No. 19A-_____

IN THE SUPREME COURT OF THE UNITED STATES

CHAD F. WOLF, ET AL., APPLICANTS

v.

COOK COUNTY, ET AL.

APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

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PARTIES TO THE PROCEEDING

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

Respondents (plaintiffs-appellees below) are Cook County, Illinois; and Illinois Coalition for Immigrant and Refugee Rights, Inc.

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* The complaint named Kevin K. McAleenan, then the Acting Secretary of Homeland Security, as a defendant in his official capacity. Chad F. Wolf has since assumed the role of Acting Secretary, and has thus been automatically substituted as a party in place of former Acting Secretary McAleenan. See Fed. R. App. P. 43(c)(2); Fed. R. Civ. P. 25(d). Similarly, the complaint named Kenneth T. Cuccinelli II in his role as Acting Director of the United States Citizenship and Immigration Services. Mr. Cuccinelli is now serving as Senior Official Performing the Duties of the Director, and seeks relief in that capacity.

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of applicants Chad F. Wolf et al., respectfully applies for a stay of a preliminary injunction issued on October 14, 2019, by the United States District Court for the Northern District of Illinois (App., infra, 34a-35a), pending the consideration and disposition of the government's appeal from that injunction to the United States Court of Appeals for the Seventh Circuit and, if the court of appeals affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

This application concerns a Department of Homeland Security (DHS) rule, promulgated through notice-and-comment rulemaking, interpreting a statutory provision stating that an alien is inadmissible if, "in the opinion of" the Secretary, the alien is

"likely at any time to become a public charge." 8 U.S.C. 1182(a)(4)(A); see 84 Fed. Reg. 41,292 (Aug. 14, 2019) (Rule). Whereas a 1999 guidance document had interpreted "public charge" to mean an alien who was at a minimum "primarily dependent" on a limited set of cash benefits from the government, the Rule extends the set of relevant benefits to include certain designated non-cash benefits providing for basic needs such as housing and food, and asks whether the alien is likely at any time to receive such benefits for more than 12 months in aggregate within any 36-month period.

This Court recently stayed a pair of preliminary injunctions issued by the United States District Court for the Southern District of New York enjoining the Rule on a nationwide basis. See DHS v. New York, 140 S. Ct. 599 (2020) (No. 19A785). In that case, the government sought a full stay of the injunctions or, in the alternative, a stay of the nationwide effect of the injunctions. See Gov't Stay Application at 40, New York, supra (No. 19A785). In its stay application there, the government explained that the district court in this case also had preliminarily enjoined the Rule, but only within Illinois, not nationwide, and that a divided Seventh Circuit panel had declined to stay the injunction pending appeal. See id. at 13. The government further explained that if this Court were to stay the nationwide injunctions in their entirety, "the government intends

to ask the Seventh Circuit to reconsider its [earlier] denial of a stay pending appeal" in this case. Id. at 13 n.2.

The Court stayed the New York injunctions in their entirety. New York, 140 S. Ct. at 599. In so doing, the Court necessarily concluded that if the court of appeals were to uphold the preliminary injunctions in those cases, the Court likely would grant a petition for a writ of certiorari; there was a fair prospect the Court would rule in favor of the government; the government likely would suffer irreparable harm absent a stay; and, to the extent it was a close case, the balance of equities favored the government. See Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers).

Those same factors govern the stay application here. Yet the Seventh Circuit summarily denied the government's renewed motion for a stay. See App., infra, 73a. The court of appeals did not explain how its ruling was consistent with this Court's order in New York; indeed, it did not issue a reasoned opinion or offer any explanation at all. See ibid. The Seventh Circuit thus stands alone in finding a stay unwarranted under these circumstances: the Ninth Circuit stayed materially identical injunctions (including one nationwide and two more limited injunctions) in a published opinion, see City & County of San Francisco v. USCIS, 944 F.3d 773 (2019); the Fourth Circuit also stayed a materially identical nationwide injunction, see Order, Casa de Maryland, Inc.

v. Trump, No. 19-2222 (Dec. 9, 2019); and of course this Court stayed the injunctions that currently are pending on appeal to the Second Circuit, see New York, 140 S. Ct. at 599.

This case thus readily meets the standards for a stay. Indeed, this case is materially indistinguishable from New York. Although the injunction here is not nationwide, the Court stayed the New York injunctions in their entirety, thus necessarily determining that there was a fair prospect the Court would agree with the government not just that a nationwide injunction was inconsistent with Article III and equitable principles, but also that challenges to the Rule will be unsuccessful and that even a more limited injunction would impose irreparable harm on the government. That determination controls this case. As explained below, each of the stay factors is met here, for precisely the same reasons as in New York. The government therefore respectfully requests a stay of the district court's injunction of the Rule pending appeal and any further proceedings in this Court.

STATEMENT

1. a. The INA provides that an alien is "inadmissible" if, "in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, [the alien] is likely at any time to become a public charge." 8 U.S.C.

1182(a)(4)(A).[1] That assessment "shall at a minimum consider the alien's (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." 8 U.S.C. 1182(a)(4)(B). A separate INA provision states 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" since entry. 8 U.S.C. 1227(a)(5).

Three agencies make public-charge inadmissibility determinations under Section 1182(a)(4): DHS for aliens seeking admission at the border and aliens within the country who apply to adjust their status to that of a lawful permanent resident; the Department of State when evaluating visa applications filed by aliens abroad; and the Department of Justice when the question arises during removal proceedings. See 84 Fed. Reg. at 41,294 n.3. The Rule at issue governs DHS's public-charge inadmissibility determinations. Ibid. DHS indicated in promulgating the Rule that the State Department and Department of Justice were planning to adopt consistent guidance. Ibid.

b. Although the public-charge ground of inadmissibility dates back to the first immigration statutes, Congress has never

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[1] The statute refers to the Attorney General, but in 2002, Congress transferred the Attorney General's authority to make inadmissibility determinations in the relevant circumstances to the Secretary of Homeland Security. See 6 U.S.C. 557; 8 U.S.C. 1103; see also 6 U.S.C. 211(c)(8).

defined the term "public charge," instead leaving the term's definition and application to the Executive Branch's discretion. In 1999, the Immigration and Naturalization Service (INS) proposed a rule to "for the first time define 'public charge,'" 64 Fed. Reg. 28,676, 28,689 (May 26, 1999), a term that the INS noted was "ambiguous" and had "never been defined in statute or regulation," id. at 28,676-28,677. The proposed rule would have provided that in determining whether an alien was "'likely at any time to become a public charge'" "'in the opinion of' the consular officer or Service officer making the decision," "public charge" would mean an alien "who is likely to become primarily dependent on the Government for subsistence as demonstrated by either: (i) [t]he receipt of public cash assistance for income maintenance purposes, or (ii) [i]nstitutionalization for long-term care at Government expense." Id. at 28,681 (quoting 8 U.S.C. 1182(a)(4)(A)). When it announced the proposed rule, INS also issued "field guidance" adopting the proposed rule's definition of "public charge." Id. at 28,689. The proposed rule was never finalized, leaving only the 1999 field guidance in place. 84 Fed. Reg. at 41,348 n.295.

c. In October 2018, DHS published a new potential approach to public-charge inadmissibility determinations. It did so through a proposed rule subject to notice and comment. 83 Fed. Reg. 51,114 (Oct. 10, 2018). After responding to comments received during the comment period, DHS promulgated the final Rule in August

2019. 84 Fed. Reg. at 41,501. The Rule is the first time the Executive Branch has defined the term "public charge," and established a framework for evaluating whether an alien is likely at any time to become a public charge, in a final rule following notice and comment.

The Rule defines "public charge" to mean "an alien who receives one or more [designated] public benefits * * * for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." 84 Fed. Reg. at 41,501. The designated public benefits include cash assistance for income maintenance and certain non-cash benefits, including most Medicaid benefits, Supplemental Nutrition Assistance Program benefits, and federal housing assistance. Ibid. As the agency explained, the Rule's definition of "public charge" differs from the 1999 field guidance in that (1) it incorporates certain non-cash benefits; and (2) it replaces the "primarily dependent" standard with the 12-month/36-month measure of dependence. Id. at 41,294-41,295.

The Rule also sets forth a framework the agency will use to evaluate whether, considering the "totality of an alien's individual circumstances," the alien is "likely at any time in the future to become a public charge." 84 Fed. Reg. at 41,369; see id. at 41,501-41,504. Among other things, the framework identifies a number of factors an adjudicator must consider in making a

public-charge inadmissibility determination, such as the alien's age, financial resources, employment history, education, and health. Ibid. The Rule was set to take effect on October 15, 2019. Id. at 41,292.

2. a. Respondents are Cook County, Illinois, and a non-governmental organization (the Coalition) that provides services to immigrants. In September 2019, they filed suit seeking to enjoin the Rule, in part on the ground that its definition of "public charge" is not a permissible interpretation of the INA. See Complaint ¶¶ 54-65. On respondents' view, the term unambiguously includes only aliens primarily and permanently dependent on the government for subsistence. See App., infra, 17a.

On October 14, 2019, the district court granted respondents' request for a preliminary injunction barring the government from implementing the Rule in Illinois, and a stay of the rule under 5 U.S.C. 705. App., infra, 1a-33a, 34a-35a. The court concluded that respondents had standing because the County anticipates that its hospitals will incur greater costs when aliens disenroll from public benefits in response to the Rule, and because the Coalition has focused its educational programming on the Rule. Id. at 5a-10a. The court also concluded that respondents were within the zone of interests protected by the public-charge provision because the County would suffer economic injury, and because an advocacy

organization like the Coalition is "precisely the type of organization that would reasonably be expected to 'police the interests that the statute protects.'" Id. at 13a-15a (citation omitted).

On the merits, the district court concluded that respondents were likely to prevail on their claim that the Rule's definition of "public charge" is inconsistent with the statute. App., infra, 18a-27a. The court thought that "the Supreme Court told us just over a century ago what 'public charge' meant in the relevant era." Id. at 18a. Specifically, the district court read this Court's 1915 decision in Gegiow v. Uhl, 239 U.S. 3, to mean that a "public charge" is a person who will be primarily and permanently dependent on the government for support. App., infra, 17a-18a. The district court did not address respondents' claims that the Rule violates various federal statutes and principles of equal protection under the Fifth Amendment, or that the Rule is arbitrary and capricious under 5 U.S.C. 706. Cf. Complaint ¶¶ 150-151, 153, 156-188.

Regarding the other preliminary-injunction factors, the district court concluded that the harms respondents anticipated experiencing as a result of the Rule -- for the County, economic injuries and possible public-health risks; and for the Coalition, diversion of resources away from existing programs -- were irreparable. App., infra, 28a. As to the balance of equities and hardships, the court determined that it "favor[ed]" respondents

"on the present record," even though a "delay in implementing the Rule undoubtedly would impose some harm on DHS." Id. at 29a. The court also concluded that an injunction was in the public interest because of the public-health risks to Cook County caused by lower alien enrollment in medical benefits, and because, in its view, plaintiffs were likely to succeed in showing that the Rule is unlawful. Id. at 30a. The district court enjoined enforcement of the Rule in Illinois. Id. at 31a.

b. The government appealed the preliminary injunction and moved the district court for a stay of the injunction pending appeal; the court denied the motion on November 14, 2019. App., infra, 60a-71a. The government sought a stay from the court of appeals the following day; a divided panel denied the stay on December 23, 2019, over Judge Barrett's dissent. Id. at 72a. The court ordered expedited briefing on the appeal and scheduled oral argument for February 26, 2020. See C.A. Docs. 42 and 43 (Dec. 30, 2019).

3. While this case was pending, the government also was litigating challenges to the Rule filed in four other district courts. Three of those district courts (in four cases) issued nationwide injunctions against implementation of the Rule. See Casa de Maryland, Inc. v. Trump, 19-cv-2715 (D. Md.); Washington v. DHS, No. 19-cv-5210 (E.D. Wash.); New York v. DHS, No. 19-cv-7777 (S.D.N.Y.); Make the Road New York v. Cuccinelli, No. 19-cv-

7993 (S.D.N.Y.). The fourth district court issued more limited injunctions in the two cases before it. See City & County of San Francisco v. USCIS, No. 19-cv-4717 (N.D. Cal.) (injunction limited to plaintiff counties); California v. DHS, No. 19-cv-4975 (N.D. Cal.) (plaintiff States and D.C.).

On December 5, 2019, the Ninth Circuit granted the government's motions for stays pending appeal of the injunctions entered in the three cases filed in that circuit. City & County of San Francisco v. USCIS, 944 F.3d 773. In a lengthy opinion that canvassed the history of the public-charge provision and related immigration laws, the Ninth Circuit held that "DHS has shown a strong likelihood of success on the merits, that it will suffer irreparable harm, and that the balance of the equities and public interest favor a stay." Id. at 781. In particular, it held that the statutory term "public charge" was "ambiguous" and "capable of a range of meanings," id. at 792; that Congress had historically granted the Executive Branch broad discretion to define the term; and that the Executive Branch had, in fact, interpreted the term differently over the previous 150 years, id. at 792-797. The court then held that the Rule was "easily" a reasonable interpretation of the statute, particularly in light of Congress's express intent that its 1996 welfare-reform and immigration-reform legislation would help ensure that "aliens

within the Nation's borders not depend on public resources to meet their needs." Id. at 799 (quoting 8 U.S.C. 1601(2)).

On December 9, 2019, the Fourth Circuit likewise granted the government's motion for a stay pending appeal of the nationwide injunction entered by a district court in Maryland. Order, Casa de Maryland, Inc. v. Trump, No. 19-2222.

On January 8, 2020, contrary to the decisions of the Fourth and Ninth Circuits, the Second Circuit issued a one-paragraph order denying the government's motions to stay the nationwide injunctions issued by the New York district court. New York v. DHS, Nos. 19-3591 & -3595, 2020 WL 95815. The court noted that it had "set an expedited briefing schedule on the merits of the government's appeals, with the last brief due on February 14," and oral argument to "be scheduled promptly thereafter." Id. at *1.

4. This Court granted a stay of the New York injunctions. DHS v. New York, 140 S. Ct. 599 (2020) (No. 19A785). In its application, the government asked that the Court stay the injunctions in their entirety or, in the alternative, at least limit the injunctions' scope to aliens served by the plaintiffs in their respective jurisdictions in those cases. See Gov't Stay Application at 40, New York, supra (No. 19A785). The government argued that the nationwide scope of the injunctions there would have been improper even if the plaintiffs' challenge to the Rule was likely to succeed, see id. at 32-39, but the government's

primary argument was that any injunction was inappropriate because the Rule is consistent with the Executive Branch's historically broad and flexible authority over public-charge inadmissibility determinations under the INA, see id. at 18-31. The government also indicated that if the Court were to stay the injunctions in their entirety, the government would "ask the Seventh Circuit to reconsider its [earlier] denial of a stay pending appeal" in this case. Id. at 13 n.2. This Court granted a stay of the injunctions in their entirety. New York, 140 S. Ct. at 599.

5. In accordance with the government's representation to this Court, the government renewed its motion to the Seventh Circuit seeking a stay pending appeal. C.A. Doc. 92 (Jan. 28, 2020). In its renewed motion, the government explained that "in granting the stay [in New York], th[is] Court necessarily concluded that the government had a likelihood of success on the merits, that the government would suffer irreparable harm in the absence of a stay, and that no other equitable considerations rendered a stay inappropriate." C.A. Doc. 92-1, at 2 (Jan. 28, 2020). The government explained that "[t]hose same considerations govern [the court of appeals'] determination whether to issue a stay, and should lead to the same conclusion in a case involving the same legal challenge to the same Rule based on the same type of alleged harm." Ibid.

The court of appeals denied the renewed motion in a summary order. App., infra, 73a. The court did not provide any reasoning for the denial, and thus did not explain how its decision was consistent with this Court's determination in New York that a stay pending appeal was warranted.

ARGUMENT

The government respectfully requests that this Court grant a stay of the district court's preliminary injunction pending completion of further proceedings in the court of appeals and, if necessary, this Court. A stay pending the disposition of a petition for a writ of certiorari is appropriate if there is (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (brackets, citation, and internal quotation marks omitted).[2] All of those requirements are met here.

[2] Under this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court has authority to enter a stay pending proceedings in a court of appeals. See, e.g., DHS v. New York, 140 S. Ct. 599 (2020); Trump v. International Refugee Assistance Project, 138 S. Ct. 542 (2017).

Indeed, this Court already determined that all of those requirements were met when it issued a stay in DHS v. New York, 140 S. Ct. 599 (2020) (No. 19A785). That case involved materially identical preliminary injunctions preventing implementation of the Rule as impermissible under the INA, the Administrative Procedure Act (APA), the Rehabilitation Act, and principles of equal protection. The injunctions in New York had nationwide scope, and the Court stayed them in their entirety, as opposed to granting the more limited relief -- which the government requested in the alternative -- of narrowing their scope to the affected plaintiffs. The Court thus necessarily determined that the government had a fair prospect of success not just on its contention that a nationwide injunction was inconsistent with Article III and traditional principles of equity, but also on the merits of its defense of the challenged Rule. That determination is dispositive here.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WOULD GRANT CERTIORARI IF THE COURT OF APPEALS UPHOLDS THE DISTRICT COURT'S INJUNCTION

If the court of appeals ultimately upholds the district court's preliminary injunction in this case, there is a "reasonable probability" that the Court will grant certiorari. Conkright, 556 U.S. at 1402 (citation omitted). Indeed, by granting the stay pending appeal in New York, supra (No. 19A785), this Court already has determined that it is reasonably probable the Court would grant

a petition for a writ of certiorari to review the Rule's legality in the event a court of appeals affirmed a preliminary injunction against its implementation. As explained below, the Ninth Circuit has concluded in a published decision that "Congress left DHS and other agencies enforcing our immigration laws the flexibility to adapt the definition of 'public charge' as necessary," and held that the definition DHS has adopted "easily" fits within the range of permissible definitions. City & County of San Francisco v. USCIS, 944 F.3d 773, 797, 799 (2019). The Fourth Circuit likewise has concluded that challenges to the Rule are unlikely to succeed. See Order, Casa de Maryland, Inc. v. Trump, No. 19-2222 (Dec. 9, 2019).

A decision by the Seventh Circuit upholding the district court's preliminary injunction here would thus likely "conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). Such a decision also would "conflict[] with relevant decisions of this Court," Sup. Ct. R. 10(c): This Court's decision staying the preliminary injunctions in New York, supra (No. 19A785), necessarily reflected a determination that the government had made "a strong showing that [it] is likely to succeed on the merits" of its claim that the Rule is lawful. Nken v. Holder, 556 U.S. 418, 426 (2009). To affirm the preliminary injunction here, however, the court of appeals would have to find just the opposite -- namely, that

respondents are likely to succeed on their claim that the Rule is unlawful. See Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008). Under those circumstances, there is at least a "reasonable probability" that the Court would grant certiorari were the court of appeals to affirm.

II. THERE IS AT LEAST A FAIR PROSPECT THAT THE COURT WOULD VACATE THE INJUNCTION

There also is at least a "fair prospect" that if this Court granted a writ of certiorari, it would vacate the preliminary injunction here. Conkright, 556 U.S. at 1402. Again, by granting the stay in New York, supra (No. 19A785), this Court already has determined that the government has demonstrated at least a fair prospect of success on its claim that the Rule is lawful. That determination should be dispositive here.

A. As a threshold matter, like the plaintiffs in New York, respondents here are unlikely to succeed because they have not adequately alleged a cognizable injury within the relevant zone of interests. The district court concluded otherwise with respect to the County because the Rule "will cause immigrants to disenroll from, or refrain from enrolling in, critical public benefits out of fear of being deemed a public charge," which in the court's view would cause them to "forgo routine treatment," including "immunizations" and "diagnostic testing," resulting in "more costly, uncompensated emergency care down the line" and an increased "risk of vaccine-preventable and other communicable

diseases spreading throughout the County." App., infra, 7a. But the Rule exempts Medicaid coverage for emergency services, and other reductions in benefit-program enrollment are likely to save money for governmental bodies, especially those that fund such programs. See 84 Fed. Reg. at 41,363, 41,300-41,301. And the claim of harm from an increased risk that communicable diseases might spread in the County depends on an "attenuated chain of possibilities," not the "certainly impending" injury Article III requires. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410 (2013).

The district court likewise was incorrect in concluding that the Coalition has organizational standing because, if the Rule goes into effect, it will "expend[] resources to prevent frustration of its programs' missions, to educate immigrants and staff about the Rule's effects, and to encourage immigrants not covered by but nonetheless deterred by the Rule to continue enrolling in benefits programs." App., infra, 10a. This Court has held that merely showing that governmental action would be a "setback to [an] organization's abstract social interests" is insufficient to establish standing, Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982); and that insufficiency is not cured by an organization's insistence that it will divert resources to "prevent frustration" of its goals resulting from that setback, App., infra, 10a. Cf. Clapper, 568 U.S. at 418 (finding "self-inflicted injuries" insufficient to establish standing).

In any event, even if respondents' claims of harm were sufficient to satisfy Article III, their asserted interest in maintaining enrollment in public-benefits programs is "inconsistent" with the purpose of the public-charge inadmissibility ground -- namely, to reduce the use of public benefits -- and thus outside the relevant zone of interests. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225 (2012).

B. As the Ninth Circuit recognized in its published opinion, and as the government explained in its application for a stay in New York, supra (No. 19A785), see Gov't Stay Application at 18-30, challenges to the Rule also are unlikely to succeed because they lack merit. The INA's text and structure make clear that receipt of public benefits, including non-cash benefits that are not intended to serve as a primary means of support, is an important consideration in determining whether an alien is inadmissible on the public-charge ground. The Rule thus gives the statute its most natural meaning by specifying that an alien who depends on public assistance for necessities such as food and shelter for extended periods may qualify as a "public charge" even if that assistance is not provided through cash benefits or does not provide the alien's sole or primary means of support. That interpretation also follows Congress's direction -- in legislation adopted contemporaneously with the current public-charge

inadmissibility provision -- that it should be the official "immigration policy of the United States" to ensure that "availability of public benefits not constitute an incentive for immigration to the United States." 8 U.S.C. 1601(2). At the very least, the Rule represents a reasonable and lawful exercise of the substantial discretion Congress has long vested in the Executive Branch to make public-charge inadmissibility determinations.

1. The INA renders inadmissible "[a]ny alien who * * * in the opinion of the [Secretary] * * * is likely at any time to become a public charge," based "at a minimum" on an assessment of specified factors such as "health," "financial status," and "education and skills." 8 U.S.C. 1182(a)(4)(A) and (B). As the Ninth Circuit explained, that statutory text provides four important indicators that Congress intended to give DHS substantial discretion over public-charge inadmissibility determinations.

First, Congress's reference to the "opinion" of the relevant Executive Branch official "is the language of discretion," under which "the officials are given broad leeway." City & County of San Francisco, 944 F.3d at 791; see Thor Power Tool Co. v. Commissioner, 439 U.S. 522, 540 (1979) (recognizing that where a statute specifies that a determination be made "in the opinion of" an agency official, it confers "broad discretion" on the official to make that determination). Second, "the critical term 'public

charge' is not a term of art. It is not self-defining. * * * In a word, the phrase is 'ambiguous' under Chevron; it is capable of a range of meanings." City & County of San Francisco, 944 F.3d at 792. Third, although the statute provides a non-exhaustive list of factors that the Executive Branch official must take into account "'at a minimum,'" it "expressly did not limit the discretion of officials to those factors." Ibid. Fourth, Congress expressly "granted DHS the power to adopt regulations to enforce the provisions of the INA," indicating that "Congress intended that DHS would resolve any ambiguities in the INA." Ibid. (citing Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016)).

Related statutory provisions show that Congress also recognized that receipt of public benefits, including non-cash benefits, often could be relevant to determining whether an alien is likely at any time to become a public charge. One such set of provisions requires that many aliens seeking admission or adjustment of status must submit "affidavit[s] of support" executed by sponsors -- such as a petitioning family member or employer -- to avoid a public-charge inadmissibility determination. See 8 U.S.C. 1182(a)(4)(C) and (D). Aliens who fail to submit the required affidavit are treated by operation of law as inadmissible on the public-charge ground, regardless of their individual circumstances. 8 U.S.C. 1182(a)(4). Moreover, Congress 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," 8 U.S.C. 1183a(a)(1)(A), and Congress granted federal and state governments the right to seek reimbursement from the sponsor for "any means-tested public benefit" the government provides to the alien, 8 U.S.C. 1183a(b)(1)(A), including non-cash benefits. Taken together, those provisions mean that to avoid being found inadmissible on the public-charge ground, a covered alien must have 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 (even if those benefits are only minimal). Congress itself thus provided that the mere possibility that an alien might obtain unreimbursed, means-tested public benefits in the future would in some circumstances be sufficient to render that alien likely to become a public charge, regardless of the alien's other circumstances.

Likewise supporting the Rule's consideration of non-cash benefits are INA provisions stating that when making public-charge inadmissibility determinations for certain aliens who have "been battered or subjected to extreme cruelty in the United States," 8 U.S.C. 1641(c)(1)(A), DHS "shall not consider any benefits the alien may have received," including various non-cash benefits, 8 U.S.C. 1182(s); see 8 U.S.C. 1611-1613 (specifying the public benefits for which battered aliens and other qualified aliens are

eligible, such as "public or assisted housing," "food assistance," and "disability" benefits). The inclusion of that express prohibition for a narrow class of aliens presupposes that DHS generally can consider the past receipt of non-cash benefits such as public housing and food assistance in making public-charge inadmissibility determinations for other aliens. Cf. Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1844 (2018) ("There is no reason to create an exception to a prohibition unless the prohibition would otherwise forbid what the exception allows.").

Surrounding statutory provisions also leave no doubt about why Congress would have intended the Executive Branch to take such public benefits into account in making public-charge inadmissibility determinations. In legislation passed contemporaneously with the 1996 enactment of the current public-charge inadmissibility provision, Congress stressed the government's "compelling" interest in ensuring "that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. 1601(5). Congress emphasized that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," 8 U.S.C. 1601(1), and 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, * * * and (B) the availability of public benefits not constitute an incentive for immigration to the

United States," 8 U.S.C. 1601(2). Congress equated a lack of "self-sufficiency" with the receipt of "public benefits" by aliens, 8 U.S.C. 1601(3), which it defined broadly to include any "welfare, health, disability, public or assisted housing * * * or any other similar benefit," 8 U.S.C. 1611(c)(1)(B).

2. Respondents have no persuasive answer to the INA's text and structure, which make the receipt of public benefits, including non-cash benefits, an important aspect of "public charge" inadmissibility determinations. Respondents argue instead that the Rule's interpretation is inconsistent with historical usage of the phrase "public charge," which they contend refers exclusively and unambiguously to aliens "'who are likely to become primarily and permanently dependent on the government for subsistence.'" App., infra, 17a (citation omitted).

As the Ninth Circuit explained, historical evidence does not support that contention. City & County of San Francisco, 944 F.3d at 792-798. Instead, the common thread through Congress's enactment of various public-charge provisions has been an intent to preserve Executive Branch flexibility to "adapt" public-charge provisions to "change[s] over time" in "the way in which federal, state, and local governments have cared for our most vulnerable populations." Id. at 792. In the late nineteenth and early twentieth centuries, for example, those who were not self-sufficient were often "housed in a government or charitable

institution, such as an almshouse, asylum, or penitentiary." Id. at 793. In that context, therefore, it made sense that "the likelihood of being housed in a state institution" would be "considered * * * to be the primary factor in the public-charge analysis." Id. at 794.

As the "movement towards social welfare" broadened the availability of other types of more limited public benefits over the twentieth century, however, the open-ended phrase allowed the Executive Branch to take into account those changes. City & County of San Francisco, 944 F.3d at 795. For example, both the 1933 and 1951 editions of Black's Law Dictionary indicated that the term "public charge," "[a]s used in" the 1917 Immigration Act, meant simply "one who produces a money charge upon, or an expense to, the public for support and care" -- without reference to the type of expense. Black's Law Dictionary (3d ed. 1933); Black's Law Dictionary (4th ed. 1951). A 1929 treatise did the same. See Arthur Cook et al., Immigration Laws of the United States § 285 (1929) (noting that "public charge" meant a person who required "any maintenance, or financial assistance, rendered from public funds, or funds secured by taxation"). And as early as 1948, the Board of Immigration Appeals (Board) held that an alien may qualify as a "public charge" for deportability purposes if the alien (or a sponsor or relative) fails to repay a public benefit upon demand by a government agency entitled to repayment, even where the

benefits in question are "clothing, transportation, and other incidental expenses." In re B-, 3 I. & N. Dec. 323, 326-327 (B.I.A. 1948; A.G. 1948); see City & County of San Francisco, 944 F.3d at 795 (discussing In re B-).[3]

The INA's statutory and legislative history underscores Congress's intent to preserve the Executive Branch's flexibility in this area. In an extensive report that served as a foundation for the original enactment of the INA, the Senate Judiciary Committee recognized that "[d]ecisions of the courts have given varied definitions of the phrase 'likely to become a public charge,'" and that "'different consuls, even in close proximity with one another, have enforced [public-charge] standards highly inconsistent with one another.'" S. Rep. No. 1515, 81st Cong., 2d Sess., 347, 349 (1950). Rather than adopt one of those specific standards, the Committee indicated that because "the elements constituting likelihood of becoming a public charge are varied,

[3] The Board concluded that the alien in In re B- was not deportable as a public charge based on the care she received at a state mental hospital because Illinois law did not allow the State to demand repayment for those expenses. 3 I. & N. Dec. at 327. But the Board indicated that she would have been deportable as a public charge if her relatives had failed to pay the cost of her "clothing, transportation, and other incidental expenses," because Illinois law made her "legally liable" for repayment of those non-cash benefits. Ibid.

there should be no attempt to define the term in the law." Id. at 349.

Consistent with that recommended approach, neither the INA nor any subsequent congressional enactment has provided a more specific definition of "public charge." Instead, Congress has "described various factors to be considered 'at a minimum,' without even defining those factors," making it "apparent that Congress left DHS and other agencies enforcing our immigration laws the flexibility to adapt the definition of 'public charge' as necessary." City & County of San Francisco, 944 F.3d at 797.

3. The district court drew a different conclusion by relying on this Court's decision in Gegiow v. Uhl, 239 U.S. 3 (1915), for the proposition "that 'public charge' encompasses only persons who -- like 'idiots' or persons with 'a mental or physical defect of a nature to affect their ability to make a living' -- would be substantially, if not entirely, dependent on government assistance on a long-term basis." App., infra, 19a (citation omitted). That contention -- which also was pressed by the plaintiffs in the New York cases, see NY Stay Opp'n at 5, 24, New York, supra (No. 19A785); MTR Stay Opp'n at 6, New York, supra (No. 19A785) -- reflects a misreading of Gegiow.

The Court in Gegiow actually addressed only the "single question" of "whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of

his immediate destination is overstocked." 239 U.S. at 9-10. This Court said no, requiring such determinations to be based on the characteristics of the alien, not his place of destination. Ibid. And while the Court suggested in dicta that "public charge" might be interpreted narrowly in the Immigration Act of 1910 to accord with certain terms (like "paupers" and "professional beggars," id. at 10) that appeared alongside it in that particular statute, Congress subsequently revised the relevant language specifically to disapprove that inference by distancing "public charge" from those narrower terms, see Immigration Act of 1917, 64th Cong., ch. 29, § 3, 39 Stat. 875-876; S. Rep. No. 352, 64th Cong., 1st Sess. 5 (1916) ("The purpose of this change is to overcome recent decisions of the courts limiting the meaning of the description of the excluded class. * * * (See especially Gegiow v. Uhl, 239 U. S., 3.)."); see also United States ex rel. Iorio v. Day, 34 F.2d 920, 922 (2d Cir. 1929) (L. Hand, J.) (explaining that the public-charge statute "is certainly now intended to cover cases like Gegiow").

Moreover, even assuming Gegiow's dictum survived the Immigration Act of 1917, it did not retain any force following Congress's 1952 overhaul of the immigration laws and 1996 passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, in which Congress rewrote and reenacted the entire public-charge inadmissibility

provision at issue here without any reference to the narrower terms like "pauper" on which Gegiow's dictum had rested, § 531(a), 110 Stat. 3009-674 to 3009-675.

* * * * *

Given Congress's direction that "the availability of public benefits" should not be "an incentive for immigration to the United States," 8 U.S.C. 1601(2), and its longstanding history of preserving flexibility in the meaning of "public charge," the Rule "easily" qualifies as a reasonable interpretation of the statute, City & County of San Francisco, 944 F.3d at 799. Nothing in the statute precludes the agency from considering non-cash benefits or public benefits that do not provide an alien's sole or primary means of support, and the Rule's use of the 12-months in 36-months standard establishes a sensible and administrable framework for making individualized public-charge inadmissibility determinations. Respondents are unlikely to succeed in arguing otherwise.

III. THERE IS A LIKELIHOOD THAT IRREPARABLE HARM WILL RESULT FROM THE DENIAL OF A STAY

Finally, "irreparable harm will result from the denial of a stay." Conkright, 556 U.S. at 1402 (brackets and citation omitted). As with the other factors, by granting a stay in New York, supra (No. 19A785), this Court already has determined that the government will suffer irreparable harm absent a stay. As the Ninth Circuit recognized, "the preliminary injunctions will," unless stayed, "force DHS to grant status to those not legally

entitled to it." City & County of San Francisco, 944 F.3d at 806. DHS "currently has no practical means of revisiting public-charge determinations once made," making that harm effectively irreparable. Id. at 805. And given the "compelling" interest that Congress has attached to ensuring self-sufficiency among aliens admitted to the United States, 8 U.S.C. 1601(5), that harm substantially outweighs whatever limited and speculative fiscal injuries respondents claim they will suffer during the pendency of this litigation.

To be sure, the government did not immediately seek relief in this Court from the court of appeals' initial denial of a stay. At the time the court of appeals initially denied relief in this case, the nationwide injunctions entered by the Southern District of New York remained in effect, and thus obtaining a stay of the Illinois-specific injunction here would have had little practical effect. After the Second Circuit declined to stay those nationwide injunctions several weeks later, the government filed a single stay application with this Court, asking the Court either to stay the injunctions in their entirety or to limit their scope. See Gov't Stay Application at 40, New York, supra (No. 19A785). The government indicated in that application that once the Court ruled, the government would make any further request for relief in this case -- if appropriate -- to the Seventh Circuit in the first instance. See id. at 13 n.2.

That course of action was reasonable and efficient. Rather than burden the Court with parallel stay applications from two different circuits on materially identical issues, the government sought relief from the broader injunctions arising out of the Second Circuit, with the expectation that the Seventh Circuit could address the narrower injunction here if warranted. Had this Court merely narrowed the nationwide injunctions in New York so that they resembled the jurisdiction-specific injunction here, the government would not have renewed its request for a stay of the injunction in this case, thereby avoiding an additional round of litigation. When the Court instead stayed the injunctions in New York in their entirety, the government asked the Seventh Circuit to follow this Court's lead and stay the injunction in this case as well. It is only because the court of appeals has declined to give effect to this Court's ruling in New York that the government must now return to the Court for a second time concerning the same Rule.

CONCLUSION

This Court should stay the district court's preliminary injunction pending the completion of further proceedings in the court of appeals and, if necessary, this Court.

Respectfully submitted.

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