UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Cook County, Illinois; Illinois Coalition for Immigrant and Refugee Rights, Inc.,

Plaintiffs,

v.

Chad F. Wolf, in his official capacity as Acting Secretary of U.S. Department of Homeland Security; et al.

Defendants.

Case No. 19-cv-6334

DEFENDANTS' RESPONSE TO PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs move for summary judgment, asking the Court to vacate the Department of Homeland Security ("DHS") Rule *Inadmissibility on Public Charge Grounds*[1] ("Rule") based on the Seventh Circuit's recent decision concluding that the Rule is likely unlawful under the Administrative Procedure Act ("APA"). Defendants do not dispute that the Seventh Circuit's legal conclusions concerning the Rule may justify summary judgment for Plaintiffs on their APA claims here. For the sake of preservation for appeal, Defendants will reiterate their jurisdictional challenges and their arguments on the merits.

LEGAL STANDARD

"Summary judgment shall be rendered if on the record 'there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law.'" *Shintom Am., Inc. v. Car Telephones, Inc.*, 45 F.3d 1107, 1109 (7th Cir. 1995) (quoting F.R.C.P. 56(c)). "The party moving for summary judgment must affirmatively demonstrate the absence of a genuine issue of material fact." *Id.* The "moving party on the summary judgment motion" has "the obligation of setting forth the basic facts and law which, in their view, warrant[] summary judgment on [the relevant] claim[s]." *Carmichael v. Vill. of Palatine, Ill.*, 605 F.3d 451, 460 (7th Cir. 2010).

ARGUMENT

I. Plaintiffs lack standing to assert their APA claims, and otherwise fall outside of the relevant zone of interests.

Neither Plaintiff has established a cognizable, non-speculative injury sufficient for standing. "To seek injunctive relief, a plaintiff must show that [it] is under threat of suffering

[1] 84 Fed. Reg. 41292 (Aug. 14, 2019).

'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action . . . ; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The "threatened injury must be certainly impending to constitute injury in fact"; allegations of "possible future injury do not satisfy . . . Art. III." *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990). Where, as here, "the plaintiff is not [itself] the object of the government action," standing "is ordinarily 'substantially more difficult' to establish." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992).

Here, Cook County submits no evidence confirming that it is suffering, or will imminently suffer, an injury due to the Rule. Instead, Cook County *still* relies upon alleged probabilistic injuries caused by independent decisions of third parties not before the Court. Cook County claims that its health care system, CCH, will suffer an injury if aliens in Cook County were to forgo public benefits, relying more on uncompensated emergency health care from CCH. But this theory is too speculative to support standing. First, there is no indication that Cook County will "certainly" suffer a net increase in health expenditures. Cook County represented that it already provides "$500 million in uncompensated care each year."[2] Compl. for Declaratory and Inj. Relief ¶ 88, ECF No. 1 ("Compl."). Cook County's costs will thus fall to a certain degree as fewer aliens turn to it for uncompensated care. *See, e.g.*, Compl. ¶ 79 (immigrants "will fail to seek testing and treatment" due to the Rule). There is also no indication in the Complaint that any alleged cost increase to Cook County from emergency services will exceed what Cook County will save as a result of the Rule. Additionally, this alleged harm is also speculative since it is unclear whether a material number of aliens that use CCH in particular will necessarily forgo Medicaid benefits, and

[2] Cook County does not state in its Complaint that this figure is limited to emergency services.

equally unclear whether a material number of aliens will rely on uncompensated emergency care from CCH in particular. Indeed, Plaintiffs broadly allege that the Rule will create "tension between immigrant patients and CCH," Compl. ¶ 109, suggesting that immigrants will be deterred from using CCH in general. Even if Plaintiffs' injury allegations were sufficient at the motion to dismiss at the motion to dismiss stage, Plaintiffs must now come forward with concrete evidence. See *Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury . . . may suffice" but "[i]n response to a summary judgment motion . . . the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts.").

ICIRR likewise lacks standing. Generally, for an organization to have standing, the challenged conduct must "perceptibly impair[]" the "organization's *activities*," with a "consequent drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The alleged "drain on . . . resources" must have "a clear nexus to [a] legally-protected right or interest of the organization." *Keep Chicago Livable v. City of Chicago*, 913 F.3d 618, 625 (7th Cir. 2019). The challenged policy or conduct must "disrupt[]" plaintiffs' activities, and create "additional or new burdens" that make any new expenditure "warranted" and "require[d]." *Common Cause Indiana v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019). Additionally, a plaintiff "must point to a concrete and demonstrable injury to [its] activities; a mere setback to its abstract social interests is not sufficient." *H.O.P.E., Inc. v. Eden Mgmt. LLC*, 128 F. Supp. 3d 1066, 1077 (N.D. Ill. 2015).

ICIRR asserts that its mission is to "provide health and social services to immigrant Illinoisans," and that it channeled resources into creating a new organization—PIF-IL—to counteract the Rule's alleged effects. Compl. ¶¶ 110, 114. But ICIRR does not allege that the Rule will disrupt any of its current *activities*, thus requiring a diversion of resources into PIF-IL. ICIRR

alleges only that the Rule will produce effects inconsistent with ICIRR's ultimate social goals, and that it thus chose to commit resources to educating aliens about the new regulation.[3]

Plaintiffs' claims also fall outside the zone of interests of the "public charge" inadmissibility provision in § 1182(a)(4)(A). Plaintiffs must "establish that" their alleged injuries fall "within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis" for their claims (here, the INA's public charge provision). *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990). Plaintiffs do not fall within the zone of interests simply because they are "incidentally benefitted" by a narrower reading of the public charge provision. *Am. Fed'n of Gov't Employees, Local 2119 ("AFGE") v. Cohen*, 171 F.3d 460, 469 (7th Cir. 1999).

Neither Plaintiff satisfies this standard. First, Cook County's alleged injuries—a possible increase in uncompensated care provided by CCH—is too far attenuated from the public charge provision's zone of interests. The provision applies to aliens who may be denied a change or adjustment of status on public charge grounds. There is no indication that the provision "sought to . . . protect[]" localities from downstream effects of disenrollment from federal benefits, and thus "it cannot reasonably be inferred that Congress intended [for Plaintiffs'] suit[]." *AFGE*, 171 F.3d at 468-69. Second, there is likewise no indication that the public charge inadmissibility provision "sought to protect" ICIRR from its alleged injury (its choice to spend resources in response to the Rule). Indeed, the Seventh Circuit expressed doubt over whether ICIRR, at least, falls within the relevant zone of interests. *See Cook Cty., Illinois v. Wolf*, 962 F.3d 208, 221 (7th Cir. 2020) ("the

[3] As a separate matter, for ICIRR, investing money in educating immigrants is "business as usual." *Common Cause*, 937 F.3d at 955. "[A]n organization does not suffer an injury in fact where it expend[s] resources to educate its members and others unless doing so subjects the organization to operational costs beyond those normally expended." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920 (D.C. Cir. 2015).

link between [ICIRR's alleged] injuries and the purpose of the public-charge part of the statute is . . . attenuated"). Accordingly, Plaintiffs lack standing to assert their APA claims, and otherwise do not fall within the relevant zone of interests.

II. The Rule is Not Contrary to Law Under the APA.

A. The Seventh Circuit Correctly Ruled at *Chevron* Step One.

Although their motion for summary judgment is expressly premised on the Seventh Circuit's decision, Plaintiffs conveniently suggest that the Seventh Circuit erred at *Chevron* step one. It did not. The history recounted by the majority and dissent belies Plaintiffs' suggestion that "the meaning of 'public charge' has remained consistent and unambiguous since the term first entered the statutory lexicon in 1882." Mot. 10. *See Cook County*, 963 F.3d at 222-26; *id.* at 238-48 (Barrett, J., dissenting). The Ninth Circuit agreed, and the Fourth Circuit ruled for DHS at *Chevron* step one. *See City and Cty. of San Francisco v. USCIS*, 944 F.3d 773, 791-99 (9th Cir. 2019); *cf. CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 249-50 (4th Cir. 2020). To date, the Second Circuit is the only circuit court to accept Plaintiffs' argument and resolve the case against DHS at *Chevron* step one. *New York v. Dep't of Homeland Sec.*, 969 F.3d 42, 2020 U.S. App. LEXIS 24492, at *92-96 (2d. Cir. 2020).

B. The Seventh Circuit Erred in Ruling for Plaintiffs at *Chevron* Step Two.

The Seventh Circuit's holding that this case must be resolved at *Chevron* step two is significant. "Our review at this stage is deferential; we will uphold the agency's interpretation so long as it is 'a permissible construction of the statute.'" *Coyomani-Cielo v. Holder*, 758 F.3d 908, 914 (7th Cir. 2014) (quoting *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

1. The Rule Does Not Unreasonably Interpret the INA.

Plaintiffs advance five arguments as to why the Rule fails at *Chevron* Step Two. None of those arguments entitles Plaintiffs to summary judgment.

First, Plaintiffs argue that the Rule imposes a "de minimis" test and reflects an "extreme view" incompatible with the INA. Mot. 11-13. Defendants contest these characterizations, of course. The Rule's test is not *de minimis*; an applicant may only be found inadmissible if likely to receive more than 12 months of enumerated benefits in the aggregate within a 36-month period. Thus, there is no "violence [done] to the English language." Mot. 12 (quoting *Cook County*, 962 F.3d at 229). And the Rule's test can hardly be "extreme," since it comports with early definitions of "public charge," *see* MTD 18-20; since Congress enacted an Immigration Act after *Gegiow v. Uhl* specifically to dissociate "public charge" from "paupers" and "professional beggars," *id.* at 20-24; and since Congress more recently amended the INA such that the mere *possibility* that an alien might obtain *any* unreimbursed, means-tested public benefits in the future was sufficient to render that alien inadmissible on the public charge ground, regardless of the alien's other circumstances, *id.* at 16-17.

Second, Plaintiffs argue that the Rule impermissibly departs from the INA's totality-of-circumstances test. Mot. 13. But Plaintiffs mischaracterize the Rule, which does not "redefine[] the public charge test in terms of only benefits use." Mot. 13. *Compare* Rule 41298 (explaining that receipt of public benefits for more than 12 months within any 36-month period was but one "heavily weighted negative factor" in the totality of the circumstances) *with id.* at 41501 (mandating that individual public-charge inadmissibility determinations must be "based on the totality of the alien's [particular] circumstances"). DHS responded specifically to the argument that it was departing from a totality-of-circumstances approach. *E.g.*, *id.* at 41365-66. Plaintiffs are again eliding the distinction between the definition of "public charge" and the totality of

circumstances to be considered in forecasting whether one is likely at any time to meet that definition.

Third, Plaintiffs argue that "legislative history" shows the Rule to be unreasonable. Mot. 13-14. But the Immigration Control and Financial Responsibility Act ("ICFRA") cited by Plaintiffs never became law. "Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute," because "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160, 170 (2001). As a result, "several equally tenable inferences may be drawn from such inaction." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). The 2013 Senate Report—also connected to *failed* legislation—is likewise unavailing. Nor can strong inferences be drawn from Senator Kyl's lone statement. *Trump v. Hawaii*, 138 S. Ct. 2392, 2413 (2018) (citing *NLRB v. Sw. Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("This is a good example of why floor statements rank among the least illuminating forms of legislative history.") (citing *Milner v. Dep't of the Navy*, 563 U.S. 562, 572 (2011)). Ultimately, these assorted citations form nothing near a "legislative consensus." Mot. 14.

Fourth, Plaintiffs argue that there is no "natural limitation" to the Rule's definition of "public charge." Mot. 14-15. This is a red herring. The "zero-tolerance rule" feared by Plaintiffs and the Seventh Circuit simply does not exist, and is not under review here. Mot. 14. Rather, the Rule under review requires a demonstrable and significant receipt of public benefits before one an alien be deemed a "public charge."[4]

[4] Plaintiffs argue that counsel for DHS conceded, at oral argument before the Seventh Circuit, that it was "possible" to define "public charge" as one who consumes one benefit for one month. Mot. 14-15 n.9. Plaintiffs omit that their counsel was unable to answer "how long," in Plaintiffs' view, one would have to rely on public benefits before becoming a public charge, or what "primary" dependence meant. *See* Oral Arg. Audio 38:20-39:15. The fact that neither counsel

Fifth, Plaintiffs argue that the Rule is contrary to PRWORA's amendments to the INA. Mot. 15-19. They suggest that the Rule "reinvents immigrant self-sufficiency to mean near total abstention from public benefits." *Id.* at 15. But as Judge Barrett explained in dissent, it is Congress—through PRWORA—that made immigrants generally ineligible for the public benefits that the Rule considers. *See generally Cook County*, 962 F.3d at 235-36 (Barrett, J., dissenting) ("[F]ederal law is not particularly generous about extending public assistance to noncitizens. That is not a function of the public charge rule; it is a function of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), commonly referred to as the 'Welfare Reform Act.'"). And while Plaintiffs and the Seventh Circuit suggest that "Congress drew the balance" between benefits and self-sufficiency, Mot. 16 (quoting *Cook County*, 962 F.3d at 228), Congress has consistently and expressly left it to *the Executive* to determine who is likely at any time to become a public charge. 8 U.S.C. § 1182(a)(4)(A). As Plaintiffs acknowledge, PRWORA's provisions regarding the Affidavit of Support Under Section 213A of the INA allowed immigrants "who otherwise *would be excluded as a public charge*" to overcome the exclusion. Mot. 17 (quoting H.R. Rep. No. 104-725, at 387 (1996)) (emphasis added). That was Defendants' point: because the support obligations that flow from the execution of an Affidavit of Support Under Section 213A of the INA require reimbursement for *any* means-tested public benefit, the mere possibility that an applicant would receive means-tested public benefits without a sponsor from whom reimbursement could be sought would *otherwise* have deemed the applicant inadmissible on the public charge ground. MTD 16-17. The Rule does not

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could not define the metes and bounds of "public charge" reflects only that the term has never been conclusively defined and, to the contrary, left expressly to the Executive's opinion. More importantly, the only question presented is whether *this* Rule—not a hypothetical "zero tolerance" rule—is within the bounds of the statute.

"penaliz[e] people for accepting benefits Congress made available to them," but rather defines as a "public charge" an alien who is likely at any time in the future to receive those benefits over the threshold. Plaintiffs do not contest that receipt of these benefits—at *some* level, for *some* duration—would render an alien a public charge, though they cannot identify those thresholds. But in any event, DHS has not promulgated a rule under which "receipt of *any* public benefit . . . shows that a person is not self-sufficient." Mot. 18 (quoting *Cook County*, 962 F.3d at 232) (emphasis added).

2. The Rule is Not Contrary to the Rehabilitation Act.

As the Seventh Circuit did, Plaintiffs conflate Counts One and Two. Mot. 19-21. Count One alleges that the Rule is contrary to the INA, which requires the Court to assess under *Chevron* step two whether the Rule's definition is within the ambit of the INA's term "public charge." Count Two alleges a separate claim entirely: that the Rule violates the Rehabilitation Act. *Compare* Compl. ¶¶ 140-47 *with* Compl. ¶ 150. Although the Court may review "*comparative* statutes" at *Chevron* step two, *Emergency Servs. Billing Corp. v. Allstate Ins. Co.*, 668 F.3d 459, 466 (7th Cir. 2012) (emphasis added), the INA and Rehabilitation Act are in no way "comparative." And the fact that the Seventh Circuit majority had to resort to irrelevant statutes only underscores that it could not find the Rule an unreasonable interpretation of the INA itself—which must be assessed on its own terms.

In any event, the Rule does not violate the Rehabilitation Act. As explained in detail in Defendants' motion to dismiss, MTD 29-31, the Rule does not conflict with section 504 because disability cannot be the *sole* reason for denial of adjustment of status under the totality-of-circumstances test required by the public charge statute. First, both the INA and the Rule require all aliens' admissibility to be assessed by a totality of the circumstances analysis in which no one

factor can be dispositive. Second, contrary to Plaintiffs' assertion, a "lack of disability" is not "equate[d]" with "health" *per se*, Mot. 19, but instead a disability is only weighed negatively to the extent that an alien's particular disability tends to show that he is "more likely than not to become a public charge" at any time. Rule 41368. Indeed, the Rule explicitly states that if "there is no indication that such disability makes the alien more likely to become a public charge, the alien's disability will not be considered an adverse factor in the inadmissibility determination." *Id.* Therefore, it is an alien's future likelihood of receiving on public benefits, and not his health or disability in and of itself, that could be a negative factor in the public charge analysis, and such a consideration does not run afoul of section 504's prohibition. *See Brumfield v. City of Chicago*, 735 F.3d 619, 630 (7th Cir. 2013) ("The Rehabilitation Act protects qualified employees from discrimination solely by reason of disability, meaning that if an employer fires an employee for any reason other than that she is disabled—*even if the reason is the consequence of the disability*—there has been no violation of the Rehabilitation Act.") (emphasis added). Notably, the INA *requires* Defendants to consider the health of aliens as part of the public charge determination, and Plaintiffs are simply incorrect that the Rule violates section 504 because it may assign negative weight to an applicant's health status or disability in making that determination, as acknowledged by the Ninth Circuit in a related case. *See San Francisco*, 944 F.3d at 799-800.

Consequently, Plaintiffs are not entitled to summary judgment on their claim that the Rule is contrary to law under the Rehabilitation Act.[5]

[5] Count II of Plaintiffs' complaint also alleges that the Final Rule is not in accordance with the law under the APA because the Rule's public charge definition is contrary to the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") and because the Rule violates the Supplemental Nutritional Assistance Program ("SNAP") Act. Plaintiffs' motion does not discuss any facts or legal arguments related to these claims and therefore fails by definition to meet Plaintiffs' burden to demonstrate entitlement to judgment as a matter of law. In any event, the

III. The Rule is Not Arbitrary or Capricious Under the APA.

A. DHS Adequately Considered Costs Due to Disenrollment from Public Benefits.

Plaintiffs claim that DHS failed to adequately consider the costs associated with individuals choosing to disenroll from public benefits because of the Rule. Mot. at 22-25. But as the Ninth Circuit found, "DHS addressed at length the costs and benefits associated with the Final Rule." *San Francisco*, 944 F.3d at 801; *see also id*. at 803 (discussing DHS's analysis of costs and benefits). DHS explained that, by excluding from the country those aliens likely to rely on public benefits and by encouraging those within the country to become self-sufficient, the Rule is likely to save federal and state governments billions of dollars annually in benefit payments and associated costs. *See* 83 Fed. Reg. 51114, 51228 (Oct. 10, 2018) ("NPRM"). At the same time, DHS recognized that the disenrollment of aliens from public benefit programs could have certain adverse effects. It noted, for example, that a reduction in public benefit enrollment and payments could negatively affect third parties who receive such payments as revenue, including, for example, health-care providers that participate in Medicaid and local businesses that accept SNAP benefits. *Id.* at 51118; Rule at 41313. DHS also recognized that disenrollment in public benefit programs by aliens subject to the Rule or those who incorrectly believe they are subject to the Rule could have adverse consequences on the health and welfare of those populations, while also potentially imposing some "costs [on] states and localities." Rule at 41313.

Although it recognized these potential costs, DHS explained that there were reasons to believe that the costs would not be as great as some feared. *Id*. at 41313. Among other things, in response to commentator concerns, DHS took steps to "mitigate . . . disenrollment impacts," including by exempting certain public benefits from the list of those covered by the Rule. *Id*. at

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Seventh Circuit rejected Plaintiffs' claim that the Rule violates the SNAP Act. *Cook County*, 962 F.3d at 227.

41313-14. DHS also noted that the majority of aliens subject to the Rule do not currently receive public benefits, either because they reside outside the United States or because, following the 1996 welfare-reform legislation, they are generally precluded from receiving such benefits. *Id*. at 41212-13.

DHS also explained that those classes of aliens who are eligible for the noncash benefits covered by the Rule, such as lawful permanent residents and refugees, are, except in rare circumstances, not subject to a public charge inadmissibility determination and are thus not affected by the Rule. *Id*. at 41313. DHS also considered and made plans to address disenrollment by those not covered by the Rule. To the extent such individuals disenroll from public benefits out of confusion over the Rule's coverage, the agency reasoned that the effect might be short-lived, as such individuals might re-enroll after realizing their error. *Id*. at 41463. DHS included in the Rule detailed tables listing categories of aliens and indicating whether or not the public charge ground of inadmissibility applied, as well as tables of nonimmigrants indicating whether the public benefit condition would apply. *See id*. at 41336-46; *see also id*. at 41292 (summarizing populations to whom the rule does not apply). And, to clear up any potential remaining confusion as quickly as possible—thus minimizing disenrollment among populations not subject to the Rule—DHS further stated that it planned to "issue clear guidance that identifies the groups of individuals who are not subject to this rule, including, but not limited to, U.S. citizens, [certain] lawful permanent residents, . . . and refugees." *Id*. at 41313.

Ultimately, DHS rationally concluded that the benefits obtained from promoting self-sufficiency outweighed the Rule's potential costs. *Id*. at 41314. As the agency explained, the precise costs of the Rule were uncertain, given the impossibility of estimating precisely the number of individuals who would disenroll from public benefit programs as a result of the Rule, how long

they would remain disenrolled, and to what extent such disenrollment would ultimately affect state and local communities and governments. *See, e.g.*, *id*. at 41313. At the same time, the Rule produced clear but similarly difficult-to-measure benefits, such as encouraging self-sufficiency among aliens entering the country or adjusting status, and reducing the incentive to immigrate based on the availability of public benefits. DHS's ultimate decision about whether to move forward with the Rule thus "called for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty." *Dep't of Comm. v. New York*, 139 S. Ct. 2551, 2571 (2019). Given Congress's clear focus on ensuring that aliens admitted to the country rely on private resources and not public benefits, DHS's decision to prioritize self-reliance among aliens is plainly reasonable. *See San Francisco*, 944 F.3d at 800-05 (finding DHS likely to prevail in defending against APA claim that the Rule is arbitrary and capricious because DHS inadequately considered harms); *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003) ("When . . . an agency is obliged to make policy judgments where no factual certainties exist . . . we require only that the agency so state and go on to identify the considerations it found persuasive."). It is not for courts "to ask whether [the] decision was 'the best one possible" or even whether it was 'better than the alternatives.'" *Dep't of Commerce*, 139 S. Ct. at 2571.

Contrary to Plaintiffs' suggestion, the law does not require an agency to precisely quantify all potential effects of a rule in order to comply with the APA. *See Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013) (the "law does not require agencies to measure the immeasurable"); *Defs. of Wildlife v. Zinke*, 856 F.3d 1248, 1263 (9th Cir. 2017) (finding agency action was not arbitrary and capricious notwithstanding agency's "failure to quantify" effects). "As predicting costs and benefits without reliable data is a primarily predictive exercise, the [agency] need[s] only to acknowledge [the] factual uncertainties and identify the considerations it found persuasive in

reaching its conclusions." *SIFMA v. CFTC*, 67 F. Supp. 3d 373, 432 (D.D.C. 2014). DHS did that here.

Next, Plaintiffs' assertion that DHS failed to alter the Rule in response to concerns about disenrollment is simply incorrect. The Rule explained that DHS made a number of changes to the Rule to mitigate some of the concerns raised regarding disenrollment impacts, such as excluding certain benefits from the scope of the Rule. Rule at 41313-14, 41471. This process—full consideration of the issues and the evidence on both sides, the adoption of changes in response, and an articulated statement of the reasons for the agency's ultimate decision—was neither arbitrary nor capricious. *See San Francisco*, 944 F.3d at 800-05 (finding DHS likely to prevail in defending against APA claim that the Rule is arbitrary and capricious because DHS inadequately considered harms).[6]

Plaintiffs are simply incorrect in claiming that DHS declined to address comments concerning vaccinations. Indeed, based in part on its consideration of such comments, DHS decided to exclude receipt of Medicaid by aliens under the age of 21 or by pregnant women from the definition of public benefits. Rule at 41384, 41471. That change alone should eliminate much of the concern that children will forgo vaccinations as a result of the Rule. *See id*. at 41384. In addition, DHS noted that "[v]accinations obtained through public benefits programs are not considered public benefits" and "local health centers and state health departments provide

[6] Plaintiffs argue that certain USCIS forms will "amplif[y]" the alleged disenrollment impact. Mot. at 22 n.12. But the complaint does not even mention those documents, much less plead any claim based on them. Indeed, these documents post-date the Rule itself. *See* Mot., Exs. A & B (dated 10/15/2019). These documents, therefore, are hardly relevant to whether the Rule was arbitrary or capricious when promulgated. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (APA review is "based on the full administrative record that was before the [decisionmaker] *at the time he made his decision*") (emphasis added); *Dep't of Commerce*, 139 S. Ct. at 2573 ("[I]n reviewing agency action, a court is ordinarily limited to evaluating the agency's *contemporaneous explanation* in light of the existing administrative record.") (emphasis added).

preventive services that include vaccines that may be offered on a sliding scale fee based on income." *Id*. at 41384-85. For these reasons, DHS concluded "that vaccines would still be available for children and adults even if they disenroll from Medicaid." *Id*. at 41385.[7]

Likewise, Plaintiffs are mistaken when they claim that "Defendants failed to consider the Rule's impact on state and local government reliance interests." Mot. at 24. In a section of the Rule titled "Costs Related to States and Local Governments, and Public Benefit-Granting Agencies," DHS responded to comments raising those concerns, and referenced its responses to comments about "[i]ncreased costs to health care providers, states, and localities." Rule at 41469-70, 41312. Thus, DHS did consider these issues, and reasonably determined that the benefits obtained from promoting self-sufficiency outweighed the Rule's potential costs, notwithstanding potential "costs [on] states and localities." *Id*. at 41313. The fact that Plaintiffs happen to disagree with DHS's weighing of the benefits and costs is irrelevant under arbitrary and capricious review.

B. DHS Provided a Reasoned Explanation for the Rule.

DHS easily met its obligation to provide a reasoned explanation for the Rule. Importantly, the "fact that DHS has changed policy does not substantially alter the burden in the challengers' favor." *San Francisco*, 944 F.3d at 801. It is well-settled that there is "no basis in the Administrative Procedure Act . . . for a requirement . . . [of] more searching review" when an agency changes its position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). And there is certainly no basis to find that the agency's prior interpretation in nonbinding guidance

[7] Plaintiffs' gratuitous discussion of the COVID-19 pandemic has no relevance to whether the Rule was arbitrary or capricious when it was issued in 2019. Mot. at 24. And although Plaintiffs note that another court preliminarily enjoined the Rule due to COVID-19 concerns, that injunction was swiftly stayed by the Second Circuit. *See New York v. Dep't of Homeland Sec.*, No. 20-2537, 2020 U.S. App. LEXIS 28866 (2d Cir. Sep. 11, 2020). Plaintiffs also fail to mention that they asked the Supreme Court to lift its stay of this court's preliminary injunction because of COVID-19 concerns, and the Supreme Court declined to do so. *See Wolf v. Cook Cty.*, 206 L.Ed.2d 847 (2020).

could possibly foreclose DHS from adopting a different reasonable interpretation through notice-and-comment rulemaking. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). As the Supreme Court explained in *Fox*, all that DHS was required to do to permissibly change course from the 1999 Field Guidance was to acknowledge that the Rule is adopting a policy change, provide a reasoned explanation for the change, and explain how it believes the new interpretation is reasonable. *See Fox*, 556 U.S. 514-16. The Rule readily meets these standards, and so DHS is entitled to full deference to its changed interpretations, consistent with its obligation to "consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64; *see also* NPRM at 51116 (acknowledging that DHS was proposing "major changes"); Rule at 41319, 41295 (describing changes from prior guidance); NPRM at 51160-64 & Tables 10-12; Rule at 41308, 41319 (explaining that the prior guidance "failed to offer meaningful guidance for purposes of considering the mandatory factors and was therefore ineffective"); Rule at 41305 (explaining how new approach reasonably advances the stated purposes).

Nevertheless, Plaintiffs argue that DHS did not adequately justify the Rule, including the 12/36 standard. But, as Plaintiffs should know, "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." *CASA de Md.*, 971 at 234. Those analyses offered "insight into the length of time that recipients of public benefits tend to remain on those benefits, and lend support to the notion that this rule's standard provides meaningful flexibility to aliens who may require one or more of the public benefits for relatively short periods of time, without allowing an alien

who is not self-sufficient to avoid facing public charge consequences." Rule at 41360. The 12/36 standard accommodates a significant proportion of short-term benefits use, while also providing a clear, administrable cut-off point. *Id*.

Although Plaintiffs baldly assert that the 12/36 standard's promotion of self-sufficiency is somehow inconsistent with Congress's intent as reflected in the INA and PRWORA, Mot. at 25, it was Congress that expressly equated a lack of self-sufficiency with receipt of "public benefits," which it defined broadly to include the noncash benefits at issue here. 8 U.S.C. §§ 1601(2)-(4), 1611(c). There is no question that the concept of self-sufficiency is directly relevant to whether someone is a public charge, under any conceivable definition of "public charge." *See San Francisco*, 944 F.3d at 799 ("Receipt of non-cash public assistance is surely relevant to 'self-sufficiency' and whether immigrants are 'depend[ing] on public resources to meet their needs.'"). The only question is to what extent a person must lack self-sufficiency to be considered a public charge. It was thus rational for DHS to conclude that aliens who rely on the public benefits enumerated in the Rule for months at a time are aliens who "depend on public resources to meet their needs," 8 U.S.C. § 1601(2)(A), and are not "self-sufficien[t]," *id.* § 1601(1). Even the 1999 Field Guidance tied the definition of public charge to the receipt of public benefits. 64 Fed. Reg. 28676, 28689 (May 26, 1999) ("Field Guidance"). The Rule simply redefines what benefits received over what time period qualify an alien as a public charge.

Plaintiffs also insist that certain public benefits cannot be considered by the Rule because they allegedly are "supplemental" in nature. Mot. at 26. But the 1996 amendments "to the INA reflect more than Congress's view that the term 'public charge' is capacious enough to include supplemental dependence on public assistance. They reflect its preference that the Executive consider even supplemental dependence in enforcing the public charge exclusion." *Cook Cty.*, 962

F.3d at 248 (Barrett, J., dissenting); *see also Casa de Md*, 971 F.3d at 252 ("The statute contains no threshold of benefits—quantitative, qualitative, or durational—that one must accept before qualifying as a public charge."). Accordingly, the fact that some benefit use may be characterized as supplemental does not preclude a determination that the individual using those benefits is not self-sufficient.

Plaintiffs similarly argue that the Rule's consideration of supposedly "supplemental" benefits undermines the goal of self-sufficiency because such benefits may enhance aliens' ability to become self-sufficient. Mot. at 26. As noted, Congress expressly equated a lack of self-sufficiency with receipt of public benefits. 8 U.S.C. §§ 1601(2)-(4), 1611(c). For aliens, Congress's intent is that aliens should be self-sufficient before they seek admission or adjustment of status, not that they should someday attain self-sufficiency by drawing on public resources to improve their financial condition. Rule at 41308, 41421.

Plaintiffs also insist that the Rule adds factors to the totality-of-the-circumstances analysis "that are irrational and based upon speculative assumptions about immigrants' future experiences in the United States." Mot. at 26. Plaintiffs' concerns about the forward-looking nature of the analysis is, of course, a criticism of the statute, not the Rule. *See* 8 U.S.C. § 1182(a)(4)(A) ("Any alien who . . . *is likely at any time* to become a public charge is inadmissible[.]") (emphasis added). Thus, the fact that an alien's circumstances may change over time does not create an "obvious dilemma." Mot. at 26-27. To comply with the statute, DHS must make a necessarily predictive determination using information available to it at the time of the determination.

In any event, the factors Plaintiffs criticize are each highly relevant in assessing an individual's likelihood of becoming at any time a public charge. As to family size, Congress has imposed an express statutory requirement that DHS consider "family status" in determining

whether an alien is inadmissible on public charge grounds. 8 U.S.C. § 1182(a)(4)(B)(i)(III). In the Rule, DHS cited data showing a higher rate of non-cash benefit use as family size increases, Rule at 41395, which supports the commonsense understanding that financial strains increase as families grow in size.

Likewise, an application for benefits, though "not the same as receipt," is "indicative of an alien's intent to receive such a benefit." *Id*. at 41422. The fact that an alien believed he or she needed public assistance to support his or her basic needs, though not dispositive on its own, is a relevant factor when considering the likelihood that that person will become a public charge. *See id*. ("The fact that an alien has in the past applied for . . . public benefits . . . would never be dispositive on its own, but would be relevant to assessing an alien's likelihood of becoming at any time in the future a public charge.").[8] DHS therefore reasonably incorporated these factors into the public charge inadmissibility analysis.

In concluding that English proficiency was a relevant factor in the public charge inadmissibility calculus, DHS cited Census Bureau data and other studies indicating that non-English speakers earned considerably less money and were more likely to be unemployed than English speakers, thus supporting the conclusion that non-English speakers were more likely to become public charges than their English-proficient counterparts. NPRM at 51195-96. DHS also cited evidence indicating that noncitizens who reside in households where English is spoken "[n]ot well" or "[n]ot at all" received public benefits at much higher rates than noncitizens residing in households where English was spoken "[w]ell" or "[v]ery well," lending further support to the

[8] Consideration of an application for public benefits is also consistent with early case law discussing the standard for identifying a person as a public charge. *See Overseers of Princeton v. Overseers of S. Brunswick*, 23 N.J.L. 169, 172 (1851) (Carpenter, J., concurring) ("The probability of [a person] becoming chargeable is sufficiently shown by his application for relief").

conclusion that English proficiency is a relevant consideration. *Id*. at 51196. The Rule's suggested reliance on an alien's credit history was likewise not irrational. Plaintiffs simply ignore that Congress has *required* DHS to consider an alien's "financial status," 8 U.S.C. § 1182(a)(4)(B)(i), of which credit reports are plainly relevant evidence. Credit reports provide an indication of the relative strength or weakness of an individual's financial status, and thus provide insight into whether the alien will be able to support himself or herself financially in the future. NPRM at 51189; Rule at 41425.

As to disability, the Rule considers medical conditions only to the extent that they tend to show that the alien is "more likely than not to become a public charge" at any time because, for instance, the condition "interfere[s] with the alien's ability to provide and care for himself or herself[.]" Rule at 41368; 8 C.F.R. § 212.22(b)(2)(i). The Rule's treatment of medical conditions is consistent with the INA, which specifically directs federal immigration authorities to consider "health" in making public charge determinations. *San Francisco*, 944 F.3d at 800; 8 U.S.C. § 1182(a)(4)(B)(i). "Health" certainly includes an alien's medical conditions, and it is therefore Congress, not the Rule, that requires DHS to take this factor into account.

Finally, Plaintiffs misunderstand the Rule's treatment of affidavits of support. Mot. at 27-28. The Rule is clear that "the existence of a sufficient affidavit of support, where required to be submitted, is considered as a positive factor in any public charge inadmissibility determination[.]" Rule at 41440. Nevertheless, "the sponsorship obligation set forth on the affidavit of support does not attach until *after* the application for an immigrant visa or adjustment of status is granted." *Id*. "Therefore, DHS will not, in adjudicating an adjustment of status application, consider the sponsor's potential future reimbursement in a public charge inadmissibility determination when there is not yet a reimbursement obligation." *Id*.

IV. The Court Should Not Order Nationwide Relief.

If the Court were to determine that vacatur is appropriate, the vacatur should not extend nationwide. "Vacatur is a form of 'equitable relief[.]'" *N.M. Health Connections v. HHS*, 340 F. Supp. 3d 1112, 1176 (D.N.M. 2018).[9] It is axiomatic that equitable relief "does not follow from success on the merits as a matter of course" but rather is subject to "equitable discretion," *Winter v. NRDC, Inc.*, 555 U.S. 7, 32 (2008); *see also Johnson v. U.S. Office of Pers. Mgmt.*, 783 F.3d 655, 663 (7th Cir. 2015) (observing that "partial vacatur is sometimes an appropriate remedy" for a violation of the APA).

Here, there is no equitable reason for the Court to issue a nationwide vacatur of the Rule when Plaintiffs' interests would be fully remedied by a more limited order commensurate with the specific harms Plaintiffs have alleged. Indeed, when Plaintiffs sought a preliminary injunction, they asked for relief "within the State of Illinois," ECF No. 27, at 19, thereby conceding that broader relief was unnecessary to protect their interests. To the extent that Plaintiffs are seeking broader relief now, their request reveals that the true purpose of this lawsuit is to block a policy that Plaintiffs dislike, not to remedy any harm they are allegedly suffering.

Although the APA instructs that unlawful agency action "shall" be "set aside," 5 U.S.C. § 706(2), it does not say, and should not be construed to require, that the agency action be categorically set aside, rather than set aside only insofar as it affects the plaintiffs. Courts reject

[9] Congress enacted the APA against a background rule that statutory remedies should be construed in accordance with "traditions of equity practice." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Indeed, the APA preserves all ordinary principles of equity. See 5 U.S.C. § 702(1) ("Nothing herein affects . . . the power or duty of the court to . . . deny relief on any other appropriate legal or equitable ground[.]"). And the Supreme Court has confirmed that, in an APA case, "equitable defenses may be interposed." *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967); *see also* Amicus Brief for Nicholas Bagley and Samuel L. Bray, *Trump v. Pennsylvania*, No. 19-454, 2020 WL 1433996, at *11-17 (2017) (Mar. 9, 2020) (noting APA left traditional equity practice undisturbed).

the argument that the APA requires a reviewing court to set aside a rule that it deems unlawful "for the entire country," finding instead that "[n]othing in the language of the APA . . . requires [a court] to exercise such far-reaching power." *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001), *overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012). Accepting the argument that under the APA, the proper remedy "is an order setting aside the unconstitutional regulation for the entire country" "would result in the same harm as upholding the nationwide injunction." *Id*.

Without exception, every district court decision enjoining the Rule nationwide has been stayed and/or reversed on appeal. Injunctions issued by the Southern District of New York were stayed by the Supreme Court, *Department of Homeland Security v. New York*, 140 S. Ct. 599 (2020), with Justice Gorsuch devoting an entire concurrence to address concerns implicated by nationwide injunctions, *see id*. at 600 ("The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them."). The Second Circuit later limited those injunctions to states within the Second Circuit. *See New York v. Dep't of Homeland Sec.*, 2020 U.S. App. LEXIS 24492 at *92-96. And when the Southern District of New York entered a new nationwide preliminary injunction of the Rule, the Second Circuit stayed temporarily the nationwide aspect of that injunction (and later stayed that injunction altogether). *See New York v. DHS*, No. 20-2537, ECF No. 35 (2d Cir. Aug. 12, 2020).

After the District of Maryland enjoined the Rule nationwide, the Fourth Circuit reversed, and strongly criticized the nationwide relief, which was "plainly overbroad" and "plainly improper[.]" *See CASA de Md., Inc. v. Trump*, 971 F.3d 220, 256 (4th Cir. 2020). The Court explained at length that nationwide injunctions are inconsistent with well-established limitations on equitable relief and the judicial role itself. *Id*. at 256-62. The practice of issuing such relief leads

to "nothing more than 'government by injunction,'" *id*. at 261, in which, as here, litigants undermine the democratic process by using litigation to change federal policies that the litigants dislike. For the same reasons that nationwide injunctions of the Rule were improper, nationwide vactur likewise would be improper.

Extending nationwide effect to the Court's vacatur, if any, here would be particularly inappropriate given that courts in other circuits have upheld the Rule. The Fourth Circuit squarely held that "the DHS Rule is unquestionably lawful," and that to "hold otherwise is a serious error in statutory interpretation" and "a broadside against separation of powers and the role of Article III courts." *Id*. at 250-51. Likewise, the Ninth Circuit held that the Rule "easily satisfies" the *Chevron* standard. *San Francisco*, 944 F.3d at 799. Rather than effectively overriding those decisions, the Court should instead limit any relief to address only the specific harms that Plaintiffs here may demonstrate.

V. The Court Should Stay Any Relief Pending Appeal.

In the event the Court grants any relief to Plaintiffs, the Court should stay its order pending appeal. Allowing any such relief to take immediate effect would conflict with the Supreme Court's stay of this Court's preliminary injunction. *Wolf v. Cook Cty., Illinois*, 140 S. Ct. 681, 206 L. Ed. 2d 142 (2020). In issuing that stay, the Supreme Court "necessarily conclud[ed]" that Plaintiffs were unlikely to succeed on the merits. *CASA de Maryland*, 971 F.3d at 230. The stay was entered "by the whole court, not a single Justice." *Id*.

The Supreme Court's stay decision also necessarily reflects a determination that the balance of the harms and the public interest support a stay, and that balance is identical here. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). If the Rule is vacated, DHS will be required to grant lawful-permanent-resident status to aliens whom the Secretary would otherwise deem likely to become public charges in the exercise of his discretion. DHS currently has no practical means of

revisiting public charge inadmissibility determinations once made, *see* Declaration of Daniel Renaud, ECF No. 92, so vacatur would inevitably result in the grant of lawful-permanent-resident status to aliens who, under the Secretary's interpretation of the statute, are likely to become public charges. *See San Francisco*, 944 F.3d at 805 (finding DHS would suffer irreparable harm from injunction); *New York v. Dep't of Homeland Sec.*, 2020 U.S. App. LEXIS 28866 at *15 (DHS demonstrated "irreparable harm resulting from its inability to enforce its regulation").

In short, the Supreme Court granted a stay over Plaintiffs' objections and there is no basis for this Court to reach a different decision here. Accordingly, if the Court grants relief, it should stay the effect of its order to allow the government to consider whether to seek appellate relief.

CONCLUSION

The Court should deny Plaintiffs' Partial Motion for Summary Judgment.

Dated: September 28, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Cook County, Illinois; Illinois Coalition for Immigrant and Refugee Rights, Inc.,

Plaintiffs,

v.

Chad F. Wolf, in his official capacity as Acting Secretary of U.S. Department of Homeland Security; et al.

Defendants.

Case No. 19-cv-6334

DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Civil Rule 56.1(b), Defendants submit the following responses to Plaintiffs' Local Rule 56.1(a) Statement of Undisputed Material Facts.

1. Plaintiff Cook County is an Illinois governmental entity with its principal place of business in Chicago, Cook County, Illinois. The County is the second largest county in the United States by population. Cook County Government, About Cook County, https://www.cookcountyil.gov/content/about-cook-county (last visited August 28, 2020).

Response: Defendants do not dispute this statement.

2. Plaintiff Illinois Coalition for Immigrant and Refugee Rights ("ICIRR") is a non-profit, member-based organization located in Chicago, Illinois, and incorporated in Illinois. ICIRR promotes the rights of immigrants and refugees to full and equal participation in the civic, cultural, social, and political life in Illinois and beyond. ICIRR's mission includes ensuring that immigrants are self-sufficient and can access permitted public benefits. ICIRR has nearly 100 member organizations throughout Illinois. Member organizations include community health centers, health

and nutrition programs, social service providers, and other organizations that work to ensure immigrants receive the support they need for their families to be successful. See Dkt. 27-1, Ex. 4, Declaration of Lawrence Benito at ¶¶ 2–10, 42.

Response: Defendants do not dispute this statement.

3. Defendant Chad F. Wolf is Acting Secretary of the U.S. Department of Homeland Security ("DHS") and is sued in his official capacity. In his capacity as the Acting Secretary of DHS, Defendant Wolf oversees the Agency that issued the Final Rule challenged by this lawsuit. He directs each of the component agencies of DHS.

Response: The assertion that Chad F. Wolf "directs" each of the component agencies of DHS is vague. Defendants do not dispute that Chad F. Wolf holds all powers conferred upon the office of the Secretary of the U.S. Department of Homeland Security. Defendants do not dispute the remainder of this statement.

4. Defendant United States Department of Homeland Security is a cabinet-level department of the United States federal government. DHS is made up of U.S. Citizenship and Immigration Services ("USCIS"), Customs and Border Protection ("CBP"), and Immigration and Customs Enforcement ("ICE").

Response: Defendants do not dispute that Defendant United States Department of Homeland Security is a cabinet-level department of the United States federal government, and that DHS is made up of, in part, U.S. Citizenship and Immigration Services ("USCIS"), Customs and Border Protection ("CBP"), and Immigration and Customs Enforcement ("ICE").

5. Defendant Kenneth T. Cuccinelli is the Acting Director of USCIS and is sued in his official capacity.

Response: Kenneth T. Cuccinelli is the Senior Official Performing the Duties of the Director of USCIS. Defendants do not dispute the remainder of the statement.

6. Defendant USCIS is a sub-agency of DHS that is primarily responsible for the immigration services functions of the United States, including the administration of applications by foreign nationals in the United States for the adjustment of status to lawful permanent residency, immigrant and nonimmigrant visas, change of status to a different visa category, or extension of stay.

Response: Defendants do not dispute this statement.

7. This Court has personal jurisdiction over the Defendants pursuant to 28 U.S.C. § 1391(e) because the Defendants are agencies and officers of the United States. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under federal law.

Response: Defendants dispute that the Court has subject matter jurisdiction over this action because Defendants are contesting Plaintiffs' standing to bring suit. Defendants do not dispute the remainder of this statement.

8. Defendants' publication of the Final Rule in the Federal Register on August 14, 2019 constitutes final agency action and is therefore judicially reviewable within the meaning of the APA, 5 U.S.C. §§ 704, 706.

Response: Defendants do not dispute this statement.

9. Venue is proper in this district because Defendants are agencies and officers of the United States, the County is a resident of this judicial district, ICIRR is a non-profit organization incorporated in Chicago, Illinois and a resident of Illinois, and because a substantial part of the events or omissions giving rise to the claims occurred in this district.

Response: Defendants do not dispute this statement.

10. On May 26, 1999, the former Immigration and Nationality Service proposed a rule and issued field guidance about public charge determinations. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999) ("Field Guidance"); Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676 (May 26, 1999) (1999 NPRM); Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999).

Response: Defendants do not dispute this statement.

11. On October 10, 2018, DHS published a Notice of Proposed Rulemaking ("Proposed Rule") regarding the public charge ground for inadmissibility, which redefined the statutory term public charge. 83 Fed. Reg. 51,114.

Response: Defendants dispute that, in the October 10, 2018 Notice of Proposed Rulemaking regarding the public charge ground of inadmissibility, Defendants "redefined" the statutory term public charge. The relevant statute does not define the term "public charge," *see* 8 U.S.C. § 1182(a)(4)(A), and even the U.S. Court of Appeals for the Seventh Circuit concluded that there was no fixed definition of public charge, *see Cook Cty., Illinois v. Wolf*, 962 F.3d 208, 226 (7th Cir. 2020) ("[T]he meaning of 'public charge' has evolved over time as immigration priorities have changed and as the nature of public assistance has shifted from institutionalization of the destitute and sick, to a wide variety of cash and in-kind welfare programs. What has been consistent is the delegation from Congress to the Executive Branch of discretion, within bounds, to make public-charge determinations.").

12. On August 14, 2019, DHS issued its final rulemaking. Inadmissibility on Public Charge Grounds, set forth in 84 Fed. Reg. 41,292–508 (Aug. 14, 2019) (the "Final Rule" or the "Rule").

Response: Defendants do not dispute this statement.

13. To implement the Rule, DHS issued an updated I-944 Form and Instructions for the I-944 form. They are attached as Exhibits A and B to the Memorandum in Support of Plaintiffs' Motion for Summary Judgment on Counts I-III. They are also publicly available on Defendant USCIS's website at https://www.uscis.gov/i-944.

Response: Defendants do not dispute this statement.

14. On October 14, 2019, this Court issued a preliminary injunction enjoining the Final Rule's application within Illinois. This Court held that the Final Rule was contrary to the plain meaning of the term in the INA. Dkt. 106 ("PI Order").

Response: Defendants admit that, on October 14, 2019, the Court issued a preliminary injunction enjoining the Final Rule's application within Illinois. Defendants dispute that the Court held that the Final Rule was contrary to the "plain meaning" of the term "public charge" in the INA. The Court concluded that the Supreme Court's decision *Gegiow v. Uhl*, 239 U.S. 3, 36 (1915) foreclosed DHS's reading of the term "public charge." The parties should refer to the text of the Court's preliminary injunction order to resolve any disputes as to its meaning.

15. The Seventh Circuit affirmed, agreeing with this Court's conclusion that the Final Rule's definition of "public charge" is not a permissible construction of the statutory text. *Cook County v. Wolf*, 962 F.3d 208, 226–29 (7th Cir. 2020).

Response: Defendants do not dispute this statement.

16. On August 12, 2020, the Seventh Circuit denied Defendants' petition for rehearing en banc. *Cook County v. Wolf*, No. 19-3169 Order Denying Defendants-Appellants' Petition for Rehearing (7th Cir. Aug. 12, 2020). The Appellate Court's mandate issued on August 20, 2020. *Cook County v. Wolf*, No. 19-3169 Notice of Issuance of Mandate (7th Cir. August 20, 2020).

Response: Defendants do not dispute this statement.

Dated: September 28, 2020

Respectfully submitted,

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