

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19-3595

Caption [use short title]

Motion for: Stay of Preliminary Injunction Pending Appeal

Set forth below precise, complete statement of relief sought:

Stay of the district court's October 11 order, which issued a preliminary injunction and stay enjoining the Department of Homeland Security's August 2019 Rule defining a "public charge" for purposes of 8 U.S.C. § 1182(a)(4), pending completion of the government's appeal.

Make the Road New York v. Cuccinelli

MOVING PARTY: U.S. Dep't Homeland Security et al.

OPPOSING PARTY: Make the Road New York et al.

- Plaintiff Defendant
Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Gerard Sinzdak

OPPOSING ATTORNEY: Robert O'Loughlin

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Court- Judge/ Agency appealed from: Southern District of New York - George B. Daniels, J.

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below? Yes No
Has this relief been previously sought in this court? Yes No

Requested return date and explanation of emergency:
The government requests relief by December 6, 2019. Under the district court's injunction, which is already in effect, the Department of Homeland Security will grant lawful permanent resident status to aliens who would qualify as likely to become public charges under the enjoined rule.

Signature of Moving Attorney:

/s/ Gerard Sinzdak Date: 11-15-2019 Service by: CM/ECF Other [Attach proof of service]

No. 19-3595

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE,
ASIAN AMERICAN FOUNDATION, CATHOLIC CHARITIES COMMUNITY SERVICES,
and CATHOLIC LEGAL IMMIGRATION NETWORK, INC.,

Plaintiffs-Appellees,

v.

KENNETH T. CUCCINELLI, in his official capacity as Acting Director of USCIS, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

APPELLANTS' MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY

The federal government respectfully requests a stay pending its appeal of the district court’s preliminary injunction (and associated stay under 5 U.S.C. § 705) barring implementation of a Department of Homeland Security (DHS) rule interpreting the statutory provision that renders inadmissible any alien who DHS determines is “likely at any time to become a public charge.” 8 U.S.C. § 1182(a)(4)(A). *See Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019). The Rule defines the term “public charge” to mean those aliens who receive certain public benefits, including specified noncash benefits, for more than twelve months in the aggregate within a thirty-six-month period. The Rule also describes how the agency will determine whether an alien is likely to become a public charge.

The government is likely to prevail on its appeal. As a threshold matter, plaintiffs—four nonprofit organizations that provide legal and educational services to immigrant communities—have not established standing to sue under Article III and zone-of-interest principles. Plaintiffs allege that the Rule will require them to change the subject matter and focus of their educational and legal services. But the mere fact that an organization will have to alter the content of services it is already providing in response to a new rule is not sufficient to support standing. If it were, an organization would have standing to challenge any regulatory change that might affect its clients. Nor are the organizations’ asserted interest in avoiding alterations to the content of their services within the zone of interests of the public-charge statute.

On the merits, numerous statutory provisions demonstrate that Congress intended to require aliens to rely on their own resources, rather than taxpayer-supported benefits, to meet their basic needs. For example, Congress required many aliens to obtain sponsors who must promise to reimburse the government for public benefits the alien receives, and declared any alien who fails to obtain a required sponsor automatically likely to become a public charge.

The Rule—which renders inadmissible aliens who are likely to rely on government support for a significant period to meet basic needs—fully accords with Congress’s intent. The district court concluded otherwise largely because neither the Executive Branch nor Congress had previously adopted the Rule’s definition of public charge. But it is black-letter law that an agency may change its interpretation of a law it implements, provided that the agency acknowledges and explains its reasons for the change, as DHS did here. And, over the last 130 years, Congress has repeatedly and intentionally left the definition and application of the term “public charge” to the discretion of the Executive Branch.

Plaintiffs are also unlikely to succeed in showing that the Rule is arbitrary and capricious, is inconsistent with equal-protection principles, or violates the Rehabilitation Act. The agency more than adequately explained its reasons for adopting the Rule and for identifying certain factors as relevant to the public-charge inadmissibility determination. Those explanations, moreover, provide an ample rational basis for the Rule, thus satisfying equal protection. And the Rule’s

requirement that an adjudicator consider an alien’s medical condition when making a public-charge determination—a requirement Congress itself imposed—does not violate the Rehabilitation Act.

The remaining factors likewise weigh in favor of a stay. So long as the Rule cannot take effect, the government will grant lawful permanent status to aliens who would qualify as likely to become public charges under the Rule. Any harm plaintiffs might experience does not constitute irreparable injury sufficient to outweigh that harm to the federal government and taxpayers.¹

STATEMENT

The Immigration and Nationality Act (INA) provides that “[a]ny alien who, . . . in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.” 8 U.S.C. § 1182(a)(4)(A).² That assessment “shall at a minimum consider the alien’s (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and

¹ The district court issued a second nationwide injunction in a related case. *See New York v. DHS*, No. 19-3591 (2d Cir.). Four other district courts have issued preliminary injunctions barring DHS from implementing the Rule, all of which the government has appealed. *See Casa de Maryland, Inc. v. Trump*, 19-cv-2715 (D. Md) (nationwide); *Cook County, Illinois v. McAleenan*, 19-cv-6334 (N.D. Ill.) (Illinois); *City and County of San Francisco v. USCIS*, No. 19-cv-4717 (N.D. Cal.) (Plaintiff Counties); *California v. USDHS*, No. 19-cv-4975 (N.D. Cal.) (Plaintiff States and the District of Columbia); *Washington v. USDHS*, No. 19-cv-5210 (E.D. Wash.) (nationwide).

² In 2002, Congress transferred the Attorney General’s authority to make inadmissibility determinations in the relevant circumstances to the Secretary of Homeland Security. *See* 8 U.S.C. § 1103; 6 U.S.C. § 557.

(V) education and skills.” *Id.* § 1182(a)(4)(B). A separate provision provides that an alien is deportable if, within five years of entry, the alien “has become a public charge from causes not affirmatively shown to have arisen” within that time. *Id.* § 1227(a)(5).

2. Congress has never defined the term “public charge,” instead leaving the term’s definition and application to the Executive’s discretion. The challenged Rule is the first time the Executive Branch has defined the term in a final rule following notice and comment. A never-finalized rule proposed in 1999 would have defined “public charge” to mean an alien “who is likely to become primarily dependent on the Government for subsistence as demonstrated by either: (i) the receipt of public cash assistance for income maintenance purposes, or (ii) institutionalization for long-term care at Government expense.” 64 Fed. Reg. 28,676, 28,681 (May 26, 1999). Simultaneously issued “field guidance” adopted the proposed rule’s definition. 64 Fed. Reg. 28,689 (May 26, 1999) (1999 Guidance).

In August 2019, DHS promulgated the Rule at issue. The Rule defines “public charge” to mean “an alien who receives one or more [specified] public benefits . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).” 84 Fed. Reg. at 41,501. The specified public benefits include cash assistance for income maintenance and certain noncash benefits, including most Medicaid benefits, Supplemental Nutrition Assistance Program benefits, and federal housing assistance. *Id.* As DHS explained, the Rule’s definition of “public charge” differs from the 1999

Guidance’s definition in that: (1) it incorporates certain noncash benefits; and (2) it replaces the “primarily dependent” standard with the 12-month/36-month measure of dependence.

The Rule also sets forth a framework for evaluating whether, considering the “totality of an alien’s individual circumstances,” the alien is “[l]ikely at any time to become a public charge.” 84 Fed. Reg. at 41,501-04. Among other things, the framework identifies factors the adjudicator must consider in making public-charge inadmissibility determinations. *Id.* The Rule’s effective date was October 15, 2019.

3. Plaintiffs—four nonprofit organizations who provide educational and legal services to immigrant communities—challenged the Rule, alleging that it is not a permissible construction of “public charge,” is arbitrary and capricious, runs afoul of the equal protection component of the Fifth Amendment, and violates the Rehabilitation Act. Dkt. 1, at 112-15.

On October 11, 2019, the district court granted plaintiffs’ request for a nationwide preliminary injunction barring DHS from implementing the Rule. Attachment A (Op.). The court concluded that plaintiffs had standing because the Rule will purportedly “force[]” plaintiffs “to divert [their] resources and provide *new* services.” *Id.* at 8. Specifically, the court noted that plaintiffs “will have to divert resources to educate their clients, members, and the public about the Rule” and will have to update their legal materials. *Id.* at 9. The court also concluded that plaintiffs were within the zone of interests protected by the public-charge provision, reasoning

that the “interests of immigrants [(whom the statute regulates)] and immigrant advocacy organizations such as Plaintiffs are inextricably intertwined.” Op. 12.

On the merits, the court concluded that plaintiffs were likely to prevail on their claim that the Rule’s definition of “public charge” was not consistent with the statute. Op. 13-15. The court reasoned that the Rule’s definition was impermissible because it had “*never*” previously been used, and there was an “absence of [evidence indicating] any Congressional intent” to allow DHS to define the term in the manner it had. Op. 14-15.

The court also concluded that plaintiffs were likely to succeed in demonstrating that the Rule was arbitrary and capricious, because DHS allegedly failed to provide reasoned explanations for changing the definition of “public charge” and for adopting its chosen framework. Op. 15-19. The court further concluded that plaintiffs had raised a “colorable argument” that the Rule violates the Rehabilitation Act because the Rule “considers disability as a negative factor in the public charge assessment.” Op. 19-20. Finally, the court found that plaintiffs were likely to succeed on their equal-protection claim because the Rule lacked a rational basis. Op. 20-21.

4. The government sought a stay from the district court on October 25, and informed the court that it would seek relief from this Court if the district court had not acted by November 14. We will inform this Court promptly if the district court rules.

ARGUMENT

I. The Government Is Likely To Prevail On The Merits

A. Plaintiffs Lack Standing

The district court erred in holding that the plaintiff organizations have standing to seek injunctive relief. Plaintiffs cannot show, as they must to establish standing on their own behalf, that the Rule will impede their “ability to carry out” their “core activities,” such as providing education and advocacy services to immigrant communities. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 109-11 (2d Cir. 2017). Plaintiffs assert that the Rule altered the subject matter of the organizations’ educational and advocacy efforts. If that change were sufficient to show organizational standing, *any* regulatory change adverse to an organization’s clients would give rise to organizational standing. Such a holding would render meaningless the Supreme Court’s admonition that a “setback to the organization’s abstract social interests” is insufficient for organizational standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Moreover, the organizations’ desire to avoid changes to the content of their programming is not even “marginally related” to the public-charge provision’s purpose: to ensure that aliens do not rely on public benefits. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). That provision does not create judicially cognizable interests for anyone outside the government, except for an alien in the United States who otherwise has a right to challenge a

determination of inadmissibility, for no third party has a judicially enforceable interest in the admission or removal of an alien.

Similarly, legal services organizations do not have standing merely because they “will also have to expend additional resources helping clients prepare applications for adjustments, [and] representing clients in removal proceedings.” Op. 9. A public-interest law firm does not have standing to challenge any regulation that is unfavorable to its clients, *cf. Kowalski v. Tesmer*, 543 U.S. 125, 134 & n.5 (2004), which might make the law firm’s work more difficult. A contrary holding would again mean that any regulatory change contrary to a legal services organization’s interests would provide a basis for standing.

The district court purported to recognize that organizational plaintiffs cannot establish standing merely by demonstrating that they had to adjust services they are “*already* providing.” Op. 8. But the court then relied on alterations to services—educational “workshops,” outreach, and “direct legal services”—that plaintiffs previously provided. *See id.* at 5 (noting that plaintiff Make the Road New York “conducts educational workshops” and “represents immigrants in removal proceedings”).

B. The Rule Adopts A Permissible Construction Of The Statute

1. The INA renders inadmissible “[a]ny alien who” is “likely at any time to become a public charge.” 8 U.S.C. § 1182(a)(4)(A). In determining whether an alien is likely to become a public charge, DHS must review the alien’s individual

circumstances, including the alien’s “age”; “health”; “family status”; “assets, resources, and financial status”; and “education and skills.” *Id.* § 1182(a)(4)(B)(i).

Related provisions of the INA illustrate that the receipt of public benefits, including noncash benefits, is relevant to the determination whether an alien is likely to become a public charge. Congress expressly instructed that, when making a public-charge inadmissibility determination, DHS must not consider any past receipt of benefits, including various noncash benefits, if the alien “has been battered or subjected to extreme cruelty in the United States by [specified persons].” 8 U.S.C. §§ 1641(c), 1182(s). The inclusion of that provision presupposes that DHS will ordinarily consider the past receipt of benefits in making “public charge” determinations.

In addition, many aliens seeking adjustment of status must obtain affidavits of support from sponsors. 8 U.S.C. § 1182(a)(4)(C) (requiring most family-sponsored immigrants to submit affidavits of support); *id.* § 1182(a)(4)(D) (same for certain employment-based immigrants); *id.* § 1183a. Aliens who fail to obtain a required affidavit of support qualify by operation of law as likely to become public charges, regardless of their individual circumstances. *Id.* § 1182(a)(4). Congress further specified that the sponsor must agree “to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line,” *id.* § 1183a(a), and granted federal and state governments the right to seek reimbursement from the

sponsor for “any means-tested public benefit” that the government provides to the alien, *id.* § 1183a(b).

The import of the affidavit-of-support provision is clear: To avoid being found inadmissible as likely to become a public charge, an alien governed by the provision must find a sponsor who is willing to reimburse the government for *any* means-tested public benefits the alien receives while the sponsorship obligation is in effect.

Through this requirement, Congress thus provided that the mere *possibility* that an alien might obtain unreimbursed, means-tested public benefits in the future was sufficient to render that alien likely to become a public charge, regardless of the alien’s other circumstances. And Congress enacted the affidavit-of-support provision in 1996—the same year that it enacted the current version of the public-charge inadmissibility provision—against the backdrop of a longstanding interpretation of the term “public charge” for purposes of deportability, *see* 8 U.S.C. § 1227(a)(5), as applying whenever an alien or the alien’s sponsor fails to honor a lawful demand for repayment of a public benefit. *See Matter of B*, 3 I. & N. Dec. 323 (BIA and AG 1948); Sen. Hearing 104-487, at 81 (March 12, 1996) (noting that interpretation).

Congress also took other steps to limit aliens’ ability to obtain public benefits. Congress provided that, for purposes of eligibility for means-tested public benefits, the alien’s income is “deemed to include” the “income and resources” of the sponsor. 8 U.S.C. § 1631(a). And Congress barred most aliens from obtaining most federal

public benefits until they have been in the country for five years or, in some cases, indefinitely. *See id.* §§ 1611-1613, 1641; 83 Fed. Reg. at 51,126-33.

As Congress explained, those and other provisions were driven by its concern about the “increasing” use by aliens of “public benefits [provided by] Federal, State, and local governments.” 8 U.S.C. § 1601(3). Congress emphasized that “[s]elf-sufficiency has been a basic principle of United States immigration law since this country’s earliest immigration statutes,” *id.* § 1601(1), and that it “continues to be the immigration policy of the United States that (A) aliens within the Nation’s borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (B) the availability of public benefits not constitute an incentive for immigration to the United States,” *id.* § 1601(2). Consistent with these pronouncements, Congress expressly equated a lack of “self-sufficiency” with the receipt of “public benefits by aliens,” *id.* § 1601(3), which it defined broadly to include any “welfare, health, disability, public or assisted housing . . . or any other similar benefit,” *id.* § 1611(c) (defining “federal public benefit”). And it stressed the government’s “compelling” interest in enacting new welfare-reform and public-charge legislation “to assure that aliens be self-reliant.” *Id.* § 1601(5).

Consistent with that statutory context and history, the Rule defines a “public charge” as an “alien who receives one or more [enumerated] public benefits” over a specified period of time. 84 Fed. Reg. at 41,501. That definition respects Congress’s

understanding that the term “public charge” would encompass individuals who rely on taxpayer-funded benefits to meet their basic needs. At a minimum, the Rule is “a permissible construction of the statute.” *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

2. The district court concluded that the INA forecloses the Rule’s definition of “public charge” because the Rule is purportedly inconsistent with the term’s “well-established meaning.” Op. 12-15. In so doing, the court appeared to accept plaintiffs’ argument that the term “public charge” has, since 1882, “been interpreted narrowly to refer to an individual who is ‘institutionalized or [is] otherwise primarily dependent on the government for subsistence,’” and that Congress adopted that allegedly longstanding meaning. Op. 13. The court’s conclusions are flawed.

As discussed, Congress’s 1996 INA amendments and its contemporaneous welfare-reform legislation demonstrate that it did not understand “public charge” to have the narrow meaning plaintiffs assert. And there would have been no basis for Congress to presume that the term had such a fixed, narrow definition. Rather, Congress had repeatedly and intentionally left the term’s definition and application to the discretion of the Executive Branch. In an extensive Report that formed an important part of the foundation for the enactment of the INA, the Senate Judiciary Committee emphasized that because “the elements constituting likelihood of becoming a public charge are varied, there should be no attempt to define the term in the law.” S. Rep. No. 81-1515, at 349 (1950); *see also id.* at 803 (reproducing Senate

resolution directing Committee to make “full and complete investigation of our entire immigration system” and provide recommendations). The Report also recognized that “[d]ecisions of the courts have given varied definitions of the phrase ‘likely to become a public charge,’” *id.* at 347, and that “[d]ifferent consuls, even in close proximity with one another, have enforced [public-charge] standards highly inconsistent with one another.” *Id.* at 349. But instead of adopting a definition of public charge—much less the one plaintiffs urge—the Report concluded that the public-charge inadmissibility determination properly “rests within the discretion of” Executive Branch officials. *Id.*

The statute itself reflects Congress’s broad delegation of authority to the Executive Branch, as it expressly provides that public-charge determinations are made “in the opinion of the Attorney General.” 8 U.S.C. § 1182(a)(4). The 1999 Guidance—which defined the term public charge by reference to cash assistance—represents an exercise of the Executive Branch’s longstanding discretion to define the term “public charge” and provides an example of the term’s evolution to reflect the modern welfare state.

Judicial and administrative interpretations of the term likewise undermine plaintiffs’ assertion that “public charge” has been uniformly understood to apply only to aliens who are primarily dependent on public support. Since at least 1948, the Attorney General has taken the authoritative position that an alien qualifies as a “public charge” for deportability purposes if the alien fails to repay a public benefit

upon a demand for repayment, regardless of the amount of the unpaid benefit or the length of time the alien received the benefit. *See Matter of B*, 3 I. & N. Dec. at 326.

Courts have also held that an alien's reliance on public support for basic necessities on a temporary basis is sufficient to render the alien a "public charge." *See, e.g., Guimond v. Howes*, 9 F.2d 412, 414 (D. Me. 1925) (wife was "likely to become a public charge" in light of evidence that she and her family had been supported by the town twice in two years); *Ex parte Turner*, 10 F.2d 816, 816 (S.D. Cal. 1926) (similar).

The district court also erroneously found it significant that, in 1996 and 2013, Congress declined to adopt legislation that would have expressly defined the term "public charge" to include receipt of certain noncash benefits. Op. 15. "Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160 (2001). Here, Congress likely rejected the proposals to preserve Executive Branch flexibility to define the term. There is no indication that Congress believed the proposed definitions were fundamentally inconsistent with the statutory term "public charge."

The district court also emphasized that the Executive Branch had not previously adopted the Rule's particular definition of public charge. Op. 14. But it is a bedrock principle of administrative law that an agency may alter its interpretation of a statute it is charged with enforcing. *See FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). Particularly where the prior governing interpretation was adopted as field

guidance, there should be no serious dispute that the agency charged with administering a statute has authority to alter its interpretation after notice-and-comment rulemaking.

C. The Rule Is Not Arbitrary And Capricious And Is Consistent With Equal Protection Principles

The Rule fits squarely “within the bounds of reasoned decisionmaking,” *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983). The agency “forthrightly acknowledged” that it was changing its approach to public-charge inadmissibility determinations and provided “good reasons for the new policy.” *Fox*, 556 U.S. at 515. Specifically, the agency explained that the Rule was designed “to better ensure that applicants for admission to the United States and applicants for adjustment of status to lawful permanent resident . . . are self-sufficient—*i.e.*, do not depend on public resources to meet their needs.” 83 Fed. Reg. at 51,122. The agency reasoned that Congress itself viewed the receipt of any public benefits, including noncash benefits, as indicative of a lack of self-sufficiency and that the Rule was thus more consistent with congressional intent than the agency’s 1999 approach. 83 Fed. Reg. at 51,123; *see also* 84 Fed. Reg. at 41,319.

The agency also stressed the “artificial distinction between cash and non-cash benefits.” 83 Fed. Reg. at 51,123. “Food, shelter, and necessary medical treatment are basic necessities of life.” 83 Fed. Reg. at 51,159. Thus, a “person who needs the public’s assistance to provide for these basic necessities is not self-sufficient.” *Id.* The

agency also emphasized that the cost to the federal government of providing noncash benefits to a recipient often exceeds the cost of cash-based assistance, demonstrating that noncash benefits are in many individual cases a more significant form of public support. 83 Fed. Reg. at 51,160.

The agency also explained its reasons for selecting the various factors it identified as weighing on the question whether an alien was likely to become a public charge. *See* 83 Fed. Reg. at 51,178-207. As DHS explained, the factors implemented Congress's mandate that the agency consider each alien's "age"; "health"; "family status"; "assets, resources, and financial status"; and "education and skills." *See id.* at 51,178. The agency also described in detail how each of the various factors bore positively or negatively on the determination whether an alien was likely to receive public benefits in the future, while retaining the "totality of the circumstances" approach that allows each adjudicating officer to make a decision appropriate to each alien's individual circumstances.

The agency also rationally weighed the benefits and costs of the Rule. It explained that, by excluding from the country those aliens likely to rely on public benefits and encouraging those within the country to become self-sufficient, the Rule was likely to reduce federal and state government outlays for public benefits by billions of dollars annually. *See* 83 Fed. Reg. at 51,228. At the same time, the agency recognized that alien disenrollment from public-benefit programs could have certain adverse effects. The agency noted, for example, that a reduction in public-benefit

enrollment could negatively impact third parties who receive payments under public-benefit programs, including, for example, health-care providers who participate in Medicaid. 83 Fed. Reg. at 51,118; 84 Fed. Reg. at 41,313. The agency also considered potential adverse consequences of disenrollment in public benefits program by aliens who are subject to the Rule or who incorrectly believe they are subject to the Rule. 84 Fed. Reg. at 41,313.

Although it recognized these potential costs, the agency explained that there were reasons to believe that the costs were not as great as some feared. 84 Fed. Reg. at 41,313. Among other things, the agency had taken steps to “mitigate . . . disenrollment impacts.” *Id.* Those steps included exempting the receipt of certain benefits, such as Medicaid benefits received by aliens under twenty-one and pregnant women, from the Rule’s coverage. *Id.* at 41,313-14. The agency further stated that it planned to “issue clear guidance that identifies the groups of individuals who are not subject to this rule,” thus helping to minimize disenrollment based on misunderstandings. *Id.* at 41,313.

Ultimately, the agency rationally concluded that the benefits obtained from ensuring that aliens entering the country or adjusting to permanent lawful status are self-supporting outweighed the Rule’s potential costs. *See* 84 Fed. Reg. at 41,314. Given Congress’s clear focus on ensuring that aliens admitted to the country rely on their own resources and not public benefits, the agency’s decision to prioritize the goal of self-reliance among aliens was plainly reasonable.

The district court concluded that the Rule was arbitrary because it “change[d] the public charge assessment into a *benefits* issue, rather than an inquiry about *self-subsistence*.” Op. 16. But self-subsistence is merely the converse of reliance on public benefits. It was thus hardly irrational for DHS to conclude that aliens who rely on the public benefits enumerated in the Rule over the specified period are aliens who “depend on public resources to meet their needs,” 8 U.S.C. § 1601(2)(A), and are not “self-sufficien[t],” *id* § 1601(1). Even the 1999 Guidance tied the definition of public charge to the receipt of public benefits. *See supra* pp. 4, 13. The Rule simply redefines what benefits received over what time period qualify an alien as a public charge.

The district court also expressed concern that the Rule could sweep in an alien who is “fully capable of supporting herself without government assistance” but nonetheless “elects to accept a benefit, such as public housing, simply because she is entitled to it.” Op. 16-17. Even assuming an alien living in public housing is “fully capable of supporting herself,” the clear import of Congress’s 1996 legislation was to compel aliens to rely on private rather than public resources.

The district court also erred in finding that the agency’s reliance on a twelve-months-within-a-thirty-six-month-period standard was irrational. Op. 17. The 12/36 standard reflects the agency’s reasonable conclusion that the “short-term and intermittent” use of public benefits is not inconsistent with self-sufficiency. 84 Fed. Reg. at 41,361. DHS reasonably based the standard on studies analyzing “the length of time that recipients of public benefits tend to remain on those benefits.” *Id.* at

41,361. And agencies who apply and enforce undefined statutory terms may reasonably adopt such numerical standards through rulemaking to provide clarity to the public.

The district court further concluded that there was no “rational relationship[] between many of the [] factors enumerated in the Rule and a finding of benefits use.” Op. 18. But the agency explained the relevance of the selected factors to the totality-of-the-circumstances inquiry. For example, the agency reasonably explained that English proficiency is relevant to the question whether an individual is likely to rely on public benefits because, as demonstrated by various studies, those with low English proficiency “tend to have the lowest employment rate, lowest rate of full-time employment, and lowest median earnings,” 84 Fed. Reg. at 41,432, and tend to use public benefits at greater rates than those who speak English well, 83 Fed. Reg. at 51,196.

Given the agency’s reasoned explanations and the clear rational bases it had for adopting the Rule, the district court erred in concluding that plaintiffs were likely to succeed in establishing that the Rule violates equal-protection principles because it purportedly lacks a “reasonable basis,” Op. 20-21.

D. The Rule Does Not Violate The Rehabilitation Act

Plaintiffs have not raised even a “colorable argument” that the Rule violates the Rehabilitation Act. Op. 20. The Act provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability,” be denied

the benefits of a federal program. 29 U.S.C. § 794(a). “[B]y its terms,” the statute “does not compel [government] institutions to disregard the disabilities of” individuals. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979).

Consistent with the Rehabilitation Act, the Rule does not deny any alien admission into the United States, or adjustment of status, “solely by reason of” disability. The Rule provides that an alien’s medical condition is one factor, not the sole factor, that an adjudicator will consider in evaluating the totality of an alien’s circumstances. Op. 19. Moreover, in 1996, Congress explicitly added “health” as a factor DHS “shall . . . consider” in evaluating whether the alien is likely to become a public charge, 8 U.S.C. § 1182(a)(4)(B)(i), thus requiring DHS to take an alien’s medical condition, including a disability, into account.

II. The Remaining Factors Favor A Stay

Both the government and the public will be irreparably harmed if the Rule cannot go into effect. So long as the Rule is enjoined, DHS will grant lawful-permanent-resident status to aliens whom the Secretary would otherwise deem likely to become public charges in the exercise of his discretion. DHS currently has no practical means of revisiting public-charge admissibility determinations once made, *see* Dkt. 151 ¶ 4, so the injunctions will inevitably result in the grant of lawful-permanent-resident status to aliens who, under the Secretary’s interpretation of the statute, are likely to become public charges.

Conversely, plaintiffs' alleged injuries are speculative. And even if it were clear that a stay would somehow irreparably harm plaintiffs, any such injuries would be outweighed by the harms to the government and the public.

III. The Court Should At Least Stay The Injunction In Part

At a minimum, the Court should stay the injunction insofar as it sweeps more broadly than necessary to redress plaintiffs' alleged injuries. The district court justified its injunction's scope based on the need for uniformity in immigration enforcement. But that asserted need cannot overcome the fundamental principle that an injunction "must be narrowly tailored to remedy the specific harm shown." *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028-29 (9th Cir. 2019). Plaintiffs here allege harms to their educational efforts and legal services. An injunction barring enforcement of the Rule within their service areas would remedy those harms. *See Trump v. Hawaii*, 138 S.Ct. 2392, 2424-29 (2018) (Thomas, J., concurring).

CONCLUSION

The preliminary injunction (and associated stay under 5 U.S.C. § 705) should be stayed pending the federal government's appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,172 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Gerard Sinzdak

Gerard Sinzdak

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Gerard Sinz dak

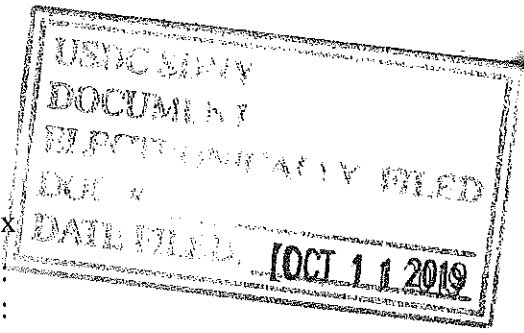
Gerard Sinz dak

ATTACHMENTS

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ATTACHMENT A



**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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

Plaintiffs,

-against-

KEN CUCCINELLI, *in his official capacity as Acting Director of United States Citizenship and Immigration Services*; UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES; KEVIN K. MCALEENAN, *in his official capacity as Acting Secretary of Homeland Security*; and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants.

MEMORANDUM DECISION
AND ORDER

19 Civ. 7993 (GBD)

-----X
GEORGE B. DANIELS, United States District Judge:

Plaintiffs Make the Road New York, African Services Committee, Asian American Federation, Catholic Charities Community Services (Archdiocese of New York), and Catholic Legal Immigration Network, Inc. bring this action against Defendants Kenneth T. Cuccinelli II, in his official capacity as Acting Director of the United States Citizenship and Immigration Services (“USCIS”); Kevin K. McAleenan, in his official capacity as Acting Secretary of the United States Department of Homeland Security (“DHS”); USCIS; and DHS. (Compl., ECF No. 1.) Plaintiffs challenge Defendants’ promulgation, implementation, and enforcement of a rule, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248) (the “Rule”), which redefines the term “public charge” and establishes new criteria for determining whether a noncitizen applying for admission into the

United States or for adjustment of status is ineligible because he or she is likely to become a “public charge.” (*See id.* ¶¶ 1–3.) Plaintiffs seek, *inter alia*, (1) a judgment declaring that the Rule is unauthorized and contrary to law, (2) a vacatur of the Rule, and (3) an injunction enjoining Defendants from implementing the Rule. (*Id.* at 115.)

Plaintiffs now move pursuant to Federal Rule of Civil Procedure 65 for a preliminary injunction enjoining Defendants from implementing or enforcing the Rule, which is scheduled to take effect on October 15, 2019. (*See* Notice of Mot., ECF No. 38.) Plaintiffs’ motion for a preliminary injunction is GRANTED.¹

I. FACTUAL BACKGROUND

A. Current Framework for Public Charge Determination.

The Immigration and Nationality Act (the “INA”) provides that the federal government may deny admission or adjustment of status to any noncitizen who it determines is “likely at any time to become a public charge.” 8 U.S.C. § 1182(a)(4)(A). In 1996, Congress enacted two pieces of legislation focusing on noncitizens’ eligibility for public benefits and on public charge determinations. It first passed the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, § 403, 110 Stat. 2105, 2265–67 (1996) (the “Welfare Reform Act”), which established a detailed—and restrictive—scheme governing noncitizens’ access to benefits. It also passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 531, 110 Stat. 3009, 3674–75 (1996) (“IIRIRA”), which amended the INA by codifying five factors relevant to a public charge determination. Specifically, IIRIRA provides that in assessing whether an applicant is likely to fall within the definition of public charge, DHS

¹ This Court also grants, under separate order, the same preliminary injunction and stay in a related action, *State of New York v. United States Department of Homeland Security*, 19 Civ. 7777 (GBD).

should, “at a minimum,” take into account the applicant’s age; health; family status; assets, resources, and financial status; and education and skills. 8 U.S.C. § 1182(a)(4)(B)(i).

In 1999, DHS’s predecessor, the Immigration and Naturalization Service (“INS”), issued its Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999) (the “Field Guidance”), as well as a parallel proposed rule, 64 Fed. Reg. 28,676, which “summarize[d] longstanding law with respect to public charge and provide[d] new guidance on public charge determinations” in light of IIRIRA, the Welfare Reform Act, and other recent legislation. 64 Fed. Reg. at 28,689. Both the Field Guidance and proposed rule defined “public charge” as a noncitizen who has become or is likely to become “primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.” *Id.* (internal quotation marks omitted). Consistent with the INA, INS regulations, and several INS, Board of Immigration Appeals, and Attorney General decisions, they instructed INS officials to evaluate a noncitizen’s likelihood of becoming a public charge by examining the totality of the noncitizen’s circumstances at the time of his or her application. *Id.* at 28,690. The Field Guidance noted that “[t]he existence or absence of a particular factor should never be the sole criterion for determining if an alien is likely to become a public charge.” *Id.* (emphasis omitted). Although the parallel proposed rule was never finalized, the Field Guidance sets forth the current framework for public charge determinations.

B. The 2018 Proposed Rulemaking and Rule.

On October 10, 2018, DHS published a notice of proposed rulemaking, Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (Oct. 10, 2018), which withdrew the 1999 proposed rule that INS had issued with the Field Guidance. *Id.* at 51,114. This newly proposed rule sought,

among other things, to redefine “public charge,” and to amend the totality-of-the-circumstances standard that is currently used in public charge determinations. *See id.* The notice provided a 60-day period for public comments on the proposed rule. *Id.* DHS collected 266,077 comments, “the vast majority of which opposed the rule.” 84 Fed. Reg. at 41,297; *see also id.* at 41,304–484 (describing and responding to public comments).

Subsequently, on August 14, 2019, DHS issued the Rule. It was finalized, with several changes, as the proposed rule described in the October 2018 notice. *Id.* at 41,292; *see also id.* at 41,297–303 (summarizing changes in Rule).

Under the Rule, “public charge” is to be defined as any noncitizen “who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period.” *Id.* at 41,501. The Rule defines “public benefit,” in turn, as both cash benefits and noncash benefits such as Supplemental Nutrition Assistance Program, Medicaid, and public housing and Section 8 housing assistance. *Id.* Each benefit is to be counted separately in calculating the duration of use, such that, for example, receipt of two benefits in one month would count as two months. *Id.*

The Rule also provides a new framework for assessing whether a noncitizen is likely at any time to become a public charge. Specifically, the Rule enumerates an expanded non-exclusive list of factors relevant to analyzing whether a person is likely to receive 12 months of public benefits within 36 months. *See id.* 41,502–04. It includes, for example, family size, English-language proficiency, credit score, and any application for the enumerated public benefits, regardless of the actual receipt or use of such benefits. *Id.* The Rule designates the factors as “positive,” “negative,” “heavily weighted positive,” or “heavily weighted negative,” and instructs the DHS officer to “weigh” all such factors “individually and cumulatively.” *Id.* at 41,397; *see also id.* 41,502–

04. Under this framework, if the negative factors outweigh the positive factors, the applicant would be found likely to receive 12 months of public benefits in the future. The applicant would then be found inadmissible as likely to become a public charge. Conversely, if the positive factors outweigh the negative factors, the applicant would not be found inadmissible as likely to receive 12 months of public benefits and thereby become a public charge. *Id.* at 41,397.

DHS published various corrections to the Rule as recently as October 2, 2019. Inadmissibility on Public Charge Grounds; Correction, 84 Fed. Reg. 52,357 (Oct. 2, 2019). None of these corrections materially alter the new public charge determination framework as outlined above. The Rule, as corrected, is set to go into effect on October 15, 2019.

C. Plaintiffs' Services.

Plaintiffs are nonprofit organizations that work with and for immigrants. (Compl. ¶¶ 21–46.) They provide direct services, including legal, educational, and health-related. (*Id.* ¶¶ 21–22, 26, 31, 34–36, 40–42.) Make the Road New York, for instance, conducts educational workshops on issues affecting immigrants, represents immigrants in removal proceedings, and assists immigrants in applying for benefits and accessing health services. (*Id.* ¶ 22.) Similarly, African Services Committee provides legal representation in immigration proceedings, including those for adjustment of status; health-related services; emergency financial support; and food pantry and nutrition services. (*Id.* ¶ 26.) Plaintiffs also administer community outreach programs that, for example, disseminate information on immigration policies, (*id.* ¶¶ 21, 26), make referrals to social service providers, (*id.* ¶ 36), and host in-person trainings on immigration-related matters, (*id.* ¶ 40).

II. LEGAL STANDARD

“[A] preliminary injunction is ‘an extraordinary remedy never awarded as of right.’” *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (per curiam) (citation omitted). To obtain 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 tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

III. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS

The Administrative Procedure Act (“APA”) authorizes judicial review of agency rules. Under the APA, a reviewing court must “hold unlawful and set aside agency action” that is “in excess of statutory jurisdiction, authority, or limitations”; is “not in accordance with law”; or is “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C § 706(2)(A), (C). Here, Plaintiffs are likely to succeed on the merits of their claim that the Rule conflicts with the APA in all of these respects.

A. Plaintiffs Satisfy the Threshold Justiciability Requirements.

As a preliminary matter, Defendants raise several arguments that Plaintiffs’ claims are not justiciable. Specifically, they assert that Plaintiffs lack standing, the claims are not ripe for judicial review, and Plaintiffs fall outside the zone of interests regulated by the Rule.

1. Plaintiffs Have Standing.

Article III of the U.S. Constitution limits the judicial power of federal courts to “Cases” or “Controversies.” U.S. Const. art. III, § 2, cl. 1. To invoke this power, a plaintiff must have standing to sue. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013) (citation omitted). The plaintiff bears the burden of establishing standing, *Rajamin v. Deutsche Bank Nat’l Tr. Co.*, 757

F.3d 79, 84 (2d Cir. 2014) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 108 (2d Cir. 2009)), and such burden applies to each claim and form of relief sought, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). To demonstrate Article III standing, the plaintiff must show that (1) “it has suffered a concrete and particularized injury that is either actual or imminent,” (2) “the injury is fairly traceable to the defendant,” and (3) “it is likely that a favorable decision will redress that injury.” *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (citing *Lujan*, 504 U.S. at 560–61). “[T]he presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement.” *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (citation omitted).

Defendants argue, on several grounds, that Plaintiffs lack standing. First, they challenge Plaintiffs’ reliance on an “organizational” standing theory. An organization “may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.” *Warth v. Seldin*, 422 U.S. 490, 511 (1975). “Under this theory of “organizational” standing, the organization is just another person—albeit a legal person—seeking to vindicate a right.” *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012). Therefore, “[t]o qualify, the organization itself ‘must ‘meet[] the same standing test that applies to individuals.’” *Id.* (second alteration in original) (citations omitted).

The Second Circuit has found that an organization has standing where the defendant’s conduct interferes with or burdens the organization’s ability to carry out its usual activities, or where the organization is forced to expend resources to prevent some adverse consequence on a well-defined and particularized class of individuals. *See, e.g., Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017) (finding concrete and cognizable injury where local ordinance regulating ability of day laborers to solicit employment

would “force” organization to expend greater resources since “if the laborers are dispersed, it will be more costly to reach them”); *N.Y. Civil Liberties Union*, 684 F.3d at 295 (finding standing where organization’s ability to represent its clients in administrative hearings was “impeded” and “will continue to [be] impede[d]” by defendant’s policy barring public access to such hearings). “Only a ‘perceptible impairment’ of an organization’s activities is necessary for there to be an ‘injury in fact.’” *Nnebe v. Davis*, 644 F.3d 147 (2d Cir. 2011) (quoting *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993)). Moreover, “‘somewhat relaxed standing’ rules apply” where “a party seeks review of a prohibition prior to its being enforced.” *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017).

Courts have distinguished between cases where a defendant’s conduct forced a plaintiff to divert its resources and provide *new* services, therefore giving rise to organizational standing, and cases where a plaintiff was *already* providing the services at issue and therefore failed to allege any injury. *Compare Nat. Res. Def. Council, Inc. v. Wheeler*, 367 F. Supp. 3d 219, 230 (S.D.N.Y. 2019) (finding no injury where organization failed to allege that it “diverted any other resources from its activities (specific or otherwise)” because of directive at issue), *and Lowell v. Lyft, Inc.*, 352 F. Supp. 3d 248, 259 (S.D.N.Y. 2018) (finding no injury where no allegations that defendant’s conduct caused organization “to expend any resources separate from this litigation or that it was otherwise impeded in its ability to pursue its mission”), *with Oyster Bay*, 868 F.3d at 110 (finding standing where ordinance would force organization to divert resources from its other activities in order to combat negative effects of ordinance), *and Olsen v. Stark Homes, Inc.*, 759 F.3d 140, 158 (2d Cir. 2014) (finding standing where organization devoted new resources to investigate its clients’ housing discrimination claims and advocate on their behalf), *and Mental Disability Law Clinic, Touro Law Ctr. v. Hogan*, 519 F. App’x. 714, 716–17 (2d Cir. 2013) (finding standing

where organization expended resources to challenge state mental health agency's policy of asserting counterclaims for outstanding treatment charges against patients who sued agency and thereby discouraged patients from bringing such suits), and *Nnebe*, 644 F.3d at 157–58 (finding standing where organization “allocated resources to assist drivers only when another party—the City—ha[d] initiated proceedings against one of its members”).

This case falls squarely in the category of those where the plaintiff was forced to divert its resources from its usual mission-related activities because of the defendant's conduct. As Plaintiffs adequately demonstrate, the Rule forces them to devote substantial resources to mitigate its potentially harmful effects—resources that Plaintiffs could and would have used for other purposes. Plaintiffs allege, for example, that they will have to divert resources to educate their clients, members, and the public about the Rule. (Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj. (“Pls.' Mem.”), ECF No. 39, at 36–37.) Those Plaintiffs that provide direct legal services will also have to expend additional resources helping clients prepare applications for adjustments, representing clients in removal proceedings, and conducting additional trainings. (*Id.* at 37.) In fact, Plaintiffs allege that they have *already* had to dedicate significant resources addressing the Rule since the announcement of the Rule last year. They have, for example, already conducted dozens of workshops. (Decl. of Theo Oshiro, ECF No. 43, ¶¶ 21, 25). They have also developed new materials for legal information sessions that previously could be held on a groupwide basis but now require individualized consultation due to the Rule's complexity. (Decl. of C. Mario Russell, ECF No. 44, ¶ 19). These are entirely new services that, but for the Rule, Plaintiffs would not have had to provide.

Defendants additionally argue that Plaintiffs' claims of irreparable injury “consist of potential future harms that, if they ever came to pass, would be spurred by decisions of third parties

not before the Court,” and that these injuries are therefore too speculative. (Mem. of Law in Opp’n to Pls.’ Mot. for a Prelim. Inj. (“Defs.’ Opp’n”), ECF No. 129, at 9). In Defendants’ view, the Rule governs only DHS personnel and certain noncitizens, but does not directly affect Plaintiffs, either by requiring or forbidding any action on Plaintiffs’ part or by expressly interfering with any of Plaintiffs’ programs. (*Id.*) This argument fails. As set forth above, Plaintiffs sufficiently allege “concrete and particularized” injuries that they themselves will suffer and, in fact, have *already* begun to suffer. Plaintiffs therefore have standing to bring this action on their own behalf.

2. Plaintiffs’ Claims Are Ripe for Judicial Review.

To be justiciable, Plaintiffs’ claims must also be ripe—that is, they “must present ‘a real, substantial controversy, not a mere hypothetical question.’” *Nat’l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013) (quoting *AMSAT Cable Ltd. v. Cablevision of Conn.*, 6 F.3d 867, 872 (2d Cir.1993)). “Ripeness ‘is peculiarly a question of timing,’” and “[a] claim is not ripe if it depends upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” *Id.* (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)).

“Ripeness encompasses two overlapping doctrines concerning the exercise of federal court jurisdiction.” *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 429 (2d Cir. 2013) (citing *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)) (internal quotation marks omitted). The first, constitutional ripeness, “overlaps with the standing doctrine, ‘most notably in the shared requirement that the plaintiff’s injury be imminent rather than conjectural or hypothetical.’” *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 110 (2d Cir. 2013) (quoting *Ross v. Bank of Am., N.A.*, 524 F.3d 217, 226 (2d Cir. 2008)). Prudential ripeness, meanwhile, is “an important exception to the usual rule that where jurisdiction exists a

federal court must exercise it,’ and allows a court to determine ‘that the case will be better decided later.’” *Id.* (quoting *Simmonds v. Immigration Naturalization Serv.*, 326 F.3d 351, 357 (2d Cir. 2003)). In determining whether a case is prudentially ripe, courts examine “(1) whether [the case] is fit for judicial decision and (2) whether and to what extent the parties will endure hardship if decision is withheld.” *Simmonds*, 326 F.3d at 359 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)).

One can conceive of no issue of greater ripeness than that presented here. The Rule is scheduled to go into effect in a matter of *days*, at which point hundreds of thousands of individuals who were previously eligible for admission and permanent residence in the United States will no longer be eligible because of this change of law. Adverse consequences and determinations will soon begin to have their effect. The Rule is intended to immediately cause the immigrant population to avoid public benefits. Plaintiffs must be prepared to immediately adjust to the results of this change in policy.

No further factual predicate is necessary for purposes of determining ripeness, where there is clearly a legal question about whether the Rule exceeds Defendants’ delegated authority, violates the law, and is arbitrary and capricious. Moreover, for the same reasons that Plaintiffs sufficiently allege an injury under the standing inquiry, they have shown that they will endure significant hardship with any delay. Accordingly, Plaintiffs’ claims are ripe for review, both constitutionally and prudentially.

3. Plaintiffs Are Within the Zone of Interests Regulated By the Rule.

The final threshold question raised by Defendants is whether Plaintiffs have concerns that “fall within the zone of interests protected by the law invoked.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (citation and internal quotation marks

omitted). The zone-of-interests test is “not ‘especially demanding,’” particularly with respect to the APA and its “generous review provisions.” *Id.* at 130 (citation and internal quotation marks omitted). Indeed, in the APA context, the Supreme Court has “often ‘conspicuously included the word ‘arguably’ in the test to indicate that the benefit of any doubt goes to the plaintiff.’” *Id.* (citation omitted). “The test 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-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 567 U.S. 209, 225 (2012) (citation omitted).

Plaintiffs plainly fall within the INA’s zone of interests. The interests of immigrants and immigrant advocacy organizations such as Plaintiffs are inextricably intertwined. In fact, the court in *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260 (E.D.N.Y. 2018), found that Make the Road New York, one of the Plaintiffs in this very action, fall within the zone of interests of the INA. *Id.* at 269 n.3. Furthermore, the zone-of-interests test “does not require the plaintiff to be an intended beneficiary of the law in question,” but instead allows parties simply “who are injured” to seek redress. *Citizens for Responsibility & Ethics in Wash. v. Trump*, No. 18-474, 2019 WL 4383205, at *16 (2d Cir. Sept. 13, 2019). The Supreme Court has consistently found that economic injuries like those alleged here satisfy the test. *See, e.g., Bank of Am. Corp. v. City of Miami*, 137 S.Ct. 1296, 1304–05 (2017) (finding city’s discriminatory lending claims within zone of interests of Fair Housing Act, despite economic nature of harms alleged and absence of any indication that Act was intended to protect municipal budgets).

B. Plaintiffs Sufficiently Allege That the Rule Exceeds Statutory Authority and Is Contrary to Law.

Turning to the merits of Plaintiffs’ claims, Plaintiffs argue that the Rule violates the APA because it exceeds DHS’s delegated authority under the INA and is contrary to law. *See* 5 U.S.C.

§ 706(2)(A), (C). In analyzing an agency’s interpretation of a statute and whether the agency’s action exceeds statutory authority, courts often apply the two-step framework articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). “[T]he question . . . is always whether the agency has gone beyond what Congress has permitted it to do[.]” *City of Arlington v. FCC*, 569 U.S. 290, 298 (2013). Under *Chevron*, courts first ask whether the statute is clear. *Chevron*, 467 U.S. at 842. If so, “that is the end of the matter[,] for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43. Where there is ambiguity, however, courts then ask whether the agency’s interpretation of the statute is reasonable. *Id.* at 843–44. Such deference “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Notwithstanding this implicit delegation, “agencies must operate ‘within the bounds of reasonable interpretation,’” and “reasonable statutory interpretation must account for both ‘the specific context in which . . . language is used’ and ‘the broader context of the statute as a whole.’” *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (citations omitted).

1. Long-Standing Definition of “Public Charge.”

Plaintiffs argue that the Rule’s definition of “public charge” is a drastic deviation from the unambiguous and well-established meaning of the term that has existed for over 130 years. (Pls.’ Mem. at 5, 18–19.) They assert that the term has been interpreted narrowly to refer to an individual who is “institutionalized or [is] otherwise primarily dependent on the government for subsistence.” (*Id.* at 5.) Going as far back as 1882, when Congress passed the first federal immigration statute, Plaintiffs note that the statute rendered excludable “any person unable to take care of himself or herself without becoming a public charge,” (*id.* at 6 (quoting Immigration Act

of 1882, ch. 376, 22 Stat. 214, 47th Cong. (1882))), and that its legislative history showed that Congress intended “public charge” to refer to “those likely to become long-term residents of ‘poor-houses and alms-houses,’” (*id.* (quoting 13 Cong. Rec. 5109 (June 19, 1882) (statement of Rep. Davis))). Plaintiffs point to court decisions in the years that followed, which confirmed this definition of “public charge.” (*Id.* at 6–7.) According to Plaintiffs, federal agencies have also affirmed this narrow interpretation, as evidenced by INS’s 1999 Field Guidance. (*Id.* at 12.)

In opposition, Defendants assert that the definition of “public charge” in the Rule “is consistent with the plain meaning of the statutory text, which ‘is to be determined as of the time that it became law.’” (Def.’ Opp’n at 11–12 (quoting *One West Bank v. Melina*, 827 F.3d 214, 220 (2d Cir. 2016))). They direct this Court to dictionaries used in the 1880s, when the Immigration Act of 1882 was passed, which allegedly “make clear” that a noncitizen becomes a “public charge” “when his inability to achieve self-sufficiency imposes an ‘obligation’ or ‘liability’ on ‘the body of the citizens’ to provide for his basic necessities.” (*Id.* at 12–13.)

Upon review of the plain language of the INA, the history and common-law meaning of “public charge,” agency interpretation, and Congress’s repeated reenactment of the INA’s public charge provision without material change, one thing is abundantly clear—“public charge” has *never* been understood to mean receipt of 12 months of benefits within a 36-month period. Defendants admit that this is a “new definition” under the Rule. (*Id.* at 5.) And at oral argument, they did not dispute that this definition has *never* been referenced in the history of U.S. immigration law or that there is *zero* precedent supporting this particular definition. (*See, e.g.*, Tr. of Oral Arg. dated Oct. 7, 2019 at 51:8–11, 52:1–3.) No ordinary or legal dictionary definition of “public charge” references Defendants’ proposed meaning of that term. As such, Plaintiffs raise a compelling argument that Defendants lack the authority to redefine “public charge” as they have.

2. Congress's Intent.

Nor is there any evidence that Congress intended for a redefinition of “public charge,” and certainly not in the manner set forth in the Rule. No legislative intent or historical precedent alludes to this new definition. Defendants have made no showing that Congress was anything but content with the current definition set forth in the Field Guidance, which defines public charge as someone who has become or is likely to become primarily dependent on the government for cash assistance. Indeed, Congress has repeatedly endorsed this definition and rejected efforts to expand it. For example, during the 1996 debate over IIRIRA, several members of Congress tried and failed to extend the meaning of public charge to include the use of non-cash benefits. *See* 142 Cong. Rec. S11612, at S11712 (daily ed. Sept. 16, 1996). Congress rejected similar efforts in 2013 because of its “strict benefit restrictions and requirements.” S. Rep. 113-40, at 42 (2013).

In addition, if Congress wanted to deny immigrants any of the public benefits enumerated in the Rule, it could have done so, as it similarly has in the past. The Welfare Reform Act, for example, restricted certain noncitizens' eligibility for certain benefits. Specifically, it provided that only “qualified” noncitizens—which, in most cases, meant those who had remained in the United States for five years—could have access to most federal means-tested public benefits. 8 U.S.C §§ 1612, 1613. Therefore, the absence of any Congressional intent to redefine public charge also counsels in favor of a preliminary injunction.

C. Plaintiffs Sufficiently Demonstrate That the Rule Is Arbitrary and Capricious.

Plaintiffs additionally argue that the Rule is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). “The scope of review under the ‘arbitrary and capricious’ standard is narrow[.]” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Nevertheless, the APA requires an agency to “engage in ‘reasoned decisionmaking,’” *Michigan v.*

EPA, 135 S. Ct. 2699, 2706 (2015) (citation omitted), and to “articulate a satisfactory explanation for its action,” *State Farm*, 463 U.S. at 43 (citation omitted). An agency rule is arbitrary and capricious if the agency:

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

Id. Where an agency action changes prior policy, the agency need not demonstrate “that the reasons for the new policy are *better* than the reasons for the old one.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2008). It must, however, “show that there are good reasons for the new policy.” *Id.* This requirement is heightened where the “new policy rests upon factual findings that contradict those which underlay its prior policy,” *id.* (citation omitted), as “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy,” *id.* at 516.

1. Defendants’ Justification of Rule.

Here, Defendants fail to provide any reasonable explanation for changing the definition of “public charge” or the framework for evaluating whether a noncitizen is likely to become a public charge. As noted above, “public charge” has never been interpreted as someone “who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period.” 84 Fed. Reg. at 41,501. This new definition essentially changes the public charge assessment into a *benefits* issue, rather than an inquiry about *self-subsistence*, such that any individual who is deemed likely to accept a benefit is considered a public charge. Receipt of a benefit, however, does not necessarily indicate that the individual is unable to support herself. One could envision, for example, a scenario where an individual is fully capable of supporting herself without government assistance but elects to accept a benefit, such as public housing, simply

because she is entitled to it. 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. Moreover, considering that the federal welfare program was not established in the United States until the 1930s, whereas the concept of public charge existed at least as early as 1882, there *must* be some definition of public charge separate and apart from mere receipt of benefits.

At oral argument, Defendants were afforded numerous opportunities to articulate a rational basis for equating public charge with receipt of benefits for 12 months within a 36-month period, particularly when this has never been the rule. Defendants failed each and every time. When asked, for example, why the standard was 12 months and 36 months as opposed to any other number of months, Defendants merely responded that they do not need to “show a case from 100 years ago that also adopted this precise 12[/]36 standard.” (Tr. of Oral Arg. dated Oct. 7, 2019 at 53:14–20.) Defendants were asked to explain how the new framework would operate and to provide an example of the “typical person” that Defendants could predict is going to receive 12 months of benefits in a 36-month period. (*Id.* 68:11–80:123.) Defendants again stumbled along and were unable to adequately explain what the determinative factor is under the Rule, what individual would fall across the line and be considered a public charge, and what evaluation of the factors enumerated in the Rule would make the DHS officer confident that she could make an appropriate prediction. (*Id.*) And yet, according to Defendants, the Rule is intended to “provide[] a number of concrete guidelines to assist in making [the public charge] determination” and is “designed . . . to make it more predictable for people on both sides of the adjudicatory process.” (*Id.* at 80:20–23.) Quite the opposite appears to be the case.

Defendants suggest that the totality-of-circumstances test remains and that receipt of benefits for 12 months out of a 36-month period is only one of several factors to be considered. (*Id.* at 52:17–22.) This characterization of the Rule is plainly incorrect. Under the Rule, receipt of such benefits is not *one* of the factors considered; it is *the* factor. That is, if a DHS officer believes that an individual is likely to have benefits for 12 months out of a 36-month period, the inquiry ends there, and the individual is *automatically* considered a public charge. As such, Defendants are not simply expanding or elaborating on the list of factors to consider in the totality of the circumstances. Rather, they are entirely reworking the framework, and with no rational basis.

Defendants also fail to demonstrate rational relationships between many of the additional factors enumerated in the Rule and a finding of benefits use. One illustrative example is the addition of English-language proficiency as a factor. Defendants do not dispute that there has never been an English-language requirement in the public charge analysis. They argue, however, that the Rule “properly” adds English proficiency as a factor, given the requirement in the INA to consider an applicant’s “education and skills.” (Defs.’ Opp’n at 26.) Defendants’ suggestion that an individual is likely to become a public charge simply by virtue of her limited English proficiency is baseless, as one can certainly be a productive and self-sufficient citizen without knowing *any* English. The United States of America has no official language. Many, if not most, immigrants who arrived at these shores did not speak English. It is simply offensive to contend that English proficiency is a valid predictor of self-sufficiency.²

² Similarly, it is unclear how the credit score of a new immigrant—who, for example, may have only recently opened her first credit account and therefore has a short credit history, which would negatively impact her credit score—is indicative of her likelihood to receive 12 months of public benefits. Defendants blithely argue that a low credit score “is an indication that someone has made financial decisions that are not necessarily entirely responsible” and that “those irresponsible financial decisions may be the product

In short, Defendants do not articulate why they are changing the public charge definition, why this new definition is needed now, or why the definition set forth in the Rule—which has absolutely no support in the history of U.S. immigration law—is reasonable. The Rule is simply a new agency policy of exclusion in search of a justification. It is repugnant to the American Dream of the opportunity for prosperity and success through hard work and upward mobility. Immigrants have always come to this country seeking a better life for themselves and their posterity. With or without help, most succeed.

2. Rehabilitation Act.

Plaintiffs further argue that the Rule discriminates against individuals with disabilities, in contravention of Section 504 of the Rehabilitation Act, Pub. L. No. 93-112, 87 Stat. 394 (1973) (codified at 29 U.S.C. § 794). Section 504 provides that no individual with a disability “shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . under any program or activity conducted by any Executive agency.” 29 U.S.C. § 794(a). DHS, in particular, is prohibited from denying access to benefits and services on the basis of disability, 6 C.F.R. § 15.30(b)(1), and from using discriminatory criteria or methods of administration, *id.* § 15.30(b)(4). *See also id.* § 15.49. “Exclusion or discrimination [under Section 504] may take the form of disparate treatment, disparate impact, or failure to make reasonable accommodation.” *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016).

The Rule clearly considers disability as a negative factor in the public charge assessment. Defendants acknowledge that disability is “one factor . . . that may be considered” and that it is “relevant . . . to the extent that an alien’s particular disability tends to show that he is ‘more likely

of someone who doesn’t have very much money to work with.” (Tr. of Oral Arg. dated Oct. 7, 2019 at 86:16–20).

than not to become a public charge' at any time." (Defs.' Opp'n at 22 (quoting 84 Fed. Reg. at 41,368).) Defendants do not explain how disability alone is itself a negative factor indicative of being more likely to become a public charge. In fact, it is inconsistent with the reality that many individuals with disabilities live independent and productive lives. As such, Plaintiffs have raised at least a colorable argument that the Rule as to be applied may violate the Rehabilitation Act, and further discovery and development of the record is warranted prior to its implementation.

3. Fifth Amendment Equal Protection Guarantee.

According to Plaintiffs, the Rule violates the equal protection guarantee of the Fifth Amendment to the U.S. Constitution because it disproportionately harms noncitizens of color. Plaintiffs and Defendants disagree about the appropriate level of scrutiny under which to assess the Rule's constitutionality. Plaintiffs argue that the Rule was motivated by discriminatory animus towards noncitizens of color and is therefore subject to strict scrutiny under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). (Pls.' Mem. at 31–32.) Defendants, on the other hand, contend that because the government has "broad power over naturalization and immigration," (Defs.' Opp'n at 34 (quoting *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001))), the Rule is subject only to rational basis review, (*id.* at 34–35).

Under either standard, the conclusion remains the same: Plaintiffs have sufficiently demonstrated a likelihood of success on the merits of their equal protection claim. Indeed, even under the highly deferential standard advanced by Defendants, Defendants have yet to articulate a "rational relationship between the disparity of treatment and some legitimate government purpose." *Lewis*, 252 F.3d at 582 (citations and internal quotation marks omitted). Defendants do not dispute that the Rule will disparately impact noncitizens of color. At oral argument, when asked whether the Rule "will have a greater impact on people of Hispanic and African descent,"

for example, Defendants’ response was that they “don’t know” and that “that’s the same issue that would have applied under the [Field Guidance], which [Defendants] assume also would have had a disproportionate impact.” (Tr. of Oral Arg. dated Oct. 7, 2019 at 81:10–16.) Defendants instead challenge Plaintiffs’ equal protection claim by arguing that the Rule is “rationally related to the government’s compelling, statutorily-codified interest in minimizing the incentive of aliens to immigrate to the United States due to the availability of public benefits and promoting the self-sufficiency of aliens within the United States.” (Defs.’ Opp’n at 35.) But, as discussed above, this is no reasonable basis for Defendants’ sharp departure from the current public charge determination framework. *See supra* Part III.C.1. As such, “Plaintiffs have, at the very least, raised serious questions going to the merits of their Equal Protection Claim.” *Saget v. Trump*, 375 F. Supp. 3d 280, 374 (E.D.N.Y. 2019).

IV. PLAINTIFFS HAVE DEMONSTRATED THAT THEY WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION

“A showing of irreparable harm is ‘the single most important prerequisite for the issuance of a preliminary injunction.’” *Faiveley Transp. Malmö AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (citation omitted). “To satisfy the irreparable harm requirement, Plaintiffs must demonstrate that absent a preliminary injunction they will suffer ‘an injury that is neither remote nor speculative, but actual and imminent,’ and one that cannot be remedied ‘if a court waits until the end of trial to resolve the harm.’” *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (citation omitted). However, Plaintiffs need only show “a *threat* of irreparable harm, not that irreparable harm already ha[s] occurred.” *Mullins v. City of New York*, 626 F.3d 47, 55 (2d Cir. 2010).

The irreparable injury to Plaintiffs by forcing them to divert resources and by shifting the burden of providing services to those who can no longer obtain federal benefits without

jeopardizing their status in the United States, and the immediate response that is necessary by this shift of burden to Plaintiffs, is a direct and inevitable consequence of the impending implementation of the Rule. As discussed above, Plaintiffs allege that the Rule will hinder their ability to carry out their missions and force them to expend substantial resources to mitigate the potentially adverse effects of the Rule. *See supra* Parts III.A.1–2. Plaintiffs provide declarations extensively describing and calculating such injuries. (*See, e.g.*, Decl. of Diane Schanzenbach, Ph.D., ECF No. 40; Decl. of Ryan Allen, Ph.D., ECF No. 41; Decl. of Leighton Ku, Ph.D., M.P.H., ECF No. 42.)

No less important is the immediate and significant impact that the implementation of the Rule will have on law-abiding residents who have come to this country to seek a better life. The consequences that Plaintiffs must address, and America must endure, will be personal and public disruption, much of which cannot be undone. Overnight, the Rule will expose individuals to economic insecurity, health instability, denial of their path to citizenship, and potential deportation—none of which is the result of any conduct by those such injuries will affect. It is a rule that will punish individuals for their receipt of benefits provided by our government, and discourages them from lawfully receiving available assistance intended to aid them in becoming contributing members of our society. It is impossible to argue that there is no irreparable harm for these individuals, Plaintiffs, and the public at large.

V. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST TIP IN PLAINTIFFS' FAVOR

Finally, Plaintiffs must demonstrate that “the balance of equities tips in [their] favor” and that “an injunction is in the public interest.” *Winter*, 555 U.S. at 20. “These factors merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). In assessing these factors, the court must “balance the competing claims of injury and must consider the effect

on each party of the granting or withholding of the requested relief,” as well as “the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 555 U.S. at 24 (citations omitted).

Here, preventing the alleged economic and public health harms provides a significant public benefit. As discussed above, these harms are not speculative or insufficiently immediate. In fact, the notice of proposed rulemaking itself acknowledged that the Rule could cause “[w]orse health outcomes”; “[i]ncreased use of emergency rooms and emergent care as a method of primary health care due to delayed treatment”; “[i]ncreased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated”; “[i]ncreases in uncompensated care in which a treatment or service is not paid for by an insurer or patient”; “[i]ncreased rates of poverty and housing instability”; “[r]educed productivity and educational attainment”; and other “unanticipated consequences and indirect costs.” 83 Fed. Reg. at 51,270.

Moreover, there is no public interest in allowing Defendants to proceed with an unlawful, arbitrary, and capricious rule that exceeds their statutory authority. *See Planned Parenthood of N.Y.C., Inc. v. U.S. Dep’t of Health & Human Servs.*, 337 F. Supp. 3d 308, 343 (S.D.N.Y. 2018) (“It is evident that ‘[t]here is generally no public interest in the perpetuation of unlawful agency action.’ . . . The inverse is also true: ‘there is a substantial public interest in ‘having governmental agencies abide by the federal laws that govern their existence and operations.’” (quoting *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)).)

To be sure, Defendants have a legitimate interest in administering the national immigration system. However, that interest is not paramount in this instance, particularly where Defendants fail to demonstrate why or how the current public charge framework is inadequate. Defendants have applied their current rules for decades, and the current concept of “public charge” has been

accepted for over a century. Aside from conclusory allegations that they will “be harmed by an impediment” to administering the immigration system, (Defs.’ Opp’n at 38), Defendants do not—and cannot—articulate what actual hardship they will suffer by maintaining the status quo.

Accordingly, because Plaintiffs are likely to succeed on the merits and to suffer irreparable harm absent preliminary relief, and the balance of hardships and public interest tip in their favor, Plaintiffs are entitled to a preliminary injunction.

VI. THE INJUNCTION SHOULD APPLY NATIONWIDE

As to the scope of the relief, a nationwide injunction is necessary. The scope of preliminary injunctive relief generally should be “no broader than necessary to cure the effects of the harm caused by the violation” and “not impose unnecessary burdens on lawful activity.” *Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH*, 843 F.3d 48, 72 (2d Cir. 2016) (citations omitted). However, there is no requirement that an injunction affect only the parties in the suit. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (“[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.”)

Here, a nationwide injunction is appropriate. First, national immigration policies, such as the Rule, require uniformity. *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), *rev’d on other grounds*, 138 S. Ct. 2392 (2018); *see also Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 438 (E.D.N.Y. 2018) (granting nationwide injunction preventing rescission of Deferred Action for Childhood Arrivals program in part because “there is a strong federal interest in the uniformity of federal immigration law”); U.S. Const. art. I, § 8, cl. 4 (“The Congress shall have Power . . . To establish a[] uniform Rule of Naturalization.”). A geographically limited injunction that would

result in inconsistent applications of the Rule, and different public charge determinations based upon similar factors, is inimical to this need for uniformity in immigration enforcement.

Indeed, at least nine lawsuits have already been filed challenging the Rule, including *State of California v. U.S. Department of Homeland Security*, 19 Civ. 4975 (PJH) (N.D. Cal.) and *State of Washington v. United States Department of Homeland Security*, 19 Civ. 5210 (RMP) (E.D. Wash.).³ In just these two actions alone, Plaintiffs include the State of California, District of Columbia, State of Maine, Commonwealth of Pennsylvania, State of Oregon, State of Washington, Commonwealth of Virginia, State of Colorado, State of Delaware, State of Illinois, State of Maryland, Commonwealth of Massachusetts, Attorney General Dana Nessel on behalf of the People of Michigan, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, and State of Rhode Island. Combined with the instant action, that means that nearly *two dozen jurisdictions* have already brought suit. It would clearly wreak havoc on the immigration system if limited injunctions were issued, resulting in different public charge frameworks spread across the country, based solely on geography. *Batalla*, 279 F. Supp. at 438 (granting nationwide injunction where more limited injunction “would likely create administrative problems for the Defendants”).

There is no reasonable basis to apply one public charge framework to one set of individuals and a different public charge framework to a second set of individuals merely because they live in different states. It would be illogical, for example, if a New York resident was eligible for adjustment of status but a resident of a sister state with the *same exact* background was not eligible,

³ In addition to the instant action and the related action both before this Court, these other actions include *Mayor and City Council of Baltimore v. United States Department of Homeland Security*, 19 Civ. 2851 (PJM) (D. Md.); *Casa De Maryland, Inc. v. Trump*, 19 Civ. 2715 (PWG) (D. Md.); *City and County of San Francisco v. U.S. Citizenship and Immigration Services*, 19 Civ. 4717 (PJH) (N.D. Cal.); *La Clinica De La Raza v. Trump*, 19 Civ. 4980 (PJH) (N.D. Cal.); and *Cook County, Illinois v. McAleenan*, 19 Civ. 6334 (GF) (N.D. Ill.).

only because the second resident had the misfortune of living somewhere not covered by a limited injunction.

Relatedly, a nationwide injunction is necessary to accord Plaintiffs and other interested parties with complete redress. In particular, an individual should not have to fear that moving from one state to another could result in a denial of adjustment of status. For example, if the injunction were limited to New York, Connecticut, and Vermont, and a New York resident moved to New Jersey where the injunction would not apply, this individual could there be considered a public charge and face serious repercussions simply for crossing state borders. “[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.” *United States v. Guest*, 383 U.S. 745, 758 (1966) (citations omitted). It has been considered a “right so elementary [that it] was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.” *Id.*; see also *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) (“Our cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference.”) The Supreme Court’s recognition of the preeminence of this right lends further support for a nationwide injunction that would not interfere with individuals’ ability to move from one place to another. See, e.g., *Batalla*, 279 F. Supp. 3d at 438 (finding nationwide injunction appropriate “partly in light of the simple fact that people move from state to state and job to job”).

Accordingly, this Court grants a nationwide injunction, as well as a stay postponing the effective date of the Rule pending a final ruling on the merits, or further order of the Court.⁴


⁴ The standard for a stay under 5 U.S.C. § 705 is the same as the standard for a preliminary injunction. *Nat. Res. Def. Council v. U.S. Dep’t of Energy*, 362 F. Supp. 3d 126, 149 (S.D.N.Y. 2019). Accordingly, this Court grants the stay for the same reasons it grants the injunction.

VII. CONCLUSION

Plaintiffs' motion for issuance of a preliminary injunction, (ECF No. 38), is GRANTED.

Dated: New York, New York
October 11, 2019

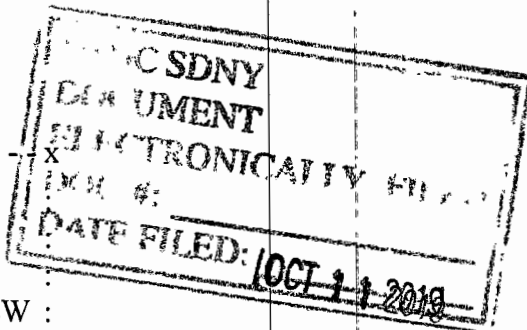
SO ORDERED.



GEORGE B. DANIELS
United States District Judge

ATTACHMENT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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

Plaintiffs,

-against-

KEN CUCCINELLI, *in his official capacity as Acting Director of United States Citizenship and Immigration Services*; UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES; KEVIN K. MCALEENAN, *in his official capacity as Acting Secretary of Homeland Security*; and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants.

ORDER GRANTING PLAINTIFFS'
MOTION FOR A PRELIMINARY
INJUNCTION

19 Civ. 7993 (GBD)

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GEORGE B. DANIELS, United States District Judge:

WHEREAS on September 9, 2019, Make the Road New York, African Services Committee, Asian American Federation, Catholic Charities Community Services, and Catholic Legal Immigration Network, Inc. (the "Organizational Plaintiffs") filed a Motion for Preliminary Injunction in Case No. 19 Civ. 7993 (GBD) (S.D.N.Y.) (the "Organizational Action") to enjoin defendants from implementing or enforcing the Final Rule of the Department of Homeland Security titled "Inadmissibility on Public Charge Grounds," 84 Fed. Reg. 41,292 (the "Rule") pursuant to Federal Rule of Civil Procedure 65, or to postpone the effective date of the Rule pursuant to 5 U.S.C. § 705;

WHEREAS also on September 9, 2019, the State of New York, the City of New York, the State of Connecticut, and the State of Vermont (the "State Plaintiffs," and, together with the

Organizational Plaintiffs, “Plaintiffs”) similarly filed a Motion for Preliminary Injunction in Case No. 19 Civ. 7777 (GBD) (S.D.N.Y.) (the “State Action,” and, together with the Organizational Action, the “Actions”) to enjoin defendants from implementing or enforcing the Rule pursuant to Federal Rule of Civil Procedure 65, or to postpone the effective date of the Rule pursuant to 5 U.S.C. § 705 (together with the Organizational Plaintiffs’ motion, the “Motions”);

WHEREAS on September 27, 2019, Kenneth T. Cuccinelli II, United States Citizenship & Immigration Services, Kevin K. McAleenan, Department of Homeland Security, and the United States of America (as to the State Action only) (“Defendants”) submitted briefs in opposition to the Motions;

WHEREAS on October 4, 2019, Plaintiffs filed replies in further support of the Motions;

WHEREAS *amici* have filed briefs in support of or opposition to the Motions;

WHEREAS on October 7, 2019, this Court held a hearing on the Motions at which counsel for all parties presented oral argument;

WHEREAS this Court, having considered the Motion and the documents filed therewith, as well as all other papers filed in the Actions, and having heard oral arguments from the parties, finds good cause to grant the Motions because:

1. Plaintiffs are likely to succeed on the merits of their claims under the Administrative Procedure Act, and, with respect to the Organizational Plaintiffs, under the United States Constitution;
2. Plaintiffs will suffer irreparable harm if the Rule becomes effective; and
3. The balance of equities and the interests of justice favor issuance of a preliminary injunction;

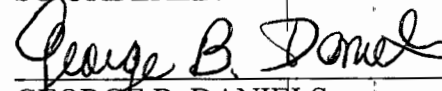
It is hereby ORDERED that, pursuant to Federal Rule of Civil Procedure 65(a), Defendants are RESTRAINED AND ENJOINED from:

1. Enforcing, applying or treating as effective, or allowing persons under their control to enforce, apply, or treat as effective, the Rule; and
2. Implementing, considering in connection with any application, or requiring the use of any new or updated forms whose submission would be required under the Rule, including the new Form I-944, titled "Declaration of Self Sufficiency," and the updated Form I-485, titled "Application to Register Permanent Residence of Adjust Status"; and,

It is hereby FURTHER ORDERED that, pursuant to 5 U.S.C. § 705, the effective date of the Rule is STAYED and POSTPONED *sine die* pending further Order of the Court such that, if this Order is later terminated and the Rule goes into effect, the Rule's stated effective date of October 15, 2019, as well as any references in the Rule to October 15, 2019, including but not limited those contained in proposed 8 CFR §§ 212.20, 212.22(b)(4)(i)(E), 212.22(b)(4)(ii)(E)(1), 212.22(b)(4)(ii)(E)(2), 212.22(b)(4)(ii)(F), 212.22(c)(1)(ii), 212.22(d), 214.1, 248.1(a), and 248.1(c)(4), shall be replaced with a date after this Order is terminated.

Dated: New York, New York
October 11, 2019

SO ORDERED.


GEORGE B. DANIELS
United States District Judge