No. 19-3169

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

COOK COUNTY, ILLINOIS, an Illinois governmental entity; and **ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC.**,

Plaintiffs-Appellees,

v.

CHAD F. WOLF, in his official capacity as Acting Secretary of U.S. Department of Homeland Security; **U.S. DEPARTMENT OF HOMELAND SECURITY**, a federal agency;

KENNETH T. CUCCINELLI II, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; and **U.S. CITIZENSHIP AND IMMIGRATION SERVICES**, a federal agency,

Defendants-Appellants.

Appeal from the United States District Court, Northern District of Illinois, Eastern Division

No. 19 CV 6334

The Honorable Gary S. Feinerman, Judge Presiding

BRIEF OF PLAINTIFFS-APPELLEES

Counsel listed on next page

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Litigation Division
Lauren E. Miller, Special Assistant
State's Attorney
Civil Actions Bureau
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Steven A. Levy
A. Colin Wexler
Takayuki Ono
Juan C. Arguello
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Militza M. Pagan
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Counsel for Illinois Coalition For Immigrant and Refugee Rights, Inc.

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3169

Short Caption: Cook County, et al., v. Chad F. Wolf, et al. [REVISED]

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervener or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Cook County, Illinois

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Goldberg Kohn Ltd.

(3) If the party, amicus or intervener is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervener's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ David E. Morrison Date: 01/17/2020

Attorney's Printed Name: David E. Morrison

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: Goldberg Kohn Ltd.
55 E. Monroe St., Suite 3300, Chicago, IL 60603

Phone Number: 312.201.3972 Fax Number: 312.863.7472

E-Mail Address: david.morrison@goldbergkohn.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3169

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Steven A. Levy Date: 01/17/2020

Attorney's Printed Name: Steven A. Levy

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Goldberg Kohn Ltd.
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Phone Number: 312.201.3965 Fax Number: 312.863.7465

E-Mail Address: steven.levy@goldbergkohn.com

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ A. Colin Wexler Date: 01/17/20

Attorney's Printed Name: A. Colin Wexler

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Goldberg Kohn Ltd.
55 E. Monroe St., Suite 3300, Chicago, IL 60603

Phone Number: 312.201.3967 Fax Number: 312.863.7467

E-Mail Address: colin.wexler@goldbergkohn.com

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Appellate Court No: 19-3169

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Takayuki Ono Date: 01/17/2020

Attorney's Printed Name: Takayuki Ono

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Phone Number: 312.201.3872 Fax Number: 312.863.7872

E-Mail Address: taky.ono@goldbergkohn.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3169

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N/A

Attorney's Signature: /s/ Juan Arguello Date: 01/17/2020

Attorney's Printed Name: Juan Arguello

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Goldberg Kohn Ltd.
55 E. Monroe St., Suite 3300, Chicago, IL 60603

Phone Number: 312.201.3954 Fax Number: 312.863.7454

E-Mail Address: Juan.Arguello@goldbergkohn.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3169

Short Caption: Cook County, Ill., et al., v. Chad F. Wolf, et al. (revised)

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Tacy Flint Date: 1/15/2020

Attorney's Printed Name: Tacy Flint

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: Sidley Austin LLP, 1 South Dearborn Street, Chicago, IL 60603

Phone Number: 312-853-7875 Fax Number: 312-853-7036

E-Mail Address: tflint@sidley.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3169

Short Caption: Cook County, Ill., et al. v. Chad F. Wolf, et al. (revised)

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ David A. Gordon Date: 1/15/2020

Attorney's Printed Name: David A. Gordon

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Sidley Austin LLP, 1 South Dearborn Street, Chicago, IL 60603

Phone Number: 312-853-7159 Fax Number: 312-853-7036

E-Mail Address: dgordon@sidley.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3169

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Marlow Svatek Date: 1/15/2020

Attorney's Printed Name: Marlow Svatek

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Sidley Austin LLP, 1 South Dearborn Street, Chicago, IL 60603

Phone Number: 312-853-7028 Fax Number: 312-853-7036

E-Mail Address: msvatek@sidley.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Robert S. Velevis Date: 1/15/2020

Attorney's Printed Name: Robert S. Velevis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Sidley Austin LLP, 2021 McKinney Ave., Suite #2000, Dallas, TX 75201

Phone Number: 214-969-3501 Fax Number:

E-Mail Address: rvelevis@sidley.com

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N/A

Attorney's Signature: Caroline Goodwin Chapman Date: 01/15/2020

Attorney's Printed Name: Caroline Goodwin Chapman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Legal Council for Health Justice, 17 N. State St., Ste. 900, Chicago, IL 60602

Phone Number: 312-605-1981 Fax Number: 312-427-8419

E-Mail Address: cchapman@legalcouncil.org

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Legal Council for Health Justice; Shriver Center on Poverty Law; Sidley Austin, LLP

(3) If the party, amicus or intervener is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervener's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Meghan P. Carter Date: 01/15/2020

Attorney's Printed Name: Meghan P. Carter

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3169

Short Caption: Cook County, et al., v. Chad F. Wolf, et. al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervener or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IS ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
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N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: Nanshelmun R. Dashan Date: 01/15/2020

Attorney's Printed Name: Nanshelmun R. Dashan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

PRELIMINARY STATEMENT

This appeal is the fourth attempt by the Department of Homeland Security ("DHS") to void the district court's preliminary injunction order. The first three attempts failed; this one should too.

For more than a century, the term "public charge" has encompassed only those immigrants likely to become primarily dependent upon the government for long-term support and subsistence. By promulgating the *Inadmissibility on Public Charge Grounds* rule, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (the "Final Rule"), DHS exceeded the scope of its authority; the Final Rule improperly redfines the term "public charge" to include immigrants who receive only modest and temporary benefits, preventing these immigrants from obtaining legal permanent residence (a "green card"). The district court preliminarily enjoined the Final Rule from going into effect in Illinois. This Court should similarly reject DHS's attempt to usurp Congress's legislative function.

On appeal, DHS argues that Plaintiffs—Cook County and the Illinois Coalition for Immigrant and Refugee Rights ("ICIRR")—lack standing to challenge the Final Rule and that the Final Rule's definition of "public charge" accords with Congress's intent. DHS is incorrect on both counts.

Plaintiffs maintain standing to challenge the Final Rule. DHS concedes that the Final Rule will cause immigrants to disenroll from public benefits—or not to seek benefits in the first place—out of fear of being deemed a public charge. As the district court correctly held, both evidence and common sense indicate that this disenrollment will harm Cook County through its County Health and Hospitals

System ("CCH"). With respect to ICIRR, the Final Rule would reduce immigrants' enrollment in health services, food, and other programs, reducing income ICIRR obtains from facilitating such enrollment. It would also force ICIRR to divert its resources away from existing programming efforts to educate immigrants about the Final Rule.

DHS also continues to ignore the definition of "public charge" in the late-nineteenth century (the time period DHS *itself* argued for in the district court): a person substantially dependent upon long-term government assistance. In light of Supreme Court precedent and other case law consistent with this definition, the district court properly found Plaintiffs are likely to prevail on the merits of their claim that the Final Rule exceeds the authority Congress granted to DHS. Moreover, DHS fails to demonstrate that the balance of harms weighs in its favor. This Court should affirm the district court's entry of the preliminary injunction.

JURISDICTIONAL STATEMENT

DHS's jurisdictional statement is complete and correct.

ISSUES PRESENTED

1. Did the district court correctly conclude that Plaintiffs have standing to challenge the Final Rule under both Article III and the "zone of interests" protected by the Immigration and Nationality Act?

2. Did the district court correctly conclude that Plaintiffs are likely to succeed on the merits of their claim that DHS exceeded its authority in promulgating the Final Rule?

3. Did the district court correctly conclude that the remaining preliminary injunction factors weigh in favor of granting a preliminary injunction?

STATEMENT OF THE CASE

I. Background

The Immigration and Nationality Act ("INA") allows the federal government to deny admission or adjustment of immigration status to any non-citizen "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The statutory term "public charge" first entered the U.S. Code through the Immigration Act of 1882, ch. 376, §§ 1-2, Stat. 214, 214 (August 3, 1982) ("1882 Act"). As DHS conceded below, Congress has retained functionally identical "public charge" language ever since.[1] And for more than a century, courts—including the Supreme Court—have interpreted the term to refer only to those primarily and permanently dependent upon the government for long-term support and subsistence.[2]

In promulgating the Final Rule, DHS "redefine[d] the term 'public charge' to mean an alien who receives one or more designated 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)." 84 Fed. Reg. at 41,295.

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[1] *See*, *e.g.*, Immigration Act of 1891, ch. 551, 26 Stat. 1084, 1084; Immigration Act of 1907, ch. 1134, 34 Stat. 898, 899; Immigration Act of 1917, ch. 29 § 3, 39 Stat. 874, 876; INA of 1952, ch. 477, § 212(a)(15), 66 Stat. 163, 183; Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 531(a), 110 Stat. 3009-546, 3009-674-75 (1996); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

[2] *See*, *e.g.*, *Gegiow v. Uhl*, 239 U.S. 3, 10 (1915); *Ex parte Mitchell*, 256 F. 229, 234 (N.D.N.Y. 1919); *Ex parte Tsunetaro Machida*, 277 F. 239, 241 (W.D. Wash. 1921); *United States ex rel. La Reddola v. Tod*, 299 F. 592, 592–93 (2d Cir. 1924); *United States ex rel. De Sousa v. Day*, 22 F.2d 472, 473–74 (2d Cir. 1927).

This redefinition creates two major changes to the public charge landscape. First, by implementing a duration-based standard, the Final Rule would bar immigrants who receive—or are likely to receive—even minimal benefits so long as they receive them for the requisite time period. *Id.*; *see also id.* at 41,360–61. Second, the Final Rule expands the definition of "public benefit" to include non-cash benefits such as SNAP (formerly food stamps), most forms of Medicaid, and various forms of housing assistance. *Id.* at 41,295. Neither change comports with the statute.

II. Prior Proceedings

On October 14, 2019, the district court granted Plaintiffs' preliminary injunction motion and issued an order enjoining the Final Rule's application within Illinois. Record on Appeal ("R.") 87. The district court held that Plaintiffs adduced evidence sufficient to establish standing. Specifically, the Final Rule would: (1) cause substantial financial harm to CCH; and (2) impair ICIRR's ability to work within its core mission of increasing immigrants' access to healthcare, while also forcing the organization to divert resources away from this goal. Short Appendix ("SA") 7, 9–10. The district court also concluded that the Final Rule's expansive "redefinition" of "public charge"—upon which the entirety of the Final Rule is premised—is inconsistent with the plain statutory meaning of that term as it had been understood for almost 150 years. *Id.* at 15–16. Accordingly, the district court invalidated the Final Rule at step one of the *Chevron* analysis. *Id.* (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)).

On November 14, 2019, the district court denied DHS's motion to stay proceedings pending appeal for the reasons detailed in its preliminary injunction

order. R. 104. The district court found that DHS's motion largely reiterated its earlier arguments, and rejected DHS's belated attempts to cure their defects. *See* R. 109 at 25.

On November 15, 2019, DHS filed a motion for stay pending appeal in this Court. Appellate Record ("AR.") 18. On December 23, 2019, this Court denied DHS's motion. AR. 41.

SUMMARY OF ARGUMENT

This Court should affirm entry of the preliminary injunction. Plaintiffs asserted cognizable injuries satisfying Article III and falling within the INA's zone of interests. The district court correctly concluded that the projected disenrollment and lack of enrollment caused by the Final Rule would result in costly, uncompensated emergency care and community health epidemics. SA7. Cook County would be forced to bear the costs of these injuries through its operation of CCH—one of the largest public hospital systems in the nation. *Id.* DHS offers no reason to question this evidentiary finding, which is subject to a deferential clear error review on appeal. *See Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018).

Similarly, ICIRR already has expended resources to: (1) prevent frustration of its programs' missions; (2) educate immigrants and staff about the Final Rule's effects; and (3) encourage immigrants to continue enrolling in public benefits. SA10. Under this Court's well-settled precedent, *see Common Cause Ind. v. Lawson*, 937 F.3d 944, 954–55 (7th Cir. 2019), this impairment of ICIRR's ability to further its

mission, along with the Final Rule's forced diversion of resources, secures ICIRR's standing.

The district court also found Plaintiffs likely to prevail on their APA claims. In determining the relevant time period for statutory construction under *Chevron*, the district court accepted DHS's position that "'the late 19th century [is] the key time to consider' for determining the meaning of the term 'public charge.'" SA18 (citation omitted). And the plain meaning of "public charge" in the late-nineteenth century remains consistent with Plaintiffs' definition: "persons who ... would be substantially, if not entirely, dependent on government assistance on a long-term basis." *Id.* 18-19 (citing *Gegiow v. Uhl*, 239 U.S. 3, 10 (1915)). Numerous nineteenth-century dictionaries,[3] state court cases,[4] and federal court cases[5] confirm the district court's interpretation of the public charge provision. *Id.* at 24–25. And by retaining the "public charge" language, Congress ratified the judicial decisions interpreting the statutory term to refer to long-term, significant dependency. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 n. 4 (2004). Against this statutory and case law backdrop, Plaintiffs are likely to prevail on the merits of their claim that DHS exceeded its authority in promulgating the Final Rule.

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[3] *See, e.g.*, SA25 (quoting THE CENTURY DICTIONARY OF THE ENGLISH LANGUAGE at 929 (William Dwight Whitney, ed. 1889); WEBSTER'S CONDENSED DICTIONARY OF THE ENGLISH LANGUAGE at 84 (Dorsey Gardner, ed. 1884)).

[4] *See*, *e.g.*, SA25 (citing *Cicero Twp. v. Falconberry*, 42 N.E. 42, 44 (Ind. App. 1895); *City of Boston v. Capen*, 61 Mass. 116, 121–22 (Mass. 1851); *Overseers of Princeton Twp. v. Overseers of S. Brunswick Twp.*, 23 N.J.L. 169 (N.J. 1851)).

[5] *See supra* note 2.

The remaining preliminary injunction factors weigh in Plaintiffs' favor. Plaintiffs have demonstrated that if the Final Rule goes into effect, they will suffer irreparable financial and programmatic harm. With respect to the public interest, Cook County *as a whole* also would bear the related public health risks. Indeed, DHS acknowledged that the Final Rule may lead to these specific harms. *See, e.g.*, 83 Fed. Reg. 51,114 at 51,270. DHS fails to explain how any harm caused by a temporary delay would outweigh these anticipated consequences, and the district court rejected its insufficient attempt to do so at the motion to stay hearing. R. 109 at 33–35 (citing R. 92). The district court correctly found the remaining equitable factors to weigh in Plaintiffs' favor.

STANDARD OF REVIEW

On appeal, courts review the legal question of a plaintiff's standing de novo, and the factual findings upon which a standing determination rests for clear error. *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008). This Court "review[s] the grant of a preliminary injunction for the abuse of discretion, reviewing legal issues de novo while factual findings are reviewed for clear error. Substantial deference is given to the district court's weighing of evidence and balancing of the various equitable factors." *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017) (internal citations omitted).

ARGUMENT

To secure a preliminary injunction, the moving party "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tip in his favor, and that

an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As Plaintiffs have satisfied each factor, this Court should affirm the preliminary injunction order.

I. The District Court Correctly Concluded That Plaintiffs Have Article III Standing.

DHS argues that Plaintiffs lack standing because their harms are too speculative. To establish Article III standing, plaintiffs "must show that they are under an actual or imminent threat of suffering a concrete and particularized 'injury in fact'; that this injury is fairly traceable to the defendant's conduct; and that it is likely that a favorable judicial decision will prevent or redress the injury." *Common Cause*, 937 F.3d at 949. Here, DHS offers no reason to question the factual findings underlying the district court's determination, much less make the requisite "clear error" showing. *See id.*

A. Cook County's Financial Harms Satisfy Article III.

The district court correctly concluded that Cook County's financial responsibility for CCH constitutes "more than enough" to establish standing. SA8. Local governments maintain standing to sue when a regulation threatens their proprietary interests. *See Village of Riverdale v. 138th St. Joint Venture*, 527 F. Supp. 2d 760, 764 (N.D. Ill. 2007) (municipalities have standing to sue to protect interests that "are as varied as the municipalities responsibilities, powers and assets") (citing *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1198–99 (9th Cir. 2004) (city had standing to sue where federal plan threatened its tourism industry and local tax revenue)); *see also County of Santa Clara v. Trump*, 250 F. Supp. 3d 497,

526 (N.D. Cal. 2017) (counties had standing to challenge proposed federal law that would result in loss of federal funds). Here, the harm to Cook County's proprietary interests results from the disenrollment DHS *concedes* will occur if the Final Rule is implemented. SA7 (internal citations omitted).[6] The district court's standing analysis flows from this projected disenrollment, otherwise known as the Final Rule's "chilling effect," and remains unchallenged by DHS.

First, the district court found Cook County "adduce[d] evidence showing, consistent with common sense, that where individuals lack access to health coverage and do not avail themselves of government-provided healthcare, they are likely to forgo routine treatment," resulting in costly, uncompensated emergency care CCH will have to cover. SA7; *see also Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 110–11 (1979) (municipality established standing because "a significant reduction in property values directly injure[d] ... its tax base, thus threatening its ability to bear the costs of local government and to provide services"); *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1095 (7th Cir. 1992) (City of Chicago had standing because its "fair housing agency ha[d] to use its scarce resources to ensure compliance with the fair housing laws" rather than to "perform its routine services"). Indeed, the Final Rule "specifically noted that 'hospital systems, state agencies, and other organizations

[6] *See also* 84 Fed. Reg. at 41,469–70; 83 Fed. Reg. at 51,117 (conceding that Final Rule will result in $2.27 billion less transfers from federal to state governments due to disenrollment); R. 1 ¶ 72 (independent experts predict disenrollment to occur at a 15 to 35 percent rate, six to 14 times greater than DHS's 2.5 percent prediction) (84 Fed. Reg. 41,311, 41,463).

that provide public assistance to aliens and their households' will suffer financial harm from the Rule's implementation." SA8 (quoting 84 Fed. Reg. at 41,469-70). The district court further found that because uninsured persons who do not seek public medical benefits are less likely to receive immunizations or seek diagnostic testing, the Final Rule increases the risk of vaccine-preventable and other communicable diseases throughout Cook County—a burden CCH would have to bear. SA7 (internal citations omitted).

DHS attempts to circumvent the district court's factual findings—as well as the controlling case law upon which it relied—by proceeding down its own path of speculation. For example, DHS posits that even if some immigrants disenroll from Medicaid and subsequently use emergency services they cannot afford, this would "not necessarily" harm CCH. Br. at 17. Specifically, because "an alien may at any time use state and federal public benefits to cover emergency services, and DHS will not hold receipt of benefits for emergency care against the alien in a public charge inadmissibility determination," DHS appears to suggest that *every* unenrolled immigrant will enroll—or even re-enroll—in Medicaid specifically for emergency services. *Id.* (citing 84 Fed. Reg. at 41,384, which states that DHS will "exclude[] receipt of Medicaid ... if the State determines that the relevant treatment falls under 'emergency medical conditions'"). But DHS waived this argument by failing to raise it before the district court. *See* R. 73 at 7–9; *see also Sansone v. Brennan*, 917 F.3d 975, 983 (7th Cir. 2019). Moreover, this conjecture defies both common sense and the Final Rule's text.

DHS concedes that confusion and fear concerning the Final Rule will cause "some individuals [to] disenroll or forego enrollment in public benefits programs even though they are not directly regulated by this rule." 84 Fed. Reg. 41,463; *see also* R. 1 ¶ 90 (CCH frontline staff members have already reported that clients have subject to the Final Rule). DHS offers no reason to suggest that this chilling effect will be any less substantial or damaging to CCH when immigrants—whether directly regulated by the Final Rule or not—face the need for emergency services. As one commenter noted, because "different states will make different determinations about what constitutes an emergency, and this uncertainty will cause individuals with chronic, involuntary medical conditions to ... avoid treatment out of fear" that their services will not be deemed an emergency. 84 Fed. Reg. 41,384; *see also Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2565–66 (2019) (even actions stemming from third parties' "unfounded fears" do not make an injury too speculative to confer standing).

The Final Rule's "stacking" provision—which counts the receipt of two benefits in one month as two months—further renders this emergency exclusion meaningless. Even if DHS excludes the receipt of certain emergency medical services under Medicaid, every other public benefit a regulated person receives during a temporary emergency would *still count* separately as one month of benefits

for purposes of a public charge determination, thus amplifying the Final Rule's chilling effect.[7]

Furthermore, even if some individuals disenroll from Medicaid and manage to reenroll for emergency services, DHS offers no evidence to suggest that these patients would fully compensate for the $30 million Cook County stands to lose annually as a result of the Final Rule. R. 1 ¶ 97. DHS's theory similarly ignores the administrative costs health providers incur when forced to repeatedly "churn" individuals on and off Medicaid. *See* R. 1 ¶ 89; *see also, e.g.*, 84 Fed. Reg. 41,469; *California v. Trump*, 267 F. Supp. 3d 1119, 1126 (N.D. Cal. 2017) (states' "administrative costs"—caused by a disruption to healthcare exchanges they administer—sufficient to establish standing).

Finally, DHS does not dispute that the risk of disease due to individuals foregoing vaccinations and preventative care poses a significant threat to Cook County. Instead, it argues that this risk remains too "unquantified" to confer standing. Appellants' Brief ("Br.") at 17. But DHS offers no basis to question the district court's findings on this matter. SA7–8. Nor does DHS dispute that CCH would disproportionately bear the burden of these health repercussions, as it already provides half of all charity care in Cook County. *Id.*

[7] The Medicaid exclusion rings hollow when viewed within the stacking provision and the statute's prospective nature; together, they allow DHS to predict whether an immigrant will *ever* suffer a temporary hardship or emergency that might give rise to short-term benefit use, *i.e.*, four benefits over a three-month period.

DHS fails to rebut—and largely agrees with—the facts upon which the district court based its conclusion. Accordingly, the district court correctly ruled that Cook County has standing.

B. ICIRR's Organizational Harms Satisfy Article III.

With respect to ICIRR, the district court correctly found that the Rule would force (and already has forced) ICIRR to "expend[] resources to prevent frustration of its programs' missions, to educate immigrants and staff about the Rule's effects, and to encourage immigrants not covered by but nonetheless deterred by the Rule to continue enrolling in benefits programs." SA9-10. On appeal, DHS rehashes its argument that ICIRR cannot assert standing based upon the "baseline work" it is already doing. Br. at 18. DHS's argument continues to ignore well-settled precedent in this Circuit and from the Supreme Court, and thus cannot succeed on appeal.

A plaintiff may establish organizational standing by showing a "concrete and demonstrable injury—to the organization's activities—with the consequent drain on the organization's resources." *Keep Chicago Livable v. City of Chicago*, 913 F.3d 618, 625 (7th Cir. 2019) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). An organization proves such injury by demonstrating that the alleged conduct has frustrated its mission and thus caused it to divert resources from its existing programs to combat a defendant's conduct. *Havens*, 455 U.S. at 379; *see also Village of Belwood v. Dwiveldi*, 895 F.2d 1521, 1526 (7th Cir. 1990) ("[T]he only injury which need be shown to confer [organizational] standing ... is deflection of ... time and money[.]").

The district court found that ICIRR had "adduce[d] evidence that its existing programs include efforts within immigrant communities to increase access to care, improve health literacy, and reduce reliance on emergency room care." SA10. The district court further found that ICIRR had *already* expended resources to prevent frustration of these missions. *Id.* And if the Final Rule went into effect, the district court found ICIRR's diversion of resources would continue to increase. *Id.* DHS does not dispute that ICIRR would suffer these consequences as a result of the Final Rule. Rather, it contends that these consequences affect only "policy interests" and that ICIRR is *choosing* to spend resources "on the kind of work it was already doing." Br. 19 (internal quotations omitted). DHS is incorrect for several reasons.

First, ICIRR's existing programming effort, which focuses on increasing access to healthcare and other public benefits, is not a "policy interest." Rather, it is central to ICIRR's mission to help Illinois immigrants receive health and social services. R. 27-1 at 340, ¶ 6. ICIRR and its members have lost, and will continue to lose, important revenue they receive by helping immigrants enroll for public benefits. *Id.* ¶¶ 29–30. As such, DHS offers no reason to question the district court's finding that "the evidence adduced by ICIRR suggests a 'concrete and demonstrable injury' to the organization's activities, not "'simply a setback to its abstract social interests.'" SA10 (quoting *Havens*, 455 U.S. at 379).

Second, DHS cites the Supreme Court's decision in *Simon v. E. Welfare Rights Org.*, 426 U.S. 26 (1976), to argue that the district court's finding would allow organizations "to manufacture standing simply by spending resources to

counteract a law with which it disagrees." Br. at 19. But in *Simon*, the Supreme Court found that plaintiff organizations—acting on behalf of their indigent members—failed to establish organizational standing because they "alleged no injury to themselves as organizations." 426 U.S. at 40. Rather, they possessed only an "abstract concern" over a change in tax regulations that favored hospitals providing more limited services to indigent individuals. *Id.* Here, ICIRR alleges more than an "abstract concern"; the district court found ICIRR established organizational standing precisely because it proffered evidence of harm to its core organizational mission and distribution of resources. SA10.

Finally, DHS continues to misconstrue this Court's decision in *Common Cause* by suggesting that ICIRR is merely continuing the work it was "already doing." Br. at 19 (citing 937 F.3d at 955). While organizations cannot "'convert[] ordinary program costs into an injury in fact,'" injury in fact occurs "when additional or new burdens are created by the law the organization is challenging." 937 F.3d at 955 (internal citations omitted). The district court found that ICIRR had been compelled to take on such additional or new burdens in response to the Final Rule because ICIRR had: (1) expended resources to prevent frustration of its programming missions; (2) begun educational efforts to inform immigrants and staff about the Rule's effects; and (3) encouraged immigrants to continue enrolling in benefits programs. SA10. For this reason, "ICIRR's standing is secure." *Id.*

II. The District Court Correctly Concluded That Plaintiffs Fall Within The Zone Of Interests Protected By The INA.

The district court twice concluded that both Cook County and ICIRR satisfy the APA's "zone-of-interests" test. SA13. On appeal, DHS recycles its unsuccessful argument that only aliens deemed inadmissible under a public charge determination pass that test. Br. at 20. DHS's argument defies binding precedent and must be rejected.

An APA plaintiff must satisfy not only Article III's standing requirements, but also an additional test: "The interest ... assert[ed] must be 'arguably within the zone of interests to be protected or regulated by the statute'" that the agency action allegedly violated. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) ("Match-E-Be") (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). This test is not "'especially demanding.'" *Id.* (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987)). In fact, it "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be*, 567 U.S. at 225 (internal quotations omitted).

With respect to Cook County, DHS argues that the district court misread *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017). Br. at 22. The district court concluded that Cook County's financial harms were sufficiently comparable to the "lost tax revenue and extra municipal expenses" that placed Miami within the Fair Housing Act's zone of interests. SA15 (citing *City of Miami*,

137 S. Ct. at 1303). In both cases, the district court explained, "the consequences of the challenged action generate additional costs for the municipal plaintiff." *Id.* DHS offers no reason to question the district court's reasoning, and instead argues that financial harm alone cannot satisfy the zone-of-interests test. Br. at 22. But the County's financial harm *is* related to the Final Rule which, by regulating immigrants' public benefit use, threatens to harm CCH precisely because it is a major charity care provider to immigrants. SA7–8. Accordingly, this harm places Cook County squarely within the INA's zone of interests.

As to ICIRR, DHS first contends that only immigrants improperly deemed inadmissible as public charges pass the zone-of-interests test. Br. at 20. However, even if an APA plaintiff is not among "those who Congress intended to benefit," that plaintiff nonetheless falls within the zone of interests if it is among "those who in practice can be expected to police the interests that the [relevant] statute protects." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998); *see also Amgen, Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004).

Thus, the district court found that ICIRR is "precisely the type of organization that would reasonably be expected to police the interests that the statute protects." SA14 (internal quotations omitted). Specifically, it determined that "ICIRR's interests in ensuring that health and social services remain available to immigrants and in helping them navigate the immigration process" closely align with the INA's principal interest in protecting aliens from being improperly deemed inadmissible. *Id.* at 13–14. Moreover, the district court pointed to *five* INA

provisions that specifically give organizations like ICIRR a role in helping immigrants navigate immigration procedures. *Id.* (citing statutory provisions); *see also Clarke,* 479 U.S. at 401 (court must "consider any provision that helps [it] to understand Congress' overall purposes in the" relevant statutes). Given the APA's "generous review" standard, *Clarke*, 479 U.S. at 395, such provisions place ICIRR "at the least[] arguably 'within the zone of interests'" protected by the INA. *Match-E-Be*, 567 U.S. at 225.

DHS claims that the INA protects taxpayer resources, and thus an organization that "advocates for healthcare" cannot be expected to police its interests. Br. at 21–22. Relatedly, DHS argues that Plaintiffs seek to further an alleged interest in g*reater* use of public benefits by aliens—an interest inconsistent with the public charge provision's goal of "reduc[ing] public-benefit use by aliens." *Id.* However, ICIRR's interest in ensuring health services remain available to immigrants does not contradict, and in fact aligns with, the INA's purpose. SA13–14. Moreover, Cook County and ICIRR do not bring suit to *increase* immigrants' use of public benefits, but rather to *maintain* the same application of "public charge" that has existed for centuries, as Congress intended, and minimize the Final Rule's chilling effect. *See, e.g.*, R. 1 ¶¶ 23–50. Further, the Final Rule's stated purposed is not to reduce immigrants' use of public benefits at all costs, but to instead "minimize the incentive of aliens to attempt to immigrate to, or to adjust status in, the United States due to the availability of public benefits." 84 Fed. Reg. at 41,305. Plaintiffs' interests in caring for patients without incurring debilitating financial

losses (as to Cook County) and helping eligible immigrants navigate complex immigration systems and public benefits programs (as to ICIRR) are not inconsistent with this goal. In fact, as discussed above, they place Plaintiffs within the zone of interests.

III. The District Court Correctly Concluded That Plaintiffs Are Likely To Succeed On The Merits.

A. The Final Rule's New Public Charge Definition Deviates From The Statutory Language's Plain Meaning And Congress's Clear Intent.

The district court correctly concluded that DHS's expansive redefinition of "public charge" is inconsistent with the term's plain statutory meaning, and must be invalidated at step one of the *Chevron* analysis. SA15–16. As required at *Chevron*'s first step, the court adhered to "ordinary principles of statutory interpretation" considering, for example, dictionary definitions and the statutory scheme as a whole—to determine whether the statute "unambiguously foreclose[d]" DHS's interpretation. *Coyomani-Cielo v. Holder*, 758 F.3d 908, 912 (7th Cir. 2014); *Correa-Diaz v. Sessions*, 881 F.3d 523, 527 (7th Cir. 2018) (quoting *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017)). Moreover, and pursuant to DHS's own "foundational" logic, SA18, it followed the "fundamental canon of statutory interpretation" that words should be interpreted based on their meaning when Congress first enacted the statute. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (quoting *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)). Under that rubric, the district court held the definition of "public charge," as defined in 1882, unambiguously forecloses the agency's interpretation. SA18.

Now, regretting its own asserted framework after the district court disagreed with DHS's position as to what "public charge" actually meant in 1882, *id.* at 18–19, DHS advances numerous new arguments and fails to grapple with the district court's opinion. The district court's ruling—that the Final Rule is inconsistent with the statute—remains correct and should be affirmed.

B. DHS Has Waived Its Argument That The 1996 Statute Changed The Definition Of "Public Charge."

On appeal, DHS raises several arguments based upon provisions added to the 1996 statute. *See* Br. at 25–30. As such, DHS appears to no longer agree with its assertion in the district court. *See* R. 73 at 14 (arguing that the late-nineteenth century is "the key time to consider" in interpreting the term "public charge"). But because DHS unequivocally advanced—and prevailed upon—this position below, its new, contradictory arguments are foreclosed on appeal.

In opposing a preliminary injunction, DHS initially argued: "Since 1882, Congress has consistently provided for the inadmissibility ... of indigent aliens determined by the Executive Branch as likely to become 'public charges.' ... This makes the late 19th century the key time to consider." *Id.* at 13-14. DHS repeatedly reiterated that the present public charge statute comes at the end of "[a]n unbroken line of predecessor statutes going back to at least 1882," which "have contained a similar inadmissibility ground for public charge" that "without exception" delegated the same authority to the executive branch. *Id.* at 3; *see also id.* at 22 ("Congress's comprehensive delegation of interpretive authority is well-established in precedent dating back to the early public charge statutes."); *id.* at 23 (noting "[t]he long

history of congressional delegation of definitional authority over the meaning of 'public charge'" and "the longstanding delegation to the Executive Branch to exercise definitional authority over … the meaning of 'public charge'"). DHS even expressly stated that, "in 1996 and 2013, ... Congress left the public charge provision unchanged." *Id.* at 23. When the district court asked DHS to clarify at oral argument whether it stood by its position that "the late 19th Century is the key time to consider," DHS offered an unequivocal "yes." R. 108 at 21–22.

DHS's argument proved effective, and the district court agreed that "the late 19th century [is] the key time to consider' for determining the meaning of the term 'public charge,' *id.* at 27." SA18 (brackets in original). The court later reaffirmed, in denying a stay, that it had "agreed with [DHS's] … overarching interpretive methodology in [its preliminary injunction] opinion, and [it] disagreed with the plaintiffs." R. 109 at 18.[8]

Contrary to DHS's representations below, it now relies almost exclusively upon other immigration-related statutory provisions enacted in the late twentieth century. *See* Br. at 25–30. But having advanced and prevailed on the position that nineteenth-century sources are determinative of the statutory meaning, DHS has waived any argument that "public charge" is defined by reference to twentieth-century authorities. *See Sauk Prairie Conservation Alliance v. United States*

[8] Indeed, at the hearing on DHS's motion to stay the preliminary injunction, Judge Feinerman again asked DHS whether the meaning of the term had changed in the 1996 statute. R. 109 at 19 ("Did the '96 act leave things the same, or did it change?"). DHS's counsel responded that the 1996 statute "didn't mark a significant departure in terms of what 'public charge' has meant." *Id.* at 19; *see id.* at 20–21 ("I don't think [the 1996 statute] changed fundamentally the underlying term or the meaning of 'public charge.'").

Department of the Interior, 944 F.3d 664, 673 (7th Cir. 2019) (holding that plaintiff had waived a "new" argument that was "never mentioned ... in the district court"); *Lott v. Levitt*, 556 F.3d 564, 568 (7th Cir. 2009) (applying Illinois law, despite plaintiff's argument on appeal that Virginia law should apply, where plaintiff had agreed with application of Illinois law in district court). DHS is "not entitled to get a free peek at how [this] dispute will shake out" under its first theory, and then, "when things don't go [DHS's] way, ask for a mulligan" under a contradictory theory. *Lott*, 556 F.3d at 568. "The principle of waiver is designed to prohibit this very type of gamesmanship." *Id.* The Court therefore should disregard DHS's new arguments based on the 1996 statutory regime.

C. The District Court Correctly Concluded That The Text, As Interpreted By The Supreme Court, Forecloses The Rule's Definition.

DHS's efforts to offer a new theory on appeal remain unsurprising given the district court's thorough analysis below. As the district court held, the Supreme Court's conclusive interpretation of the statute in *Gegiow*, 239 U.S. at 10, precludes the redefinition attempted in the Final Rule. The first public charge statute refused entry to "any person unable to take care of himself or herself without becoming a public charge." *See* 1882 Act. *Gegiow* held that a person can be deemed a "public charge" only on the basis of "permanent personal objections," not due to temporary acceptance of non-cash public benefits to which they are entitled. 239 U.S. at 10. DHS could not below, and does not now, identify any basis for departing from that settled interpretation.

1. The Supreme Court's Interpretation Of "Public Charge" In *Gegiow* Forecloses DHS's Interpretation.

a. *Gegiow* Holds That An Immigrant Can Be Deemed A Public Charge Only On The Basis Of "Permanent Personal Objections".

The district court began by recognizing, pursuant to DHS's argument, the "fundamental canon of statutory construction" that "words generally should be interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute." SA17 (quoting *Oliveira*, 139 S. Ct. at 539); *see also* SA18 (quoting R. 73 at 3, 14) (citations omitted); *Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 863 (7th Cir. 2016). "Fortunately," the court explained, "the Supreme Court told us just over a century ago what 'public charge' meant in the relevant era, and thus what it means today." SA18.

In *Gegiow*, the Supreme Court considered whether Russian laborers were properly excluded as people likely to become "public charges." 239 U.S. at 8. In support of their exclusion, the agency asserted that the laborers: (1) were "illiterate"; (2) "arrived here with very little money"; (3) "have no one legally obligated here to assist them"; and (4) were "bound for Portland, Oregon, where the reports of industrial conditions show that it would be impossible for [them] to obtain employment." *Id.* at 8. But the Court rejected the laborers' exclusion as inconsistent with the statute, explaining that "[p]ersons likely to become a public charge" must be interpreted in context of the terms surrounding it, which includes "paupers and professional beggars, ... idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their

ability to earn a living, convicted felons, prostitutes, and so forth." *Id.* at 10. Each of these categories refers to immigrants "excluded on the ground of *permanent personal objections accompanying them*." *Id.* (emphasis added). The mere prospect that the immigrants before the Court might struggle to fully and immediately support themselves in Portland's challenging labor market did not support their exclusion as likely public charges, because that would mean "the one phrase before us is directed to different considerations than any other of those with which it is associated." *Id. Gegiow* thus instructs that the term "'public charge' does not … encompass persons who receive benefits, whether modest or substantial, due to being temporarily unable to support themselves entirely on their own." SA18.

The Supreme Court has never revisited, much less overturned or narrowed, its interpretation of the statutory term "public charge." The Court's reading of "public charge" therefore definitively establishes the meaning of that statutory text. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction ... if the prior court decision holds that its construction follows from the unambiguous terms of the statute."). Moreover, as the district court explained, "the federal judiciary is hierarchical, so in deciding here whether the Final Rule faithfully implements the statutory 'public charge' provision, this court must adhere to the Supreme Court's understanding of the term." SA24.

Indeed, as the district court recited, numerous other courts have followed *Gegiow*'s interpretation. *Id.* at 19 (citing authorities). For example, the Second

Circuit explained some ten years after *Gegiow* that "the persons [in *Gegiow*], though adults, had no savings worth mentioning, no apparent means of securing employment, and no persons under legal obligation to support them to whom they could turn." *U.S. ex rel. De Sousa v. Day*, 22 F.2d 472, 473 (2d Cir. 1927). Thus, "in the face of [*Gegiow*] it is hard to say that a healthy adult immigrant, with no previous history of pauperism, and nothing to interfere with his chances in life but lack of savings, is likely to become a public charge within the meaning of the statute." *Id.* at 473–74. This result stems from the principle that however dire an alien's temporary circumstances, he is not likely to become a public charge absent some "*permanent* personal objection." *Gegiow*, 239 U.S. at 10 (emphasis added). *See also Ex parte Horn*, 292 F. 455, 457–58 (W.D. Wash. 1923) (holding that the definition of "public charge" includes "a 'pauper' or an occupant of an almshouse for want of means of support," as well as a convicted prisoner who would be "committed to the custody of a department of the government by due course of law"); *Ex parte Riley*, 17 F.2d 646, 646 (D. Me. 1926) (holding that petitioner "was a persistent and avowed violator of the prohibition laws" such that he was likely to go to jail, "where he would be a public charge"), *rev'd on other grounds, Riley v. Howes*, 24 F.2d 686 (1st Cir. 1928). Each of these cases hews to a definition of "public charge" as one who has long-term, substantial dependence on governmental care.

DHS attempts to evade *Gegiow* by asserting that the case remains limited to its facts and stands only for the proposition that the public charge determination must be based upon "the alien's own circumstances," rather than "general labor

conditions." Br. at 32. But the numerous court decisions following *Gegiow* did not limit the case's import to labor conditions. And the *Gegiow* Court's reasoning is not so limited: the Court held, based on the statutory text, that a public charge finding requires a *"permanent"* condition. *Gegiow*, 239 U.S. at 10 (emphasis added). When the Court applied that principle to the facts, it concluded that the petitioners could not be deemed "public charges" based solely on temporary and remediable circumstances like an overstocked labor market in "the city of [their] immediate destination." *Id.* at 9–10. Contrary to DHS's assertion, that principle applies with equal force to individuals who temporarily receive public benefits on a short-term basis, but are otherwise generally able to support themselves. Thus, as the district court explained, *Gegiow* "plainly conveys" that "'public charge' encompasses only persons who … would be substantially, if not entirely, dependent on government assistance on a long-term basis." SA19.

b. Congress Did Not Abrogate *Gegiow*.

DHS also argues that *Gegiow* cannot apply because Congress amended the statute in 1917. Br. at 33. The district court rightly rejected this argument for two reasons. *See* SA19–20. First, as noted *supra*, DHS "maintained (correctly) that 'the late 19th century [is] the key time to consider' in ascertaining the meaning of the term 'public charge,' and therefore cannot be heard to contend that the pertinent timeframe is, on second thought, 1917." *Id.* at 20 (quoting R. 73 at 27). Second, "the 1917 Act did not change the meaning of 'public charge' in the manner urged by" DHS. *Id.* The 1917 amendment did not purport to redefine the term "public charge." *See* Immigration Act of 1917, ch. 29 § 3, 39 Stat. 874. Rather, the 1917 amendment

moved the reference to "public charge" from between the terms "paupers" and "professional beggars" to the end of a long list of examples of those likely to require prolonged governmental care—for reasons of ill health or a history of inability to care for oneself, for example. *See id.*; *see also* SA20 (discussing the 1917 change in statutory text). DHS fails to explain how this relocation of the term "public charge"—without any change to the definition of "public charge" itself—suggests an authorization to exclude those who receive *de minimis* or temporary public benefits.[9]

It is thus unsurprising that, as the district court recognized, "that is precisely how many cases of the era understood the 1917 Act." SA21 (citing authorities). Indeed, even after the 1917 amendment, courts continued to interpret the term "public charge" consistent with the *Gegiow* decision. *See*, *e.g.*, *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922) (explaining that "this change of location of the words does not change the meaning that should be given them," and holding that a case involving a young, "able-bodied" woman with "no mental or physical disability" and "a disposition to work and support herself" came "directly within the ruling in the Gegiow Case"); *Coykendall v. Skrmetta*, 22 F.2d 120, 121 (5th Cir. 1927) (holding that, even after the 1917 amendment, "it cannot well be supposed

[9] If anything, this relocation of the term suggests that the preceding list provides examples for the larger umbrella term of "persons likely to become a public charge." *See Howe v. United States*, 247 F. 292, 294 (2d Cir. 1917) (stating that numerous categories listed in the 1907 Act "might all be regarded as likely to become a public charge"); *U.S. ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929) (noting that "the [public charge] clause, however construed, overlaps other provisions; e.g., paupers, vagrants and the like").

that the words in question were intended to refer to anything other than a condition of dependence on the public for support").

DHS also cites *U.S. ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929), Br. at 33, but as the district court explained, *Iorio* does not support DHS's reading. R. 109 at 31–32. *Iorio* held that the statutory change in 1917 "was meant to capture situations ... 'where the occasion leads to the conclusion that the alien will become destitute, though generally capable of standing on his own feet.'" Br. at 32 (quoting *Iorio*, 34 F.2d at 922). In other words, according to *Iorio*, the amendment clarified that an immigrant could become a "public charge" within the meaning of the statute as a result of external economic conditions—not solely as a result of "personal" conditions—but reconfirmed that a person is a public charge only if he or she is "destitute," which "has a meaning of ... substantially, if not exclusively, dependent on the government for ... subsistence." R. 109 at 33; *see also Iorio*, 34 F.2d at 922 (holding that "[t]he language itself, 'public charge,' suggests … dependency"). Given its reading of the 1917 Act, the Second Circuit affirmed that its interpretation of "public charge" in the pre-1917 statute in *Howe v. U.S. ex. Rel. Savitsky*, 247 F.292 (2d Cir. 1917)—which held that "public charge" encompassed only those persons who were so dependent on the state as to be institutionalized—remained good law. *See id.*[10]

[10] DHS also relies on a Senate report and a letter from the Secretary of Labor to the House Committee on Immigration and Naturalization regarding the 1917 Amendment. Br. at 33. Such legislative history materials are generally not a reliable indicator of a statute's meaning. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[J]udicial reliance on legislative materials like committee reports … may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—

2. Other Contemporaneous Sources Confirm The District Court's Reading Of The Statute.

Although *Gegiow*'s binding interpretation of the statute is alone sufficient, other contemporary sources confirm the district court's reading of the statute. Because the statute refused entry to "any person *unable to take care of himself or herself* without becoming a public charge," *see* the 1882 Act ch. 376 at § 1, (emphasis added), the statute itself made clear that "public charge" involved a wholesale inability to care for oneself—*i.e.*, without becoming a charge of the state. This plain reading also was consistent with the language, in the very same statute, used by Congress to authorize the Secretary of Treasury to enter into contracts with state agencies "to provide for the support and relief of such immigrants therein landing as may fall into distress or need public aid." *Id.* (emphasis added). In the terminology of the time, an immigrant who "landed" was one who was *permitted entry*; by contrast, if a person was deemed a "public charge," they were "not ... permitted to land." *Id.* Thus, Congress from the outset directed that immigrants permitted to "land"—*i.e.*, who by definition were not excluded as "public charges"—could be granted short-term "support and relief" from government agencies, directly contradicting DHS's current position. By contrast, immigrants subject to exclusion in the late nineteenth-century statutes all required long-term state care or institutionalization, and thus demonstrated primary and permanent dependence on

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both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text."); *Coyomani-Cielo v. Holder*, 758 F.3d 908, 914 (7th Cir. 2014) (declining to consider legislative history as part of the *Chevron* step-one analysis). In any event, neither of these sources calls into question *Gegiow*'s holding that the "public charge" inquiry turns on long-term conditions.

the government. *See* 1891 Act, 51 Cong. ch. 551, 26 Stat. 1084, § 1 (March 3, 1891) (excluding "idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, [etc.]"); 1907 Act, 59 Cong. ch. 1134, § 2 (February 20, 1907) (same).

Contemporary dictionaries confirm this common-sense reading of the statutory text. *See* SA24-25. The 1889 Century Dictionary, for example, described a "public charge" as an individual who was so dependent upon the government as to be "'committed'" to its "'custody, care, concern, or management.'" SA25 (quoting THE CENTURY DICTIONARY OF THE ENGLISH LANGUAGE at 929 (William Dwight Whitney, ed., 1889); WEBSTER'S CONDENSED DICTIONARY OF THE ENGLISH LANGUAGE at 84 (Dorsey Gardner, ed., 1884) (defining "charge" as a "person or thing committed to the care or management of another")). That plain meaning persists through the present day. *See Public charge*, OXFORD ENGLISH DICTIONARY (3d. ed. 2007) (defining "public charge" as "a thing which is the responsibility of the state; a person who is dependent upon the State for care or support").

For its part, DHS cites two entries in Black's Law Dictionary, along with a 1929 immigration treatise that define "public charge" as meaning "any maintenance, or financial assistance, rendered from public funds, or funds secured by taxation." Arthur Cook et al., *Immigration Laws of the United States* § 285 (1929). As the district court explained, to the extent these sources are read to mean that *any* government support turns an individual into a public charge, "[t]he

treatise is wrong." SA23. And it does not purport to define the *statutory* term "public charge," as is clear from the fact that neither the treatise (nor Black's Law) "address[es] *Gegiow* in expressing its understanding of 'public charge.'" *Id.*[11]

3. Since *Gegiow*, A Consistent Body Of Case Law And Agency Action Has Confirmed The Meaning Of The Term.

More recent case law confirms the continuing force of *Gegiow*. Over the past century, a consistent body of judicial and administrative authority has held that a "public charge" is an individual with primary or long-term dependence on the government for care.

As detailed above, the district court exhaustively reviewed each case identified by the parties, and concluded without reservation that it had seen not seen "any case holding that an alien could be deemed a public charge based on the receipt, or anticipated receipt, of a modest quantum of public benefits for short periods of time." SA22. DHS's brief in this Court does not address, much less refute, the district court's analysis on this point or the cases it relied upon. Instead, DHS cites just four cases, none of which support the Final Rule's interpretation of the

[11] Instead, the Cook treatise relies exclusively on *Ex parte Kichmiriantz*, 283 F. 697 (N.D. Cal. 1922), which "does not support" DHS's view. SA23. In *Kichmiriantz*, an immigrant was deemed a public charge because he was "unable to care for himself in any way" such that, without care, he "would starve to death within a short time." 283 F. at 698. And the cases cited in Black's Law Dictionary actually *refute* DHS's reading of "public charge" as encompassing those who accept only temporary, modest public benefits. *See, e.g., Lam Fung Yen v. Frick*, 233 F. 393, 396 (6th Cir. 1916) (considering whether petitioner had "no other *permanent* means of support") (emphasis added); *Ex parte Riley*, 17 F.2d at 646 (D. Me. 1926) (explaining that the public charge provision generally covers "those who are entirely lacking means of support"); *Ng Fung Ho v. White*, 266 F. 765, 769 (9th Cir. 1920), *aff'd in part*, *rev'd in part*, 259 U.S. 276 (1922); *Wallis v. U.S. ex rel. Mannara*, 273 F. 509, 511 (2d Cir. 1921) (holding that family was likely to become public charge because the father was "certified for senility" and "would not be capable of continued self-support").

term "public charge." Specifically, in each of these cases, an immigrant was deemed a public charge when he or she was likely to be fully or substantially dependent upon government support for a significant period of time. In some cases, for example, the dependency resulted from the head of family's incarceration, which prevented self-sufficiency through paid work. *See United States ex rel. Medich v. Burmaster*, 24 F.2d 57, 59 (8th Cir. 1928) (immigrant was likely to be a public charge because he was "actually incarcerated"); *Guimond v. Howes*, 9 F.2d 412, 413–14 (D. Me. 1925) (family likely to become public charges because they were dependent on local benefits while the husband was incarcerated). And in *Ex parte Turner*, the court found the immigrant likely to become a public charge based upon a history of serious illness that led the court to conclude he was "predisposed to physical infirmity" and would "likely be incapacitated from performing *any work or earning support* for himself and family." 10 F.2d 816, 817 (S.D. Cal. 1926) (emphasis added). Accordingly, DHS's assertion—that the court's public charge analysis turned on the fact that the immigrant's family had received short-term charitable support during a hospitalization, Br. at 35—remains incorrect. *See* Turner, 10 F.2d at 817.

Finally, DHS points to *In re B*, 3 I. & N. Dec. 323, 324 (BIA 1948), to argue that "an alien can be subject to deportation on public-charge grounds" if the immigrant or the immigrant's sponsor does not pay debts owed to the government, "regardless of whether the alien was 'primarily dependent' on the benefits" giving rise to the debt. (Br. at 36.) But once again, *In re B* does not help DHS. There, the

Board of Immigration Appeals made clear that "[t]he acceptance by an alien of services provided by a State or by a subdivision of a State to its residents, services for which no specific charge is made, *does not in and of itself make the alien a public charge*." 3 I. & N. Dec. at 324 (emphasis added). The decision goes on to cite numerous examples of public benefits that do *not* trigger a public charge determination, including "an alien who participates, without cost to him, in an adult education program sponsored by the State," "an alien child who attends public school, or alien child who takes advantage of the free-lunch program offered by schools." *Id.* This case thus once again refutes DHS's assertion that the statutory definition is broad enough to encompass *any* immigrant who accepts *any* public benefits "without reference to amount" or duration. Br. at 37-38.[12]

In staying a preliminary injunction of the Final Rule, the Ninth Circuit concluded that there is no "one fixed understanding of 'public charge,'" but that the term has instead had different meanings, "reflecting changes in the way in which we provide assistance to the needy." *City & County of San Francisco v. Citizenship & Immigration Servs.*, 944 F.3d 773, 786 (9th Cir. 2019). This was error. As reflected in the history of judicial and administrative rulings described here, the

[12] Other agency decisions similarly reject the statutory interpretation embodied in the Final Rule. *See In re Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (BIA 1962) (noting that the "public charge" provision "has been the subject of extensive judicial interpretation" and that "[t]he general tenor of the holdings is that the statute requires more than a showing of a possibility that the alien will require public support"); *In re Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974) (having been "on welfare does not, by itself, establish that he or she is likely to become a public charge"); *In re A,* 19 I. & N. Dec. 867, 870 (BIA 1988) (petitioner was not likely to become a public charge even though she received cash assistance because she was "young," employed, and able to earn a living).

definition of "public charge" has remain fixed for more than a century—and it has consistently referred to an individual who places substantial and long-term reliance on the government for care, even as the nature of care offered by the government has evolved. In the nineteenth century, an individual who was institutionalized in an almshouse was a public charge—while an immigrant who received "support and relief" upon "landing" was not. In the modern era, an individual who requires long-term cash payments to survive may be a public charge, while an immigrant temporarily accepting SNAP benefits is not. Although the governmental approach to need has changed, the definition of "public charge" has not.

D. DHS's Arguments Find No Support In The Text.

Unable to muster case law support, DHS advances two principal arguments for its broad redefinition of "public charge"—through which it alone retains unlimited power to determine which public benefits will render an immigrant a public charge. First, DHS argues that *other* provisions in the *1996* Act demonstrate that Congress meant to exclude immigrants from receipt of public benefits. But even if the Court chooses to reach this argument, it should be rejected, as the separate provisions to which DHS points undercut its reading of the text. And second, according to DHS, Congress wrote the statute to provide DHS with essentially unlimited authority. This argument cannot survive nondelegation principles and is, in any event, foreclosed.

1. Separate Provisions Of The 1996 Act Do Not Support DHS's Argument.

A common thread underlies each of DHS's new arguments based on the 1996 Act: Congress, through various mechanisms, manifested a national policy to further self-sufficiency for immigrants to the United States. *See* Br. at 28. But each of the provisions to which DHS cites express "general policy goals" without purporting to define the statutory term "public charge." SA16. And, as the district court observed, "'[y]ou cannot discover how far a statute goes by observing the direction in which it points.'" SA16–17 (quoting *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992)); *see also, W. Fuels-Ill., Inc. v. ICC*, 878 F.2d 1025, 1029 (7th Cir. 1989) (explaining that, under "established principles of statutory interpretation," the "broad goals" announced in a statute's "statement of policies" did "not superscede a specific provision of the statute"). These unrelated provisions, therefore, do not help DHS.

First, DHS argues that the affidavit-of-support provision shows that Congress believed "the mere *possibility* that an alien might obtain unreimbursed, means-tested public benefits in the future was sufficient to render that alien inadmissible on public charge grounds." Br. at 25. However, as the Final Rule acknowledges, the statute only requires certain categories of immigrants—*i.e.*, some family-sponsored immigrants and a narrow category of employment-based immigrants who are employed by their relatives—to obtain affidavits of support from sponsors. *See* 8 U.S.C. § 1182(a)(4)(C)(D); 84 Fed. Reg. at 41,448 ("Not all aliens are required to submit the affidavit of support."). Outside of those

enumerated exceptions, the "public charge" provision generally does not require an affidavit of support and does not automatically render immigrants inadmissible as a public charge if they fail to obtain one. *See* 8 U.S.C. § 1182(a)(4)(B) (requiring DHS to "at a minimum consider" five statutory factors to determine whether an individual is a "public charge," and providing that, "[i]n addition to [those] factors ... [DHS] may also consider any affidavit of support ... "); *see also* 84 Fed. Reg. at 41,448 ("Congress ... did not establish submission of the affidavit of support as a mandatory factor in all public charge inadmissibility determinations."). Indeed, the fact that Congress *expressly required* certain enumerated categories of immigrants to obtain an affidavit of support from a relative—in which the relative promises to reimburse all federal public benefits—shows that Congress knew how to impose this heightened requirement on all immigrants if it wanted to, yet intentionally omitted such a requirement from the general "public charge" provision. *See Moral-Salazar v. Holder*, 708 F.3d 957, 961 (7th Cir. 2013) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Kucana v. Holder*, 558 U.S. 233, 249 (2010)); *see also*, *e.g.*, *Sierra Club v. E.P.A.*, 311 F.3d 853, 859 (7th Cir. 2002).

DHS points to another provision in the INA that expressly prohibits DHS from considering past receipt of benefits when determining whether a domestic violence victim is inadmissible as a "public charge." Br. at 27. According to DHS, this provision "presupposes that DHS will ordinarily consider the past receipt of

benefits in making public-charge inadmissibility determinations." *Id.* But as "qualified" aliens under 8 U.S.C. § 1641(c), domestic violence victims are *not* subject to exclusion under the "public charge" provision. *See* 8 U.S.C. § 1182(a)(4)(E) ("Subparagraph A [the public charge provision] … *shall not apply to an alien who … is a qualified alien described in* section 1641(c)) (emphasis added); *id.* at § 1641(c)) (defining "qualified alien" to include domestic violence victims). Indeed, the Final Rule recognizes that "victims of domestic violence … are generally exempted by statute from public charge inadmissibility determinations." 84 Fed. Reg. at 41,328. Thus, the treatment of past benefits with respect to domestic violence victims has no bearing on the "public charge" provision.

Next, DHS points to a 1986 amnesty program creating "[s]pecial rules for determination of public charge" for certain classes of aliens. Br. at 27–28. Those special rules were designed to promote a feasible path to legal status for specific groups—those who had been in the United States since before January 1, 1982 and certain classes of agricultural workers. *See* Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (providing for "adjustment of status of certain entrants before January 1, 1982" and rules for "special agricultural workers"). In its desire to streamline the path to legal status for those individuals, Congress provided for a more circumspect public charge inquiry requiring only that the applicant "demonstrate[ ] a history of employment in the United States evidencing self-support without receipt of public cash assistance." 8 U.S.C. § 1255a(d)(B)(iii); *see also* H.R. REP. 99-682, pt. 1, at 45–46 (1986), reprinted in

1986 U.S.C.C.A.N. 5649, 5649–50 (explaining the purposes of the bill). But this limited-effect public charge test—requiring only historical proof of employment and non-receipt of cash assistance—aligns with the interpretation that Plaintiffs advance here. This language, therefore, does not support the overly-broad reading DHS now asserts.

Finally, DHS relies upon Congress's decision to bar certain immigrants from obtaining many public benefits until they have been in the country for five years. Br. at 29. But DHS ignores that Congress has affirmatively *authorized* immigrants—including immigrants subject to the public charge provision—to obtain public benefits, including the very benefits that are targeted in the Final Rule.[13] DHS cannot reconcile these Congressional *grants* of benefits with a reading of "public charge" that authorizes penalties based on immigrants' acceptance of the very benefits Congress intended them to use. *See New York v. U.S. Dep't of Homeland Sec.*, No. 19 CIV. 7777 (GBD), 2019 WL 5100372, at *7 (S.D.N.Y. Oct. 11, 2019)("Under the Rule, although this individual is legally entitled to public housing, if she takes advantage of this right, she may be penalized with denial of adjustment of status. There is no logic to this framework.").

[13] *See* Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at 8 U.S.C. §§ 1611, 1621) (allowing even non-"qualified" immigrants to obtain numerous non-cash benefits, including public housing under the Section 8 program); Farm Security and Rural Investment Act, Pub. L. No. 107-171, § 4401, 116 Stat. 134 (2002) (codified as amended at 7 U.S.C. § 7901 et seq.) (granting food stamp benefits to certain immigrants); Children's Health Insurance Program Reauthorization Act, Pub. L. No. 111-3, 123 Stat. 8 § 214 (2009) (codified as amended at 42 U.S.C. §§ 1396–97 et seq.) (extending public health benefits, including Medicaid and the Children's Health Insurance Program, to immigrant children and pregnant women regardless of the five-year waiting period).

Ultimately, these ancillary statutory provisions do not alter the longstanding definition of public charge, as Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 68 (2001). Indeed, far from endorsing DHS's reading of "public charge," Congress repeatedly has rejected it. *See* H.R. Rep. 104-469, pt. 1, at 266–67 (1996) (rejecting definition of "public charge" that would have encompassed those who received almost any public benefits for more than one year, including non-cash benefits); 142 Cong. Rec. S11872 (daily ed. Sept. 30, 1996) (statement of Sen. Kyl) (considering and rejecting a proposed definition of "public charge" that would have covered those who received "federal public benefits for an aggregate of 12 months over a period of 7 years"); S. Rep. No. 113-40, at 42 (2013) (rejecting attempt to broaden the definition of "public charge" to exclude immigrants who were likely to qualify "even for non-cash employment supports").

2. DHS Does Not Have Boundless Discretion To Redefine The Term "Public Charge" However It Sees Fit.

Finally, lacking any support in the statutory text, DHS claims that the Final Rule is consistent with 8 U.S.C. § 1182(a)(4) because "Congress has repeatedly and intentionally left the [public charge] definition and application to the discretion of the Executive Branch." Br. at 37–38. The Ninth Circuit likewise recently pointed to the lack of a statutory definition in concluding that "DHS has the authority to interpret" the term. *City & County of San Francisco*, 944 F.3d at 798. But such a reading of the statute provides no textual limitation; the agency retains unfettered

discretion to adopt any definition of "public charge" it chooses. Indeed, as noted above, the Rule itself refers to a "redefin[ition]": an immigrant is now a "public charge" if she accepts any benefit that can be deemed a liability of the public, "without reference to amount," Br. at 37—whether it be a single month of food stamps, a single publicly insured doctor's visit, or even perhaps a free school lunch. This redefinition is unsustainable.

First, DHS's reading of the statute amounts to an unconstitutional delegation of authority to the agency. A statute constitutes an unlawful delegation of power to the executive branch if Congress failed to "suppl[y] an intelligible principle to guide the delegee's use of discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2124 (2019). That is precisely what DHS's misreading of the statute does: it would allow DHS to pick and choose from the myriad forms of public benefits conferred and declare that *any* immigrant who is likely (in DHS's opinion) to accept *any one* of them is disqualified from adjusting status or gaining admission to the United States. This version of the statute would allow DHS not only to adjudicate public charge determinations, but also to declare the legislative policy of the United States in defining the class of immigrants subject to the public charge statute. Such a limitless provision would be an unlawful delegation of legislative authority. *See Gundy*, 139 S. Ct. at 2123; *see also id.* at 2137-43 (2019) (Gorsuch, J., dissenting); *cf. Doe v. Trump*, 19-cv-1743, 2019 WL 6324560, at **9–12 (D. Or. Nov. 26, 2019).

The non-delegation principle applies with even greater force where, as here, it implicates questions of "deep 'economic and political significance.'" *King v.*

Burwell, 135 S. Ct. 2480, 2489 (2015) (internal citation omitted). DHS's revision of the public charge provision stands to affect hundreds of thousands of individuals in the United States, impose billions of dollars in costs to states, and completely reshape our nation's immigration policies and landscape. *See* R. 27-1 (Declaration of David E. Morrison attaching studies and reports of the impact of the Final Rule). "[H]ad Congress wished to assign that question to an agency, it surely would have done so expressly." *Burwell*, 135 S. Ct. at 2489; *see also, Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("We must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").

Because such a limitless statute would violate nondelegation principles, it is no wonder that DHS's reading is not supported by the text. The fundamental error in DHS's argument is that it conflates discretion to *apply* the term "public charge" with discretion to *define* the term "public charge." Although the Executive Branch undoubtedly has some discretion to determine, on a case-by-case basis, which applicants are likely to fall within the term "public charge," that discretion is not so unbounded as to permit the agency to redefine the term "public charge" itself. When Congress wants to give an agency discretion to define a term, it says so explicitly. *See*, *e.g., Rush Univ. Med. Ctr. v. Burwell*, 763 F.3d 754, 760 (7th Cir. 2014) (holding that Congress expressly delegated to the agency the power to define the key term at issue where it included the word "define[]" in the statutory text)

(quoting 42 U.S.C. § 1395ww(d)(5)(B)(x)(II)). Congress declined to include such language here. *See* 8 U.S.C. § 1182(a)(4)(A). Instead, the statute merely gives Executive Branch officials discretion to decide whether a given alien is likely to become a public charge in light of the well-established meaning of that term and the statutory factors. *See id.*

DHS also asserts that its claim to unbridled authority finds support from the statute's reference to "the opinion" of DHS officials. Br. at 39 (quoting 8 U.S.C. § 1182(a)(4)(A)). But the statute only relies upon the opinion of agency officials at the time at which an individual immigrant is subject to evaluation—*i.e.*, "at the time of application for a visa" and "at the time of application for admission or adjustment of status." 8 U.S.C. § 1182(a)(4)(A). Because it defers to agency opinion at the time of evaluation, the statute authorizes the agency to exercise discretion as to the circumstances of particular cases, not the fundamental meaning of the term "public charge."

Nor can DHS extrapolate discretion from its theory that "Congress has never defined the term." Br. at 38. As this Court has explained, "the lack of a statutory definition … does not render a term ambiguous." *Emergency Servs. Billing Corp. v. Allstate Ins. Co.*, 668 F.3d 459, 466 (7th Cir. 2012) (brackets, quotation marks, and citation omitted). That is especially true where, as here, Congress repeatedly re-adopted the term against a backdrop of judicial decisions consistently interpreting it to refer to long-term and significant dependency. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 589–90 (2010) ("We have often observed

that when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.") (ellipses, quotation marks, and citation omitted).

In sum, Congress's definition of "public charge" unambiguously forecloses the Final Rule. The Supreme Court in *Gegiow* made clear that DHS's interpretation of "public charge" cannot coexist with the meaning of the term when first used, which as DHS properly conceded below, is the proper time period to consider. Because "the judiciary is the final authority on issues of statutory construction," and because DHS's interpretation is "contrary to clear congressional intent," this Court must reject the Final Rule. *Chevron*, 467 U.S. at 843 n.9.

E. The Final Rule Is Not A Permissible Construction Of The Statute.

Even if the Court holds that the statute is ambiguous, the Final Rule is still not entitled to deference because it is an unreasonable interpretation of the INA. Under *Chevron* step two, courts must determine whether "the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Put another way, the court "asks whether [the agency's] interpretation of the statute is reasonable." *Our Country Home Enters., Inc. v. Comm'r of Internal Revenue*, 855 F.3d 773, 787 (7th Cir. 2017). For the same reasons discussed *supra* regarding *Chevron* step one, the agency's interpretation is not a "permissible construction of the statute." *See Casa de Maryland, Inc. v. Trump*, No. PWG-19-2715, 2019 WL 5190689, at *15 (D. Md. Oct. 14, 2019); *cf. Whitman*, 531 U.S. at 481 (noting that "the statute [is] to some extent ambiguous," but holding the agency's interpretation unlawful because it

"goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear").

F. In The Alternative, The Final Rule Is Contrary To Law And Arbitrary And Capricious.

Separately, the Final Rule is not in accordance with law and is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). The parties briefed this issue below, R. 27 at 35–44; R. 73 at 24–32, but the district court did not reach this independent ground for enjoining the Final Rule given its *Chevron I* analysis. Other courts, however, have held that the Final Rule fails arbitrary and capricious review.[14]

The Final Rule remains contrary to law for at least three reasons. First, although the Final Rule pays lip service to the statutory multifactor test, in reality it substitutes this holistic analysis with a single-factor test. *See New York v. U.S. Dep't of Homeland Sec.*, 2019 WL 5100372, at *8; 84 Fed. Reg. at 41,309. Second, the Final Rule contradicts the SNAP statute, which prohibits DHS from considering these benefits as income or resources for "*any purpose* under any Federal ... laws ... ." 7 U.S.C. § 2017(b) (emphasis added). By treating SNAP benefits as "income or resources" from the state, the Final Rule violates this statutory provision. Third, the Final Rule is contrary to Section 504 of the Rehabilitation Act because it discriminates against disabled immigrants by negatively weighting a "disability diagnosis" and receipt of Medicaid. *See* 29 U.S.C. § 794(a). Section 504 was expressly intended to be a remedial statute, passed by Congress "to rectify the

[14] *See, e.g.*, *New York v. U.S. Dep't of Homeland Sec.*, No. 19 Civ. 7777 (GBD), 2019 WL 5100372, at **8-10 (S.D.N.Y. Oct. 11, 2019); *Make the Road New York v. Cuccinelli*, No. 19 Civ. 7993 (GBD), 2019 WL 5484638, at **7-9 (S.D.N.Y. Oct. 11, 2019).

harms resulting from action that discriminated [against individuals with disabilities]." *Alexander v. Choate,* 469 U.S. 287, 295 (1985); *see also* 28 C.F.R. § 41.51(b)(3). Under Section 504, the existence of a disability cannot be separated from its effects. *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). By considering health, disability, the receipt of Medicaid, and the lack of private health insurance as negative factors *per se*, *and,* considering as one of the few positive factors the lack of a medical condition, the Final Rule violates Section 504 because "but for their disability," persons with disabilities would have an equal opportunity not to be deemed a public charge as individuals without disabilities. *See* 8 C.F.R. §§ 212.22(b)(2), (b)(4)(i)(E), (b)(5)(b), (b)(7)(iii)(c)(1)(iii)(A); *see also* 42 U.S.C. § 1396n(i).

The Final Rule is also arbitrary and capricious for at least two reasons. First, the agency failed to give a logical rationale for the duration-based standard. The Final Rule cites concerns about protecting the public budget, but fails to explain how penalizing individuals who "receive only hundreds of dollars, or less, in public benefits annually" materially furthers that purpose. 84 Fed. Reg. at 41,360–61; *cf. Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014) ("Though an agency's predictive judgments about the likely economic effects of a rule are entitled to deference, deference to such judgment must be based on some logic and evidence, not sheer speculation.") (citations, quotation marks, brackets, and alterations omitted). Second, the agency flatly refused to consider substantial evidence that the Rule would have a "chilling effect." *See* 84 Fed. Reg. at 41,300; *Fred Meyer Stores, Inc. v. Nat'l Labor Relations Bd.*, 865 F.3d 630, 638 (D.C. Cir. 2017) (agency finding

was deficient due to a "complete failure to reasonably reflect upon the information contained in the record and grapple with contrary evidence—disregarding entirely the need for reasoned decisionmaking"). And although the agency insists that it is "difficult to predict the rule's disenrollment impacts," 84 Fed. Reg. at 41,309-10, it cannot simply point to "'substantial uncertainty' as a justification for its actions." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2590 (2019) (Breyer, J., concurring in part and dissenting in part) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)).

The district court did not need to reach these grounds, but they offer further support for its conclusion that Plaintiffs are likely to succeed on the merits of their challenge to the Final Rule.

IV. The Remaining Factors Weigh In Favor Of A Preliminary Injunction.

The district court correctly found that the remaining preliminary injunction factors weigh in Plaintiffs' favor. This Court should affirm the district court's weighing of evidence and balancing of the equitable factors.

A. Plaintiffs Have Shown That They Would Suffer Irreparable Harm If The Rule Went Into Effect.

A party seeking a preliminary injunction must show "more than a mere possibility of harm." *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044-45 (7th Cir. 2017). The harm, however, need not "actually occur before injunctive relief is warranted" or "be certain to occur before a court may grant relief on the merits." *Id.* Rather, "harm is considered irreparable if

it cannot be prevented or fully rectified by the final judgment after trial." *Id.* (citation and quotation marks omitted).

In this case, the APA's limited waiver of sovereign immunity governs Plaintiffs' potential relief; the APA waives the sovereign immunity of the United States only to the extent a plaintiff seeks "relief other than money damages." 5 U.S.C. § 702. Therefore, as the district court correctly noted, if Plaintiffs "show that, in the absence of a preliminary injunction, they will suffer injury that would ordinarily be redressed by money damages, that will suffice to show irreparable harm, as 'there is no adequate remedy at law' to rectify that injury." SA28 (quoting *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015)).

Here, Plaintiffs have done just that. As discussed above, *supra* at 11, the district court found the Rule will cause immigrants to disenroll from, or refrain from enrolling in, medical benefits, thus leading them to forgo routine treatment and ultimately rely upon more costly, uncompensated emergency care from CCH. SA28. At the very least, CCH anticipates this chilling effect to create an annual loss of $30 million in Medicaid reimbursements. R. 1 ¶ 97. Moreover, this figure does not take into account the long-term increases in cost that CCH and the County will incur as Cook County's vaccine-preventable and other communicable diseases spread. *Id.* ¶¶ 96, 98. Similarly, the district court found that ICIRR established irreparable harm through its current and projected diversion of resources away from its existing programs. SA29.

On appeal, DHS continues to counter Plaintiffs' factual evidence of harm with speculation. First, DHS argues that Cook County's injuries constitute "mere risk[s]" insufficient to establish irreparable harm. Br. at 42. But as discussed above with respect to standing, *supra* at 11–14, DHS's conjecture as to how immigrants will respond to the Rule cannot refute the district court's factual findings, based upon concrete evidence put forth by Plaintiffs. Indeed, Cook County put forth evidence that individuals are *already* disenrolling due to the Rule's chilling effect. R. 1 ¶ 90. And as to ICIRR, DHS does not dispute its diversion of resources, but rather repeats its mistaken theory that the diversion "is not a cognizable injury." Br. at 42. Given the unavailability of money damages for Plaintiffs' financial and resource-related harms, this Court should affirm the district court's findings as to irreparable harm.

B. The Balance Of Harms And Public Interest Weigh In Plaintiffs' Favor.

In balancing the harms, courts "weigh[] the irreparable harm that the moving party would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief." *Valencia*, 883 F.3d at 966 (citation omitted). When reviewing the issuance of a preliminary injunction on appeal, a court gives "substantial deference" to the district court's weighing of evidence and balancing of the various equitable factors. *Turnell*, 796 F.3d at 662.

Here, DHS fails to offer evidence of harm that would tip the scale in its favor. To be sure, the district court acknowledged that a temporary delay in implementing the Rule would impose "some harm" on DHS. Br. at 42 (citing R. 106 at 29). But as the district court also noted, DHS failed to offer "any explanation of the practical

consequences of the delay and whether those consequences are irreparable." SA29.[15] Given this lack of explanation, along with: (1) the Rule's substantial financial and programmatic harm to Plaintiffs; and (2) Plaintiffs' desire to maintain the decades-long regulatory status quo, the balance of harms tip in Plaintiffs' favor.

As for the public interest, DHS states only that "Plaintiffs do not serve the public interest by promoting increased use of public benefits by aliens, contrary to Congress's clear intent." Br. at 43. Again, DHS improperly raises this argument for the first time on appeal. *Sansone*, 917 F.3d at 983; *see also* R. 73-1 at 41–42. And in any event, this assertion remains misguided. *DHS* contradicts Congress's clear intent by pursuing a definition of "public charge" at odds with the statute. As the district court explained in its discussion of the equitable factors, "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

Ultimately, the district court found that a preliminary injunction satisfied the public interest given "the court's holding that Cook County and ICIRR are likely to succeed on the merits of their challenge ... [,] that the balance of harms otherwise favors preliminary relief, and ... the public health risks to Cook County if the Final

[15] Indeed, DHS submitted *no evidence whatsoever* in support of its opposition to the preliminary injunction. In its motion to stay, DHS belatedly attached an affidavit from a USCIS official who attested to supposed effects nationwide without identifying harms that would result from the court's Illinois-specific injunction, R. 92. *See* R.109 at 33–34. Because that affidavit was not before the district court at the time it issued the preliminary order, it is not relevant here. *See, e.g.*, *Stagman v. Ryan*, 176 F.3d 986, 994 (7th Cir. 1999) (explaining that the Court "will not consider evidence that was not before the district court in making its decision"). And in any event, the declaration does not even address what harms purportedly will flow from the injunction actually at issue here.

Rule were allowed to take effect." SA30. For these same reasons, this Court should afford the proper substantial deference to the district court's determination and affirm the preliminary injunction order.

CONCLUSION

For the foregoing reasons, the district court's preliminary injunction should be affirmed.

Dated: January 17, 2020

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i), as modified by Circuit Rule 32(c), because it contains 13,853 words, as reported by the word count function of Microsoft Word, excluding the parts of the response exempted by Rule 32(f); and

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/s/ David E. Morrison

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ David E. Morrison