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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-17213

D.C. No. 4:19-cv-04717–PJH

[Filed: April 8, 2021]

CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SANTA CLARA,	)
Plaintiffs-Appellees,	)
v.	)
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; ALEJANDRO MAYORKAS, in his official capacity as Secretary of the U.S. Department of Homeland Security; TRACY RENAUD in her official capacity as Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services,	)
Defendants-Appellants,	)

STATES OF ARIZONA, ALABAMA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA,
Intervenors-Pending.

No. 19-17214

D.C. No. 4:19-cv-04975-PJH

STATE OF CALIFORNIA; DISTRICT OF COLUMBIA; STATE OF MAINE; COMMONWEALTH OF PENNSYLVANIA; STATE OF OREGON,
Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; ALEJANDRO MAYORKAS, in his official capacity as Secretary of the U.S. Department of Homeland Security; TRACY RENAUD in her official capacity as Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services,
Defendants-Appellants,

STATES OF ARIZONA, ALABAMA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI,

MISSOURI, MONTANA, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA,
Intervenors-Pending.

No. 19-35914

D.C. No. 4:19-cv-05210-RMP

STATE OF WASHINGTON; COMMONWEALTH OF VIRGINIA; STATE OF COLORADO; STATE OF DELAWARE; STATE OF ILLINOIS; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; DANA NESSEL, Attorney General on behalf of the People of Michigan; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF RHODE ISLAND; STATE OF HAWAII,
Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; ALEJANDRO MAYORKAS, in his official capacity as Secretary of the U.S. Department of Homeland Security; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; TRACY RENAUD in her official capacity as Senior Official Performing the Duties of the Director, U.S. Citizenship and

Immigration Services,
Defendants-Appellants,

STATES OF ARIZONA, ALABAMA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA,
Intervenors-Pending.

Filed April 8, 2021

Before: Mary M. Schroeder, William A. Fletcher, and Lawrence J. VanDyke, Circuit Judges.

Order;
Dissent by Judge VanDyke

SUMMARY*

Immigration/Intervention

The panel denied motions by the State of Arizona and other states to intervene in cases in which the panel previously issued an opinion in *City and County of San Francisco v. USCIS*, 981 F.3d 742 (9th Cir. 2020) [Schroeder (author) W. Fletcher VanDyke (dissenting)], affirming in part and vacating in part preliminary injunctions enjoining implementation of the Department of Homeland Security's redefinition of the term "public charge," and in which the Supreme

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Court on March 9, 2021, dismissed pending petitions for writ of certiorari pursuant to the stipulation of the parties.

Judge VanDyke dissented from the denial of intervention. Judge VanDyke wrote that with the recent change in federal administrations, the Biden Administration stopped defending certain rules promulgated by the Trump Administration, including the Public Charge rule at issue in this case. Judge VanDyke observed that this in itself is neither surprising nor particularly unusual, as elections have consequences, and new presidential administrations, especially of a different party, often disagree with some of the rules promulgated by their predecessors. But here, Judge VanDyke wrote, the new administration did something quite extraordinary with the Public Charge rule: in concert with the various plaintiffs who had challenged the rule in federal courts across the country, the federal defendants simultaneously dismissed all the cases challenging the rule (including cases pending before the Supreme Court), acquiesced in a single judge's nationwide vacatur of the rule, leveraged that now-unopposed vacatur to immediately remove the rule from the Federal Register, and quickly engaged in a cursory rulemaking stating that the federal government was reverting back to the Clinton-era guidance—all without the normal notice and comment typically needed to change rules.

A collection of states moved to intervene in the various lawsuits challenging the rule around the country (including this one), arguing that because the federal government was now demonstrably in cahoots

with the plaintiffs, the states should be allowed to take up the mantle of defending the Trump-era rule. Pointing to the fact that the Supreme Court had both stayed multiple lower courts' injunctions of the rule and—until the new administration voluntarily dismissed its appeals—planned to review the rule's validity, the states contended there was something amuck about the federal government's new rulemaking-by-collusive-acquiescence.

In Judge VanDyke's view, the states easily met the intervention standard of Federal Rule of Civil Procedure 24. First, because the states quickly intervened within days of discovering that the federal government had abandoned their interests, and the federal government asserted no apparent prejudice in allowing intervention, Judge VanDyke wrote that the motion to intervene was timely. Judge VanDyke wrote that the states also have a "significant protectable interest" in the continuing validity of the rule because invalidating the rule could cost the states as much as $1.01 billion annually. Responding to the plaintiffs' and the federal government's argument that in lieu of joining this litigation, the states could vindicate their interests by participating in an agency review process or asking the agency to promulgate a new rule, Judge VanDyke observed that this argument might have had more merit had the federal government followed the traditional route of asking the courts to hold the public charge cases in abeyance, rescinding the rule per the Administrative Procedure Act, and then promulgating a new rule through notice and comment rulemaking. Judge VanDyke wrote that instead, the federal government intentionally avoided the APA entirely by

acquiescing in a final district court judgment, and altering the federal regulations by unilaterally reinstating the Clinton-era field guidance as the de facto new rule—without any formal agency rulemaking or meaningful notice to the public. Judge VanDyke wrote that by deliberately evading the administrative process in this way, the government harmed the state intervenors by preventing them from seeking any meaningful relief through agency channels. Judge VanDyke wrote that the disposition of this action, together with the federal government's other coordinated efforts to eliminate the rule while avoiding APA review, will impair or impede the states' ability to protect their interest in the 2019 rule's estimated annual savings. Judge VanDyke also wrote that the existing parties obviously do not adequately represent the states' interests because they are now united in vigorous opposition to the rule.

Addressing the plaintiffs' and the government's argument that this case is moot because the court cannot offer adequate relief now that the 2019 rule has been vacated by a different federal judge in the Seventh Circuit, Judge VanDyke wrote that the parties opposing intervention had not met their heavy burden of showing that there is not any effective relief that a court can provide. Judge VanDyke noted that the states could obtain effective relief because they currently have an action pending before the Supreme Court asking that Court to order the Seventh Circuit to reverse or stay the vacatur of the rule, and if successful, that would remove any obstacle to the states ultimately getting relief in this court. Judge VanDyke pointed out that if the states are successful in

their current request that the Supreme Court stay the Seventh Circuit's vacatur of the rule, the panel's denial of intervention will leave the states with no way to prevent one of the district courts in this circuit from immediately imposing a nationwide preliminary injunction of the rule or, worse, vacating the rule (again).

Judge VanDyke observed that there is a final reason why intervention is especially warranted in this case. Judge VanDyke wrote that by granting two stays (and a later petition for certiorari), the Supreme Court repeatedly indicated that the United States had "made a strong showing that [it was] likely to succeed on the merits" in its defense of the rule. Judge VanDyke wrote that absent intervention, the parties' strategic cooperative dismissals preclude those whose interests are no longer represented from pursuing arguments that the Supreme Court has already alluded are meritorious. Judge VanDyke wrote that even more concerning, the dismissals lock in a final judgment and a handful of presumptively wrong appellate court decisions in multiple circuits, and circumvent the APA by avoiding formal notice-and-comment procedures.

Judge VanDyke suggested a possible solution to this novel problem of a new federal administration deliberately short-circuiting the normal APA process. Judge VanDyke observed that the Supreme Court obviously could allow the states to intervene in the Seventh Circuit litigation and defend the 2019 rule in place of the federal government. But Judge VanDyke wrote that there may be a simpler solution here that would not only address what has happened with

respect to the Public Charge rule but, perhaps more importantly, would encourage future administrations to change rules—not through collusive capitulation—but via the familiar and required APA rulemaking process Congress created for that purpose. Judge VanDyke wrote that the Supreme Court could simply clarify that *Munsingwear* vacatur of lower court decisions and judgments is appropriate in this circumstance where the federal government and the plaintiffs jointly mooted litigation by acquiescing in a judgment against the government, which then prevented the normal APA process for removing or replacing a formal rule.

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ORDER

The Motion of State of South Carolina to Join Motion to Intervene by the States of Arizona, et al., is **GRANTED.**

The Motion of State of Missouri to Join Motion to Intervene by the States of Arizona, et al., is **GRANTED.**

The Motion to Intervene by the States of Arizona, et al., is **DENIED.**

VANDYKE, Circuit Judge, dissenting from the denial of intervention:

With the recent change in federal administrations, the Biden Administration stopped defending certain rules promulgated by the Trump Administration, including the Public Charge rule at issue in this case. That in itself is neither surprising nor particularly unusual. Elections have consequences, as they say, and a common enough one is that new presidential administrations, especially of a different party, often disagree with some of the rules promulgated by their predecessors. But here, as I explain in more detail below, the new administration did something quite extraordinary with the Public Charge rule. In concert with the various plaintiffs who had challenged the rule in federal courts across the country, the federal defendants simultaneously dismissed all the cases challenging the rule (including cases pending before the Supreme Court), acquiesced in a single judge's nationwide vacatur of the rule, leveraged that now-unopposed vacatur to immediately remove the rule from the Federal Register, and quickly engaged in a cursory rulemaking stating that the federal government was reverting back to the Clinton-era guidance—all without the normal notice and comment typically needed to change rules.

In short, the new administration didn't just stop defending the prior administration's rule and ask the courts to stay the legal challenges while it promulgated a new rule through the ordinary (and invariably time- and resource-consuming) process envisioned by the APA. Instead, together with the plaintiffs challenging

the rule, it implemented a plan to instantly terminate the rule with extreme prejudice—ensuring not only that the rule was gone faster than toilet paper in a pandemic, but that it could effectively never, ever be resurrected, even by a future administration. All while avoiding the normal messy public participation generally required to change a federal rule. Not bad for a day's work.

But not everyone was impressed with this rare display of governmental efficiency. Swiftly rebounding from the whiplash, a collection of states quickly moved to intervene in the various lawsuits challenging the rule around the country (including this one), arguing that because the federal government was now demonstrably in cahoots with the plaintiffs, the states should be allowed to take up the mantle of defending the Trump-era rule. Pointing to the fact that the Supreme Court had both stayed multiple lower courts' injunctions of the rule *and*—until the new administration voluntarily dismissed its appeals—planned to review the rule's validity, the states contended there is something amuck about the federal government's new rulemaking-by-collusive-acquiescence.

The panel majority denies the states' motion for intervention. I conclude intervention is warranted, and therefore respectfully dissent. Before explaining why, I first provide some background on the Public Charge rule and the legal challenges to it. And after explaining why we should have granted intervention, I briefly conclude with what I think might be a possible solution to this novel problem of a new federal administration

deliberately (1) short-circuiting the normal APA process by using a single judge to engage in de facto nationwide rulemaking and (2) locking in adverse legal precedents that the Supreme Court has already signaled are highly questionable.

I. Background

A. The term "Public Charge"

The term "public charge" has been a part of our country's statutory immigration lexicon for more than a century. *City & County of San Francisco v. USCIS*, 981 F.3d 742, 749 (9th Cir. 2020) (noting the first use in the Immigration Act of 1882). The most recent regulatory interpretation of that term has prompted various circuits across the nation to spill much ink arguing over its precise historical contours. *See, e.g.*, *Cook County v. Wolf*, 962 F.3d 208, 222–29 (7th Cir. 2020); *New York v. U.S. Dep't of Homeland Security*, 969 F.3d 42, 63–80 (2d Cir. 2020); *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 230–34 (4th Cir. 2020), *vacated for reh'g en banc*, 981 F.3d 311 (4th Cir. 2020) (dismissed Mar. 11, 2021); *City & County of San Francisco*, 981 F.3d at 756–58. Throughout much of its history, however, "public charge" has maintained a less-than-precise meaning, even as the term was continuously used in various state and federal statutes denying admission or adjustment of immigration status to noncitizens that were "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A); *see also Cook County* , 962 F.3d at 238–42 (Barrett, J., dissenting) (explaining the statutory usages and inferred meanings of the term "public charge" throughout its history).

In a laudable attempt to give the term a more concrete meaning, the Clinton Administration proposed a rule to define the term "public charge," but the effort was ultimately abandoned and a final rule never issued. *See* Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676 (proposed May 26, 1999). Enduring from that attempt, however, was field guidance defining a "public charge." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,692 (May 26, 1999). This field guidance was not binding, but the Department of Homeland Security (DHS) followed it in the absence of explicit regulatory direction. *See New York*, 969 F.3d at 53.

Under the guidance, an individual was considered a "public charge" if he was likely to receive "[c]ash assistance for income maintenance [or] institutionalization for long-term care at government expense." 64 Fed. Reg. at 28,692. But an individual seeking adjustment of status would *not* be considered a "public charge," even though he would need government-provided housing, government-paid electrical assistance, government-provided food, government health insurance for himself and his children, *and* government-provided childcare while using government-provided job training. *See* 64 Fed. Reg. at 28,692–93. In short, under the de facto rule in existence before the Trump Administration promulgated an actual rule, a noncitizen would *not* be deemed a public charge even though the government furnished essentially his every need (and many of his wants), just as long as the government didn't give him

cash benefits that he could then use to pay for his Netflix subscription.

While the ambiguous concept of a "public charge" no doubt allows for substantial interpretive elasticity, that seems quite a stretch. Indeed, it seems exactly backwards from what most people would think makes someone a "public charge." Nowadays, almost everybody in this country is getting cash stimulus payments from the IRS on what feels like a semi-regular basis, and nobody thinks that alone makes them a public charge. Call me crazy, but I expect most people would say it is being overly reliant on the government to meet your needs that makes one a public charge, not whether the welfare benefits are provided in cash or in kind.

B. New Public Charge Definition

Nearly two decades after the Clinton Administration promulgated its guidance, the Trump Administration in August 2019 issued a final rule—after notice and comment—defining "public charge." Inadmissibility on Public Charge Grounds; Final Rule, 84 Fed. Reg. 41,292 (Aug. 14, 2019). The 2019 rule looked prospectively at applications for admission or adjustment of status to determine whether the individual was "more likely than not at any time in the future to receive one or more designated public benefits for more than 12 months in the aggregate within any 36-month period." *Id.* at 41,295. The rule considered whether an individual would likely receive cash from the government and/or "means-tested non-cash benefits . . . which bear directly on the recipient's self-sufficiency and . . . account for

significant federal expenditures on low-income individuals." *Id.* at 41,296. If, under the totality of circumstances analysis, a noncitizen applying for admission or adjustment of status would likely need specified cash benefits and/or various non-monetizable government-provided housing, food assistance, or medical insurance for more than a collective twelve months, then the noncitizen could be considered a public charge. *Id.* at 41,501 (citing 8 C.F.R. § 212.21).

Because many categories of immigrants are either not eligible for these types of public benefits or are exempted from the public charge exclusion, the rule primarily affected only a limited subset of immigrants—nonimmigrant visa holders applying for green cards. *See Cook County*, 962 F.3d at 235–38 (Barrett, J., dissenting).[1] While not currently eligible for public benefits, upon adjustment of status, those individuals would be eligible in the future—thus, "[t]he public charge rule is concerned with what use a green card applicant would make of this future eligibility." *Id.* at 237.

C. Challenging the 2019 Public Charge Rule

Notwithstanding that the 2019 rule affected only a narrow group of people, almost none of whom have previously used public benefits, a score of outraged

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[1] A lawful permanent resident—already admitted to the U.S. and thus eligible for select public benefits—could also be subject to the 2019 rule if the individual left the United States for more than 180 days, which would bring his residency in to question and prompt the need to seek admission upon returning. *See Cook County*, 962 F.3d at 236 (Barrett, J., dissenting).

entities challenged the rule.[2] In late 2019, district courts in the Second, Fourth, Seventh, and Ninth Circuits all preliminarily enjoined the rule's enforcement. *See New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 353 (S.D.N.Y. 2019); *CASA de Md., Inc. v. Trump*, 414 F. Supp. 3d 760, 788 (D. Md. 2019); *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1014 (N.D. Ill. 2019); *City & County of San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1073 (N.D. Cal. 2019); *Washington v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 1191, 1224 (E.D. Wash. 2019). A divided motions panel of this court stayed the injunctions issued in this circuit in a published opinion, thereby allowing the rule to go into effect. *City & County of San Francisco v. USCIS*, 944 F.3d 773, 7 81 (9th Cir. 2019). Likewise, the Fourth Circuit stayed the preliminary injunction in its circuit. *CASA de Md., Inc.*, 971 F.3d at 237. The Second and Seventh Circuits initially denied stays, but the Supreme Court stepped in and stayed the preliminary injunctions issued in those circuits as well. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599 (2020);*Wolf v. Cook County*, 140 S. Ct. 681, 681 (2020). In sum, although the plaintiffs had a nice run of initial successes

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[2] The states challenging the rule alleged injury in the form of resident noncitizens, confused by the language of the rule, unnecessarily disenrolling from state public benefits. *See New York*, 969 F.3d at 59–60. DHS explained that the new rule would actually save the states money because they would be paying out less in public benefits. *Id.* at 60. The challenging states didn't disagree that the rule would directly save them money, but countered with a response that would delight salespeople everywhere: sometimes you have to spend money to save it. *Id.*; *see also City & County of San Francisco*, 981 F.3d at 755.

challenging the rule, by early 2020, all the injunctions against the rule had been stayed and the rule was in effect nationwide.

Undeterred by the Supreme Court's signal that challenges to the rule were ultimately likely to fail on the merits, lower courts continued to hammer away. The Second Circuit in continuing litigation affirmed the issuance of its circuit's preliminary injunction (with a limited scope), as did divided panels in the Seventh Circuit and this circuit. *See New York*, 969 F.3d at 50 (affirming the preliminary injunction, but with a limited scope); *Cook County*, 962 F.3d at 215; *City & County of San Francisco*, 981 F.3d at 763 (affirming preliminary injunctions, but with a limited scope). But a divided Fourth Circuit panel reversed, noting that the Supreme Court's stay in other circuits' proceedings "would have been improbable if not impossible had the government, as the stay applicant, not made a strong showing that it was likely to succeed on the merits." *CASA de Md., Inc.*, 971 F.3d at 229 (citation and internal quotation marks omitted).

Meanwhile, back in the Seventh Circuit, having moved on from the preliminary injunction stage to the merits phase of litigation, the Northern District of Illinois on November 2, 2020 entered a Rule 54(b) final judgment against the federal government and vacated the rule in its entirety. *Cook County v. Wolf*, No. 1:19-cv-06334, 2020 WL 6393005, at *6–7 (N.D. Ill. Nov. 2, 2020). Notwithstanding the Supreme Court's stay of its earlier preliminary injunction, the district court denied the government's request to stay the vacatur of the rule. *Id.* The Seventh Circuit, perhaps more

experienced at reading the Supreme Court, stepped in and stayed implementation of the district court's judgment pending appeal. Order Granting Motion to Stay Judgment, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Nov. 19, 2020), ECF No. 21.

While all this was going on, the federal government filed multiple petitions for certiorari seeking Supreme Court review of the Second, Seventh, and Ninth Circuit decisions concluding that the rule was likely unlawful. As these petitions were pending, President Biden took office in January 2021. Almost exactly a month later, the Supreme Court on February 22, 2021 granted review of the Second Circuit's case. *See Dep't of Homeland Sec. v. New York*, No. 20-449, 2021 WL 666376, at *1 (U.S. Feb. 22, 2021). While obviously one can never fully predict how the Supreme Court is going to decide a case, the Supreme Court's earlier stays—combined with its later cert grant of a lower court decision at odds with those stays —did not bode well for opponents of the rule.

D. DHS's Rapid Dismissal of the Litigation

One of those opponents was the new Biden Administration, which put the federal government in the awkward position of having a case teed up before the Supreme Court that it knew it was likely to win, but now really wanted to lose. So in the early hours of March 9, 2021, despite the Supreme Court having granted certiorari just two weeks prior in a related case that the government had asked the Court to review, DHS in coordination with the plaintiffs moved to dismiss the Seventh Circuit appeal of the district

court's vacatur of the rule.[3] Approximately an hour and a half later, DHS released a statement explaining that "the Department of Justice will no longer pursue appellate review of judicial decisions invalidating or enjoining enforcement of the 2019 Rule."[4] With a reaction time the envy of every appellate court, the Seventh Circuit only a few hours after DHS's statement granted the motion to dismiss and immediately issued the mandate.[5] Later that same evening, DHS issued another statement noting that "[f]ollowing the Seventh Circuit dismissal this afternoon, the final judgment from the Northern District of Illinois, which vacated the 2019 public charge rule, went into effect." It continued that "[a]s a result, the 1999 interim field guidance on the public charge inadmissibility provision (i.e., the [Clinton-era] policy that was in place before the 2019 public charge rule) is now in effect."[6] A little over 24 hours later, the

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[3] *See* Unopposed Mot ion to Voluntarily Dismiss Appeal, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021), ECF No. 23.

[4] Press Release, U.S. Dep't of Homeland Sec., DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility.

[5] Order Dismissing Appeal, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021), ECF No. 24-1; Notice of Issuance of Mandate, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021), ECF No. 24-2.

[6] Press Release, U.S. Dep't of Homeland Sec., DHS Secretary Statement on the 2019 Public Charge Rule(Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule.

parties filed a joint stipulation to dismiss the case in the Northern District of Illinois.[7] The district court closed the case the following day.[8]

On the same day it dismissed its Seventh Circuit appeal, the federal government, now BFFs with its prior opponents, also filed joint stipulations to dismiss all the cases pending before the Supreme Court, including the Second Circuit case in which the Supreme Court had already granted cert.[9] Consistent with the Supreme Court's Rule 46.1, which allows automatic dismissal of a case by unanimous agreement of the parties, the Clerk of the Supreme Court, "without further reference to the Court," dismissed those cases. Sup. Ct. R 46.1.[10]

In the afternoon of that same day, March 9, 2021, the parties also moved to dismiss their case in the

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[7] Joint Stipulation of Dismissal with Prejudice, *CookCounty v. Wolf*, No. 19-cv-6334 (N.D. Ill. Mar. 11, 2019), ECF No. 253.

[8] Notification of Docket Entry, *Cook County v. Wolf*, No. 19-cv-6334 (N.D. Ill. Mar. 12, 2019), ECF No. 254.

[9] Joint Stipulation to Dismiss, *U.S. Dep't of Homeland Sec. v. New York*, No. 20-449 (U.S. Mar. 9, 2021); Joint Stipulation to Dismiss, *Mayorkas v. Cook County* , No. 20-450 (U.S. Mar. 9, 2021); Joint Stipulation to Dismiss, *USCIS v. City & County of San Francisco*, No. 20-962 (U.S. Mar. 9, 2021).

[10] *Mayorkas v. Cook County*, No. 20-450, 2021 WL 1081063 (U.S. Mar. 9, 2021); *USCIS v. City & County of San Francisco*, No. 20-962, 2021 WL 1081068 (U.S. Mar. 9, 2021); *Dep't of Homeland Sec. v. New York*, No. 20-449, 2021 WL 1081216 (U.S. Mar. 9, 2021).

Fourth Circuit.[11] The Fourth Circuit granted the unopposed motion and issued the mandate two days later, on March 11, 2021, noting the lack of opposition.[12]

On that same day—March 11, 2021, only two days after the federal government's volte-face—fourteen states[13] responded in the Seventh and Fourth Circuits to the parties' synchronized blitzkrieg, collectively filing a Motion to Recall the Mandate to Permit Intervention as Appellant, an Opposed Motion to Reconsider, or alternatively, Rehear, a Motion to Dismiss, and an Opposed Motion to Intervene.[14] The

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[11] *See* Unopposed Motion to Voluntarily Dismiss Appeal, *CASA de Md. v. Biden*, No. 19-2222 (4th Cir. Mar. 9, 2021), ECF No. 210.

[12] *See* Order, *CASA de Md. v. Biden*, No. 19-2222 (4th Cir. Mar. 11, 2021), ECF No. 211; Rule 42(b) Mandate, *CASA de Md. v. Biden*, No. 19-2222 (4th Cir. Mar. 11, 2021), ECF No. 212.

[13] The states are Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia. The day before, on March 10, 2021, the states of Arizona, Alabama, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Montana, Oklahoma, Texas, and West Virginia, filed the Motion to Intervene now denied by this panel. *See* Motion to Intervene, *City and County of San Francisco v. USCIS*, Nos. 19-17213, 19-17214, 19-35914 (9th Cir. Mar. 10, 2021) . South Carolina and Missouri subsequently moved to join the motion before our court.

[14] *See* Motion to Recall the Mandate to Permit Intervention as Appellant, Opposed Motion to Reconsider, or in the Alternative to Rehear, the Motion to Dismiss, Opposed Motion to Intervene-Appellants, *Cook County v. Wolf*, No. 20-3150, (7th Cir. Mar. 11, 2021), ECF Nos. 25-1, 25-2, 25-3; Motion to Recall the Mandate to

states explained that "[b]ecause the Court issued its mandate within hours of the United States' announcement that it would no longer defend the Rule, interested parties had no ability to intervene before it did so," and "because the United States did not inform the States that it intended to cease defending the Rule before abandoning numerous cases supporting the Rule nationwide, the States did not have an opportunity to intervene at an earlier point."[15]

The Seventh Circuit summarily denied the states' motions on March 15, 2021,[16] coincidentally the same day that DHS issued a final rule removing the 2019 rule. The Fourth Circuit also summarily denied the states' motions on March 18, 2021.[17] On March 19, 2021, having been denied intervention or any other relief by the Seventh Circuit, the states asked the Supreme Court to order intervention or grant

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Permit Intervention as Appellant, Opposed Motion to Reconsider, or in the Alternative to Rehear, the Motion to Dismiss, Opposed Motion for Leave to Intervene-Appellants, *CASA de Md. v. Biden*, No. 19-2222 (4th Cir. Mar. 11, 2021), ECF Nos. 213, 214, 215.

[15] *See* Motion to Recall the Mandate t o Permit Intervention as Appellant, *Cook County v. Wolf*, No. 20-3150, (7th Cir. Mar. 11, 2021), ECF Nos. 25-1, at 4.

[16] *See* Order Denying Motions, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 15, 2021), ECF No. 26.

[17] *See* Order Denying Motions, *CASA de Md. v. Biden*, No. 19-2222 (4th Cir. Mar. 18, 2021), ECF No. 216.

alternative relief that would allow them to revive the lower court litigation.[18]

E. DHS's Rescission of the 2019 Rule

On March 15, 2021, DHS issued a final rule "remov[ing] the regulations resulting from [the 2019 rule], which has since been vacated by a Federal district court."[19] Notably, it issued the final rule without a notice and comment period or delayed effective date, stating instead that it was promulgating a rule that was already in effect: "[t]his rule is effective on March 9, 2021, as a result of the district court's vacatur." It explained that "[b]ecause this rule simply implements the district court's vacatur of the August 2019 rule, as a consequence of which the August 2019 rule no longer has any legal effect, DHS is not required to provide notice and comment or delay the effective date of this rule." Accordingly, there was "good cause" to "bypass[] any otherwise applicable requirements of notice and comment and a delayed effective date" as "unnecessary for implementation of the court's order vacating the rule . . . in light of the agency's immediate need to implement the now-effective final judgment."[20]

This is the background against which we are presented the instant motion to intervene. Arguing

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[18] *See* Application for Leave to Intervene & for a Stay of Judgment, *Texas v. Cook County*, No. 20A150 (U.S. Mar. 19, 2021).

[19] Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021) (to be codified at 8 C.F.R. pts. 103, 106, 212–14, 245, 248).

[20] *Id.* at 14,221.

that the federal government managed to snatch defeat from the jaws of victory only by naked capitulation, the states ask for an opportunity to pick up the football and step into the federal government's shoes, just as the formerly adversarial parties are walking off the field together, hand- in-hand, celebrating their "win-win." Meanwhile, the plaintiffs and feds, only months ago bitter enemies, collectively press us to deny intervention. The game is over, they say. You can't put Humpty Dumpty back together again. The horse hasn't just left the barn—it's dead, and never coming back.

II. Analysis

The federal government and the plaintiffs have certainly played their hand well. Not only have they gotten rid of a rule they dislike, but they've done so in a way that allowed them to dodge the pesky requirements of the APA *and* ensure that it will be very difficult for any future administration to promulgate another rule like the 2019 rule. But putting aside one's view of the merits of the rule itself, that doesn't seem like a good thing for good government. Leveraging a single judge's ruling into a mechanism to avoid the public participation in rule changes envisioned by the APA should trouble pretty much everyone, one would hope. Especially when the legal validity of that ruling is highly suspect and left untested only because of the collusive actions of the parties. Left unchecked, it seems quite likely this will become the mechanism of choice for future administrations to replace disfavored rules with prior favored ones.

But of course, just because something is bad policy doesn't always mean there is a legal basis to challenge it. Ultimately, the question currently before this panel is whether the states should be allowed to intervene—that is, not whether they should win the game, but just whether they should be allowed to play. That question is controlled by a well-established standard that favors intervention. As explained below, I think the states have easily met that standard here.

A. The States Meet the Intervention Standard

The states' motion to intervene is governed by Federal Rule of Civil Procedure 24. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007). Per Rule 24(a)(2), applicants can intervene in an action as of right when they meet the following four requirements:

> (1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest.

Prete v. Bradbury , 438 F.3d 949, 954 (9th Cir. 2006) (citation and internal quotation marks omitted); *see also* Fed. R. Civ. P. 24(a)(2). When determining whether these four "requirements are met, we normally

follow 'practical and equitable considerations' and construe the Rule 'broadly in favor of proposed intervenors.'" *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc) (citation omitted).

To evaluate intervention's timeliness, "we consider (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Peruta v. County of San Diego*, 824 F.3d 919, 940 (9th Cir. 2016) (en banc) (citation and internal quotation marks omitted). If a putative intervenor moves promptly to intervene when it becomes clear that their interests "would no longer be protected . . . there is no reason why [the intervention] should not be considered timely." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394–95 (1977). The states here moved to intervene in the public charge cases within mere days of the federal government making public that it no longer sought to defend the rule. The plaintiffs and the federal government argue against intervention by contending that "[n]either practical nor equitable concerns justify intervention at this late stage in the litigation." But this is hardly the typical case where putative intervenors sat on their hands until the eleventh hour. Instead, the federal government robustly defended the rule for more than a year in courts across the nation before suddenly acquiescing in its vacatur and dismissing all the public charge cases without prior notice. Because the states quickly intervened when they discovered that the federal government had abandoned their interests, and the federal government

has asserted no apparent prejudice in allowing intervention, the motion to intervene is timely.

The states also have a "significant protectable interest" in the continuing validity of the rule because invalidating the rule could cost the states as much as $1.01 billion annually.[21] The federal government contends that in lieu of joining this litigation, the states can vindicate their interests by participating in an agency review process or asking the agency to promulgate a new rule. This argument might have had more merit had the federal government followed the traditional route of asking the courts to hold the public charge cases in abeyance, rescinding the rule per the APA, and then promulgating a new rule through notice and comment rulemaking. But instead, the federal government intentionally avoided the APA entirely by acquiescing in a final district court judgment and altering the federal regulations by unilaterally reinstating the 1999 field guidance. *See* 86 Fed. Reg. at 14,221 ("This rule removes from the Code of Federal Regulations. . . the regulatory text that DHS promulgated in the August 2019 rule and restores the regulatory text to appear as it did prior to the issuance of the August 2019 rule."). Its carefully coordinated actions effectively removed the Trump-era rule and installed the Clinton-era guidance as the de facto new rule—without any formal agency rulemaking or meaningful notice to the public. By deliberately evading the administrative process in this way, the

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[21] Motion to Intervene by the States at 1, 3–5, *City & County of San Francisco v. USCIS*, 981 F.3d 742 (9th Cir. 2021) (Nos. 19-17213, 19-17214, 19-35914).

government harmed the state intervenors by preventing them from seeking any meaningful relief through agency channels. The courts can and should remedy this procedural harm. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("When a litigant is vested with a procedural right, that litigant has standing if the re is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.").

The disposition of this action, together with the federal government's other coordinated efforts to eliminate the rule while avoiding APA review, will impair or impede the states' ability to protect their interest in the 2019 rule's estimated annual savings discussed above. And the existing parties obviously do not adequately represent the states' interests because they are now united in vigorous *opposition* to the rule. *See Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) ("The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties.").

Against the states' arguments in favor of intervention, the federal government and plaintiffs have one main response: this case is moot because the court cannot offer adequate relief now that the 2019 rule has been vacated by a different federal judge in a different circuit.

"The party asserting mootness bears the burden of establishing that there is no effective relief that the court can provide." *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006). "That burden is 'heavy';

a case is not moot where *any* effective relief may be granted." *Id.* (emphasis in original) (citation omitted).

The parties opposing intervention have failed to meet their "heavy" burden here. *Id.* (citation omitted). As the states explain, they could obtain effective relief because they currently have an action pending before the Supreme Court asking that Court to order the Seventh Circuit to reverse or stay the vacatur of the rule. If successful, that would remove any obstacle to the states ultimately getting relief in this court. *See Allied Concrete & Supply Co. v Baker*, 904 F.3d 1053, 1066 (9th Cir. 2018) (distinguishing moot cases where the underlying litigation had concluded from cases where "a potential petition for rehearing or certiorari keeps a case alive"). Indeed, *if* the states are successful in their current request that the Supreme Court stay the Seventh Circuit's vacatur of the rule, given our denial of their intervention here the states will be left with no way to prevent one of the district courts in our circuit from immediately imposing a nationwide preliminary injunction of the rule or, worse, vacating the rule (again). The horse may have left the barn, but the rumors of its death are, if not greatly exaggerated, at least premature.

Since this case is not moot, I would have granted the states' intervention motion because now that the federal government has abandoned the field, only the states themselves can present their arguments in favor of the rule to the Court. By denying the motion to intervene, we are sanctioning a collude-and-circumvent tactic by the parties, who clearly now share the same agenda. *Cf. Knox v. Serv. Emp. Int'l Union, Loc. 1000,*

567 U.S. 298, 307 (2012) (warning that "postcertiorari maneuvers designed to insulate a decision from review by [the Supreme] Court must be viewed with a critical eye").

There is a final reason why intervention is especially warranted in this case. By granting two stays (and a later petition for certiorari), the Supreme Court repeatedly indicated that the United States had "made a strong showing that [it was] likely to succeed on the merits" in its defense of the rule. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). Absent intervention, the parties' strategic cooperative dismissals preclude those whose interests are no longer represented from pursuing arguments that the Supreme Court has already alluded are meritorious. Even more concerning, the dismissals lock in a final judgment and a handful of presumptively wrong appellate court decisions in multiple circuits, and circumvent the APA by avoiding formal notice-and-comment procedures. *See Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transp. Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1180 (9th Cir. 2021) (noting that among "the most fundamental of the APA's procedural requirements" is the requirement that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments for the agency's consideration" (citation and internal quotation marks omitted)). The United States' evasion of one of the APA's most fundamental requirements, especially on such shaky grounds as a district court decision that never withstood the crucible of full appellate review, further supports intervention here.

B. *Munsingwear* Vacatur?

There is truth to the federal government's and plaintiffs' arguments in opposition to intervention that, as things currently stand, the Ninth Circuit's Public Charge cases have been relegated to little more than a rearguard action. So long as the 2019 rule itself remains vacated nationwide by a single judge in the Seventh Circuit, not much can be done in this circuit to affect that. While that doesn't technically make this case moot for purposes of our intervention analysis, it does highlight the expansive reach of the parties' coordinated actions, and how impressively effective those actions are at preventing anyone or any single court from unwinding their multifaceted, calculated capitulation and avoidance of the APA. They really have smashed Humpty Dumpty into pieces spread across the nation, and there isn't a single court (or future administration) that can do much about it.

Except the one court that has yet to address the states' arguments: the Supreme Court. First, the Supreme Court obviously could allow the states to intervene in the Seventh Circuit litigation and defend the 2019 rule in place of the federal government. But I think there may be a simpler solution here that would not only address what has happened with respect to the Public Charge rule but, perhaps more importantly, would encourage future administrations to change rules—not through collusive capitulation—but via the familiar and required APA rulemaking process Congress created for that purpose.

The solution is that the Supreme Court could simply clarify that *Munsingwear* vacatur of lower court

decisions and judgments is appropriate in this circumstance where the federal government and the plaintiffs jointly mooted litigation by acquiescing in a judgment against the government, which then prevented the normal APA process for removing or replacing a formal rule. Under *Munsingwear*, when a civil case is mooted while on appeal to the Supreme Court, "[t]he established practice" is "to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). "Because this practice is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (citation omitted).

For instance, "[v]acatur is in order when mootness occurs through . . . the 'unilateral action of the party who prevailed in the lower court.'" *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71–72 (1997) (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994)). This is to prevent a party from securing "a favorable judgment, tak[ing] voluntary action that moots the dispute, and then retain[ing] the benefit of the judgment." *Arizonans for Off. Eng.*, 520 U.S. at 75 (alterations omitted). By requiring that the lower court judgment be vacated under those circumstances, *Munsingwear* "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 41. That's why vacatur in such circumstances is "generally 'automatic.'" *NASD Dispute Resol., Inc. v. Jud. Council of State of Cal.*, 488 F.3d 1065, 1068 (9thCir. 2007) (citation omitted).

But under the *Bancorp* exception to *Munsingwear*, courts usually won't vacate lower court decisions when the *appellant's* voluntary actions moot the appeal. *See Bancorp*, 513 U.S. at 25. The reason for that is straightforward: generally, if a party lost below, but does something intentional to moot its case while the appeal is pending, you don't need to worry about that losing party deliberately mooting the case on appeal *so that* it can "retain the benefit of the judgment" without risking a future adverse decision. For the party that *lost* below, there isn't generally any "benefit of the judgment" to be retained. If the losing party voluntarily moots the case on appeal, it is invariably for some reason other than trying to manipulate the court system to lock in favorable precedent while insulating that precedent from further review. That is why, in reliance on *Bancorp*, courts rarely *Munsingwear* vacate a lower court decision when the parties voluntarily settle a case. *See generally id.* In those situations, "[t]he judgment is not unreviewable, but simply unreviewed by [the losing party's] own choice." *Id.* Those appellants "voluntarily forfeited [their] legal remedy by the ordinary process of appeal or certiorari, thereby surrendering [their] claim to the equitable remedy of vacatur." *Id.*

The federal government's coordinated settlement of the Public Charge cases falls within the technical parameters of the *Bancorp* exception to *Munsingwear* vacatur because the federal government was the appellant in these cases. But the uniquely inequitable circumstances facing the intervening states here, together with the government's maneuvering precisely so that it could retain the benefit of some questionable

judgments it now really likes, demonstrates that this situation clearly falls far outside any reasonable rationale for *Bancorp*'s exception to *Munsingwear*'s normal rule. The settlements that the states seek to challenge are a transparent attempt by a new federal administration and its prior litigation opponents to not only rid the federal government of a now-disfavored rule, but also to avoid the APA's procedures in changing that rule *and* force any future administration that wants to enact a similar rule to fight against the strong headwinds of dubious Ninth, Seventh, and Second Circuit precedent. This is, in short, precisely an example of a party "tak[ing] voluntary action that moots the dispute, and then retain[ing] the benefit of the judgment." *Arizonans for Off. Eng.*, 520 U.S. at 75 (alterations omitted).

Because both *Munsingwear* and *Bancorp* turn on equity—and even *Bancorp* notes that "exceptional circumstance[s] may . . . counsel in favor of . . . vacatur" when parties settle, *Bancorp*, 513 U.S. at 29—the Supreme Court should make clear that the *Bancorp* exception to *Munsingwear*, which usually counsels against vacating a judgment where the appellant's voluntary actions mooted the appeal, does *not* apply in this circumstance. The states' proceedings before the Supreme Court seem like a perfect vehicle for the Court to address this unique situation where a new administration doesn't like a duly enacted rule and attempts to insulate the lower court's judgment vacating the disfavored rule from further appellate review.

Clarifying that all lower court decisions and judgments should be vacated under these circumstances would have both immediate and long-term salutary effects. First, the current administration will be required to do what every administration before it did with existing rules they didn't like—promulgate a new rule subject to all of the procedural protections provided by the APA. Second, the thicket of suspect lower-court precedents created by the Public Charge litigation, which the Supreme Court seemed poised to correct before the parties' voluntary dismissal, would be cleared away instead of remaining as a calcified obstacle to future executive discretion. And third, future administrations (and courts, and challengers) will be incentivized to follow the APA's rules, rather than attempt procedural workarounds that eliminate the public's participation in administrative rulemaking.[22]

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[22] There is one additional reason why *Munsingwear* vacatur of the lower courts' decisions would be particularly appropriate in the context of the Public Charge rule. By design, the federal government's and plaintiffs' coordinated dismissals act to replace the Trump Administration's Public Charge rule with the Clinton Administration's Public Charge "guidance." Press Release, U.S. Dep't of Homeland Sec., DHS Secretary Statement on the 2019 Public Charge Rule (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule. As discussed, under the Clinton-era guidance, a noncitizen who is *entirely* dependent on in kind government support—for food, housing, medical care, etc.—cannot be considered a "public charge" unless he also receives cash benefits. That seems like it might run into problems under the APA. But the government's circumvention of the APA allowed it to slip back into applying the old guidance without even needing to take that into consideration.

Our court should have allowed the states to intervene in these suits. But one hopes that maybe our incorrect denial of intervention may be as inconsequential as the panel majority's prior incorrect opinion, once the Supreme Court makes clear that our dirty slate must be wiped clean under *Munsingwear*—and with it, all its inequitable repercussions.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-17213

D.C. No. 4:19-cv-04717–PJH

[Filed: December 2, 2020]

CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SANTA CLARA,	)
Plaintiffs-Appellees,	)
v.	)
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; CHAD F. WOLF, in his official capacity as Acting Secretary of the United States Department of Homeland Security; KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services,	)
Defendants-Appellants.	)

No. 19-17214

D.C. No. 4:19-cv-04975-PJH

STATE OF CALIFORNIA; DISTRICT OF COLUMBIA; STATE OF MAINE; COMMONWEALTH OF PENNSYLVANIA; STATE OF OREGON, *Plaintiffs-Appellees*,	)
v.	)
U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; CHAD F. WOLF, in his official capacity as Acting Secretary of the United States Department of Homeland Security; KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services, *Defendants-Appellants.*	)

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, Chief District Judge, Presiding

No. 19-35914

D.C. No. 4:19-cv-05210-RMP

STATE OF WASHINGTON; COMMONWEALTH OF VIRGINIA; STATE OF COLORADO; STATE OF DELAWARE; STATE OF ILLINOIS; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; DANA NESSEL, Attorney General on behalf of the People of Michigan; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF RHODE ISLAND; STATE OF HAWAII,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; CHAD F. WOLF, in his official capacity as Acting Secretary of the United States Department of Homeland Security; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services,

Defendants-Appellants.

OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Rosanna Malouf Peterson, District Judge, Presiding

Argued and Submitted September 15, 2020
San Francisco, California

Filed December 2, 2020

Before: Mary M. Schroeder, William A. Fletcher, and Lawrence VanDyke, Circuit Judges.

Opinion by Judge Schroeder;
Dissent by Judge VanDyke

SUMMARY*

Immigration

In cases in which two district courts issued preliminary injunctions enjoining implementation of the Department of Homeland Security's redefinition of the term"public charge," which describes a ground of inadmissibility, the panel: 1) affirmed the preliminary injunction of the District Court for the Northern District of California covering the territory of the plaintiffs; and 2) affirmed in part and vacated in part the preliminary injunction of the District Court for the Eastern District of Washington, vacating the portion of the injunction that made it applicable nationwide.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Under 8 U.S.C. § 1182(a)(4)(A), any alien who, in the opinion of the Secretary of Homeland Security, at the time of application for admission or adjustment of status, is likely at any time to become a "public charge," is inadmissible. No statute has ever defined the term. In 1999, the Immigration and Naturalization Service issued guidance (Guidance) defining the term as one who "is or is likely to become primarily dependent on the government for subsistence." The Guidance expressly excluded non-cash benefits intended to supplement income.

In August 2019, the Department of Homeland Security (DHS) issued a rule (the Rule) that defines "public charge" to include those who are likely to participate, even for a limited period of time, in non-cash federal government assistance programs. The Rule defines the term "public charge" to mean "an alien who receives one or more [specified] public benefits . . . for more than 12 months in the aggregate within any 36-month period." Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019). The Rule also directs officials to consider English proficiency in making the public charge determination.

States and municipalities brought suits in California and Washington, asserting claims under the Administrative Procedure Act. The District Court for the Northern District of California issued a preliminary injunction covering the territory of the plaintiffs, and the District Court for the Eastern District of Washington issued a nationwide injunction. A divided motions panel of this court granted DHS's motion for a stay of those injunctions pending appeal.

The panel first concluded that the plaintiffs had established Article III standing. The plaintiffs are states and municipalities that alleged that the Rule is causing them continuing financial harm, as lawful immigrants eligible for federal cash, food, and housing assistance withdraw from these programs and instead turn to state and local programs. The panel concluded that this constituted sufficient injury. Addressing whether the injury is apparent or imminent, the panel explained that: 1) the Rule itself predicts a 2.5 percent decrease in enrollment in federal programs and a corresponding reduction in Medicaid payments of over one billion dollars per year; 2) the Rule acknowledges that disenrollment will cause other indirect financial harm to state and local entities; and 3) declarations in the record show that such entities are already experiencing disenrollment.

Next, the panel concluded that the interest of the plaintiffs in preserving immigrants' access to supplemental benefits is within the zone of interests protected by the "public charge" statute. The panel rejected DHS's suggestion that only the federal government and individuals seeking to immigrate are within the zone of interest. The panel also rejected DHS's suggestion that the purpose of the public charge statute is to reduce immigrants' use of public benefits. Addressing DHS's contention that the statute's overall purpose is to promote self-sufficiency, the panel concluded that providing access to better health care, nutrition, and supplemental housing benefits is consistent with precisely that purpose.

The panel next concluded that the plaintiffs had demonstrated a high likelihood of success in showing that the Rule is inconsistent with any reasonable interpretation of the public charge statute and therefore contrary to law. The plaintiffs pointed to repeated congressional reenactment of the provision after it had been interpreted to mean long-term dependence on government support, noting that the statute had never been interpreted to encompass temporary resort to supplemental non-cash benefits. The plaintiffs contended that this repeated reenactment amounted to congressional ratification of the historically consistent interpretation.

The panel concluded that the history of the provision supported the plaintiffs' position, noting that: 1) from the Victorian Workhouse through the 1999 Guidance, the concept of becoming a "public charge" has meant dependence on public assistance for survival; 2) the term had never encompassed persons likely to make short-term use of in-kind benefits that are neither intended nor sufficient to provide basic sustenance; and 3) the Rule introduces a lack of English proficiency. The panel also noted that the opinions of the Second Circuit and the Seventh Circuit, in affirming preliminary injunctions of the Rule, agreed that the Rule's interpretation was outside any historically accepted or sensible understanding of the term.

The panel next concluded that the Rule's promulgation was arbitrary and capricious, explaining that DHS: 1) failed to adequately consider the financial effects of the Rule; 2) failed to address concerns about

the Rule's effect on public safety, health, and nutrition, as well its effect on hospital resources and vaccination rates in the general population; and 3) failed to explain its abrupt change in policy from the 1999 Guidance.

The panel also concluded that the remaining preliminary injunction factors favored the plaintiffs. The panel explained that the plaintiffs had established that they likely are bearing and will continue to bear heavy financial costs because of withdrawal of immigrants from federal assistance programs and consequent dependence on state and local programs. The panel also observed that the public interest in preventing contagion is particularly salient during the current global pandemic, and noted the financial burdens on the plaintiffs and the adverse effects on the health and welfare of the immigrant as well as general population.

Finally, the panel concluded that a nationwide injunction was not appropriate in this case because the impact of the Rule would fall upon all districts at the same time, and the same issues regarding its validity have been and are being litigated in multiple federal district and circuit courts. Accordingly, the panel vacated that portion of the District Court for the Eastern District of Washington's injunction making it applicable nationwide.

Dissenting, Judge VanDyke, wrote that for the reasons ably articulated by this court in a December 2019 published opinion in this case, by the Fourth Circuit in *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220 (4th Cir. 2020), and by a dissenting Seventh Circuit judge in *Cook County v. Wolf*, 962 F.3d 208,

234–54 (7th Cir. 2020) (Barrett, J., dissenting)—and implied by the Supreme Court's multiple stays this year of injunctions virtually identical to those the majority today affirms—he must respectfully dissent.

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OPINION

SCHROEDER, Circuit Judge:

The phrase "public charge" enjoys a rich history in Anglo-American lore and literature, one more colorful than our American law on the subject. There have been relatively few published court decisions construing the phrase, even though our immigration statutes have barred admission to immigrants who are likely to become a "public charge" for more than a century. Until recently, the judicial and administrative guidance has reflected the traditional concept—rooted in the English Poor Laws and immortalized by Dickens in the workhouse of *Oliver Twist*—of incapacity and reliance on public support for subsistence. The first comprehensive federal immigration law barred entry to "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." Immigration Act of 1882, 22 Stat. 214,

Chap. 376 § 2 (1882). The 1999 Guidance (the Guidance) issued by the Immigration and Naturalization Service (INS), the predecessor of the current agency, defined a "public charge" as one who "is or is likely to become primarily dependent on the government for subsistence." *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999).

In 2019, the Department of Homeland Security (DHS) changed direction, however, and issued a rule (the Rule) that defines the term to include those who are likely to participate, even for a limited period of time, in non-cash federal government assistance programs. The programs designated by the Rule are not intended to provide for subsistence but instead to supplement an individual's ability to provide for basic needs such as food, medical care, and housing. 8 C.F.R. § 212.21(b). Foreseeable participation for an aggregate of twelve months in any of the federal programs within a three-year span renders an immigrant inadmissible as a public charge and ineligible for permanent resident status. § 212.21(a). In other words, a single mother with young children who DHS foresees as likely to participate in three of those programs for four months could not get a green card.

Litigation followed in multiple district courts against DHS and U.S. Citizenship and Immigration Services (USCIS) as states and municipalities recognized that the immediate effect of the Rule would be to discourage immigrants from participating in such assistance programs, even though Congress has made them available to immigrants who have been in the

country for five years. According to the plaintiffs in those cases, the Rule's effect would be to increase assistance demands on state and local governments, as their resident immigrants' overall health and welfare would be adversely affected by non-participation in federal assistance programs.

The challenges to the Rule in the district courts resulted in a chorus of preliminary injunctions holding the Rule to be contrary to law and arbitrary and capricious under the Administrative Procedure Act (APA). 5 U.S.C. § 706(2)(A). These included the two preliminary injunctions before us, one issued by the District Court for the Northern District of California (Northern District) covering the territory of the plaintiffs, and the other by the District Court for the Eastern District of Washington (Eastern District) purporting to apply nationwide. Our court became the first federal appeals court to weigh in when we granted DHS's motion for a stay of those injunctions pending appeal. *City and Cnty. of San Francisco v. USCIS*, 944 F.3d 773, 781 (9th Cir. 2019). Preliminary injunctions were also issued by courts in the Northern District of Illinois and the Southern District of New York, and they were stayed by the United States Supreme Court before appeals could be considered by the circuit courts of appeals.

When the Seventh Circuit and the Second Circuit did consider those preliminary injunction appeals, both courts affirmed the injunctions. Although their reasoning differed in some respects, both circuits concluded that the Rule's definition was both outside any historic or commonly understood meaning of

"public charge," and arbitrary and capricious, in concluding that short-term reliance on supplemental benefits made immigrants dependent on public assistance within the meaning of the statutory public charge immigration bar. *Cook Cnty., Ill. v. Wolf*, 962 F.3d 208, 229, 232–33 (7th Cir. 2020); *New York v. DHS*, 969 F.3d 42, 80–81 (2nd Cir. 2020). The Second Circuit opinion was unanimous, while a dissenting opinion in the Seventh Circuit agreed with DHS that those who receive such supplemental benefits could be considered public charges because, by receiving some assistance, they are not completely self-sufficient. *Cook Cnty.*, 962 F.3d at 250–51 (Barrett, J., dissenting).

The district court in Maryland also enjoined enforcement of the Rule and was reversed by a divided decision of the Fourth Circuit. The majority looked in large measure to the fact that the Supreme Court had stayed the injunctions in the Seventh and Second Circuits. *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 230 (4th Cir. 2020). In dissent, Judge King viewed the Rule as outside the longstanding meaning of "public charge" and would have affirmed the injunction. He also disagreed with the majority about the significance of the Supreme Court's stay, explaining that "[i]f the Court's decision to grant a stay could be understood to effectively hand victory to the government regarding the propriety of a preliminary injunction, there would be little need for an intermediate appellate court to even consider the merits of an appeal in which the Court has granted a stay." *Id.* at 281 n.16 (King, J., dissenting) (citing *Cook Cnty.*, 962 F.3d at 234).

To understand the reason for this recent cascade of litigation after a relatively quiescent statutory and regulatory history, we review the historical background of the Rule. Such a review reveals the extent to which the Rule departs from past congressional and administrative policies.

A. Statutory and Administrative Background

This country has had a federal statutory provision barring the admission of persons likely to become a "public charge" since 1882. The Immigration Act of 1882 barred entry to, among others, "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." The Immigration and Nationality Act now provides that "[a]ny alien who, . . . in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A). No statute has ever defined the term. For over a century, agencies have routinely applied these provisions in determining admissibility and removal as well as in issuing visas for entry.

In 1996, however, Congress amended the statute to add five factors for agencies to consider in determining whether an individual is likely to be a public charge: the non-citizen's age; health; family status; assets, resources and financial status; and education and skills. § 1182(a)(4)(B)(i). Congress also included a provision requiring applicants to produce an affidavit of support. *See* § 1182(a)(4)(C)–(D) (requiring most

family-sponsored immigrants to submit affidavits of support); § 1183a (affidavit of support requirements).

At nearly the same time, Congress enacted major reforms of public benefit programs that, as relevant here, made only non-citizens with five or more years of residency in the United States eligible for public benefits such as Supplemental Nutrition Assistance Program (SNAP) and Medicaid. Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105, 2265 (1996). Previously, lawful immigrants had generally been eligible for such benefits. Congress thus simultaneously reduced the number of immigrants eligible for this assistance and spelled out the factors to be considered in a public charge determination. The fact that Congress delineated the factors relevant to the public charge determination at the same time it adjusted certain immigrants' eligibility to receive specific supplemental assistance strongly suggests that Congress did not intend for such assistance to be considered as one of the public charge factors.

Judicial guidance in interpreting the phrase was apparently not in need or demand: There are relatively few such decisions. A leading early Supreme Court case resolved the important question of whether the adverse economic conditions in the location where the immigrant intends to live can render an immigrant likely to become a "public charge." *Gegiow v. Uhl*, 239 U.S. 3 (1915). The Supreme Court's answer was no because the statute spoke to the permanent characteristics personal to the immigrant rather than to local labor market conditions. *Id.* at 10. We followed

Gegiow in *Ex parte Sakaguchi*, 277 F. 913 (9th Cir. 1922), where we held that a person temporarily in need of family assistance should not have been excluded as likely to become a public charge. We so held because there was an absence of "any evidence whatever of mental or physical disability or any fact tending to show that the burden of supporting the appellant is likely to be cast upon the public." *Id.* at 916. Thus, our court in *Sakaguchi* understood the standard for determining whether someone is a public charge to be whether the "burden of support" falls on the public.

Administrative decisions followed the Supreme Court's lead by looking to the inherent characteristics of the individual rather than to external circumstances. The Board of Immigration Appeals thus held that only an individual with the inherent inability to be self-supporting is excludable as "likely to become a public charge" within the meaning of the statute. *Matter of Harutunian*, 14 I & N. Dec. 583, 589–90 (BIA 1974); *Matter of Vindman*, 16 I. & N. Dec. 131, 132 (B.I.A. 1977); *see also New York*, 969 F.3d at 69. There has been corollary administrative recognition that even if an individual has been on welfare, that fact does not in and of itself establish the requisite likelihood of becoming a public charge. An Attorney General decision collected authorities indicating that it is the totality of circumstances that must be considered in order to determine whether "the burden of supporting the alien is likely to be cast on the public." *Matter of Martinez-Lopez*, 10 I & N. Dec. 409, 421–22 (BIA 1962; A.G. 1964) (citing *Sakaguchi*, 277 F. at 916). Likely receipt of some public benefits does not automatically

render an immigrant a public charge because the public does not bear the "burden of support."

The 1996 amendments, which added factors to be considered and created the current public charge statutory provision, caused some confusion as to how big a change they represented. The INS, the agency then in charge of administering immigration, decided a regulatory definition would be helpful. It adopted the 1999 Guidance, the first regulatory guidance to interpret the rather ancient notion of "public charge" in light of the myriad, modern forms of public assistance. 64 Fed. Reg. 28,269.

The Guidance defined a "public charge" as a non-citizen who depends on the government for survival, either by receipt of income or confinement in a public institution. It described persons "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 thus embodied the traditional notion of primary dependence on the government for either income or institutional care.

The Guidance went on to identify the types of public assistance that would typically qualify as evidence of primary dependence: (1) Supplemental Security Income (SSI); (2) Temporary Assistance for Needy Families (TANF); (3) state and local cash assistance programs; and (4) programs supporting people institutionalized for long-term care. *Id.* at 28,692. The Guidance expressly excluded non-cash benefits intended to supplement income and not to provide primary

support. The explanation lay with the changing times that were bringing benefits to more and more families to improve their health and welfare. *See id.* ("[C]ertain federal, state, and local benefits are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient. Thus, participation in such non-cash programs is not evidence of poverty or dependence.").

The Guidance actually encouraged non-citizens to receive supplemental benefits in order to improve their standard of living and to promote the general health and welfare. The Guidance drew a sharp distinction between the receipt of such supplemental benefits and dependence on the government for subsistence income that would render the individual a "public charge." *Id.* at 28,692–93.

The 2019 Public Charge Rule we review in this case effectively reversed that policy by making receipt of supplemental benefits the very definition of a public charge. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019). The Rule defines the term "public charge" to mean "an alien who receives one or more [specified] public benefits . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." *Id.* at 41,501. The public benefits specified by the Rule include most Medicaid benefits, SNAP benefits, Section 8 housing vouchers and rental assistance, and other

forms of federal housing assistance. *Id.* Any receipt of such a benefit, no matter how small, will factor into the public charge determination. The Rule also directs officials to consider English proficiency in making the public charge determination. *Id.* at 41,503–04.

The Rule was greeted with challenges in federal district courts throughout the country. We deal with those in this circuit.

B. The District Court Injunctions

On appeal are two district court decisions granting preliminary injunctions barring enforcement of the Rule. The Northern District considered the challenges of California, the District of Columbia, Maine, Pennsylvania, and Oregon, consolidated with the challenges brought by the City and County of San Francisco, and the County of Santa Clara. The Eastern District heard the challenges brought by Washington, Virginia, Colorado, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, and Rhode Island. Both district courts agreed that the plaintiffs had standing because they had shown that they would likely suffer economic harm and other costs and that their concerns were within the zone of interests of the statute. Both held that the new definition of "public charge" was likely not a permissible interpretation of the statute because it would depart from the longstanding, settled understanding that a person does not become a public charge by receiving short-term aid, and must instead demonstrate an inherent incapacity to provide subsistence. *City and Cnty. of San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1101 (N.D. Cal. 2019),

Washington v. DHS, 408 F. Supp. 3d 1191, 1219 (E.D. Wash. 2019). Both found the Rule to be likely arbitrary and capricious because the agency failed to consider the burdens the Rule would impose on states and municipalities. The Eastern District issued a nationwide injunction, and the Northern District declined to do so.

Within a few weeks of the district court rulings, a divided motions panel of this court, however, stayed both injunctions pending this appeal. *City and Cnty. of SF*, 944 F.3d 773. The panel majority wrote that DHS was likely to prevail because the Rule would probably be viewed as a reasonable interpretation of a statute that had no consistent historical application and gave the agency "considerable discretion." *Id.* at 796, 799. Judge Owens dissented in part and would have denied the stay. *Id.* at 809–10 (Owens, J., dissenting).

The stay was based on a prediction of what this panel would hold in reviewing the merits of the preliminary injunctions. The stay in this case was entered at a particularly early point, less than two months after the district court injunctions. Almost none of the extensive documentation relevant to this appeal was before the motions panel. The brief of the appellant DHS in the Northern District case had been filed only the day before the panel entered its stay, and the opening brief in the Eastern District case was not filed until the day after. Still to come were not only the answering and reply briefs in both appeals, but two dozen amicus briefs, many of which we have found very helpful.

At least equally important, no other circuit court opinions had yet considered the issues. By now we have heard from three. One of those opinions even discussed and disagreed with the reasoning of this court's motions panel stay opinion, pointing out that it "pinn[ed] the definition of 'public charge' on the *form* of public care provided" in concluding that there was no consistent interpretation of the Rule. *New York*, 969 F.3d at 73 (emphasis in original). The court there said our motions panel thereby went "astray." *Id.* This was because the issue was not whether a "public charge" had always received similar assistance. *Id.* The issue should have been whether the "inquiry" under the statute had been consistent. *Id.* The Second Circuit concluded the public charge inquiry had always been whether the non-citizen "is likely to depend on that [assistance] system." *Id.*

We therefore turn to the appeal before us. We deal first with DHS's arguments that the plaintiffs may not maintain the suit because they lack Article III standing or are outside the zone of interests of the immigration statute in question.

C. Plaintiffs' Capacity to Maintain the Action

Plaintiffs are states and municipalities that allege the Rule is causing them to suffer continuing financial harm, as lawful immigrants eligible for federal cash, food, and housing assistance withdraw from these programs to avoid the impact of the Rule. Plaintiffs allege harm because such immigrants will instead turn to assistance programs administered by the state and local entities.

DHS argues that such injuries are speculative and represent only plausible future injury. There is no question that to have Article III standing to bring this action, the plaintiffs must allege that they have suffered, or will imminently suffer, a "concrete and particularized" injury in fact. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). There is also no question that an increased demand for aid supplied by the state and local entities would be such an injury. The only question is whether such demand is, as of yet, apparent or imminent.

That is not a difficult question to answer. The Rule itself predicts a 2.5 percent decrease in enrollment in public benefit programs and a corresponding reduction in Medicaid payments of over one billion dollars per year. Final Rule, 84 Fed. Reg. at 41,302, 41,463. The Rule itself further acknowledges that disenrollment will cause other indirect financial harm to state and local entities by increasing the demand for uncompensated indigent care. Declarations in the record show that such entities are already experiencing disenrollment as a result of the Rule. *See City and Cnty. of SF*, 408 F. Supp. 3d at 1122.

DHS nevertheless asserts that the Rule will result in a long-term cost savings after states compensate for the loss of federal funds by reforming their operations. But such long-term reforms would not remedy the immediate financial injury to the plaintiffs or the harms to the health and welfare of those individuals affected. As the Second Circuit explained, "this simplistic argument fails to account for the fact that the States allege injuries that extend well beyond

reduced Medicaid revenue and federal funding to the States, including an overall increase in healthcare costs that will be borne by public hospitals and general economic harms." *New York*, 969 F.3d at 60. Thus, plaintiffs have established Article III standing.

Those suing under the APA, must also establish that the interest they assert is at least "arguably within the zone of interests to be protected or regulated by the statute" in question. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). The Supreme Court has described the test as "not meant to be especially demanding" and as "not requir[ing] any 'indication of congressional purpose to benefit the would-be plaintiff.'" *Id.*at 225 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–40 (1987)). A plaintiff's interest need only be "sufficiently congruent with those of the intended beneficiaries that the litigants are not 'more likely to frustrate than to further the statutory objectives.'" *First Nat. Bank & Tr. Co. v. Nat'l Credit Union Admin.*, 988 F.2d 1272, 1275 (D.C. Cir. 1993) (quoting *Clarke*, 479 U.S. at 397 n.12).

The statute in question is, of course, the immigration statute that renders inadmissible an individual likely to become a "public charge." 8 U.S.C. § 1182(a)(4)(A). DHS appears to contend that the only entities within the zone of interests are the federal government itself and individuals seeking to immigrate, because the provision deals with immigration and only the federal government controls immigration. If that were to define the zone of interests

regulated by the statute, the scope of permissible immigration litigation against the government would be so narrow as to practically insulate it from many challenges to immigration policy and procedures, even those violating the Constitution or federal laws.

DHS suggests that the purpose of the public charge exclusion is to reduce immigrants' use of public benefits, and that the plaintiffs' suit therefore contradicts this purpose by seeking to make more federal benefits available. But this assumes that Congress's statutory purpose was the same as DHS's purpose here, which is the very dispute before us. As the Second Circuit pointed out, "DHS assumes the merits of its own argument when it identifies the purpose of the public charge ground as ensuring that non-citizens do not use public benefits . . . . Understood in context, [the public charge bar's] purpose is to exclude where appropriate and to not exclude where exclusion would be inappropriate.") *New York*, 969 F.3d at 62–63.

Moreover, DHS maintains that the statute's overall purpose is to promote self-sufficiency. Providing access to better health care, nutrition and supplemental housing benefits is consistent with precisely that purpose. *See Cook Cnty.*, 962 F.3d at 220 (access to affordable basic health care may promote self-sufficiency); Hilary Hoynes, Diane Whitmore Schanzenbach & Douglas Almond, *Long-Run Impacts of Childhood Access to the Safety Net*, 106 Am. Econ. Rev. 903, 921 (2016) (access to food stamps in childhood significantly increases economic self-sufficiency among women). For these reasons, the interests of the

plaintiffs in preserving immigrants' access to supplemental benefits is within the zone of interests protected by the statute.

We therefore conclude that the district courts correctly determined that the plaintiffs are entitled to maintain this action. All ofthe circuits to consider the validity of this Rule have reached a similar conclusion. *See Cook Cnty.*, 962 F.3d at 219–20, *CASA de Maryland*, 971 F.3d at 240–241, *New York*, 969 F.3d at 62–63. We now turn to the question whether they were entitled to the preliminary injunctions entered by the district courts.

D. Contrary to Law

Both district courts concluded that the plaintiffs are likely to prevail in their contention that the Rule violates the statute's public charge provision, and that such a conclusion supports the entry of preliminary injunctions. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). On appeal, DHS contends, as it has throughout the litigation, that the Rule is a permissible interpretation of the statute. The plaintiffs maintain that the Rule violates the statute because the Rule is not a reasonable interpretation of the meaning of "public charge."

History is a strong pillar supporting the plaintiffs' case. Plaintiffs point to repeated congressional reenactment of the provision after it had been interpreted to mean long-term dependence on government support, and had never been interpreted to encompass temporary resort to supplemental non-cash benefits. Plaintiffs contend that this repeated

reenactment amounts to congressional ratification of the historically consistent interpretation. DHS disagrees, arguing that the repeated reenactments reflect congressional intent to have a flexible standard subject to various executive branch interpretations.

Our review of the history of the provision in our law suggests the plaintiffs have the better part of this dispute. From the Victorian Workhouse through the 1999 Guidance, the concept of becoming a "public charge" has meant dependence on public assistance for survival. Up until the promulgation of this Rule, the 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. The Rule also, for the first time, introduces a lack of English proficiency as figuring into the equation, despite the common American experience of children learning English in the public schools and teaching their elders in our urban immigrant communities. 8 C.F.R. § 212.22(b)(5)(ii)(D). Indeed, in *Gegiow*, 239 U.S. 3, the Supreme Court found that the individuals in that case were not likely to become public charges even though they spoke only Russian.

In *New York*, 969 F.3d 42, the Second Circuit essentially agreed with plaintiffs' historical analysis. The court recognized and explained the line of settled judicial and administrative interpretations of a public charge as one who is primarily dependent on the government for subsistence. *Id.* at 65–70. The court traced that history in far more detail than we have outlined and was "convinced" that there was a well-settled meaning of "public charge" even before

congressional passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, and that was a person "unable to support herself, either through work, savings, or family ties." *Id.* at 71. Receipt of cash benefits may be considered in deciding whether a person is dependent on the government but has never been determinative. The Second Circuit persuasively summarized:

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

Id. at 78 (emphasis removed).

A few months earlier, the Seventh Circuit had come to a similar conclusion that the Rule violates the statutory meaning of public charge. *Cook Cnty.*, 962 F.3d 208. The Seventh Circuit differed somewhat in its analysis. After a historical survey of court decisions and secondary sources, it determined that the phrase "public charge" was susceptible to various interpretations. *Id.* at 226. It concluded, however, that DHS's interpretation, quantifying the definition to

mean receipt of twelve months' worth of benefits within three years, represented an understanding of its authority to define the phrase that "has no natural limitation." *Id.* at 228–29. If DHS's interpretation were to be accepted, then there is nothing in the statutory text that would prevent a zero-tolerance rule, where foreseeable receipt of a single benefit on one occasion would bar entry or adjustment of status. The majority forcefully rejected such an interpretation, stating:

> We see no warrant in the Act for this sweeping view. Even assuming that the term "public charge" is ambiguous and thus might encompass more than institutionalization or primary, long-term dependence on cash benefits, 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. There is a floor inherent in the words "public charge," backed up by the weight of history.

Id. at 229.

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. In commenting on the difference between its historical review in *New York* and that of the Seventh Circuit in *Cook County*, the Second Circuit noted that the Seventh Circuit had

not included the significant administrative rulings that preceded the 1996 statute. *New York*, 969 F.3d at 74.

The *New York* opinion was unanimous, but the *Cook County* opinion was not. The lengthy dissenting opinion in *Cook County* focused on other statutory provisions aimed at preventing entry of persons who could become dependent on the government. The most significant of these provisions is the requirement that family-sponsored immigrants, and employment-sponsored immigrants whose employment is tied to a family member, must furnish an affidavit from the sponsor. 8 U.S.C. §§ 1182(a)(4)(C)–(D). In the affidavit, the sponsor must agree to support the immigrant at annual income of at least 125 percent of the poverty level and pay back the relevant governmental entity in the event the immigrant receives "any means-tested public benefit." 8 U.S.C. § 1183a(a)(1)(b).

The dissent focused on the fact that the affidavit provision forces sponsors to bear responsibility for "any means-tested public benefit" that an immigrant may receive. It concluded that the affidavit provision reflects Congress's view that "public charge" may encompass receipt of supplemental benefits as well as primary dependence. *See Cook Cnty.*, 962 F.3d at 246 (Barrett, J., dissenting).

In its focus on the provisions in a related but different section of the statute, the dissent did not address the significance of the history of the public charge provision itself, nor did it address the majority's objection to the duration of the receipt of benefits as a standard having no limiting principle. The dissent concluded only that the choice of an aggregate of twelve

months is "not unreasonable." *Id.* at 253. Moreover, the dissent's interpretation of the affidavit requirement's application here seems to suggest that it would approve a public charge rule excluding individuals who received "any means-tested benefit," no matter how small, as in line with congressional intent.

In this appeal, DHS also relies upon the affidavit of support provisions to contend that the Rule is consistent with the statutory public charge bar. The public charge bar and affidavit of support provisions were parts of two separate acts. The two have no historic or functional relationship to each other. The public charge bar dates back to the 19th century, embodying an age-old concept of excluding those who may become primarily dependent on the government. Congress enacted the affidavit of support provision, however, in 1996 as part of more recent specific immigration reforms including the financial responsibilities of families and employers sponsoring individual immigrants. *See* PRWORA, Pub. L. No. 423, 110 Stat. 2271 (1996); IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009 (1996). The section of the affidavit provision that refers to public benefits serves as a post-admission remedy to help local and federal governments recoup funds. § 1183a(b). The changes to the affidavit provisions were aimed at problems with the unenforceability of such affidavits prior to 1996. Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 Creighton L. Rev. 741, 743-44, 752-53 (1998) (article by INS Associate General Counsel).

DHS also points to the provision that permits entry of battered women without regard to receipt of "any benefits." *See* 8 U.S.C. § 1182(s). DHS argues that this reflects Congress's belief that the receipt of any public benefits would be a consideration in admission for most other public charge determinations. Had Congress intended to make non-cash benefits a factor for admission or permanent residence, it would have done so directly and not through this ancillary provision. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes"). It is more likely that Congress created this provision in order to provide sweeping protections for battered migrant women, as it did throughout Section 1182. *See* § 1182(a)(6)(ii), (a)(9)(B)(iii)(IV).

For these reasons we conclude the plaintiffs have demonstrated a high likelihood of success in showing that the Rule is inconsistent with any reasonable interpretation of the statutory public charge bar and therefore is contrary to law.

E. Arbitrary and Capricious

Both district courts also ruled that the plaintiffs were likely to succeed in their contention that the Rule is arbitrary and capricious. The APA standard in this regard is inherently deferential. The task of the courts is to ensure that the agency's action relied on appropriate considerations, considered all important aspects of the issue, and provided an adequate explanation for its decision. The Supreme Court summed it up in its leading decision, *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*

("*State Farm*"), 463 U.S. 29 (1983). The Court explained the general rule:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43.

The plaintiffs argue that DHS failed the test in three principal respects: It failed to take into account the costs the Rule would impose on state and local governments; it did not consider the adverse effects on health, including both the health of immigrants who might withdraw from programs and the overall health of the community; and it did not adequately explain why it was changing the policy that was thoroughly explained in the 1999 Guidance.

1. Disenrollment and Financial Costs

We first turn to DHS's consideration of the financial impact of the proposed Rule. During the comment period, there was repeated emphasis on the financial burdens that would befall state and local governments because immigrants fearing application of the Rule would disenroll from the supplemental programs, even if the Rule did not apply to them. DHS's response was a generality coupled with an expression of uncertainty. It said that, despite these effects, the Rule's "overriding

consideration" of self-sufficiency formed "a sufficient basis to move forward." 84 Fed. Reg. at 41,312. DHS added that there was no way of knowing with any degree of exactitude how many individuals would disenroll or how much of a burden it would place on the state and local governments. *Id.* at 41,312–13.

DHS provided no analysis of the effect of the Rule on governmental entities like the plaintiffs in these cases. As the Northern District found, DHS had not "grapple[d] with estimates and credible data explained in the comments." *City and Cnty. of SF*, 408 F. Supp. 3d at 1106.

Our law requires more from an agency. A bald declaration of an agency's policy preferences does not discharge its duty to engage in "reasoned decisionmaking" and "explain the evidence which is available." *State Farm*, 463 U.S. at 52. The record before DHS was replete with detailed information about, and projections of, disenrollment and associated financial costs to state and local governments. *See, e.g.*, Ninez Ponce, Laurel Lucia, & Tia Shimada, How Proposed Changes to the 'Public Charge' Rule Will Affect Health, Hunger and the Economy in California, 32 (Nov. 2018), https://healthpolicy.ucla.edu/newsroom/Documents/2018/public-charge-seminar-slides-nov2018.pdf (estimating over 300,000 disenrollments from Medicaid in California alone); Fiscal Policy Institute, Only Wealthy Immigrants Need Apply: The Chilling Effects of "Public Charge," 5 (Nov. 2019), http://fiscalpolicy.org/wp-content/uploads/2019/11/FINAL-FPI-Public-Charge-2019-MasterCopy.pdf (estimating over $500 million combined in lost state tax

revenue). DHS was required to "reasonably reflect upon" and "grapple with" such evidence. *Fred Meyers Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017). But DHS made no attempt to quantify the financial costs of the Rule or critique the projections offered.

Similarly, DHS's repeated statements that the Rule's disenrollment impacts are "difficult to predict" do not satisfy its duty to "examine the relevant data" before it. *State Farm*, 463 U.S. at 43. The Supreme Court held in *State Farm* that an agency may not, without analysis, cite even "'substantial uncertainty' . . . as a justification for its actions." *Id.* at 52; *see also Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1200 (9th Cir. 2008) (rejecting as arbitrary and capricious agency's characterization of greenhouse gas reductions as "too uncertain to support their explicit valuation and inclusion" in analysis). DHS's analysis thus fell short of the standard established by the Supreme Court and recognized by our circuit. DHS did not adequately deal with the financial effects of the Rule.

2. Health Consequences

Although DHS wrote the Rule was intended to make immigrants healthier and stronger, commenters stressed the Rule's likely adverse health consequences for immigrants and the public as a whole, including infectious disease outbreaks and hospital closures. While acknowledging these comments, DHS concluded, without support, that the Rule "will ultimately strengthen public safety, health, and nutrition." 84 Fed. Reg. at 41,314. The Northern District aptly found

that DHS impermissibly "simply declined to engage with certain, identified public-health consequences of the Rule." *City and Cnty. of SF*, 408 F. Supp. 3d at 1111–12.

Commenters provided substantial evidence that the Rule would in fact harm public safety, health, and nutrition. DHS itself repeatedly acknowledged that hospitals might face financial harms as a result of the Rule, but DHS repeatedly declined to quantify, assess, or otherwise deal with the problem in any meaningful way. *See, e.g.*, 84 Fed. Reg. at 41,313–14, 41,384, 41,475, 41,476. This is inadequate and suggests that DHS's position was intractable. As the D.C. Circuit has observed, making some mention of evidence but then coming to a contrary, "unsupported and conclusory" decision "add[s] nothing to the agency's defense of its thesis except perhaps the implication that it was committed to its position regardless of any facts to the contrary." *Chem. Mfrs. Ass'n. v. EPA*, 28 F.3d 1259, 1266 (D.C. Cir. 1994). DHS responded by excluding certain programs for children and pregnant women from the ambit of the Rule, but never addressed the larger concerns about the Rule's effect on health as well as on hospital resources.

There were other serious health concerns. For example, comments demonstrated that the Rule would endanger public health by decreasing vaccination rates in the general population. DHS insisted that vaccines would "still be available" to Medicaid-disenrolled individuals because "local health centers and state health departments" would pick up the slack, *id.* at 41,385, despite objections voiced by such local health

centers and state health departments themselves showing that the Rule will put the populations they serve—citizens and non-citizens alike—in danger. *See, e.g.*, Mass. Dep't of Pub. Health, Comments on Inadmissibility on Public Charge Grounds (Dec.2018),https://www.regulations. gov/document?D= USCIS-2010-0012-45697; HilltownCmty. Health Ctr., Comments on Inadmissibility on Public Charge Grounds (Dec. 2018), https://www.regulations.gov/ document?D=USCIS-2010-0012-45675. A decision that "runs counter to the evidence" or "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise" is arbitrary and capricious. *State Farm*, 463 U.S. at 43. The promulgation of this Rule is such a decision. DHS claims no expertise in public health, unlike the scores of expert commenters who weighed in against the Rule.

3. Reversal of Position

Above all, DHS failed to explain its abrupt change in policy from the 1999 Guidance. An agency reversing a prior policy "must show that there are good reasons for the new policy" and provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009). The district courts below found that DHS had failed to satisfy this standard. *City and Cnty. of SF*, 408 F. Supp. 3d at 1111–12; *Washington v. DHS*, 408 F. Supp. 3d at 1220.

The 1999 Guidance had been issued after the 1996 statutory amendments setting out the general factors to be taken into account in making a public charge

determination. The Guidance considered all of the different types of public assistance governments offered, including programs providing subsistence income and those providing supplemental benefits. The Guidance expressly provided that receipt of supplemental assistance for food, healthcare and housing were not to be considered in assessing an immigrant's likelihood of becoming a public charge. As discussed above, this provision was consistent with over a century of judicial and administrative decisions interpreting the public charge bar. The Rule, however, provides that the prospect of receiving those same supplemental benefits, for even a few months, renders an individual inadmissible. This is directly contrary to the 1999 Guidance.

Yet DHS promulgated the Rule without any explanation of why the facts found, and the analysis provided, in the prior Guidance were now unsatisfactory. This is a practice the Supreme Court has rejected: an agency about-face with no "reasoned explanation . . . for disregarding" the findings underlying the prior policy. *Fox*, 556 U.S. at 516. Here is an illustration of the about-face. The 1999 Guidance had found that deterring acceptance of "important health and nutrition benefits" had yielded "an adverse impact . . . on public health and the general welfare." 64 Fed. Reg. at 28,692. In contrast, DHS now says that the new Rule "will ultimately strengthen public safety, health, and nutrition." 84 Fed. Reg. at 41,314. DHS provides no basis for this conclusion or for its departure from the empirical assessments underlying the prior policy.

In light of this policy change, coupled with the "serious reliance interests" engendered by over two decades of reliance on the Guidance, DHS was required to provide a "more detailed justification" for the Rule. *Fox*, 556 U.S. at 515. DHS provides no justification, other than the repeated conclusory mantra that the new policy will encourage self-sufficiency. DHS in effect says that by creating a disincentive for immigrants to use available assistance, the Rule will "ensur[e] that [admitted immigrants] be self-sufficient and not reliant on public resources." 84 Fed. Reg. at 41,319. DHS does not substantiate, and the record does not support, this empirical prediction. *See, e.g.*, Hilary Hoynes, Diane Whitmore Schanzenbach & Douglas Almond, *Long-Run Impacts of Childhood Access to the Safety Net*, 106 Am. Econ. Rev. 903, 930 (finding that having access to food stamps during childhood leads to "significant improvement in adult health" and "increases in economic self-sufficiency," including decreased welfare participation). Plaintiffs urge that their experience is contrary to DHS's conclusion. Also to the contrary is the experience related in multiple amicus briefs. *See, e.g.*, Brief for the Institute for Policy Integrity as Amicus Curiae Supporting Petitioners at 9 (citing evidence that reductions in SNAP participation increase homelessness); Brief for National Housing Law Project et al. as Amici Curiae Supporting Petitioners at 13 (citing evidence that Medicaid made it easier for recipients to work and find work).

4. Arbitrary and Capricious

In sum, DHS adopted the Rule, reversing prior, longstanding public policy, without adequately taking

into account its potential adverse effects on the public fisc and the public welfare. We must conclude that the Rule's promulgation was arbitrary and capricious as well as contrary to law within the meaning of the APA. 5 U.S.C. § 706(2)(A).

F. Remaining Injunction Factors

1. Irreparable Harm

Plaintiffs have shown a likelihood of success on the merits of their claim that the Rule violates the standards of the APA in that it is both contrary to law and arbitrary and capricious. To support entry of an injunction, Plaintiffs must also show a likely threat of irreparable injury in the absence of an injunction. *Winter*, 555 U.S. at 22. Plaintiffs have established that they likely are bearing and will continue to bear heavy financial costs because of withdrawal of immigrants from federal assistance programs and consequent dependence on state and local programs.

There is no dispute that such economic harm is sufficient to constitute irreparable harm because of the unavailability of monetary damages. *See California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018); 5 U.S.C. § 702 (providing for relief "other than monetary damages"). DHS counters that such harm in this case is speculative, amounting to no more than the possibility of future injury. *See Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011).

We have, however, already seen that in this case such harm is more than speculative. Plaintiffs have presented evidence that they are already experiencing

harm and DHS itself has projected significant disenrollment from federal programs, likely leading to enrollments in state and local ones. The district courts both made factual findings as to harm that DHS does not refute with citations to the record.

2. Balance of Equities and Public Interest

There was no error in finding that the balance of equities and public interest support an injunction. The Northern District pointed to the need for "continuing the provision of medical services through Medicaid to those who would predictably disenroll absent an injunction" in light of the explanations given by "parties and numerous amici . . . [of the] adverse health consequences not only to those who disenroll, but to the entire populations of the plaintiff states, for example, in the form of decreased vaccination rates." *City and Cnty. of SF*, 408 F. Supp. 3d at 1127. The public interest in preventing contagion is particularly salient during the current global pandemic.

Although DHS nevertheless argues that it is harmed by not being able to implement its new definition of public charge, if it is ultimately successful in defending the merits of the Rule, the harm will amount to no more than a temporary extension of the law previously in effect for decades. Given the financial burdens that plaintiffs have persuasively demonstrated will befall them as a result of disenrollment from federal programs, coupled with adverse effects on the health and welfare of the immigrant as well as general population, we cannot say the district courts abused their discretion in finding that the balance of equities and public interest weigh in favor the injunction.

G. Propriety of a Nationwide Injunction

The Northern District issued a preliminary injunction limited to the territory of the plaintiff state and local entities before it. The Eastern District issued a nationwide injunction, explaining that a more limited injunction would not prevent all the harms alleged. The court was concerned about protecting immigrants from harm if they moved outside of the plaintiff jurisdictions, about the economic impact on plaintiff states if immigrants moved to them to evade the consequences of the Rule, and about lawful immigrants being subject to the Rule at points of entry after travel abroad. *Washington*, 408 F. Supp. 3d at 1223.

The appropriateness of nationwide injunctions in any case has come under serious question. *See, e.g.*,*DHS v. New York*, 140 S Ct. 599, 599–601 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring). In explaining the limited scope of its injunction, the Second Circuit questioned the propriety of one court imposing its will on all:

> It is not clear to us that, where contrary views could be or have been taken by courts of parallel or superior authority entitled to determine the law within their own geographical jurisdictions, the court that imposes the most sweeping injunction should control the nationwide legal landscape.

New York, 969 F.3d at 88.

Whatever the merits of nationwide injunctions in other contexts, we conclude a nationwide injunction is

not appropriate in this case. This is because the impact of the Rule would fall upon all districts at the same time, and the same issues regarding its validity have been and are being litigated in multiple federal district and circuit courts.

Accordingly, we vacate that portion of the Eastern District's injunction making it applicable nationwide, but otherwise affirm it.

H. Rehabilitation Act

The plaintiffs also contend that the Rule violates the Rehabilitation Act, which bans discrimination on the basis of disabilities. 29 U.S.C. § 794(a). The Seventh Circuit looked favorably on this contention, and the Second Circuit expressly did not address it. *Cook Cnty.*, 962 F.3d at 228, *New York*, 969 F.3d at 64 n.20. Because we have held that the Rule violates the APA as contrary to law and arbitrary and capricious, we similarly do not address the Rehabilitation Act.

I. Conclusion

The order of the District Court for the Northern District of California is **AFFIRMED**. The order of the District Court for the Eastern District of Washington is **AFFIRMED in part and VACATED in part**. Costs are awarded to the plaintiffs.

VANDYKE, Circuit Judge, dissenting:

For the reasons ably articulated by our court in a December 2019 published opinion,[1] by the Fourth Circuit in an August 2020 opinion,[2] and by a dissenting Seventh Circuit judge in a June 2020 opinion (particularly notable for its erudition)[3]—and implied by the Supreme Court's multiple stays this year of injunctions virtually identical to those the majority today affirms[4]—I must respectfully dissent.

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[1] *City & County of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019).

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

[3] *Cook County v. Wolf*, 962 F.3d 208, 234–54 (7th Cir. 2020) (Barrett, J., dissenting).

[4] *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020); *Wolf v. Cook County*, 140 S. Ct. 681 (2020).