicate non-citizens are likely to become public charges: (1) impending or current imprisonment in a federal prison; (2) limited finances; (3) a weakened physical condition "as it relate[s] to his ability and capacity for employment[;]" and (4) traveling to the United States on a ticket paid for by someone else. *Id.* at 347-48. The Judiciary Committee recommended that the public charge ground be re-enacted in the forthcoming INA and further recommended that the term not be defined in the statute since "the elements constituting likelihood of becoming a public charge are varied." *Id.* at 349.

Congress took both recommendations, listing "[a]liens who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges" as one of the INA's grounds of inadmissibility. *See* Pub. L. No. 82-414, § 212(a)(15), 66 Stat. 163, 183 (1952). The INA also retained the corresponding ground of deportation for any non-citizen who "in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry." *Id.* § 241(a)(8).

Administrative interpretations of "public charge" after the enactment of the INA largely align with the pre-1952 interpretations. In 1964, the Attorney General noted that the term had been the subject of "extensive judicial interpretation" and that the "general tenor" of the caselaw understood "public charge" to require "[s]ome specific circumstance, such as mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public[.]" *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (A.G. 1964).

The BIA subsequently affirmed that "while economic factors should be taken into account, the alien's physical and mental condition, as it affects ability to earn a living, is of major significance." *Harutunian*, 14 I. & N. Dec. at 588. The BIA concluded that "[e]verything in the statutes, the legislative comments and the decisions points to one conclusion[:]" that Congress intended to exclude as a likely public charge a non-citizen who was not self-supporting. *Id.* at 589; *see also Matter of Vindman*, 16 I. & N. Dec. 131, 132 (B.I.A. 1977).

As the BIA applied this interpretation in subsequent decisions, it focused on the non-citizen's capacity for work, reversing decisions that put too much

weight on temporary setbacks and affirming those where a non-citizen had no prospects for employment by virtue of age or disability.[25] And in *Matter of Perez*, 15 I. & N. Dec. 136, 137 (B.I.A. 1974), the BIA explicitly held that "[t]he fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge."

4. The Current Public Charge Ground

It was against this backdrop of judicial and administrative interpretations that Congress enacted PRWORA and IIRIRA in 1996, creating the public charge ground as it exists today. While leaving the principal statutory language intact – rendering inadmissible any non-citizen who is "likely at any time to become a public charge" – IIRIRA amended the ground to require consideration of the non-citizen's age, health, family status, financial status, and education. *See* IIRIRA

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[25] *See, e.g.*, *Matter of A-*, 19 I. & N. Dec. 867, 870 (B.I.A. 1988) ("There may be circumstances beyond the control of the alien which temporarily prevent an alien from joining the work force. . . . [T]he director placed undue weight on [the family's financial circumstances], thereby overshadowing the more important factors; namely, that the applicant has now joined the work force, that she is young, and that she has no physical or mental defects which might affect her earning capacity."); *Vindman*, 16 I. & N. Dec. at 132 (affirming public charge finding where respondents were older adults and had no employment prospects); *cf. Matter of Kowalski*, 10 I. & N. Dec. 159, 160 (B.I.A. 1963).

§ 531(a). IIRIRA also required certain non-citizens to obtain affidavits of support, *id.* § 551(a), building on PRWORA's requirement that such affidavits of support be legally enforceable against the sponsor, *see* PRWORA § 423.

Congress considered, and nearly enacted, a more sweeping set of changes to the public charge ground with IIRIRA. The conference report of the bill included a statutory definition of public charge, which would have defined the term to cover "any alien who receives [means-tested public benefits] for an aggregate period of at least 12 months[.]" CONFERENCE REPORT, H.R. REP. 104-828, at 138 (1996). While the House passed the conference report containing this language, it was ultimately dropped under threat of presidential veto. *See* 142 CONG. REC. S11,882 (daily ed. Sept. 30, 1996) (statement of Sen. Kyl); *cf.* Statement on Senate Action on the "Immigration Control and Financial Responsibility Act of 1996," 32 WEEKLY COMP. PRES. DOC. 783 (May 2, 1996) (President Clinton critiquing prior version of the bill for "go[ing] too far in denying legal immigrants access to vital safety net programs which could jeopardize public health and safety").

We end our historical review back where we started this opinion, with INS's release of the 1999 Guidance to counteract public confusion after IIRIRA and PRWORA. We have already explored in some detail INS's 1999 interpretation, which defines "public charge" as one who is "primarily dependent on the Government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at Government expense." 64 Fed. Reg. at 28,677. We simply note here that INS concluded that its interpretation was warranted by "the plain meaning of the word 'charge,' 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." *Id.*

5. The Settled Meaning of "Public Charge"

With this understanding of the history of the public charge ground, we turn to the applicability of the ratification canon. We first examine whether Congress changed the statutory language as it amended the ground over the years, so as to render the canon inapposite. *See Holder v. Martinez Gutierrez*, 566

U.S. 583, 593 (2012). We then determine whether the caselaw interpretations of the term produced a sufficiently consistent and settled meaning of the term, such that we may presume Congress ratified that understanding when it created the current public charge statute in 1996. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986).

We quickly dispose of the first question. There can be no dispute that, since its origins in the Immigration Act of 1882, Congress reenacted the public charge ground without pertinent change in 1891, 1907, 1917, 1952, and 1996. We note that Congress made minor alterations to the ground over the course of its history. For example, the 1882 public charge ground excluded anyone who was "unable to take care of himself or herself without becoming a public charge" at their time of arrival in the United States while subsequent acts established the forward-looking likelihood standard. *Compare* Immigration Act of 1882 § 2 *with* Immigration Act of 1891 § 1. And with IIRIRA, Congress added the list of mandatory factors to consider when applying the ground. *See* IIRIRA § 531(a). But Congress has unwaveringly described the fundamental characteristic at issue as being a "public charge" since 1882. We easily conclude that Congress "adopt[ed]

the language used in [its] earlier act[s]" in its most recent reenactment of the public charge ground in 1996. *See Hecht v. Malley*, 265 U.S. 144, 153 (1924).

With respect to the second question, our review of the historical administrative and judicial interpretations of the ground over the years leaves us convinced that there was a settled meaning of "public charge" well before Congress enacted IIRIRA. The absolute bulk of the caselaw, from the Supreme Court, the circuit courts, and the BIA interprets "public charge" to mean a person who is unable to support herself, either through work, savings, or family ties. *See, e.g.*, *Day*, 34 F.2d at 922; *Harutunian*, 14 I. & N. Dec. at 588-89. Indeed, we think this interpretation was established early enough that it was ratified by Congress in the INA of 1952. But the subsequent and consistent administrative interpretations of the term from the 1960s and 1970s remove any doubt that it was adopted by Congress in IIRIRA. *See United Airlines, Inc. v. Brien*, 588 F.3d 158, 173 (2d Cir. 2009) (noting that "Congress's repeated amendment of the relevant provisions of the statute without expressing any disapproval" of the BIA's interpretation is "persuasive evidence that the [Agency's] interpretation is the one intended by Congress" (internal quotation marks omitted)).

We find particularly significant the Attorney General's decision from 1962, which summarizes the "extensive judicial interpretation" of the term as requiring a particular circumstance, like disability or age, that shows that "the burden of supporting the alien is likely to be cast on the public[.]" *Martinez-Lopez*, 10 I. & N. Dec. at 421. Accordingly, the Attorney General held that "[a] healthy person in the prime of life cannot ordinarily be considered likely to become a public charge[.]" *Id.* The BIA came to a similar conclusion after its own review of the public charge caselaw and legislative history, holding that "any alien who is incapable of earning a livelihood, who does not have sufficient funds in the United States for his support, and [who] has no person in the United States willing and able to assure that he will not need public support is excludable as likely to become a public charge[.]" *Harutunian*, 14 I. & N. Dec. at 589-90. Subsequent administrative decisions affirmed that the public charge determination must be made based on the totality of the circumstances and rejected the notion that receipt of public benefits categorically renders one a public charge. *See Perez*, 15 I. & N. Dec. at 137; *Vindman*, 16 I. & N. Dec. at 132; *A-*, 19 I. & N. Dec. at 870.

The scope and consistency of these administrative decisions warrants the application of the ratification canon. These published decisions are nationally binding, issued under the agency's mandate to "provide clear and uniform guidance to [other components of the government] and the general public on the proper interpretation and administration of the [INA]." 8 C.F.R. § 1003.1(d)(1). The broad principles articulated in the decisions are grounded in comprehensive reviews of public charge history and offer a consistent understanding of the term as they carry that history forward. While we may not derive a settled rule from isolated or contradictory decisions, *see Jama v. Immigration and Customs Enf't*, 543 U.S. 335, 350-52 (2005), that is not the case here. For more than twenty years prior to IIRIRA, the agency interpreted "public charge" to mean a person not capable of supporting himself. In the face of this consistent agency interpretation – which itself aligns with the earlier judicial interpretations – we conclude that when Congress reenacted the public charge ground in 1996 it ratified this settled construction of the term. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 157 (2000) (concluding that Congress ratified agency interpretation that had been

its "unwavering position since its inception" and that was consistent "with the position that its predecessor agency had first taken").

Our conclusion finds further support in the legislative history of IIRIRA. "Although we are generally reluctant to employ legislative history at step one of *Chevron*" it may be helpful "when the interpretive clues speak almost unanimously, making Congress's intent clear beyond reasonable doubt." *Catskill Mountains*, 846 F.3d at 515 (internal quotation marks and alterations omitted). We thus look to the legislative history only to confirm what we have already concluded.

As noted above, Congress very nearly included a statutory definition of "public charge" in IIRIRA that would have redefined the term to mean receipt of any form of means-tested public benefits for more than twelve months. *See* CONFERENCE REPORT, H.R. REP. NO. 104-828, at 138. That proposed definition was intended to overcome the BIA's *Matter of B-* decision, which interpreted the public charge ground of deportation, but it was deleted from the final enactment under threat of presidential veto.[26] *See* 142 CONG. REC. S4,408-09 (daily ed. April

[26] The definition was proposed as part of the public charge ground of deportation. CONFERENCE REPORT, H.R. REP. NO. 104-828, at 138. We nevertheless think it

30, 1996) (statement of Sen. Simpson); 142 CONG. REC. S11,882 (statement of Sen. Kyl). In effect, an effort was made to *change* the prior administrative and judicial consensus as to the meaning of public charge, but that effort failed.

While we agree with DHS that failed legislative proposals are, as a general matter, unreliable sources of legislative history because bills may fail for any number of reasons, here we know exactly why the definition was removed from IIRIRA and find it directly relevant to our analysis. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001). We read this legislative history as further evidence that Congress was aware of prevailing administrative interpretations of "public charge" when it enacted IIRIRA. *See Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 782-83 (1985) (applying ratification canon where legislative history demonstrated Congress was aware of interpretation). Congress's abandonment of its efforts to change the meaning of

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reasonable to look to this language as we interpret the public charge ground of inadmissibility on the principle that a term appearing in multiple places within a statute is "generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). And while the definition was proposed to overcome *Matter of B-*'s procedural safeguards for public charge deportation, the definition is confined to identifying the relevant benefits and time period of use that made one a "public charge" and could have easily been transposed to the inadmissibility context. *Cf. Harutunian*, 14 I. & N. Dec. at 589.

the term further suggests that it ratified the existing interpretation of "public charge" in 1996. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983).

DHS urges us to conclude that Congress did not ratify any interpretation of "public charge" because the term has never had a fixed definition. To support its contention, DHS points to the 1950 Senate Judiciary Committee report, which observed that "the elements constituting likelihood of becoming a public charge are varied[.]" S. REP. NO. 81-1515, at 349. Consequently, the report recommends that the term not be defined in the statute and that the determination of whether a given non-citizen is likely to become a public charge should "rest[] within the discretion of the [agency]." *Id.*; *see id.* at 347 (noting the term has been given "varied definitions" by the courts).

Rather than suggesting that the core meaning of "public charge" is unclear, the language on which DHS relies refers to the fact there are a variety of personal circumstances that may be relied on to show the *likelihood* that a would-be immigrant would fall within that category. As described above, the report distills from the caselaw four circumstances that indicate a non-citizen is likely to become a public charge. *Id.* at 348. It thereby recognizes that there are many paths

to dependency, and that administrative flexibility in determining whether a non-citizen is likely to be dependent is desirable. But the fact that many and varied circumstances may show that one is *likely* to become a public charge does not mean that the underlying term is undefined or lacks a core meaning. And while DHS makes much of the fact that it retains discretion to decide whether the ground applies in a given case, the allowance of discretion in individual cases does not mean that the term itself is standardless or without a core, established meaning.

We recognize that our conclusion that Congress ratified the settled meaning of "public charge" in 1996 conflicts with decisions from the only two circuits to have addressed this argument to date. *See City and Cty. of San Francisco v. USCIS*, 944 F.3d 773, 798 (9th Cir. 2019); *Cook Cty. v. Wolf*, 962 F.3d 208, 226 (7th Cir. 2020). In the context of granting DHS's motion to stay the injunctions against the enforcement of the Rule entered by district courts in California and Washington, the Ninth Circuit decided that "public charge" had been subjected to "varying historical interpretations" by 1996, such that the ratification canon

did not apply. *San Francisco*, 944 F.3d at 797. The Ninth Circuit reasoned that there was no consistent interpretation because

> [i]nitially, the likelihood of being housed in a government or charitable institution was most important. Then, the focus shifted in 1948 to whether public benefits received by an immigrant could be monetized, and the immigrant refused to pay for them. In 1974, it shifted again to whether the immigrant was employable and self-sufficient. That was subsequently narrowed in 1987 to whether the immigrant had received public cash assistance, which excluded in-kind benefits.[27]

Id. at 796. We think the Ninth Circuit goes astray in pinning the definition of "public charge" on the *form* of public care provided to the dependent non-citizen. That the face of our welfare system has changed over time does not mean that the fundamental inquiry of the public charge ground – whether the non-citizen is likely to depend on that system – has also changed. The settled meaning of "public charge," as the plain meaning of the term already suggests, is dependency: being a persistent "charge" on the public purse. And as we explain

[27] We explain below our further disagreement with these characterizations of the 1948 *Matter of B-* decision and the 1987 public charge provision established in the Immigration Reform and Control Act of 1986, which only applied to those non-citizens participating in an ad hoc legalization program.

further below, the mere receipt of benefits from the government does not constitute such dependency.

We are similarly unpersuaded by the Seventh Circuit's "admittedly incomplete" historical review and its conclusion that plaintiffs in that case had failed to establish that Congress ratified the settled meaning of the term. *See Cook Cty.*, 962 F.3d at 226. The Seventh Circuit focuses almost exclusively on the state of the law prior to 1927 and enactments post-dating Congress's 1996 amendment to the public charge ground, the point at which any existing interpretation would have been ratified. *Id.* at 222-26. Critically, this limited analysis omits the administrative interpretations of the 1960s and 1970s that established uniform and nationally binding interpretations of the public charge ground, a key component of our determination that Congress ratified the prevailing interpretation of the term in 1996. *See id.* at 225.

In light of the judicial, administrative, and legislative treatments of the public charge ground from 1882 to 1996, we hold that Congress ratified the settled meaning of "public charge" when it enacted IIRIRA. Congress intended the public charge ground of inadmissibility to apply to those non-citizens who

were likely to be unable to support themselves in the future and to rely on the government for subsistence. "[D]eference is not due unless a court, employing traditional tools of statutory construction, is left with an unresolved ambiguity." *Epic Sys.*, 138 S. Ct. at 1630 (internal quotation marks omitted). Here, because the ratification canon reveals the intent of Congress "on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. We thus owe no deference to the Rule and consider only whether it comports with congressional intent.

6. The Rule's Inconsistency with the Settled Meaning

"No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (emphasis omitted). Having marked out the interpretive boundaries of "public charge," we now consider whether the Rule's interpretation falls within the ambit of congressional intent. DHS repeatedly claims that the Rule aligns with the intent of Congress because it excludes those non-citizens who lack "self-sufficiency and . . . need to rely on the

government for support." 84 Fed. Reg. at 41,317; *see, e.g.*, *id.* at 41,295, 41,306, 41,318, 41,320, 41,348. As we have just concluded, Congress did indeed ratify a consistent and long-standing judicial and administrative understanding of "public charge" as focused on non-citizens' abilities to support themselves. But DHS's generalized assurance that it shares Congress's interest in self-sufficiency is belied by the Rule's actual definition of "public charge," which reveals that DHS and Congress have dramatically different notions of the term.

The prevailing administrative and judicial interpretation of "public charge" ratified by Congress understood the term to mean a non-citizen who cannot support himself, in the sense that he "is incapable of earning a livelihood, . . . does not have sufficient funds in the United States for his support, and has no person in the United States willing and able to assure that he will not need public support[.]" *Harutunian*, 14 I. & N. Dec. at 589. Moreover, under that interpretation the "determination of whether an alien is likely to become a public charge . . . is a prediction based upon the totality of the alien's circumstances . . . . The fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge." *Perez*, 15 I. & N. Dec. at 137. In contrast, the Rule

categorically renders non-citizens public charges – i.e., not self-sufficient – if they are likely to access any quantity of the enumerated benefits for a limited number of months. *See* 84 Fed. Reg. at 41,349. We think it plain on the face of these different interpretations that the Rule falls outside the statutory bounds marked out by Congress. Our conclusion is bolstered by the fact that many of the benefits newly considered by the Rule have relatively generous eligibility criteria and are designed to provide supplemental assistance to those living well above the poverty level, as we discuss in greater detail below.[28] *See infra* Section II.C.2.

To be sure, we do not find the intent of Congress evidenced by the ratification canon to be so precise as to support only one interpretation. On the contrary, the principles at issue are broad enough that they may support a variety of agency interpretations. But while an agency may "give authoritative meaning to the statute within the bounds of th[e] uncertainty" implicit in congressional

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[28] DHS assumes that receipt of SNAP, Medicaid, or housing assistance shows that a non-citizen is per se unable to meet basic needs. *See, e.g.*, 84 Fed. Reg. at 41,349. Because DHS primarily invokes this assumption as a justification for its changed interpretation, we address (and reject) it in our analysis of the Plaintiffs' arbitrary and capricious challenge. We note it here because the fact that the Rule incorporates public benefits with broader programmatic aims than basic subsistence evidences the Rule's inconsistency with congressional intent.

intent, "the presence of some uncertainty" does not prevent us from "discern[ing] the outer limits of [a statutory] term[.]" *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 525 (2009). When the meaning of a statutory term is unclear, federal agencies specialized in the area receive deference from courts in assigning meaning to the uncertain language. But the deference is not unlimited. If Congress passed a statute leaving it unclear whether a term of the statute means A, B, or C, an appropriate federal agency will receive deference in concluding that the proper meaning is any one of A, B, or C. But it does not follow that, because the statutory term could mean either A, B, or C, the agency will receive deference in interpreting it to mean X or Y or Z, because such an interpretation would be inconsistent with the meaning of the statute.

Whatever gray area may exist at the margins, we need only decide today whether Congress "has unambiguously foreclosed the [specific] statutory interpretation" at issue. *Catawba Cty. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009). And we conclude that Congress's intended meaning of "public charge"

unambiguously forecloses the Rule's expansive interpretation. We are not persuaded by DHS's efforts to argue otherwise.

DHS first attempts to argue that its definition of "public charge" is consistent with the historical caselaw interpretations of the term. DHS points to two district court cases from the 1920s to claim that Congress ratified a definition of "public charge" that encompasses minimal and temporary public benefits usage. The first, *Guimond v. Howes*, 9 F.2d 412 (D. Me. 1925), held that members of an immigrant family were likely to become public charges when the husband was a bootlegger who had been incarcerated for two periods of sixty and ninety days, respectively. *Id.* at 413. Because the family had been "supported" by the town while he was imprisoned, and because the husband's occupation made it likely he would return to jail in the future, the district court found the family likely public charges. *Id.* at 413-14. The second case, *Ex parte Turner*, 10 F.2d 816, 817 (S.D. Cal. 1926), also found that members of a family were likely public charges because the husband was "predisposed to physical infirmity" and would "likely be incapacitated from performing any work or earning support for himself and [his] family" when his ailments flared up in the future. Because his wife and

children had received charitable aid during his previous two-month hospitalization, the court anticipated they would do so again when he became sick in the future and found the family to be likely public charges. *Id*.

In both cases, the district court did look at previous, short-term receipt of public benefits in making the public charge determination. But neither case suggests that this receipt alone rendered the immigrant a public charge. Rather, the district courts found it significant that the families were likely to repeatedly become dependent on the public in the future, as the breadwinners of the families were unlikely to stop bootlegging or to overcome physical infirmity. *Guimond*, 9 F.2d at 414; *Turner*, 10 F.2d at 817. These cases thus do not suggest that courts have historically considered the temporary receipt of benefits as sufficient to enter a public charge finding. To the contrary, both *Guimond* and *Turner* rest on the finding that the benefits usage was *not* merely temporary but was likely to regularly reoccur.[29]

[29] In any event, even if these cases could be read to support DHS's proposition, they would not outweigh the prior or subsequent caselaw – particularly the agency decisions from the 1960s and 1970s setting out nationally binding public charge standards – endorsing a different interpretation of "public charge."

The only other case on which DHS relies is *Matter of B-*, 3 I. & N. Dec. at 323. DHS argues that *Matter of B-* shows that a non-citizen is deportable as a public charge if she fails to reimburse the government for the benefits used, even if the non-citizen was not primarily dependent on the benefits. DHS reads far too much into the case. In *Matter of B-*, the non-citizen was institutionalized, the paradigmatic example of a public charge. *Id.* at 324. The only issue in the case was whether she could escape deportation by reimbursing the state for the services received. *Id.* at 326. The BIA held that a non-citizen is not deportable as a public charge unless the state has asked for reimbursement and the non-citizen or her relatives have failed to pay. *Id.* at 325. Rather than broadening the definition of the public charge ground of inadmissibility – or saying *anything* that casts doubt on other cases suggesting that a "public charge" must be persistently and primarily dependent on the government – *Matter of B-* held that even an immigrant who had been institutionalized at public expense because she *was* unable to care for herself and *was* likely to require permanent hospitalization, *still* was not categorically a public charge if the state had not sought payment and been unable to collect.

Matter of B- thus offers a procedural escape hatch to those who need government services but have money to pay. While the decision alters the mechanics of deportation as a public charge, it hardly presents a new interpretation of the term "public charge" itself.[30] It seems particularly odd to cite this somewhat unusual case, with its generous treatment of a non-citizen who might well seem to fall within the established meaning of "public charge," in support of a sweeping *expansion* of that category.

DHS next argues that a series of policy statements enacted as part of PRWORA show that the Rule's interpretation is consistent with congressional intent regarding the meaning of "public charge." *See* 8 U.S.C. § 1601 (describing the "national policy with respect to welfare and immigration"). In the policy statements, which lay out the rationale for enacting restrictions on non-citizen eligibility for public benefits, Congress emphasized that "[s]elf-sufficiency has

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[30] Moreover, in *Matter of Harutunian*, the BIA held that the *Matter of B-* test is limited to the public charge ground of deportation and should not be read into the public charge ground of inadmissibility. 14 I. & N. Dec. at 589-90. This distinction between the public charge grounds of inadmissibility and deportation was affirmed by INS in its 1999 Guidance, where it explained that while "the definition of public charge is the same for both admission/adjustment and deportation, the standards applied to public charge adjudications in each context are significantly different." 64 Fed. Reg. at 28,689.

been a basic principle of United States immigration law since this country's earliest immigration statutes" and affirmed that

> [i]t continues to be the immigration policy of the United States that (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (B) the availability of public benefits not constitute an incentive for immigration to the United States.

Id. § 1601(1), (2). The policy statements further explain that PRWORA creates "new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy." *Id.* § 1601(5). The policy statements conclude by noting that any state adopting the federal benefits eligibility scheme laid out in PRWORA "shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy." *Id.* § 1601(7).

DHS reads these policy statements to mean that "Congress expressly equated a lack of 'self-sufficiency' with the receipt of 'public benefits'" and that Congress intended "public charge" to mean "individuals who rely on taxpayer-

funded benefits to meet their basic needs." Appellants' Br. at 30-31. We are thoroughly unpersuaded by this argument. PRWORA implemented Congress's goal of self-sufficiency by *restricting* non-citizen eligibility for benefits, including the establishment of the five-year waiting period for LPRs. PRWORA did not *eliminate* non-citizen eligibility for benefits nor does it suggest that such drastic action is necessary. Still less does it indicate any congressional intention that non-citizens who receive the benefits for which Congress did *not* render them ineligible risk being considered "public charges." On the contrary, the policy statements specifically proclaim that the new eligibility restrictions sufficiently "*achiev[ed]* the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy." *Id.* § 1601(7) (emphasis added). Clearly, Congress decided that the benefits it preserved for non-citizens after PRWORA did not interfere with its interest in assuring non-citizen self-sufficiency. Rather than supporting DHS's expanded interpretation, both the policy statements, taken as a whole, and the actual implementation of those policy goals in the substantive provisions of PRWORA, are in considerable tension with the Rule's new interpretation of "public charge," which penalizes

non-citizens for the possibility that they will access the very benefits PRWORA preserved for them.[31]

DHS attempts to salvage this argument by pointing out that the 1999 Guidance made various cash benefits relevant to the public charge analysis, notwithstanding that PRWORA also preserved non-citizen eligibility for those benefits. DHS argues that this shows that Congress did not intend to preclude the agency from considering the receipt of PRWORA-approved benefits in the public charge determination. DHS is correct that the 1999 Guidance makes "receipt of public cash assistance for income maintenance" one of two ways "primary dependence" on the government could be shown. 64 Fed. Reg. at 28,689. But the Guidance was also clear that receipt of such benefits alone was insufficient to establish dependency, and that any such receipt needed to be weighed in the context of the non-citizen's overall circumstances. The Guidance explicitly noted that "an alien receiving a small amount of cash for income

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[31] We note that in its decision on DHS's motion to stay the preliminary injunctions, the Ninth Circuit accepted DHS's argument on this point. *San Francisco*, 944 F.3d at 799. The Ninth Circuit based its analysis on the first two policy statements but did not consider the impact of the subsequent statements in which Congress explained that the PRWORA eligibility scheme satisfied its notions of self-sufficiency. *Id.*

maintenance purposes could be determined not likely to become a public charge due to other positive factors under the totality of the circumstances test." 64 Fed. Reg. at 28,690. While the 1999 Guidance permissibly looked at receipt of cash benefits as one *factor* indicating dependence on the government, the Rule elevates receipt of any quantity of a broad list of benefits to be the very *definition* of "public charge." *See* 84 Fed. Reg. at 41,295.

The question under consideration is whether the Rule's understanding of the term "public charge" goes beyond the bounds of the settled meaning of the term. The Plaintiffs do not argue, and we do not hold, that the receipt of various kinds of public benefits is irrelevant to the determination of whether a non-citizen is likely to become a public charge. But *defining* public charge to mean the receipt, even for a limited period, of any of a wide range of public benefits – particularly, as we discuss below, ones that are designed to supplement an individual's or family's efforts to support themselves, rather than to deal with their likely permanent inability to do so – is inconsistent with the traditional understanding of what it means to be a "public charge," which was well-established by 1996.

Finally, DHS points to three other statutory provisions to support its argument that the Rule is consistent with the intent of Congress. First, DHS points to 8 U.S.C. § 1182(s), which exempts from the public charge analysis "any benefits" received by a non-citizen who qualified for such benefits as a survivor of domestic violence. *See* 8 U.S.C. § 1641(c). DHS argues that because § 1182(s) excuses *any* benefits received, Congress understood that past receipt of even non-cash benefits would otherwise generally be relevant to a public charge determination. But 8 U.S.C. § 1182(s) was added in 2000, shortly after INS issued its 1999 Guidance in which it clarified that benefits like TANF and SSI would be relevant for the public charge determination. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1505(f), 114 Stat. 1464, 1526. Without § 1182(s), survivors of domestic violence could thus have had their receipt of cash benefits used against them. By far the most natural reading of § 1182(s) is that Congress was preventing domestic violence victims from being penalized under the then-existing framework. In any event, the statute concerns what is *relevant* to the determination, and gives no indication that Congress somehow understood that the receipt of the benefits covered by the 1999

Guidance, let alone a broader set of benefits, could categorically render non-citizens who were not domestic violence survivors "public charges." Once again, what is impermissible in DHS's interpretation is not that it renders receipt of supplemental non-cash benefits relevant to a non-citizen's classification as a public charge, but rather that it makes the receipt of such benefits determinative.

Second, DHS argues that the provisions requiring affidavits of support for family-based immigrants and allowing the government to seek reimbursement from the sponsor for any means-tested public benefit used by the non-citizen support its interpretation. DHS contends that these provisions show that Congress considered any non-citizen who might receive an unreimbursed public benefit in the future a likely public charge. *See* 8 U.S.C. §§ 1182(a)(4)(c)(ii), 1183a(b)(1)(A). We are not convinced that the affidavit reimbursement mechanism shows congressional intent to broaden the meaning of "public charge." For one thing, not all immigrants have to provide affidavits of support; the requirement is limited to family-based immigrants and we see no reason it should be taken to alter the underlying terms that apply to all non-citizens.[32] We

[32] The affidavit of support requirement is also applied to a small subset of employment-based immigrants, where the non-citizen's prospective employer is

also note that the statute includes a corollary, allowing the non-citizen herself to take the sponsor to court if the sponsor fails to support the non-citizen as promised. *See id.* § 1183a(a)(1)(B). The reimbursement provision thus serves primarily as a mechanism to get sponsors to take their commitments seriously by making them legally enforceable, a longstanding point of concern. *See* S. REP. NO. 81-1515, at 347 (Senate Judiciary Committee Report from 1950 critiquing the affidavit of support as an unenforceable document that "at most, appears to be merely a moral obligation upon the affiant").

Third and last, DHS looks to the 1986 Immigration Reform and Control Act ("IRCA") to support its claim that the Rule is consistent with congressional intent. IRCA established an ad hoc legalization program for undocumented immigrants. *See* 8 U.S.C. § 1255a. To qualify for legalization, applicants needed to prove that most of the grounds of inadmissibility did not apply to them, including the public charge ground. *See id.* § 1255a(a)(4), (d)(2). However, IRCA established a "special rule" with respect to the public charge inquiry, under which a non-citizen would not be deemed a likely public charge "if the alien

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a relative or an entity owned in large part by a relative. 8 U.S.C. § 1182(a)(4)(D).

demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance." *Id.* § 1255a(d)(2)(B)(iii). DHS argues that because the IRCA special rule specifically incorporates only cash assistance, the generic ground in § 1182(a)(4) must necessarily have a broader reach.

The implementing regulations of IRCA, however, suggest that, rather than refining the benefits relevant to the public charge inquiry, the special rule allowed a non-citizen who may otherwise be deemed a likely public charge because of his limited financial resources an additional manner of showing self-sufficiency. The relevant regulations provide that a non-citizen "who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level, may be admissible." 8 C.F.R. § 245a.2(k)(4). Accordingly, even if an applicant was "determined likely to become a public charge[,]" adjudicators were to find a non-citizen inadmissible on this ground only if he was "unable to overcome this determination after application of the special rule" and consideration of his employment history. *Id.* § 245a.2(d)(4). The BIA applied the IRCA special rule in

Matter of A-, reversing a public charge finding that put too much weight on the applicant's "financial circumstances" in the face of "the more important factors; namely, that the applicant has now joined the work force, . . . is young, and . . . has no physical or mental defects which might affect her earning capacity." 19 I. & N. Dec. at 870. In other words, the BIA read the IRCA special rule as fully consistent with the long-standing view that the ultimate issue in defining a "public charge" is the non-citizen's anticipated ability, over a protracted period, to be able to work to support himself or herself. IRCA and its implementing regulations thus show that Congress continued to emphasize capacity for work as a core element of the public charge ground.

All three of these statutory arguments share a common flaw. DHS attempts to justify a sweeping redefinition of "public charge" by pointing to tangential details within the extensive patchwork that makes up American immigration law – none of which express any intention by Congress to revise or depart from the settled meaning of the term "public charge." DHS's argument that these statutory provisions are "consistent" with its interpretation is of no relevance. The question is whether, by passing these statutes, Congress undertook to change the

long-established meaning of public charge. While the statutes to which DHS points may be "consistent" with the meaning DHS has assigned to public charge, they are no less consistent with the long established meaning of public charge that DHS seeks to overturn. These enactments do nothing to demonstrate that Congress changed the meaning of public charge. The arguments thus "run[ ] afoul of the usual rule that Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Epic Sys.*, 138 S. Ct. at 1626-27 (internal quotation marks omitted).

We conclude that the Plaintiffs have demonstrated a likelihood of success on the merits of their argument that the Rule is contrary to the INA. In reenacting the public charge ground in 1996, Congress endorsed the settled administrative and judicial interpretation of that ground as requiring a holistic examination of a non-citizen's self-sufficiency focused on ability to work and eschewing any idea that simply receiving welfare benefits made one a public charge. The Rule makes receipt of a broad range of public benefits on even a short-term basis the very

definition of "public charge." That exceedingly broad definition is not in accordance with the law. *See* 5 U.S.C. § 706(2)(A).

C. The Rule is Arbitrary and Capricious.

We next consider whether the Plaintiffs are likely to succeed on the merits of their argument that the Rule is arbitrary and capricious. *See id*. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43. But "[t]his is not to suggest that judicial review of agency action is merely perfunctory. To the contrary, within the prescribed narrow sphere, judicial inquiry must be searching and careful." *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 151 (2d Cir. 2008) (internal quotation marks omitted).

"When an administrative agency sets policy, it must provide a reasoned explanation for its action. This is not a high bar, but it is an unwavering one." *Judulang v. Holder*, 565 U.S. 42, 45 (2011). The Plaintiffs argue that the Rule is arbitrary and capricious because DHS has not provided a reasoned explanation for its changed definition of "public charge" or the Rule's expanded list of

relevant benefits. DHS contends that it has adequately explained its action, stating that it adopted its new public charge definition to "improve upon" the 1999 Guidance by "aligning public charge policy with the self-sufficiency principles set forth in [PRWORA]." 83 Fed. Reg. at 51,123; *see also* 84 Fed. Reg. at 41,319-20. DHS further explains that it expanded the list of relevant benefits because the 1999 Guidance relied on an "artificial distinction between cash and non-cash benefits" that is not warranted under DHS's new definition. 83 Fed. Reg. at 51,123; *see* 64 Fed. Reg. at 28,689. For the reasons laid out below, we agree with the district court that the Plaintiffs are likely to succeed on the merits of their claim that the Rule is arbitrary and capricious because neither rationale is a "satisfactory explanation" for DHS's actions.[33] *State Farm*, 463 U.S. at 43.

1. Explanation for Changed Definition

DHS justifies its revised definition of "public charge" – one who uses a relevant public benefit for more than twelve months in the aggregate – as a "superior interpretation of the statute to the 1999 Interim Field Guidance"

[33] Because we find the Plaintiffs likely to succeed on this basis, we do not address the Plaintiffs' additional contentions that we could find the Rule arbitrary and capricious based on its aggregation principle, selection of factors indicative of future benefits use, or cost-benefit analysis.

because it "furthers congressional intent behind both the public charge inadmissibility statute and PRWORA in ensuring that aliens . . . be self-sufficient and not reliant on public resources." 84 Fed. Reg. at 41,319. "In fact, DHS believes it would be contrary to congressional intent to promulgate regulations that . . . ignore the[] receipt" of the benefits listed in the Rule "as this would be contrary to Congress's intent in ensuring that aliens within the United States are self-sufficient." *Id.* at 41,318 (citing the PRWORA policy statements at 8 U.S.C. § 1601(2)(A)); *see, e.g.*, *id.* at 41,295, 41,305, 41,308. In short, DHS justifies its changed interpretation as necessary to implement Congress's view that "the receipt of any public benefits, including noncash benefits, [is] indicative of a lack of self-sufficiency." Appellants' Br. at 43.

This explanation fails for the same reasons as DHS's related argument that the PRWORA policy statements show that the Rule is consistent with Congress's intended meaning of "public charge." *See supra* Section II.B.6. As we discussed above, the PRWORA policy statements do show a congressional interest in ensuring non-citizen self-sufficiency. *See* 8 U.S.C. § 1601(1), (2). But the statements also show that, contrary to DHS's belief, Congress's vision of self-

sufficiency does *not* anticipate abstention from all benefits use. *See Cook Cty.*, 962 F.3d at 232 (rejecting DHS's "absolutist sense of self-sufficiency that no person in a modern society could satisfy"). Rather, Congress realized its notion of self-sufficiency with a new benefits eligibility scheme that greatly reduced – but did not eliminate – non-citizen eligibility for public benefits. *See* 8 U.S.C. § 1601(7) (describing the PRWORA eligibility scheme as "achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy"). "The Supreme Court and [other] court[s] have consistently reminded agencies that they are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *Gresham v. Azar*, 950 F.3d 93, 101 (D.C. Cir. 2020) (internal quotation marks omitted).

Had Congress thought that any benefits use was incompatible with self-sufficiency, it could have said so, either by making non-citizens ineligible for all such benefits or by making those who did receive them inadmissible. But it did not. We are thus left with an agency justification that is unmoored from the nuanced views of Congress. *See Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 85-

86 (2d Cir. 2006) (finding agency failed to provide reasoned explanation as to "how adoption of a *per se* coverage standard comports with congressional purposes in enacting the Medicare Act," which prioritized individualized care determinations). As the Supreme Court has explained,

> no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (emphasis omitted).

DHS's misconception of the PRWORA policy statements and Congress's intended notion of self-sufficiency is its principal justification for its revised definition; it identifies no other "deficienc[y]" in the 1999 Guidance, apart from its limited list of relevant benefits, discussed below. *See* 84 Fed. Reg. at 41,319; *see also id.* at 41,349 (describing the Guidance's interpretation as "suboptimal when considered in relation to the goals of the INA and PRWORA").

To be sure, we do not suggest that DHS must, as a general matter, show that the Guidance was deficient or that the Rule is necessarily a better interpretation than the prior policy reflected in the Guidance to avoid being

found arbitrary and capricious. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (clarifying that agencies are not required to show "that the reasons for the new policy are *better* than the reasons for the old one"). Nor do we suggest that, when an agency offers a statutory interpretation as part of its reason for adopting a policy, and a reviewing court later rejects the agency's statutory interpretation, that the policy is per se arbitrary and capricious. But where, as here, DHS anchors its decision to change its interpretation in the perceived shortcomings of the prior interpretation, and then fails to identify any actual defect, it has not provided a "reasoned explanation" for its actions – particularly when it bases its changed position on its reading of a statute, and it is the new Rule, rather than the old Guidance, that strays from congressional intent. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

2. Explanation for Expanded List of Benefits

This brings us to DHS's rationale for expanding the list of benefits relevant to the public charge determination. DHS explains that it included a broader group of benefits in the Rule because the distinction made in the 1999 Guidance between cash and non-cash benefits was no longer appropriate in light of the

more restrictive notions of self-sufficiency DHS enacted with the changed definition. *See* 84 Fed. Reg. at 41,356; *see also id*. at 41,349, 41,351, 41,375; 83 Fed. Reg. at 51,123. Though this explanation is in some ways subsidiary to DHS's explanation for the changed definition, DHS argues this as an additional justification and we thus address its additional shortcomings. *See* Appellants' Br. at 43.

In the 1999 Guidance, INS explained that "[a]fter extensive consultation with benefit-granting agencies" it "determined that the best evidence of whether an alien is primarily dependent on the government for subsistence is . . . the receipt of public cash assistance for income maintenance." 64 Fed. Reg. at 28,692; *see* 83 Fed. Reg. 51,133. The Guidance consequently excluded non-cash benefits (e.g., SNAP, housing assistance, and Medicaid) from consideration because those benefits were "increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition." 64 Fed. Reg. at 28,692. In other words, "participation in [those] programs [was] not evidence of poverty or dependence" because they are "by their nature supplemental and do not, alone or in

combination, provide sufficient resources to support an individual or family." *Id.*; *see id.* at 28,678.

In justifying its decision to include these non-cash benefits in the Rule, DHS explains that they are relevant to its revamped public charge definition because they "bear directly on self-sufficiency." 84 Fed. Reg. at 41,366. DHS reasons that because "[f]ood, shelter, and necessary medical treatment are basic necessities of life[, a] person who needs the public's assistance to provide for these basic necessities is not self-sufficient." 83 Fed. Reg. at 51,159. Thus, the Rule includes these benefits as relevant to the public charge determination to ensure that all benefits bearing on self-sufficiency are considered. *Id.*; *see* 84 Fed. Reg. at 41,356.

The fundamental flaw of this justification is that while DHS repeatedly contends that the non-citizens using these programs would be unable to provide for their basic necessities without governmental support, it does not provide *any* factual basis for this belief. *See, e.g.*, 83 Fed. Reg. at 51,159; 84 Fed. Reg. at 41,354, 41,366, 41,375, 41,381, 41,389. While the 1999 Guidance was developed in consultation with the benefits-granting agencies, DHS does not claim that their

expertise again informed its decision that people who use non-cash benefits would be otherwise unable to meet their basic needs.[34] Of course, DHS is free to change its interpretation and we do not suggest it is under any obligation to consult with its sister agencies in so doing. But what DHS may not do is rest its changed interpretation on unsupported speculation, particularly when its categorical assumptions run counter to the realities of the non-cash benefits at issue. The goals and eligibility criteria of these benefits programs belie DHS's assumption and show that these programs are designed to provide supplemental support, rather than subsistence, to a broad swath of the population – as INS recognized in 1999.

Take, for example, SNAP – the *Supplemental* Nutrition Assistance Program – which was born of a desire to "raise levels of nutrition among low-income households." Food Stamp Act of 1964, Pub. L. No. 88-525, § 2, 78 Stat. 703, 703. SNAP benefits are intended for all those whose "financial resources . . . are determined to be a substantial limiting factor in permitting them to obtain a *more nutritious* diet." Food and Agriculture Act of 1977, Pub. L. No. 95-113, § 1301, 91

[34] In response to a comment directly asking whether any such consultation took place, DHS invoked the deliberative process privilege. 84 Fed. Reg. at 41,460.

Stat. 913, 962 (emphasis added); *see* 7 C.F.R. § 273.9(a). Because SNAP is not intended only for those who might otherwise face starvation, the program is open to households with incomes exceeding the federal poverty guideline, 7 C.F.R. § 273.9(a)(1), and its supplemental nature is underscored by the fact that the average SNAP recipient receives only $127 a month in benefits, *see* House of Representatives Amicus Br. at 19 (citing 2018 statistics). Large numbers of SNAP recipients, far from being incapable of productive employment, work for some of America's largest corporations.[35]

The housing benefits included in the Rule have a similar aim, intended to ensure "a decent home and a suitable living environment for all persons, but principally those of low *and moderate* income." Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 101(c)(3), 88 Stat. 633, 634 (emphasis added). Indeed, while the majority of those using housing programs are low-income families, benefits remain available to those earning up to 80% of

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[35] *See* Public Justice Center Amicus Br. at 12 (citing Senate report concluding that SNAP beneficiaries are "'far more' likely to be employed than to rely on cash assistance" (quoting S. Rep. No. 11-220, at 8 (2007)); *see also* Dennis Green, *Data From States Shows Thousands of Amazon Employees Are on Food Stamps*, BUSINESS INSIDER (Aug. 25, 2018) (discussing SNAP usage by Amazon, Walmart, and McDonald's employees).

the area median income – $85,350 for a family of four in New York City in 2019. M.T.R. J. App. 164; *see* 42 U.S.C. § 1437a(b)(2)(A). It makes little sense to treat the mere receipt of housing benefits as proof of inability to survive by one's own efforts when the program is intended for, among others, people who can and do earn moderate incomes. In contrast, TANF – one of the three benefits listed in the 1999 Guidance – is generally only available to families with incomes well below the federal poverty guideline.[36]

While the Rule declares non-citizens dependent for using Medicaid instead of private health insurance, it cannot be ignored that in this country, access to private healthcare depends for many people on whether an employer offers coverage. *See* National Housing Law Project Amicus Br. at 22 (noting that roughly 40% of employed Medicaid beneficiaries work for small businesses, many of which are not legally required to provide health insurance). Considering that

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[36] The TANF earnings thresholds for new applicants vary by state and range from approximately 16% of FPG in Alabama to 91% of FPG in Nevada. *See* CONG. RESEARCH SERV., TANF: ELIGIBILITY AND BENEFIT AMOUNTS IN STATE TANF CASH ASSISTANCE PROGRAMS at 3 (2014). In the majority of states, however, TANF was only available to those earning less than 50% of FPG, which means an annual income of less than $13,100 for a family of four in 2020. *Id.*; *see* Annual Update of the HHS Poverty Guidelines, 85 Fed. Reg. 3,060, 30,060 (Jan. 17, 2020).

access to insurance is often determined by factors beyond an individual's control, we are dubious of DHS's unsupported claim that using public health insurance shows a lack of self-sufficiency.[37] To the contrary, studies show that more than 60% of Medicaid beneficiaries who are not children, older adults, or people with disabilities are *employed*. *See* Public Justice Center Amicus Br. at 20 (citing RACHEL GARFIELD ET AL., KAISER FAMILY FOUND., UNDERSTANDING THE INTERSECTION OF MEDICAID AND WORK: WHAT DOES THE DATA SAY? 2 (2019)). To be sure, it is easier for individuals to purchase private coverage in the wake of the Affordable Care Act ("ACA"), but the Rule implies that even using ACA tax credits to purchase

[37] DHS also suggests that Medicaid is included because "the total Federal expenditure for the Medicaid program overall is by far larger than any other program for low-income people," 84 Fed. Reg. at 41,379, which DHS takes as evidence that it is "a more significant form of public support" for individuals than other benefits, Appellants' Br. at 43; *see* 83 Fed. Reg. at 51,160. We are not persuaded that the difference in dollars expended is an appropriate indicator of a non-citizen's level of self-sufficiency; rather, it seems plain to us that the difference is due to the high cost of providing healthcare in the United States. *Cf. Public Citizen, Inc. v. Mineta*, 340 F.3d 39, 58 (2d Cir. 2003) ("The notion that 'cheapest is best' is contrary to *State Farm*."). The size of the government expenditure on Medicaid may be relevant to a policy debate about the costs and benefits of the program, but it has little bearing on whether Medicaid recipients should be considered "public charges."

health insurance evidences an inability to meet one's needs without government support. 84 Fed. Reg. at 41,299.

Of course, SNAP and housing benefits may very well be all that stands between some non-citizens and hunger or homelessness. Some families *may* actually fail to meet these basic needs without government support. But these programs sweep more broadly than just families on the margin, encompassing those who would no doubt keep their families fed and housed without government support but are able to do so in a healthier and safer way because they receive supplemental assistance. *See Cook Cty.*, 962 F.3d at 232 (noting that the benefits covered by the Rule "are largely supplemental" and that "[m]any recipients could get by without them" (emphasis omitted)). Accepting help that is offered to elevate one to a higher standard of living, *help that was created by Congress for that precise purpose*, does not mean a person is not self-sufficient – particularly when such programs are available not just to persons living in abject poverty but to a broad swath of low- and moderate-income Americans, including those who are productively employed. DHS goes too far in assuming that all those who participate in non-cash benefits programs would be otherwise unable

to meet their needs and that they can thus be categorically considered "public charges." Its unsupported and conclusory claim that receipt of such benefits indicates an inability to support oneself does not satisfy DHS's obligation to explain its actions. *See Gen. Chem. Corp. v. United States*, 817 F.2d 844, 855 (D.C. Cir. 1987) (rejecting agency's "conclusory" explanation and noting that "[s]uch intuitional forms of decisionmaking . . . fall somewhere on the distant side of arbitrary" (internal quotation marks omitted)); *see also State Farm*, 463 U.S. at 51.

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. When an agency changes its existing position, it need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. But the agency must at least . . . show that there are good reasons for the new policy." *Encino Motorcars,* 136 S. Ct. at 2125-26 (internal quotation marks and citations omitted). DHS has failed to do so here. Accordingly, the Plaintiffs have shown they are likely to succeed on the merits of their claim that DHS's failure to provide a reasoned explanation renders the Rule arbitrary and capricious.

III. Irreparable Harm to the Plaintiffs

The second preliminary injunction factor under *Winter* requires the Plaintiffs to show they are likely to suffer irreparable harm in the absence of injunctive relief. 555 U.S. at 20. "Irreparable harm is injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages." *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 660 (2d Cir. 2015) (internal quotation marks omitted). We have already discussed the Plaintiffs' claimed injuries in evaluating their standing to challenge the Rule and both the States and Organizations point to largely similar harms to establish this injunctive factor. *See League of Women Voters of the United States v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (looking to same injuries to establish standing and irreparable harm).

The States contend that the implementation of the Rule will result in reduced Medicaid revenue and federal funding and a greater number of uninsured patients seeking care, putting public hospitals that are already insufficiently funded at risk of closure. *See, e.g.*, N.Y. J. App. 512-13. Additionally, as the administrators of the benefits programs at issue, the States allege that they will be required to undertake costly revisions to their eligibility systems to ensure

that non-citizens are not automatically made eligible for or enrolled in benefits they may no longer wish to receive after the Rule's implementation. *See, e.g.*, N.Y. J. App. 236, 381-82. The Organizations point to the economic harms of expending funds to mitigate the impact of the Rule on the communities they serve. *See, e.g.*, M.T.R. J. App. 466-67. As noted, DHS predicted that the Rule would have economic harms, and the Rule has already had a chilling effect on non-citizen use of public benefits. See *supra* Section I.A. These injuries claimed by the States and the Organizations are actual and imminent. Moreover, because money damages are prohibited in APA actions, they are irreparable. *See* 5 U.S.C. § 702; *Ward v. Brown*, 22 F.3d 516, 520 (2d Cir. 1994). We thus conclude that the Plaintiffs have established the second factor of the preliminary injunction standard.[38]

IV. Balance of Equities and the Public Interest

The final inquiry in our preliminary injunction analysis requires us to consider whether the balance of equities tips in favor of granting the injunction

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[38] We note that our precedents suggest that the Plaintiffs may be able to show that a preliminary injunction is warranted on the strength of these first two factors alone. *See Trump v. Deutsche Bank AG*, 943 F.3d 627, 636, 640-41 (2d Cir. 2019), *rev'd on other grounds*, – U.S. – 2020 WL 3848061 (July 9, 2020). Notwithstanding this possibility, we consider the balance of equities and the public interest, as discussed in *Winter*.

and whether that injunction is in the public interest, the third and fourth *Winter* factors. *Winter*, 555 U.S. at 20; *Azar*, 911 F.3d at 575 (considering the final two factors together where the government is a party). DHS argues that it would be harmed by a preliminary injunction because an injunction would force the agency to retain its prior policy, which grants status to some non-citizens that DHS believes should be denied under a proper interpretation of the public charge ground. Because there is no apparent means by which DHS could revisit adjustment determinations made while the Rule is enjoined, this harm is irreparable.

While DHS has a valid interest in applying its preferred immigration policy, we think the balance of equities clearly tips in favor of the Plaintiffs. For one, DHS's claimed harm is, to some extent, inevitable in the preliminary injunction context. Any time the government is subject to a preliminary injunction, it necessarily suffers the injury of being prevented from enacting its preferred policy. Without additional considerations at play – for example, national security implications, *Winter*, 555 U.S. at 26, or the need to correct a previous policy that had been deemed unlawful – we do not think DHS's

inability to implement a standard that is as strict as it would like outweighs the wide-ranging economic harms that await the States and Organizations upon the implementation of the Rule.

The public interest also favors a preliminary injunction. DHS itself acknowledges that the Rule will likely result in "[w]orse health outcomes, including increased prevalence of obesity and malnutrition, . . . [i]ncreased prevalence of communicable diseases, . . . [i]ncreased rates of poverty and housing instability[,] and [r]educed productivity and educational attainment." 83 Fed. Reg. at 51,270. To say the least, the public interest does not favor the immediate implementation of the Rule.

Thus, the Plaintiffs have met their burden of showing that a preliminary injunction is warranted in these cases. Accordingly, we affirm the district court orders granting such relief in these cases.

V. Scope of Injunction

While we hold that the district court properly granted the Plaintiffs' preliminary injunction motions, there remains one final issue for our consideration: whether the district court abused its discretion by entering a nationwide injunction, rather than a geographically limited measure. DHS argues

that a national injunction is insufficiently tailored to the Plaintiffs' particular injuries and allows the decision of a single district court to override contrary decisions of other courts, an outcome not warranted by the need for uniform application of immigration law. The Plaintiffs respond that the scope of relief is determined by the extent of the violation and that the APA authorizes the broad relief issued here.

The issuance of nationwide injunctions has been the subject of increasing scrutiny in recent years, a topic that has already touched these cases on their brief foray to the Supreme Court. *See New York*, 140 S. Ct. at 599-601 (Gorsuch, J., concurring in the grant of stay); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2424-29 (2018) (Thomas, J., concurring). The difficult questions implicated in this debate are evidenced by the fact that both DHS and the Plaintiffs marshal persuasive points to support their arguments. As the Plaintiffs point out, courts have long held that when an agency action is found unlawful under the APA, "the ordinary result is that the rules are vacated – not that their application to the individual petitioners is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (internal quotation marks omitted). This aligns

with the general principle that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Moreover, courts have recognized that nationwide injunctions may be particularly appropriate in the immigration context, given the interest in a uniform immigration policy. *See Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015); *see also Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), *rev'd on other grounds,* 138 S. Ct. 2392 (2018).

On the other hand, we share DHS's concern that a district judge issuing a nationwide injunction may in effect override contrary decisions from co-equal and appellate courts, imposing its view of the law within the geographic jurisdiction of courts that have reached contrary conclusions. That result may well be more unseemly than the application of inconsistent interpretations of immigration law across the circuits – a situation that is hardly unusual, and may well persist without injustice or intolerable disruption. *See, e.g.*, *Orellana-Monson v. Holder*, 685 F.3d 511, 520 (5th Cir. 2012) (discussing circuit variance in a substantive asylum standard).

We have no doubt that the law, as it stands today, permits district courts to enter nationwide injunctions, and agree that such injunctions may be an appropriate remedy in certain circumstances – for example, where only a single case challenges the action or where multiple courts have spoken unanimously on the issue. The issuance of unqualified nationwide injunctions is a less desirable practice where, as here, numerous challenges to the same agency action are being litigated simultaneously in district and circuit courts across the country. It is not clear to us that, where contrary views could be or have been taken by courts of parallel or superior authority, entitled to determine the law within their own geographical jurisdictions, the court that imposes the most sweeping injunction should control the nationwide legal landscape.

When confronted with such a volatile litigation landscape, we encourage district courts to consider crafting preliminary injunctions that anticipate the possibility of conflict with other courts and provide for such a contingency. Such approaches could take the form of limiting language providing that the injunction would not supersede contrary rulings of other courts, an invitation to the parties to return and request modification as the situation changes, or the limitation of

the injunction to the situation of particular plaintiffs or to similarly situated persons within the geographic jurisdiction of the court.

We need not decide whether the able district judge in these cases abused his discretion in entering nationwide injunctions. Instead, we exercise our own discretion, in light of the divergent decisions that have emerged in our sister circuits since the district court entered its orders, to modify the injunction, limiting it to the states of New York, Connecticut, and Vermont. *Cf. Smith v. Woosley*, 399 F.3d 428, 436 (2d Cir. 2005). As modified, the injunction covers the State plaintiffs and the vast majority of the Organizations' operations. We see no need for a broader injunction at this point, particularly in light of the somewhat unusual posture of this case, namely that the preliminary injunction has already been stayed by the Supreme Court, not only through our disposition of the case, but also through the disposition of DHS's petition for a writ of certiorari, should DHS seek review of this decision. *See New York*, 140 S. Ct. at 599.

CONCLUSION

For the reasons stated above, we agree with the district court that a preliminary injunction is warranted in these cases but modify the scope of the

injunctions to cover only the states of New York, Connecticut, and Vermont. The orders of the district court are therefore **AFFIRMED AS MODIFIED**.

Appendix A

Amici Curiae in *New York v. DHS* and *Make the Road v. Cuccinelli*

Maureen P. Alger, Priyamvada Arora, Cooley LLP, Palo Alto, CA, *for Amici Curiae* American Academy of Pediatrics, American Medical Association, American College of Physicians, American College of Obstetricians and Gynecologists, New York State American Academy of Pediatrics, American Academy of Pediatrics – Vermont Chapter, and Medical Society of the State of New York, *in support of Plaintiffs-Appellees*.

Emily Tomoko Kuwahara, Crowell & Moring LLP, Los Angeles, CA, Austin Sutta, Crowell & Moring LLP, San Francisco, CA, *for Amici Curiae* Asian Americans Advancing Justice | AAJC, Asian American Legal Defense and Education Fund, National Women's Law Center, and 40 Other Organizations, *in support of Plaintiffs-Appellees.*

Hillary Schneller, Center for Reproductive Rights, New York, NY, *for Amicus Curiae* Center for Reproductive Rights, *in support of Plaintiffs-Appellees.*

Elizabeth B. Wydra, Brianne J. Gorod, Dayna J. Zolle, Constitutional Accountability Center, Washington, DC, *for Amici Curiae* Immigration History Scholars, *in support of Plaintiffs-Appellees*.

Johanna Dennehy, Steptoe & Johnson LLP, Washington, DC, *for Amici Curiae* Immigration Law Professors, *in support of Plaintiffs-Appellees*.

Richard L. Revesz, Jack Lienke, Max Sarinsky, Institute for Policy Integrity at New York University School of Law, New York, NY, *for Amicus Curiae* Institute for Policy Integrity at New York University School of Law, *in support of Plaintiffs-Appellees*.

Russell L. Hirschhorn, Proskauer Rose LLP, New York, NY, *for Amici Curiae* Justice in Aging, American Society on Aging, Caring Across Generations, Jewish Family Service of Los Angeles, Jewish Federations of North America, National Asian Pacific Center on Aging, National Council on Aging, National Hispanic Council on Aging, MAZON, PHI, and Center for Medicare Advocacy, *in support of Plaintiffs-Appellees*.

Nilda Isidro, Goodwin Procter LLP, New York, NY, *for Amici Curiae* Members of Congressional Black Caucus, Congressional Hispanic Caucus, and Congressional Asian Pacific American Caucus, *in support of Plaintiffs-Appellees*.

Stuart Rossman, National Consumer Law Center, Boston, MA, *for Amici Curiae* National Consumer Law Center, Legal Aid Justice Center, Public Citizen, Inc., Consumer Action, Equal Justice Society, Impact Fund, Secure Justice, Media Alliance, Americans for Financial Reform Education Fund, and New Economy Project, *in support of Plaintiffs-Appellees*.

Paul J. Lawrence, Alanna E. Peterson, Pacifica Law Group LLP, Seattle, WA, *for Amici Curiae* Nonprofit Anti-Domestic Violence and Sexual Assault Organizations, *in support of Plaintiffs-Appellees*.

Debra Gardner, Public Justice Center, Baltimore, MD, *for Amicus Curiae* Public Justice Center, *in support of Plaintiffs-Appellees*.

Paul W. Hughes, Michael B. Kimberly, Matthew A. Waring, McDermott Will & Emery LLP, Washington, DC, *for Amici Curiae* 105 Businesses and Organizations, *in support of Plaintiffs-Appellees*.

Amici Curiae in *New York v. DHS*

Sarah M. Ray, Kyle A. Virgien, Diana A. Aguilar, Charles F. Sprague, Latham & Watkins LLP, San Francisco, CA, Tyce R. Walters, Latham & Watkins LLP, Washington, DC, *for Amici Curiae* American Civil Liberties Union, Center for Public Representation, American Association of People with Disabilities, Association of University Centers on Disabilities, Autistic Self Advocacy Network, Civil Rights Education and Enforcement Center, Coelho Center for Disability Law, Policy, and Innovation, Disability Rights Advocates, Disability Rights Education and Defense Fund, Disability Rights New York, Judge David L. Bazelon Center for Mental Health Law, Little Lobbyists, Mental Health America, National Association of Councils on Developmental Disabilities, National Council on Independent Living, National Disability Rights Network, National Federation of the Blind, New York Civil Liberties Union, The Arc of the United States, and United Spinal Association, *in support of Plaintiffs-Appellees*.

Lisa C. Wood, Kristyn DeFilipp, Andrew London, Emily Nash, E. Jacqueline Chávez, Foley Hoag LLP, Boston, MA, Justin Lowe, Wendy Parmet, Health Law Advocates, Inc., Boston, MA, *for Amici Curiae* Health Law Advocates, Inc. and Other Organizations Interested in Public Health, *in support of Plaintiffs-Appellees*.

R. Adam Lauridsen, Chessie Thacher, Victor H. Yu, Nicholas R. Green, Keker, Van Nest & Peters LLP, San Francisco, CA, *for Amici Curiae* National Housing Law Project, Food Research & Action Center, Center for Law & Social Policy, National Education Association, Service Employees International Union, California League of United Latin American Citizens, California Food Policy Advocates, Center for the Study of Social Policy, Children's HealthWatch, Comunidades Unidas/Communities United, First Focus on Children, Los Angeles Regional Food Bank, Mississippi Center for Justice, National WIC Association, National Low Income Housing Coalition, Prevention Institute, Sant La Haitian Neighborhood Center, South Carolina Appleseed Legal Justice

Center, Virginia Poverty Law Center, *in support of Plaintiffs-Appellees*.

Matthew S. Freedus, Edward T. Waters, Phillip A. Escoriaza, Amanda N. Pervine, Feldesman Tucker Leifer Fidell LLP, Washington, DC, *for Amici Curiae* Public Health, Health Policy, Medicine, and Nursing Deans, Chairs, and Scholars, American Public Health Association, American Academy of Nursing, and Public Health Solutions, *in support of Plaintiffs-Appellees*.

Danielle L. Goldstein, Michael Dundas, Office of the Los Angeles City Attorney, Barbara J. Parker, Erin Bernstein, Office of the Oakland City Attorney, Margaret L. Carter, Daniel R. Suvor, O'Melveny & Myers LLP, Los Angeles, CA, Vince Ryan, Robert Hazeltine-Shedd, Harris County, TX, Donna R. Ziegler, Alameda County, CA, Esteban A. Aguilar, Jr., City of Albuquerque, NM, Anne L. Morgan, City of Austin, TX, Andre M. Davis, City of Baltimore, MD, Mark A. Flessner, Benna Ruth Solomon, City of Chicago, IL, Christopher J. Caso, City of Dallas, TX, Kristin M. Bronson, City and County of Denver, CO, Lawrence Garcia, Eli Savit, City of Detroit, MI, Rodney Pol, Jr., City of Gary, IN, Crystal Barnes, City of Holyoke, MA, Ronald C. Lewis, Judith L. Ramsey, Collyn Peddie, City of Houston, TX, Howard Phillip Schneiderman, King County, WA, Michael P. May, City of Madison, WI, Brian E. Washington, Marin County, CA, Erik Nilsson, City of Minneapolis, MN, Leslie J. Girard, William M. Litt, Anne K. Brereton, Marina S. Pantchenko, Monterey County, CA, Kathryn E. Doi, Rachael E. Blucher, Natalie M. Smith, Hanson Bridgett LLP, Sacramento, CA, Susana Alcala Wood, City of Sacramento, CA, John C. Beiers, David A. Silberman, Ilana Parmer Mandelbaum, San Mateo County, CA, Peter S. Holmes, City of Seattle, WA, Francis X. Wright, Jr., City of Somerville, MA, Michael Rankin, City of Tucson, AZ, Michael Jenkins, City of West Hollywood, CA, *for Amici Curiae* 26 Cities and Counties, *in support of Plaintiffs-Appellees*.

Amici Curiae in *Make the Road v. Cuccinelli*

Sadik Huseny, Brittany N. Lovejoy, Joseph C. Hansen, Tess L. Curet, Alexandra B. Plutshack, Latham & Watkins LLP, San Francisco, CA, *for Amici Curiae* Fiscal Policy Institute, Presidents' Alliance on Higher Education and Immigration, National Center for Law and Economic Justice, American Federation of State, County and Municipal Employees, California Immigrant Policy Center, Child Care Law Center, Colorado Fiscal Institute, Community Action Marin, Kids Forward, Michigan Immigrant Rights Center, Oasis Legal Services, Economic Progress Institute, United African Organization, and Virginia Interfaith Center for Public Policy, *in support of Plaintiffs-Appellees.*

Lawrence J. Joseph, Law Office of Lawrence J. Joseph, Washington, DC, *for Amicus Curiae* Immigration Reform Law Institute, *in support of Defendants-Appellants.*