No. 20-449

IN THE

Supreme Court of the United States

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

Petitioners,

v.

STATE OF NEW YORK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS 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.

GHITA SCHWARZ
BAHER A. AZMY
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

SUSAN E. WELBER
KATHLEEN KELLEHER
SUSAN CAMERON
HASAN SHAFIQULLAH
THE LEGAL AID SOCIETY
199 Water Street, 3rd Floor
New York, NY 10038

ANDREW J. EHRLICH
Counsel of Record
JONATHAN H. HURWITZ
ROBERT J. O'LOUGHLIN
DANIEL S. SINNREICH
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000
aehrlich@paulweiss.com

Counsel for Respondents

December 9, 2020

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether nonprofit organizations that provide legal and social services and advocate for low-income noncitizens are within the zone of interests of the Immigration and Nationality Act ("INA") and the Administrative Procedure Act ("APA") to challenge the Department of Homeland Security's "public charge" rule, 84 Fed. Reg. 41,292 (Aug. 14, 2019).

2. Whether the "public charge" rule is likely contrary to law or arbitrary and capricious under the APA.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners (defendants-appellants below) are the United States Department of Homeland Security; Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security; the United States Citizenship and Immigration Services, an agency within the United States Department of Homeland Security; and Kenneth T. Cuccinelli II, in his official capacity as Senior Official Performing the Duties of the Director of the United States Citizenship and Immigration Services.

Respondents (plaintiffs-appellees below) are the State of New York; the City of New York; the State of Connecticut; the State of Vermont; Make the Road New York; African Services Committee; Asian American Federation; Catholic Charities Communities Services (Archdiocese of New York); and Catholic Legal Immigration Network, Inc.

Respondent Make the Road New York ("MRNY") has no parent corporation, and no publicly held corporation owns 10 percent or more of MRNY.

Respondent African Services Committee ("ASC") has no parent corporation, and no publicly held corporation owns 10 percent or more of ASC.

Respondent Asian American Federation ("AAF") has no parent corporation, and no publicly held corporation owns 10 percent or more of AAF.

Respondent Catholic Charities Community Services (Archdiocese of New York) ("CCCS-NY") is a wholly owned subsidiary of Catholic Charities, Archdiocese of New York. No publicly held corporation owns 10 percent or more of CCCS-NY.

Respondent Catholic Legal Immigration Network, Inc. ("CLINIC") has no parent corporation, and no publicly held corporation owns 10 percent or more of CLINIC.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	1
A. History of "Public Charge"	2
B. The "Public Charge" Rule	7
C Procedural History	8
ARGUMENT	10
A. The Court Should Delay a Decision to Afford the Incoming Administration Time to Address This Case	11
B. The Court of Appeals Correctly Concluded That Respondents Are Within the Zone of Interests, and There Is No Conflict with Other Courts of Appeals	12
C. The Court of Appeals Correctly Concluded That Respondents Are Likely to Succeed on the Merits of Their Claims and Satisfy the Remaining Preliminary Injunction Factors	14
D. There is No Circuit Conflict Warranting Review	25

TABLE OF CONTENTS—Continued

Page

E. The Petition Does Not Warrant The Court's Review on This Posture 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page(s)

Abbott v. *Veasey*,
137 S. Ct. 612 (2017)..... 27

Albemarle Paper Co. v. *Moody*,
422 U.S. 405 (1975)..... 17

Bank of America Corp. v. *City of Miami*,
137 S. Ct. 1296 (2017)..... 12-13

Batalla Vidal v. *Wolf*,
No. 16-cv-4756, 2020 WL 6695076
(E.D.N.Y. Nov. 14, 2020)..... 29

Bob Jones University v. *United States*,
461 U.S. 574 (1983)..... 17

Bunting v. *Mellen*,
541 U.S. 1019 (2004)..... 26

CASA de Maryland, Inc. v. *Trump*,
414 F. Supp. 3d 760 (D. Md. 2019)..... 9

CASA de Maryland, Inc. v. *Trump*,
971 F.3d 220 (4th Cir. 2020)..... 14

CASA de Maryland, Inc. v. *Trump*,
No. 19-2222 (4th Cir. Dec. 9, 2019)..... 9, 25

CASA de Maryland, Inc. v. *Wolf*,
No. 20-cv-2118, 2020 WL 5500165
(D. Md. Sept. 11, 2020)..... 29

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*,
467 U.S. 837 (1984)..... 18

Chicago & Southern Air Lines, Inc. v. *Waterman S.S. Corp.*,
333 U.S. 103 (1948)..... 12

TABLE OF AUTHORITIES—Continued

Page(s)

City & County of San Francisco v. *United States Citizenship & Immigration Services*, 408 F. Supp. 3d 1057 (N.D. Cal. 2019)..... 9, 14

City & County of San Francisco v. *United States Citizenship & Immigration Services*, 944 F.3d 773 (9th Cir. 2019)..... 9, 14, 26

City & County of San Francisco v. *United States Citizenship & Immigration Services*, No. 19-17213, 2020 WL 7052286 (2020).....*passim*

City of Boston v. *Capen*, 61 Mass. 116 (1851) 3

City of Cleburne v. *Cleburne Living Center*, 473 U.S. 432 (1985)..... 24

Clarke v. *Securities Industry Association*, 479 U.S. 388 (1987)..... 12, 13

Clifford F. MacEvoy Co. v. *U.S. for Use and Benefit of Calvin Tomkins Co.*, 322 U.S. 102 (1944)..... 23

Commodities Futures Trading Commission v. *Schor*, 478 U.S. 833 (1986)..... 16

Cook County v. *McAleenan*, 417 F. Supp. 3d 1008 (N.D. Ill. 2019)..... 9

Cook County v. *Wolf*, 962 F.3d 208 (7th Cir. 2020).....*passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Cook County v. *Wolf*,
No. 19-cv-6334, 2020 WL 6393005
(N.D. Ill. Nov. 2, 2020) 28

Cuomo v. *Clearing House Association, LLC*,
557 U.S. 519 (2009) 27

Department of Homeland Security v.
New York,
140 S. Ct. 599 (2020) 9

Encino Motorcars, LLC v. *Navarro*,
136 S. Ct. 2117 (2016) 21, 22

Ex Parte Kichmiriantz,
283 F. 697 (N.D. Cal. 1922) 16

Food & Drug Administration v. *Brown*
& Williamson Tobacco Corp.,
529 U.S. 120 (2000) 18

Forest Grove School District v. *T.A.*,
557 U.S. 230 (2009) 16

Gegiow v. *Uhl*,
239 U.S. 3 (1915) 3, 4

Helsinn Healthcare S.A. v. *Teva*
Pharmaceuticals USA, Inc.,
139 S. Ct. 628 (2019) 16

Howe v. *United States ex rel. Savitsky*,
247 F. 292 (2d Cir. 1917) 4

King v. *Burwell*,
576 U.S. 473 (2015) 18

TABLE OF AUTHORITIES—Continued

Page(s)

La Clinica de la Raza v. *Trump*, 2020 WL 6940934 (N.D. Cal. Nov. 25, 2020) 14

Leary v. *United States*, 395 U.S. 6 (1969) 15

Lexmark International, Inc. v. *Static Control Components, Inc.*, 572 U.S. 118 (2014) 12

Michigan v. *Bay Mills Indian Community*, 572 U.S. 782 (2014) 17

Michigan v. *Environmental Protection Agency*, 135 S. Ct. 2699 (2015) 18

Miroyan v. *United States*, 439 U.S. 1338 (1978) 27

Motor Vehicle Manufacturers Association v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) 22

Mount Soledad Memorial Association v. *Trunk*, 567 U.S. 944 (2012) 27-28

National Football League v. *Ninth Inning, Inc.*, No. 19-1098, 2020 WL 6385695 (S. Ct. Nov. 2, 2020) 27

New York State Rifle & Pistol Association, Inc. v. *City of New York*, 140 S. Ct. 1525, 1526 (2020) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Rodriguez v. *United States*,
480 U.S. 522 (1987) 19

Romer v. *Evans*,
517 U.S. 620 (1996) 24

Trump v. *International Refugee Assistance Project*,
137 S. Ct. 2080 (2017) 25

Village of Arlington Heights v. *Metropolitan Housing Development Corp.*,
429 U.S. 252 (1977) 24

Washington v. *United States Department of Homeland Security*,
408 F. Supp. 3d 1191 (E.D. Wash. 2019) . 9

Whitman v. *American Trucking Associations,*
531 U.S. 457 (2001) 20

Wolf v. *Cook County*,
140 S. Ct. 681 (2020) 9

ADMINISTRATIVE DECISIONS

Matter of B-,
3 I. & N. Dec. 323 (B.I.A. 1948) 4

Matter of Martinez-Lopez,
10 I. & N. Dec. 409
(B.I.A. 1962; A.G. 1964) 4

CONSTITUTION

U.S. Const. art. III 12

U.S. Const. amend. V 9

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS	Page(s)
5 U.S.C. § 705	9
8 U.S.C. § 1182(a)	5
8 U.S.C. § 1182(a)(4)	1
8 U.S.C. § 1182(a)(4)(B)(i)	6
8 U.S.C. § 1601	19
8 U.S.C. § 1601(2)(A)	5
8 U.S.C. § 1601(7)	5, 19
8 U.S.C. §§ 1612-13	5
28 U.S.C. § 1254(l)	1
29 U.S.C. § 794(a)	23
Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, div. C, § 531, 110 Stat. 3009, 3674 (1996)	*passim*
Immigration Act of 1882, 47th Cong. ch. 376, § 2, 22 Stat. 214	3, 15
Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(a)(15), 66 Stat. 163, 183	4
Immigration Act of 1990, Pub. L. No. 101-649, §§ 601-03, 104 Stat. 4978, 5067-85	5
Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, § 403, 110 Stat. 2105, 2265-67 (1996)	*passim*

TABLE OF AUTHORITIES—Continued

Page(s)

8 C.F.R. § 212.21(a). 7

8 C.F.R. § 212.21(b) 8

8 C.F.R. § 212.22 8

8 C.F.R. § 212.22(b)(4)(ii)(H)..... 23

8 C.F.R. § 212.22(c)(1)(iii)(B) 23

RULES

Fourth Cir. Local R. 35(c)..... 25

COURT FILINGS

Order, *CASA de Maryland* v. *Trump*, No. 19-2222 (4th Cir. Dec. 3, 2020)..... 25

Order, *Cook Cty., Ill,* v. *Wolf*, No. 20-3150 (7th Cir. Nov. 19, 2020) 28

OTHER AUTHORITIES

13 Cong. Rec. 5106, 5109 (June 19, 1882)... 3

64 Fed. Reg. 28,676 (May 26, 1999)..... 7

83 Fed. Reg. 51,114 (Oct. 10, 2018) 4, 7, 24

84 Fed. Reg. 41,292 (Aug. 14, 2019) .....*passim*

142 Cong. Rec. S11881-82 (daily ed. Sept. 30, 1996)..... 6

E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice (11th ed. 2019)..... 26

TABLE OF AUTHORITIES—Continued

Page(s)

Field Guidance on Deportability and Inadmissibility on Public Charge Grounds ("Field Guidance"), 64 Fed. Reg. 28,689 (May 26, 1999)..... *passim*

Immigration Control & Financial Responsibility Act of 1996, H.R. 2202, 104th Cong. § 202 (1996)..... 6

S. Rep. No. 113-40 (2013)..... 6

Staff of the H. Comm. on the Judiciary, 100th Cong., Grounds for Exclusion of Aliens Under the Immigration and Nationality Act: Historical Background and Analysis (Comm. Print 1988)..... 5

Statement on Senate Action on the "Immigration Control and Financial Responsibility Act of 1996," 32 Weekly Comp. Pres. Doc. 783 (May 2, 1996) 6

The Biden Plan for Securing Our Values as a Nation of Immigrants, joebiden.com/immigration/ (last visited Dec. 8, 2020)..... 11

U.S. Gov't Accountability Off., B-331650, Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security (2020).... 29

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-90a) is reported at 969 F.3d 42. The opinions of the district court (Pet. App. 91a-120a, 125a-157a) are reported at 408 F. Supp. 3d 334 and 419 F. Supp. 3d 647.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2020. The petition for a writ of certiorari was filed on October 7, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

Respondents challenge a rule promulgated by the Department of Homeland Security ("DHS"), 84 Fed. Reg. 41,292 (Aug. 14, 2019) (the "Rule"), that seeks to impose unprecedented restrictions on the ability of low- and moderate-income noncitizens to achieve lawful permanent residence.

Under Section 212(a)(4) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(4), noncitizens are inadmissible and ineligible for lawful permanent residence ("LPR," commonly known as "green card" status) if, in the opinion of DHS personnel, they are "likely at any time to become a public charge." Judicial and administrative opinions for more than a century have interpreted the term "public charge" to refer to noncitizens who are (or are expected to be) unable to work or support themselves. Congress ratified that longstanding interpretation when it repeatedly reenacted the statutory provision without relevant change.

The Rule seeks to redefine the statutory term "public charge." Under the Rule, a "public charge" is any

noncitizen likely, for an aggregate of twelve months over three years at any time in the future, to receive cash or certain supplemental noncash public benefits (including Medicaid; SNAP, or food stamps; and certain federal housing benefits). The Rule thus renders noncitizens inadmissible, and ineligible for LPR status, if they are predicted to receive such benefits, even in small amounts, irrespective of their ability to work and care for themselves. The "likely result" of adopting this new definition is that "significantly more people will be found inadmissible on that basis," Pet App. 3a, and will be denied legal permanent residence status. Denial of lawful permanent residence status, in turn, can expose resident noncitizens to removal and separation from their families.

The court of appeals, in the decision on this interlocutory appeal, unanimously held that the Rule is likely contrary to the statutory meaning of "public charge" and that the Rule is likely arbitrary and capricious under the Administrative Procedure Act ("APA"). The court accordingly affirmed a preliminary injunction entered by the district court delaying implementation of the Rule.

The forthcoming change of Administration is likely to render this case moot. The incoming Administration has announced that it intends to reverse the Rule within its first 100 days. Such action would obviate any need for review by this Court.

A. History of "Public Charge"

The court of appeals concluded that the "settled meaning" of "public charge," as reflected in "[t]he absolute bulk of the caselaw, from the Supreme Court, the circuit courts, and the [Board of Immigration Appeals ('BIA')]," refers narrowly to "a person who

is unable to support herself, either through work, savings, or family ties." Pet. App. 47a. *See also City & Cty. of S.F. v. United States Citizenship & Immigration Servs. ("USCIS")*, No. 19-17213, 2020 WL 7052286, at *8-9 (9th Cir. Dec. 2, 2020). Congress has repeatedly endorsed that interpretation by reenacting the statutory provision without relevant change, most recently in 1996.

1. Since its first appearance in federal immigration law in 1882, "public charge" has referred narrowly to persons unable to care for themselves. Immigration Act of 1882, 47th Cong. ch. 376, § 2, 22 Stat. 214. In enacting the 1882 Act, Congress intended to exclude from admission those likely to become long-term residents of "poor-houses and alms-houses"—*i.e.*, persons who were institutionalized and wholly dependent on the government for subsistence. 13 Cong. Rec. 5109 (June 19, 1882) (statement of Rep. Davis). Indeed, the very same Act contemplated that immigrants who are not "public charges" might nevertheless need public assistance, and established an "immigrant fund" to provide such temporary "relief." 22 Stat. 214, § 1; 13 Cong. Rec. 5106 (June 19, 1882) (statement of Rep. Reagan). Contemporaneous state and local laws confirmed the common law understanding of "public charge" as individuals "incompetent to maintain themselves" or "permanently disabled," and "not merely destitute persons, who, on their arrival here, have no visible means of support." *City of Boston* v. *Capen*, 61 Mass. 116, 121-22 (1851).

Courts construing the public charge provisions of the federal immigration laws have understood it the same way. In *Gegiow* v. *Uhl*, 239 U.S. 3 (1915), this Court's only decision interpreting the public charge provision, the Court explained that the provision was intended only to exclude immigrants "on the ground of

permanent personal objections accompanying them," rather than those who might be temporarily unable to find work. *Id.* at 9-10. Lower court decisions likewise found the provision to apply only to "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).

2. As the court of appeals concluded, Pet. App. 40a-43a, administrative decisions throughout the twentieth century affirmed that mere receipt of public benefits does not render the recipient a public charge. In *Matter of B-*, 3 I. & N. Dec. 323, 324 (B.I.A. 1948), the BIA held that "acceptance by an alien of services provided by a State . . . to its residents, . . . does not in and of itself make the alien a public charge." *See also* Pet. App. 42a-43a & n.25 (collecting cases). A decision by the Attorney General, after comprehensively reviewing the case law and administrative decisions, concluded that "[a] healthy person in the prime of life cannot ordinarily be considered likely to become a public charge." *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (B.I.A. 1962; A.G. 1964). Petitioners have acknowledged that the BIA's decisions "clarified that . . . receipt of welfare would not, alone, lead to a finding of likelihood of becoming a public charge." 83 Fed. Reg. 51,114, 51,125 (Oct. 10, 2018).

3. Congress has approved these judicial and administrative interpretations by repeatedly reenacting the public charge provisions of the INA without purporting to redefine the term. In 1952, Congress reenacted the public charge inadmissibility provision in the Immigration and Nationality Act of 1952 without purporting to change its meaning. Pub. L. No. 82-414, § 212(a)(15), 66 Stat. 163, 183. Almost 40 years

later, in the Immigration Act of 1990, Congress again reenacted the public charge provision without relevant change. Pub. L. No. 101-649, §§ 601-03, 104 Stat. 4978, 5067-85. The legislative history of the 1990 Act noted that courts had associated likelihood of becoming a public charge with "destitution coupled with an inability to work." Staff of the H. Comm. on the Judiciary, 100th Cong., Grounds for Exclusion of Aliens Under the Immigration and Nationality Act: Historical Background and Analysis 121 (Comm. Print 1988).

In two major pieces of legislation enacted in 1996, Congress again chose not to disturb the settled meaning of "public charge." In the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Congress restricted noncitizens' eligibility for certain federal benefits. Pub. L. No. 104-193, § 403, 110 Stat. 2105, 2265-67 (1996) (codified at 8 U.S.C. § 1613). But many noncitizens remain eligible for certain federal benefits, and states are authorized to provide benefits to many others. *See generally* 8 U.S.C. §§ 1612-13. As petitioners note, PRWORA's statement of policy provides that noncitizens "not depend on public resources to meet their needs." 84 Fed. Reg. at 41,294 (quoting 8 U.S.C. § 1601(2)(A)). But, as the court of appeals concluded, the same policy statement concluded that this goal was "achiev[ed]" by restricting the availability of benefits to noncitizens—not by expanding the scope of the public charge exclusion. Pet. App. 60a-61a (quoting 8 U.S.C. § 1601(7)).

The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), also enacted in 1996, likewise did not overturn the settled interpretation of the INA's public charge provisions. *See* Pub. L. No. 104-208, div. C, § 531, 110 Stat. 3009, 3674 (1996) (amending 8 U.S.C. § 1182(a)). Instead, it codified the

existing "totality of the circumstances" standard, specifying that a public charge determination should take account of the applicant's age; health; family status; assets, resources, and financial status; and education and skills. *See* 8 U.S.C. § 1182(a)(4)(B)(i).

Congress's decision not to alter the settled meaning of "public charge" was not an oversight. In enacting IIRIRA, Congress considered and rejected a proposal that would have defined public charge for purposes of removal to include noncitizens who receive certain means-tested benefits—including Medicaid and food stamps—for more than 12 months. Immigration Control & Financial Responsibility Act of 1996, H.R. 2202, 104th Cong. § 202 (1996). The proposed amendment passed the House but was withdrawn in the Senate under threat of Presidential veto. 142 Cong. Rec. S11881-82 (daily ed. Sept. 30, 1996) (statement of Sen. Kyl). Specifically, President Clinton expressly threatened to veto any immigration bill that went "too far in denying legal immigrants access to vital safety net programs which could jeopardize public health and safety." Statement on Senate Action on the "Immigration Control and Financial Responsibility Act of 1996," 32 Weekly Comp. Pres. Doc. 783 (May 2, 1996). *See* Pet. App. 49a-50a. In 2013, Congress again turned back efforts to redefine public charge to include anyone who received means-tested public benefits. S. Rep. No. 113-40, at 38, 42, 63 (2013).

4. Administrative guidance from 1999—issued three years after the passage of PRWORA and IIRIRA, and under the administration of the same President who signed them into law—reaffirmed the settled interpretation of public charge. That year, the Immigration and Naturalization Service ("INS," the predecessor agency to petitioner USCIS) issued its Field Guidance

on Deportability and Inadmissibility on Public Charge Grounds ("Field Guidance"), 64 Fed. Reg. 28,689 (May 26, 1999), and a parallel proposed regulation, 64 Fed. Reg. 28,676 (May 26, 1999).

The Field Guidance defined "public charge" in the context of admissibility and LPR determinations to refer to a noncitizen "who is likely to become . . . '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. It excluded from public charge consideration receipt of noncash benefits such as Medicaid, SNAP, and housing assistance. The INS reasoned that those benefits "do not, alone or in combination, provide sufficient resources to support an individual or family." *Id.* at 28,692. The INS concluded that this understanding of "public charge" was consistent with the agency's "past practice" and "longstanding law." *Id.* at 28,689, 28,692. The Field Guidance remained in effect for twenty years until the Rule was promulgated.

B. The "Public Charge" Rule

DHS issued a Notice of Proposed Rulemaking on October 10, 2018. 83 Fed. Reg. 51,114. More than 260,000 comments were submitted, the "vast majority" in opposition. 84 Fed. Reg. at 41,297. The final Rule, largely rejecting those comments, was published in the Federal Register on August 14, 2019. *Id.* at 41,292.

The Rule defines "public charge" to mean any person who receives any amount of specified "public benefits" for more than 12 months in any 36-month period. 8 C.F.R. § 212.21(a). It defines "public benefit" to mean cash benefits or benefits from specified noncash

supplemental benefit programs, including SNAP, Medicaid (with certain exclusions), and certain federal housing benefits. 8 C.F.R. § 212.21(b). As the court of appeals noted, these benefits are widely used by working families and are available to many individuals and families with incomes well above the poverty level. Pet. App. 73a-77a; *see also* 64 Fed. Reg. at 28,692. Receipt of two benefits in one month counts as two months. Pet. App. 95a; *see also* 84 Fed. Reg. at 41,501. Thus, a person could be deemed a public charge for participating in three separate benefit programs for four months in any three-year period, as might occur after a sudden loss of employment or onset of a serious medical condition. Pet. App. 14a.

The Rule creates a complex scheme of positive and negative "factors" for USCIS personnel to consider in determining whether someone is likely to become a public charge. 8 C.F.R. §212.22. The factors focus overwhelmingly on the applicant's income and financial resources. The strong correlation between these factors (such as low income, low credit score, and past receipt of public benefits) leads to a snowball effect in which a single characteristic—low income or limited means—triggers multiple negative factors, making a public charge finding virtually inevitable. Indeed, as the court of appeals noted, USCIS's policy manual provides that seeking LPR status is *itself* deemed a negative factor, on the ground that LPRs become eligible for public benefits after the five-year waiting period has elapsed. Pet. App. 17a.

C. Procedural History

On August 27, 2019, respondents—five nonprofit organizations that serve and advocate for low-income noncitizens—commenced this action in the United States District Court for the Southern District of New

York, asserting claims under the APA and the Equal Protection guarantee of the Fifth Amendment. Co-respondents the States of New York, Connecticut, and Vermont, and the City of New York filed a related action that was assigned to the same district judge and has proceeded in tandem with this case. Seventeen States, the District of Columbia, five municipalities, and multiple nonprofit organizations brought seven similar cases in four other district courts.

Respondents moved to preliminarily enjoin the Rule and postpone its effective date under 5 U.S.C. § 705. Co-respondents filed a similar motion. On October 11, 2019, the district court granted both motions and issued preliminary injunctions barring enforcement of the Rule nationwide and postponing its effective date. Pet. App. 91a-120a, 125a-157a. All four other district courts in which the Rule was challenged also preliminarily enjoined it. *CASA de Maryland, Inc.* v. *Trump*, 414 F. Supp. 3d 760 (D. Md. 2019); *Cook Cty.* v. *McAleenan*, 417 F. Supp. 3d 1008 (N.D. Ill. 2019); *City and Cty. of S.F.* v. *USCIS*, 408 F. Supp. 3d 1057 (N.D. Cal. 2019); *Washington* v. *U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 1191 (E.D. Wash. 2019).

Petitioners appealed these decisions and moved for stays pending appeal. The Fourth Circuit and a divided panel of the Ninth Circuit granted petitioners' motions to stay. *See City & Cty. of S.F.* v. *USCIS*, 944 F.3d 773 (9th Cir. 2019); *CASA de Maryland, Inc.* v. *Trump*, No. 19-2222, Dkt. 21 (4th Cir. Dec. 9, 2019). The Second and Seventh Circuits denied similar motions, but this Court granted petitioners' applications to stay those injunctions pending appeal. *Dep't of Homeland Sec.* v. *New York*, 140 S. Ct. 599 (2020); *Wolf* v. *Cook Cty.*, 140 S. Ct. 681 (2020). Petitioners began implementing the Rule on February 24, 2020.

A unanimous panel of the Second Circuit affirmed the preliminary injunction on appeal here, but narrowed its scope to the states within the Second Circuit. The court concluded that the Rule's definition of "public charge" is contrary to law because it is inconsistent with the settled meaning of the term embodied in statute. Pet. App. 54a-67a. The court also concluded that the Rule is arbitrary and capricious under the APA because DHS had not provided a reasoned explanation for departing from the 1999 Field Guidance, and had not provided any factual basis to support the expansive list of public benefits covered by the Rule. *Id.* at 67a-78a. As discussed below (*infra* at 25-27), merits panels of the Seventh and Ninth Circuits have concurred with the result reached by the Second Circuit. The only contrary ruling on the merits, by a divided Fourth Circuit panel, has been vacated for *en banc* review.

ARGUMENT

The petition should be denied, or, at least, consideration of the petition should be deferred. The incoming Administration has stated that it intends to reverse the Rule within its first 100 days. Such action would render this case moot. At the very least, the Court should defer ruling on the petition to enable the incoming Administration to consider its position in this litigation.

The Court should deny the petition for the independent reason that the ruling of the court of appeals was correct. The court of appeals correctly determined that respondents are within the zone of interests of the APA and INA, and that, consistent with rulings by the Seventh and Ninth Circuits, the Rule is likely contrary to law and arbitrary and capricious under the APA.

Other factors weigh against granting the petition. There is no conflict among the Circuits warranting review by this Court. And it would be inefficient for the Court to review this case in its present posture, on appeal from a preliminary injunction. Instead, the Court should wait for a final judgment on the merits based on a full record and after the lower courts have addressed all potentially dispositive issues.

A. The Court Should Delay a Decision to Afford the Incoming Administration Time to Address This Case

The incoming Administration has stated that it intends to "[r]everse Trump's public charge rule" in its "first 100 days." *See* The Biden Plan for Securing Our Values as a Nation of Immigrants, joebiden.com/immigration/ (last visited Dec. 8, 2020).

It would be an inefficient use of the Court's resources to grant certiorari, as the Rule may well be rescinded before the Court issues its judgment. At a minimum, the Court should defer consideration of the petition, to afford the incoming Administration time to consider its position in this litigation.

This is not, as petitioners suggested in opposing respondents' request for an extension of time to file this opposition, mere "speculation about the agency's future actions." Resp. to Mots. at 2 (Nov. 20, 2020). Reversing the Rule is the stated position of the President-elect and would likely render this litigation moot. *See N.Y. State Rifle & Pistol Ass'n, Inc.* v. *City of New York*, 140 S. Ct. 1525, 1526 (2020). Petitioners' suggestion that this Court should grant certiorari because a ruling by this Court may be of assistance in a future challenge to actions that may be taken by the incoming Administration, *see* Resp. to Mots. at 2, rests on

speculation about exactly what actions the incoming Administration may take to reverse the Rule and what challenges, if any, may be asserted to those actions. It also appears to invite the Court to issue an advisory opinion without an Article III case or controversy. *See Chicago & Southern AirLines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive."). The Court should decline that invitation.

B. The Court of Appeals Correctly Concluded That Respondents Are Within the Zone of Interests, and There Is No Conflict with Other Courts of Appeals

1. Petitioners ask this Court to review the court of appeals' holding that respondents' challenge to the Rule is not foreclosed by the "zone of interests" doctrine. The zone of interests inquiry "in the APA context . . . is not especially demanding." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (quotation marks and citation omitted). It forecloses suit "only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id.* (quotation marks and citation omitted). Congressional intent is assessed in light of the specific provision at issue, its "context," and "Congress's overall purpose" in enacting the statute. *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987). Because Congress intended to make agency action presumptively reviewable under the APA, the test may be satisfied even if there is no "indication of congressional purpose to benefit the would-be plaintiff." *Id.* at 399-400; *see also Bank of America*

Corp. v. *City of Miami*, 137 S. Ct. 1296, 1303-04 (2017) (city's discriminatory lending claims were within the zone of interests of the Fair Housing Act despite no indication the Act was intended to protect municipal budgets).

Petitioners argue that respondents' interests are "inconsistent" with the INA's purpose, because, petitioners contend, respondents seek to "facilitate benefits usage by aliens," while the INA seeks to "limit" it. Pet. 13 (emphasis omitted). The Second Circuit correctly concluded that petitioners' position "mischaracterizes both the purpose of the public charge statute and [respondents'] interests." Pet. App. 28a. The statutory grounds for inadmissibility, including public charge, reflect a balance of Congress's 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." Pet. App. 29a; *see also* 84 Fed. Reg. at 41,306 (acknowledging INA's purposes of promoting "family unity, diversity, and humanitarian assistance"). There is no basis to conclude that only parties "advocating increasingly harsher interpretations of the grounds of inadmissibility" fall within the statute's zone of interests. Pet. App. 29a. Moreover, respondents' interests are not, contrary to petitioners' assertions, to encourage benefits use by noncitizens. Respondents provide an array of "legal and social services to non-citizens," Pet. App. 30a, including noncitizens who are not subject to the Rule but nonetheless suffer harm because of the Rule's "chilling effect" of discouraging benefits use by eligible individuals who fear negatively impacting their immigration status. Pet App. 23a, 79a; *see also infra* at 24. Respondents' interest in "increas[ing] noncitizen well-being and status" is undermined by rules

that impose unlawful impediments to admissibility or adjustment of status. Pet. App. 29a-30a.

2. The Court also should also deny certiorari on the zone of interests question because there is no conflict among the courts of appeals. Each of the other courts of appeal to have considered this issue has concluded, consistent with the Second Circuit's straightforward holding here, that the plaintiffs in those cases are within the zone of interests of the INA, or assumed that they were without deciding the issue. *See City & Cty. of S.F.*, 2020 WL 7052286, at *7-8; *CASA de Maryland, Inc.* v. *Trump*, 971 F.3d 220, 241 n.5 (4th Cir. 2020); *Cook Cty.* v. *Wolf*, 962 F.3d 208, 219-21 (7th Cir. 2020); *City & Cty. of S.F.*, 944 F.3d at 786 n.8.[1]

C. The Court of Appeals Correctly Concluded That Respondents Are Likely to Succeed on the Merits of Their Claims and Satisfy the Remaining Preliminary Injunction Factors

The Second Circuit also correctly concluded that the Rule is likely contrary to law and arbitrary and capricious. Petitioners present no arguments here that cast doubt on those conclusions. Petitioners do not challenge the district court's conclusion, affirmed by

[1] While the district court in *City & County of San Francisco* held that the non-governmental plaintiffs in that case were not within the INA's zone of interests, that decision was not appealed. *See City & Cty. of S.F.*, 408 F. Supp. 3d at 1117-18. The district court in that case subsequently denied the defendants' motion to dismiss the non-governmental plaintiffs' claims on zone of interests grounds in light of the opinions of the Second and Seventh Circuits, and the plaintiffs' refined articulation of the relevant statutory provisions and harms. *See La Clinica de la Raza* v. *Trump*, No. 19-cv-4980, 2020 WL 6940934, at *8-11 (N.D. Cal. Nov. 25, 2020).

the court of appeals, that the Rule will cause irreparable harm to respondents.

1. The court of appeals correctly ruled that "Congress's intended meaning of 'public charge' unambiguously forecloses the Rule's expansive interpretation." Pet. App. 56a. Petitioners' reliance on broad statements of Congressional policy and other statutory provisions to justify radically expanding the provision does not withstand scrutiny.

a. *First*, the Rule is inconsistent with the plain language of the INA and its longstanding historical meaning. As discussed above, since the term "public charge" was first introduced into federal immigration law in 1882, it has consistently referred to a narrow category of persons who were unable to care for themselves. *See supra* at 2-4. As the Ninth Circuit concluded: "From the Victorian Workhouse through the 1999 [Field] Guidance, the concept of becoming a 'public charge' has meant dependence on public assistance for survival. . . . [T]he concept has never encompassed persons likely to make short-term use of in-kind benefits that are neither intended nor sufficient to provide basic sustenance." *City & Cty. of S.F.*, 2020 WL 7052286, at *9.

The century-long judicial and administrative interpretation of "public charge" as inability to care for oneself and therefore primarily dependent on the government for subsistence is powerful evidence of the meaning of that term. *See supra* at 2-4, 6-7. "[A] longstanding, contemporaneous construction of a statute by the administering agencies is entitled to great weight, and will be shown great deference." *Leary* v. *United States*, 395 U.S. 6, 25 (1969) (quotation marks, citations, and alteration omitted).

Petitioners cite no case or administrative decision interpreting "public charge," as the Rule does, to include temporary receipt of noncash public benefits. Petitioners point to portions of the definition of "public charge" in the 1933 and 1951 editions of Black's Law Dictionary and a 1929 immigration treatise. Pet. 14-15, 18. But all of these sources rely on a single case, *Ex Parte Kichmiriantz*, 283 F. 697 (N.D. Cal. 1922), involving a noncitizen who had been institutionalized and was "unable to care for himself in any way." *Id.* at 697-98. *Kichmiriantz* reflects the consistent historical focus of the term on those unable to care for themselves without other support.

Second, as the court of appeals held, Congress ratified the settled meaning of 'public charge' when it enacted IIRIRA" as applying to "those non-citizens who were likely to be unable to support themselves in the future and to rely on the government for subsistence." Pet. App. 53a. *See supra* at 5-6. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodities Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) (citation omitted); *see Helsinn Healthcare S.A.* v. *Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633-34 (2019) ("[W]e presume that when Congress reenacted the same language . . . , it adopted the earlier judicial construction of the phrase."); *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-40 (2009) ("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." (citation omitted)).

Third, Congressional intent to preserve an agency's interpretation of a statute is especially clear where, as here, Congress has rejected legislation specifically intended to overturn that interpretation. *See supra* at 6. In *Bob Jones University* v. *United States*, 461 U.S. 574, 600-01 (1983), this Court concluded that Congress's repeated consideration and rejection of bills intended to overturn the challenged IRS interpretation of the tax code was "significant" evidence of "Congressional approval of the [IRS] policy." *See also Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 801-02 (2014) (Congressional intent to approve longstanding judicial interpretation of scope of tribal immunity clear when Congress considered, but did not enact, two bills that expressly sought to abrogate that interpretation). This Court has placed particular weight on Congress's decision—as it did in 1996, *see supra* at 6—to enact a bill without specific language overturning existing law when a version with such language passed one chamber of Congress but was removed during conference. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 408, 414 n.8 (1975). As the Second Circuit correctly recognized, while in some instances the significance of Congressional inaction may be unclear, here "we know exactly why the [expansive public charge] definition was removed from IIRIRA," and "Congress's abandonment of its efforts to change the meaning of the term further suggests that it ratified the existing interpretation of 'public charge' in 1996." Pet. App. 50a.

b. Petitioners' arguments that the Rule is an appropriate administrative exercise of DHS's authority to construe the statute are not persuasive.

To the extent petitioners' argument rests on the doctrine of deference to agency interpretation of statutes it is charged with implementing under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (which the court of appeals applied but which petitioners do not cite here), that doctrine is inapposite. The *Chevron* doctrine does not apply to regulations like the Rule that involve questions "of deep 'economic and political significance,'" such as those that involve "billions of dollars in spending" and affect healthcare "for millions of people." *King* v. *Burwell*, 576 U.S. 473, 485-86 (2015) (citation omitted).

In any event, the Rule fails at both *Chevron* steps. The Rule fails at step one because, as the Second Circuit held, Congress' intent on the precise question at issue—the meaning of the term "public charge" in the IIRIRA—is unambiguous and "must be given effect." Pet. App. 54a. *See supra* at 16-17. In *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143-56 (2000) for example, this Court concluded that the FDA's proposed regulation of tobacco products failed at *Chevron's* first step based upon the "range of plausible meanings" that the statutory language could have had when the statute was enacted; its legislative history, including rejected efforts to amend the statute to grant FDA such authority; and Congressional reenactment of the statute after the FDA took the position that it lacked jurisdiction to regulate tobacco. The Rule also fails at *Chevron* step two (as the Seventh Circuit held, *Cook Cty.*, 962 F.3d at 226-29) because all interpretive tools indicate that the Rule is outside any permissible scope of the statute's meaning. *See Michigan* v. *EPA*, 135 S. Ct. 2699, 2707-08 (2015).

c. Petitioners ask this Court to infer, based on statutory provisions other than the public charge provision, that Congress intended to expand the definition of public charge in 1996, despite its express consideration and rejection of such legislation. The cited provisions do not support petitioners' argument.

First, petitioners' reliance on statements of policy in PRWORA 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," 8 U.S.C. § 1601, is misplaced. Pet. 16. By retaining immigrant eligibility for certain benefits in PRWORA—and expanding that eligibility in later legislation—Congress has concluded allowing noncitizens to access those benefits is not inconsistent with the statutory purposes of PRWORA. *See supra* at 5; *see also Cook Cty.*, 962 F.3d at 228 (concluding that the Rule "conflicts with Congress's affirmative authorization for designated immigrants to receive the benefits the Rule targets"). And, as the Second Circuit noted, PRWORA's restriction (but not elimination) of noncitizen eligibility for public benefits "achiev[ed]" the government's interest in furthering noncitizen self-reliance. Pet. App. 60a-61a (citing 8 U.S.C. § 1601(7)).

The INA reflects a balance among many goals, including, as the Rule acknowledges, "family unity, diversity, and humanitarian assistance." 84 Fed. Reg. at 41,306. Petitioners' assertion that Congress's identification of a single policy justifies overturning the longstanding meaning of one statutory provision ignores this Court's teachings. *E.g.*, *Rodriguez* v. *United States*, 480 U.S. 522, 525-26 (1987) (per curiam) (emphasizing that "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers

the statute's primary objective must be the law," because "no legislation pursues its purposes at all costs").

Second, petitioners point to provisions in the INA that require certain noncitizens to provide enforceable affidavits of support by their sponsors as a condition of admissibility under the public charge provision. *See* Pet. 15-16, 19-20. PRWORA required that affidavits of support be enforceable against the sponsor, and IIRIRA made obtaining an enforceable affidavit an independent requirement under the public charge inadmissibility provision. But, as discussed above, Congress chose not to redefine "public charge" in either statute. *See supra* at 5-6, 16-18. Had Congress intended to redefine public charge, it would have done so directly, not by implicitly changing its meaning through revisions to the affidavit of support requirement. *See generally Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (noting 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").

In any event, there is no inconsistency between requiring a noncitizen seeking admission or adjustment to LPR status to provide an enforceable affidavit of support and retaining the traditional, interpretation of "public charge." The affidavit of support requirement—which DHS acknowledges is "separate" from a public charge assessment, 84 Fed. Reg. at 41,448 ensures that the sponsor's agreement to repay certain benefits used by the noncitizen can be enforced, without undermining the compelling goals of family unity and diversity that would result from rendering large numbers of noncitizens "public charges" by redefining the term. *See* Pet. App. 64a (explaining that

the affidavit of support serves as a mechanism "to get sponsors to take their commitments seriously by making them legally enforceable, a longstanding point of concern"); *see also City & Cty. of S.F.*, 2020 WL 7052286, at *10 (similar).

2. The Second Circuit also correctly concluded the Rule is arbitrary and capricious.

The Rule rests on petitioners' contention that Congress viewed the receipt of public benefits as synonymous with a lack of self-sufficiency. *See* Pet. 15. But, as the court of appeals concluded, "Congress's vision of self-sufficiency does not anticipate abstention from all benefits use." Pet. App. 69a (citing *Cook Cty.*, 962 F.3d at 232 (concluding that the Rule reflects an "absolutist sense of self-sufficiency that no person in a modern society could satisfy")). The Second Circuit thus correctly determined that petitioners failed to provide a "reasoned explanation" for departing from the 1999 Field Guidance. Pet. App. 71a (citing *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016)).; *accord City & Cty. of S.F.*, 2020 WL 7052286, at *13 ("DHS promulgated the Rule without any explanation of why the facts found, and the analysis provided, in the [Field] Guidance were now unsatisfactory.").

The Second Circuit also correctly concluded that DHS's decision to include noncash, supplemental public benefits as part of the Rule's definition of "public charge" was made without "*any* factual basis" for the assumption "that non-citizens using these programs would be unable to provide for their basic necessities without governmental support." Pet. App. 73a. As detailed by the Second Circuit, the "goals and eligibility criteria of these benefits programs belie DHS's assumption and show that these programs are intended to provide supplemental support, rather

than subsistence, to a broad swath of the population." Pet. App. 73a-74a; *see also Cook Cty.*, 962 F.3d at 232 ("[T]he benefits [the Rule] covers are largely supplemental and not intended to be, or relied upon as, a primary resource for recipients."). The Rule also "runs counter to the evidence before the agency," *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), including undisputed evidence establishing that supplemental benefits promote rather than impede self-sufficiency. *See, e.g.*, Center for Law and Social Policy, Comment, at 18-22, 31-36, 48 (Dec. 7, 2018), D. Ct. Dkt. 50-37[2]; Center on Budget and Policy Priorities, Comment, at 49-52 (Dec. 7, 2018), D. Ct. Dkt. 50-20; *see also Cook Cty.*, 962 F.3d at 232 ("Many recipients could get by without [the covered benefits], though as a result they would face greater health, nutrition, and housing insecurity, which in turn would likely harm . . . their ability to be self-sufficient."). Petitioners' failure to address this evidence renders the Rule arbitrary and capricious. *Encino Motorcars*, 136 S. Ct. at 2125-26; *see also State Farm*, 463 U.S. at 51.

3. The Second Circuit did not address the merits of respondents' Rehabilitation Act or Equal Protection claims, finding that it was unnecessary to do so in light of the likelihood of success on the APA claims. Pet. App. 32a n.20. Nevertheless, petitioners argue that these claims should fail on the merits. Pet. 23-24. There is no reason for the Court to consider these claims before the Second Circuit has done so. But in any event, petitioners are wrong on the merits.

---

[2] Citations to the district court docket ("D. Ct. Dkt.") are to *Make the Road New York* v. *Cuccinelli*, No. 19-7993 (S.D.N.Y.).

The Rule is contrary to the Rehabilitation Act, 29 U.S.C. § 794(a), because, under the Rule's scheme of positive and negative factors for determining whether a noncitizen is likely to become a public charge, individuals with disabilities start with multiple outcome-determinative strikes against them. An applicant's disability is a negative factor relating to the applicant's "assets, resources, and financial status," and, separately, is a "heavily weighted negative factor" if the noncitizen lacks private health insurance or sufficient assets to cover reasonably foreseeable medical costs related to the disability. 8 C.F.R. §§ 212.22(c)(1)(iii)(B), 212.22(b)(4)(ii)(H); 84 Fed. Reg. at 41,408. As a result, an "otherwise qualified" noncitizen could be excluded as likely to become a public charge "solely" because of these multiple negative factors related to disability. *See Cook Cty.*, 962 F.3d at 228 ("[T]he Rule disproportionately burdens disabled people and in many instances makes it all but inevitable that a person's disability will be the but-for cause of her being deemed likely to become a public charge."). DHS concedes in the Rule itself that the Rule will have a "potentially outsized impact . . . on individuals with disabilities." 84 Fed. Reg. at 41,368. Petitioners argue that the INA's inclusion of "health" as a public charge factor "provides the governing rule in this context." Pet. 23. But the Rehabilitation Act's disability discrimination provision controls because it is far more specific, and the two terms can "live together comfortably." *See Cook Cty.*, 962 F.3d at 228; *see also Clifford F. MacEvoy Co.* v. *U.S. for Use and Benefit of Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944) ("Specific terms prevail over the general in the same or another statute which might otherwise be controlling.").

The Rule also violates Equal Protection because it was motivated by discriminatory animus and its

application results in discriminatory effect. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68 (1977). As the district court recognized, it is undisputed that the Rule will disparately impact noncitizens of color. Pet. App. 149a. This evidence is bolstered by the unique circumstances in which the Rule was developed and implemented, as well as the contemporaneous statements reflecting discriminatory animus by those responsible for crafting it. *See* Am. Compl. ¶¶ 242-73, D. Ct. Dkt. 251. And while petitioners dispute the standard of review that should apply, *see* Pet. 24, the Rule does not pass even rational basis review because animus against a particular group "lacks a rational relationship to legitimate state interests." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996); *see City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985).

4. Petitioners do not challenge the district court's conclusion, affirmed by the court of appeals, that the Rule has caused, and will continue to cause, grave harm to immigrant communities across the country, and that respondents and the immigrant communities they serve will be irreparably damaged by the Rule. Pet. App. 22a-27a, 78a-82a, 135a-136a, 150a-152a. DHS has acknowledged that the Rule will discourage noncitizens from taking advantage of available health and other benefits to which they are otherwise entitled, and will consequently result in "[w]orse health outcomes," "[i]ncreased use of emergency rooms," "[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.

Petitioners contend that DHS will be irreparably harmed if it is unable to implement the Rule, as it

might grant LPR status to some unspecified number of noncitizens under the criteria set forth in the 1999 Field Guidance. Pet. 26-27. But petitioners have conceded that the 1999 Field Guidance was lawful, *see* Defs.' Mem. of Law in Opp'n to Mot. for Prelim. Inj., at 21, D. Ct. Dkt. 129, and the injunctions at issue, if allowed to take effect, would merely return to the status quo under that guidance. As the court of appeals correctly recognized, "[a]ny time the government is subject to a preliminary injunction, it necessarily suffers the injury of being prevented from enacting its preferred policy." Pet. App. 80a; *accord City & Cty. of S.F.*, 2020 WL 7052286, at *14. Absent a national security interest or similar exigent concern (which petitioners have not articulated), this rationale does not outweigh the admitted irreparable harm to respondents and the public of implementing the Rule. *See Trump* v. *Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087-89 (2017) (per curiam).

D. There is No Circuit Conflict Warranting Review

Petitioners' argue that the Court should grant the petition to resolve a conflict between the decisions by the Second and Seventh Circuits, on the one hand, and and decisions by a divided panel of the Ninth Circuit (granting a stay pending appeal) and a divided merits panel of the Fourth Circuit, on the other. Pet. 24-26. Any Circuit conflict, however, has been obviated by developments since the petition was filed. Absent a conflict, this Court's review is not warranted.

On December 3, 2020, the Fourth Circuit granted a petition for rehearing *en banc*, and tentatively scheduled the case for argument for January 22-29, 2021. *See* Order, *CASA de Maryland* v. *Trump*, No. 19-2222, Dkt. 147 (4th Cir. Dec. 3, 2020). Under Fourth Circuit

Local Rule 35(c), the grant of rehearing *en banc* has the effect of "vacat[ing] the previous panel judgment and opinion."

Likewise, on December 2, 2020, the Ninth Circuit issued a merits decision concluding, consistent with the rulings of the Second and Seventh Circuits, that the Rule is likely contrary to law and arbitrary and capricious. *See City & Cty. of S.F.*, 2020 WL 7052286. The Ninth Circuit merits panel declined to follow the reasoning of the earlier motion panel ruling. *See City & Cty. of S.F.*, 944 F.3d 773. The merits panel concluded that the motion panel's decision was "based on a prediction of what this panel would hold in reviewing the merits of the preliminary injunctions," and was rendered without full briefing or oral argument, and without the benefit of decisions from the other courts of appeals. *City & Cty. of S.F.*, 2020 WL 7052286 at *6.

These developments eliminate the conflict between the courts of appeals that might otherwise call for this Court's review. *See Bunting* v. *Mellen*, 541 U.S. 1019, 1021-22 (2004) (Stevens, J., concurring in denial of certiorari); E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice § 4.4(D) (11th ed. 2019) ("A conflict with a decision that has . . . lost all weight as authority by reason of intervening decisions of . . . the courts of appeals will not be an adequate basis for granting certiorari.").

Any modest differences in the reasoning followed by the courts of appeals does not warrant granting the petition. *Cf.* Pet. 25-26. All three courts of appeals concluded that the Rule's definition of "public charge" is "beyond the bounds of the settled meaning of the term, in light of its historical use and Congress's repeated reenactment of the statute." Pet. App. 62a.

See also id. at 56a ("[W]e do not find the intent of Congress . . . to be so precise as to support only one interpretation. . . . But . . . 'the presence of some uncertainty' does not prevent us from 'discerning the outer limits of a statutory term.'" (quoting *Cuomo* v. *Clearing House Ass'n, LLC*, 557 U.S. 519, 525 (2009) (alterations omitted))); *Cook Cty.*, 962 F.3d at 229 ("Even assuming that the term 'public charge' is ambiguous . . . , it does violence to the English language and the statutory context to say that it covers a person who receives only *de minimis* benefits for a *de minimis* period of time."); *City & Cty. of S.F.*, 2020 WL 7052286, at *10 ("Although the opinions of the Second Circuit in *New York* and the Seventh Circuit in *Cook County* reflect some disagreement over whether there was any historically established meaning of the phrase 'public charge,' they agreed that the Rule's interpretation of the statute was outside any historically accepted or sensible understanding of the term."). A mere "difference of approach between the Circuits" does not merit a grant of certiorari without a "square conflict." *Miroyan* v. *United States*, 439 U.S. 1338, 1339 (1978) (Rehnquist, J., in chambers).

E. The Petition Does Not Warrant The Court's Review on This Posture

The Court should also deny the petition and defer review until the lower courts have reached a final decision on the merits on a full evidentiary record, rather than in the present posture of an appeal from a preliminary injunction. *See, e.g.*, *Nat'l Football League* v. *Ninth Inning, Inc.*, No. 19-1098, 2020 WL 6385695 (S. Ct. Nov. 2, 2020) (statement of Kavanaugh, J., respecting denial of certiorari) (citing *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting denial of certiorari)); *Mount Soledad Mem'l*

Ass'n v. *Trunk*, 567 U.S. 944, 944 (2012) (statement of Alito, J., respecting denial of certiorari) ("Because no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take, I agree with the Court's decision to deny the petitions for certiorari.").

Denying certiorari is particularly appropriate because proceedings in the district court—and in other district courts in the parallel cases—have continued during the pendency of this appeal.[3] Discovery has commenced on respondents' claims that the Rule violates Equal Protection. The district court has set a schedule requiring fact discovery to be completed by April 16, 2021. *See* Order, D. Ct. Dkt. 264. To date, petitioners have produced what they have represented is the administrative record. *See* Notice of Submission of the Administrative Record, D. Ct. Dkt. 163. The district court has also held that respondents are entitled to discovery outside the administrative record, and respondents have served discovery requests. *See* Order, D. Ct. Dkt. 249; Joint Status Letter, D. Ct. Dkt. 280. Discovery is also proceeding in parallel cases. *See* Order, D. Ct. Dkt. 249. The Court could well benefit from further development of the factual record.

Finally, the Court should deny the petition because the parties are briefing motions in the district court that may invalidate the Rule on grounds unrelated to those presented by the present petition. On August 14,

---

[3] On November 2, 2020, while the petition was pending, the district court in *Cook County* granted summary judgment to plaintiffs on their APA claims, though the Seventh Circuit stayed that order pending resolution of the petition for certiorari in that case. *Cook Cty.* v. *Wolf*, No. 19-cv-6334, 2020 WL 6393005 (N.D. Ill. Nov. 2, 2020); *order stayed*, *Cook Cty.,* v. *Wolf*, No. 20-3150, Dkt. 21 (7th Cir. Nov. 19, 2020).

2020, the United States Government Accountability Office concluded that former Acting Secretary of Homeland Security McAleenan—in whose name the Rule was issued—and current Acting Secretary Wolf were installed in their respective roles in violation of the Federal Vacancies Reform Act ("FVRA") and the Homeland Security Act. U.S. Gov't Accountability Off., B-331650, Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security (2020). On October 2, 2020, respondents filed an amended complaint alleging that these invalid appointments render the Rule void, and respondents have since moved for summary judgment on those claims. *See* Mot. for Summary Judgment, D. Ct. Dkt. 267. Multiple district courts have already held that actions purportedly taken by McAleenan and Wolf are invalid under the FVRA on the same basis. *E.g.*, *Batalla Vidal* v. *Wolf*, No. 16-cv-4756, 2020 WL 6695076, *6-9 (E.D.N.Y. Nov. 14, 2020); *CASA de Maryland, Inc.* v. *Wolf*, No. 20-cv-2118, 2020 WL 5500165, at *20-23 (D. Md. Sept. 11, 2020). To minimize the risk of inefficient, piecemeal appeals, the Court should defer consideration of this case until the lower courts have had the opportunity to adjudicate the validity of the Rule under the FVRA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GHITA SCHWARZ
BAHER A. AZMY
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

SUSAN E. WELBER
KATHLEEN KELLEHER
SUSAN CAMERON
HASAN SHAFIQULLAH
THE LEGAL AID SOCIETY
199 Water Street, 3rd Floor
New York, NY 10038

ANDREW J. EHRLICH
Counsel of Record
JONATHAN H. HURWITZ
ROBERT J. O'LOUGHLIN
DANIEL S. SINNREICH
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000
aehrlich@paulweiss.com

Counsel for Respondents

December 9, 2020