No. 19A785

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Applicants,

v.

STATE OF NEW YORK, ET AL.,

Respondents.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Applicants,

v.

MAKE THE ROAD NEW YORK, ET AL.,

Respondents.

ON APPLICATION FOR STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONSENT MOTION FOR LEAVE TO FILE AND BRIEF OF U.S. HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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CONSENT MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF RESPONDENTS

The U.S. House of Representatives moves for leave to file the accompanying brief in support of respondents' opposition to the Department of Homeland Security's Application for a Stay Pending Appeal to the U.S. Court of Appeals for the Second Circuit of the injunctions issued by the U.S. District Court for the Southern District of New York. These orders enjoin DHS's August 14, 2019, final rule establishing a new standard for determining who is likely to become a "public charge" for purposes of inadmissibility under federal immigration law. Counsel for the parties consent to the filing of this brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the United States House of Representatives,[2] respectfully submits this brief because of its interest in ensuring that immigrants to our Nation are accorded the rights to which the immigration laws enacted by Congress entitle them. The Constitution empowers the Legislative Branch to "establish a uniform Rule of Naturalization." Art. I, § 8. The formulation of "[p]olicies pertaining to the entry of [noncitizens] and their right to remain here … is entrusted exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954) (citation omitted).

For more than 100 years, courts and the Executive Branch have understood the "public charge" provision of our Nation's immigration laws to apply to individuals who are likely to become primarily dependent upon public assistance for a significant period. Congress preserved that long-established

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[1] Pursuant to Sup. Ct. R. 37.6, the House states that no counsel for a party authored this brief in whole or in part, and no person or entity other than the House and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The Bipartisan Legal Advisory Group (BLAG) of the United States House of Representatives has authorized the filing of an *amicus* brief in this matter. The BLAG comprises the Honorable Nancy Pelosi, Speaker of the House, the Honorable Steny H. Hoyer, Majority Leader, the Honorable James E. Clyburn, Majority Whip, the Honorable Kevin McCarthy, Republican Leader, and the Honorable Steve Scalise, Republican Whip, and "speaks for, and articulates the institutional position of, the House in all litigation matters." Rules of the U.S. House of Representatives (116th Cong.), Rule II.8(b), https://perma.cc/M25F-496H. The Republican Leader and Republican Whip dissented.

meaning when it reenacted the public-charge provision without material change in 1996. Congress has an important interest in preserving its ability to reenact a statutory term, against the backdrop of that term's settled meaning, without the risk that an administration dissatisfied with Congress's policy judgment will later seek to give the term a meaning that Congress has already rejected.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Department of Homeland Security's new "public charge" rule is unprecedented. While the parties disagree about nearly every aspect of this case, they agree on this. For more than a century, no branch of the federal government has ever adopted the sweeping approach to the public-charge ground of inadmissibility that the Executive Branch now advances.

The Court should deny the stay request without even reaching the merits because the balance of equities overwhelmingly weighs against a stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). In seeking an extraordinary stay from this Court, DHS seeks to upend the long-established status quo, with harmful repercussions for immigrant communities and the public alike.

In contrast, DHS's only asserted injury absent a stay is the granting of legal status to persons based on the understanding of "public charge" that has stood for more than a century. That purported injury is far outweighed by the concrete harms a stay would inflict

on immigrants and the communities in which they live. Denying a stay would merely preserve the status quo while the Court of Appeals proceeds to resolve this case on an expedited timeline.

In addition to the decided imbalance of harms, this Court should reject the stay request because DHS has not made a "strong showing" that it is likely to succeed on the merits. *Nken*, 556 U.S. at 434. Since 1882, Congress has directed that persons likely to become "public charges" may not settle in the United States. Since its enactment, the term "public charge" has been understood by the courts and the Executive Branch to refer to a person likely to become primarily dependent on the government for a significant period. In 1996, Congress reaffirmed this long-established understanding when it enacted the current version of the provision. *See* 8 U.S.C. § 1182(a)(4)(A) (denying visas, admission, and adjustment of status to permanent residency to persons "likely at any time to become a public charge").

The current Administration now seeks to dramatically broaden the scope of the public-charge provision. On August 14, 2019, DHS issued a rule redefining "public charge" to refer to persons likely at any time to receive certain government benefits—including in-kind benefits like food stamps, Medicaid, and federal housing assistance—for more than 12 months in the aggregate within any three-year period. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,295 (Public Charge Rule). Because the class of noncitizens who may obtain these benefits at some point in their lifetimes is vast, the new rule would overhaul the Nation's immigration

system, seizing on a previously narrow exclusion to substantially limit the class of individuals who may settle here.

DHS may not substitute its own policy judgment for Congress's in this way. When Congress reenacted the public-charge provision without material change in 1996, it legislated against the backdrop of a long-settled understanding of "public charge" as limited to noncitizens who primarily depend on the government over the long term. Courts must presume that Congress intended to ratify that long-established meaning when it reenacted the provision without changing it. *See Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 633-34 (2019).

The district court correctly held that DHS's new rule deviates from the longstanding understanding of "public charge" in fundamental respects. For the first time ever, DHS would consider in its public-charge determination not just a noncitizen's receipt of cash benefits for income maintenance, but also the receipt of in-kind benefits like food stamps, Medicaid, and housing assistance—even though acceptance of such benefits does not make a noncitizen primarily dependent upon the government. In another first, a noncitizen deemed likely to collect no more than 50 cents of government assistance a day for just over one year would be considered a "public charge." And contrary to more than one hundred years of history, immigration officials would be directed to consider a noncitizen's lack of English proficiency as evidence that she is likely to become a "public charge." These changes cannot be reconciled with the language enacted by Congress.

The district court also correctly enjoined the new DHS rule on the independent ground that it would be impossible to apply rationally or fairly. The rule requires immigration officials to make predictive judgments about whether noncitizens are likely, far in the future, to collect *de minimis* supplemental public benefits for even short periods. This inquiry would give officials essentially unchecked authority to exclude prospective immigrants, and it would substantially increase the danger of arbitrary and discriminatory enforcement.

This Court should deny the stay application.

ARGUMENT

I. THE EQUITIES WEIGH DECISIVELY AGAINST A STAY.

The balance of the equities weighs conclusively against a stay because the speculative injury asserted by DHS is far outweighed by the concrete harms to the other parties in this litigation and the public at large. *See Nken*, 556 U.S. at 434.

In seeking a stay, DHS is asking this Court to upend the longstanding status quo regarding the application of the public-charge provision. DHS argues that adhering to the established meaning of "public charge," which has been applied for more than a century, will "force DHS to grant status to those not legally entitled to it," causing it "effectively irreparable" harm. Stay Appl'n 40 (citation omitted). But the predicted granting of legal status to unspecified persons from following long-established rules by itself inflicts

no injury on the Executive Branch. And DHS does not identify any tangible harms following from this speculative possibility.

Moreover, DHS took three years to finalize this rewrite of the public-charge rule, and the State Department—which is responsible for a significant proportion of public-charge determinations—has apparently held up its implementation of this new standard for paperwork reasons.[3] Thus, the claimed urgency should be viewed with deep skepticism.

On the other hand, a stay would inflict concrete, grave, and irreparable harm on respondents and the public. Unlike DHS, respondents "extensively describ[ed] and calculat[ed]" the "direct and inevitable consequence[s] of the impending implementation of the [r]ule." *New York v. DHS*, 408 F. Supp. 3d 334, 350 (S.D.N.Y. 2019). For example, the rule would irrevocably reduce revenues for healthcare providers and facilities operated by respondents. Public Charge Rule at 41,300-01; *see, e.g.*, C.A.App.269, *New York v. DHS*, No. 19-3591 (2d Cir. 2019) (estimating loss of $50 to $187 million per year to NYC Hospitals).

It would also irreparably harm respondents' residents. Conservative estimates show that more than one million people would disenroll from public benefits to which they are entitled if the rule were implemented. Public Charge Rule at 41,313; C.A.App.244-45, *Make the Road N.Y. v. DHS*, No. 19-3595 (2d Cir. 2019) (1 to 3.1 million persons will forgo Medicaid).

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[3] *See Information on Public Charge*, Travel.State.Gov Advisories (Oct. 24, 2019), https://tinyurl.com/rgwl2dv.

This in turn will cause crippling damage to the health and nutrition of many noncitizens, particularly children. *See, e.g.,* C.A.App.198-200, 227-29, *New York*, No. 19-3591. The rule is also projected to result in the "loss of 230,000 jobs and $33.8 billion in potential economic ripple effects" across the country. C.A.App.145-46, *Make the Road*, No. 19-3595.

DHS does not meaningfully dispute this evidence. It nevertheless asserts—without explanation—that these harms are "speculative." Stay Appl'n 40. Calling them "speculative" does not make them so. Respondents have introduced detailed declarations and studies establishing the concrete effects of the rule. *See, e.g.*, C.A.App.303, *New York*, No. 19-3591 (documenting estimated Medicaid enrollment losses); C.A.App.420, *Make the Road*, No. 19-3595 (quantifying impact of DHS rule on vulnerable groups).

DHS also suggests that the harms to respondents are outweighed by the "compelling interest that Congress has attached to ensuring self-sufficiency among [noncitizens] admitted to the United States." Stay Appl'n 40 (citing 8 U.S.C. § 1601(5)). This is simply wrong. When Congress made this statement, it expressly allowed noncitizens to collect public benefits under certain circumstances. *See* 8 U.S.C. § 1613. DHS can hardly claim irreparable harm from something Congress expressly authorized. General notions of "self-sufficiency" are too abstract, in any event, to establish a cognizable injury, let alone overcome respondents' concrete and irreparable injuries.

DHS presents a remarkably weak case for this Court's intervention to disrupt a status quo that has

operated for more than a century. If this Court were to grant a stay, it would irrevocably harm immigrants and communities across the Nation. But if this Court denies the request, it will simply leave in place the longstanding status quo until the Court of Appeals resolves this case in a matter of months.

A stay is plainly unwarranted under these circumstances. As Justice Rehnquist explained in *Dayton Board of Education v. Brinkman*, 439 U.S. 1358 (1978), sometimes "the status quo … can be preserved only by denying [a stay]." *Id.* at 1358. That is the case here.

II. THE MERITS ALSO WEIGH DECISIVELY AGAINST A STAY.

DHS also fails to make a "strong showing" that this Court will vacate the injunction. *Nken*, 556 U.S. at 434. The new rule's unprecedented understanding of "public charge" departs improperly from the long-settled meaning of the term enacted by Congress. And it is impossible to apply fairly and rationally.

A. DHS's Effort To Redefine "Public Charge" Departs From That Term's Longstanding And Settled Meaning.

1. The term "public charge" has always referred to persons likely to become primarily dependent on the government over the long term. Over the more than 100 years since the public-charge provision was enacted, the courts and the Executive Branch have consistently understood the term in accord with that plain meaning.

a. Congress first used the phrase "public charge" in the Immigration Act of 1882, the Nation's original immigration law. The 1882 Act provided that "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge … shall not be permitted to land [in the United States]." Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214.

The text of the 1882 statute establishes that "public charge" referred to persons primarily dependent on the government. When the provision was enacted, Webster's Dictionary defined a "charge" as a "person or thing committed to another's custody, care or management." *Webster's American Dictionary of the English Language* (1st ed. 1828). A "*public* charge," therefore, at the time was understood to refer to someone committed to the custody or care of the government. By definition, one who is committed to government custody or management relies on the public for support—*i.e.*, he or she is primarily dependent on the government.

Other features of the 1882 Act confirm that "public charge" requires a showing of primary dependency, and that the dependency must be more than temporary. A different provision of the 1882 Act created an "immigrant fund" to be "used … for the care of immigrants arriving in the United States, for the relief of such as are in distress," and commanded the Treasury Secretary to "provide for the support and relief of such immigrants therein landing as may fall into distress or need public aid." §§ 1-2, 22 Stat. at 214. The statute necessarily contemplated that the United States would admit distressed immigrants needing public

aid. The public-charge provision therefore could not have excluded immigrants simply because they might collect some government benefits.

Historical context reinforces this understanding. Congress modeled the original public-charge restriction on state laws directed at "exceptionally impoverished and destitute persons." Hidetaka Hirota, *Expelling the Poor* 33, 68 (2016). Those provisions required proof that individuals would be "unable to maintain themselves … by reason of some permanent disability." *City of Boston v. Capen*, 61 Mass. 116, 122 (1851). Accordingly, the "mere fact that a person may occasionally obtain assistance from the county does not necessarily make such person … a public charge." *Twp. of Cicero v. Falconberry*, 42 N.E. 42, 44 (Ind. App. 1895).

Thus, in *Gegiow v. Uhl*, 239 U.S. 3 (1915), this Court held as a matter of law that the public-charge provision did not apply in a case involving immigrants who had little money, did not speak English, and would be unable to find employment in their chosen destination city. *Id.* at 8-10. To be a "public charge," the Court concluded, a person must be "excluded on the ground of permanent personal objections." *Id.* at 10.

b. In 1917, Congress enacted minor changes to the public-charge provision. *See* Immigration Act of February 5, 1917, ch. 29, § 3, 39 Stat. 874, 876. The courts and the Executive Branch continued to recognize that the amended provision applied only to persons likely to become primarily dependent on the government for significant periods.

In *Ex parte Hosaye Sakaguchi*, 277 F. 913 (9th Cir. 1922), the court explained that the 1917 Amendment "does not change the meaning that should be given [public charge]." *Id.* at 916. The Ninth Circuit thus ruled that "the words 'likely to become a public charge' … exclude only those persons who are likely to become occupants of almshouses for want of means with which to support themselves in the future." *Ng Fung Ho v. White*, 266 F. 765, 769 (9th Cir. 1920), *aff'd in part, rev'd in part on other grounds*, 259 U.S. 276 (1922). Other courts also continued to interpret "public charge" to refer to "a condition of dependence on the public for support." *Coykendall v. Skrmetta*, 22 F.2d 120, 121 (5th Cir. 1927). The Executive Branch interpreted the provision similarly. *See Matter of T-*, 3 I. & N. Dec. 641, 644 (BIA 1949).

c. In 1952, Congress enacted the Immigration and Nationality Act (INA), which overhauled the Nation's immigration laws, but retained the "public charge" provision in similar form. Pub. L. No. 82-414, ch. 2, § 212, 66 Stat. 163, 183. As before, the provision was understood to apply only to noncitizens considered likely to become primarily dependent on the government over the long term.

In 1964, the Attorney General issued a precedential decision holding that the public-charge provision "requires more than a showing of a possibility that the [noncitizen] will require public support." *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (A.G. 1964). He explained that "[s]ome specific circumstance, such as mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the

public, must be present." *Id.* "A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge"—"especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency." *Id.* at 421-22.

Later opinions by the Board of Immigration Appeals (BIA) reaffirmed the settled understanding that the public-charge determination principally turns on a noncitizen's "physical and mental condition, as it affects ability to earn a living," rather than on the prospect that the noncitizen may temporarily receive small amounts of government aid. *Matter of Harutunian*, 14 I. & N. Dec. 583, 588 (BIA 1974).

Summarizing the state of the law in 1999, the Immigration and Naturalization Service (INS) explained that "public charge" means a noncitizen who has become "primarily dependent on the Government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at Government expense." Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,677 (proposed May 26, 1999) (INS Field Guidance). INS recognized that the plain meaning of the term "public charge" "suggests a complete, or nearly complete, dependence on the Government rather than the mere receipt of some lesser level of financial support." *Id.* This understanding was "consistent with" a century of "public charge" precedents. *Id.*

2. When Congress enacted the public-charge provision without material change in 1996, it intended to

retain the established judicial and administrative understanding of that statutory term.

a. Congress passed the current public-charge provision as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). *See* Pub. L. No. 104-208, 110 Stat. 3009. IIRIRA made substantial reforms to the Nation's immigration scheme, but it retained the public-charge provision materially unchanged. The Act provides that a noncitizen is inadmissible if, "in the opinion of" the relevant immigration official, the noncitizen "is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A).

Congress, in considering IIRIRA, rejected a proposal to amend the public-charge provision addressing deportation to include noncitizens who temporarily receive supplemental public benefits. A prior version of the bill would have defined "public charge" to permit deportation if a noncitizen "received Federal public benefits for an aggregate of 12 months over a period of 7 years." 142 Cong. Rec. S11872, S11882 (daily ed. Sept. 30, 1996) (statement of Sen. Kyl). But this provision was removed under threat of veto. *Id.* at S11881-82.

In 2013, Congress again rejected an attempt to expand the public-charge provision to encompass receipt of small amounts of supplemental public benefits. Then-Senator Sessions introduced an amendment that would have "expand[ed] the criteria for 'public charge'" to include receipt of non-cash benefits like Medicaid and food stamps. S. Rep. No. 113-

40, at 42 (2013). The amendment was rejected by voice vote. *Id.*

b. Where, as here, "a word or phrase has been … given a uniform interpretation by inferior courts or the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012).

The Supreme Court has repeatedly held that when Congress reenacts a statutory phrase that has a settled judicial interpretation, Congress is presumed to have adopted that interpretation. *See, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009). This Court recently emphasized that it "presume[s] that when Congress reenacted the same language in the [new statute], it adopted the earlier judicial construction of that phrase." *Helsinn*, 139 S. Ct. at 633-34.

A similar presumption applies when Congress reenacts a statutory phrase that has received an authoritative interpretation by the relevant Executive Branch agency. *Helvering v. Winmill*, 305 U.S. 79, 83 (1938). Precedential decisions issued by the BIA and Attorney General provide authoritative administrative interpretations of the immigration laws. *See* 8 C.F.R. § 1003.1(g)(1).

These presumptions apply with particular force here where Congress has rejected efforts to modify the term at issue. "Few principles of statutory construction are more compelling than the proposition that

Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted).

These principles leave no doubt that Congress preserved the long-established meaning of "public charge" when it reenacted that term without change in IIRIRA. In drafting, debating, and enacting IIRIRA, Congress legislated against the backdrop of a uniform body of law holding that the provision "requires more than a showing of a possibility that the [noncitizen] will require public support" and that "[a] healthy person in the prime of life cannot ordinarily be considered likely to become a public charge." *Matter of Martinez-Lopez*, 10 I. & N. Dec. at 421. And Congress considered and rejected a proposal to expand the public-charge provision governing deportation to cover a noncitizen's temporary receipt of benefits—compelling evidence that it did not intend to achieve that result.

c. Congress's decision to retain the longstanding meaning of "public charge" is confirmed by several other amendments Congress made to the public benefits laws and to the INA in 1996. One month before it passed IIRIRA, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (PRWORA), which overhauled key aspects of the Nation's federal benefits programs. PRWORA provided that lawful permanent residents could collect public benefits like food stamps and Medicaid after they had lived in the United States for five years. *Id.*, § 403, 110 Stat. at 2265. It also made affidavits of support

submitted by an immigrant's sponsor legally enforceable. *Id.*, § 423, 110 Stat. at 2271. Then, in IIRIRA, Congress amended the INA to require most immigrants to obtain affidavits of support from sponsors. Pub. L. No. 104-208, § 531(a), 110 Stat. 3009-674.

These changes underscore Congress's codification of the long-settled meaning of "public charge." Congress expressly authorized immigrants to collect federal benefits and required sponsors to reimburse the government for receipt of these benefits under some circumstances. Congress therefore contemplated that immigrants, at least after the initial five-year period, would collect federal benefits. It addressed its concern about immigrant self-sufficiency not by excluding all immigrants who might collect benefits, but instead by enacting a detailed scheme that limited their eligibility for a defined period and required reimbursement upon the government's request.

3. DHS's new rule impermissibly departs from the long-settled understanding of "public charge."

a. DHS's new rule transforms the public-charge provision. DHS now defines "public charge" for purposes of admissibility to mean a person who is likely to collect more than 12 months of certain public benefits in the aggregate during a 36-month period. Public Charge Rule at 41,295. For the first time, DHS seeks to consider in-kind assistance like Supplemental Nutrition Assistance Program (SNAP), Medicaid, and federal housing assistance. *Id.*

It is difficult to overstate the significance and breadth of this transformation. Less than two percent

of noncitizens receive cash benefits that could trigger a public-charge determination under the meaning of that term that has governed for a century. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,193 (proposed Oct. 10, 2018). But the new DHS rule requires immigration officers to predict whether at any time in the future a noncitizen is likely to collect *de minimis* public benefits that are widely used. The new rule would therefore increase the number of noncitizens deemed inadmissible on public-charge grounds by orders of magnitude. For context, "*about half of all U.S.-born citizens*" at some point participate in the benefits programs considered in DHS's rule.[4]

The DHS rule would overhaul the Nation's immigration system, seizing on a previously narrow exclusion to impose a new and dramatic limit on who can enter the United States or become a lawful permanent resident. That is not a decision Congress authorized DHS to make. To the contrary, Congress twice considered and rejected an expanded definition of "public charge" similar to the definition that DHS now seeks to enact administratively. The Executive Branch cannot accomplish by regulation what the Legislative Branch rejected by legislation.

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[4] Danilo Trisi, *Administration's Public Charge Rules Would Close the Door to U.S. to Immigrants Without Substantial Means*, Ctr. on Budget & Pol'y Priorities (Nov. 11, 2019), https://tinyurl.com/ur8d7xy.

b. The DHS rule departs from the long-established understanding of the term "public charge" in at least four respects.

In-Kind Benefits. The new DHS rules departs from Congress's understanding that a public-charge determination can be triggered only by a likelihood of receiving aid associated with primary dependence on the government, like cash assistance for income maintenance.

Individuals who receive the benefits considered in DHS's new rule often do not depend on them for subsistence. The in-kind benefits in DHS's rule—SNAP, Medicaid, and housing assistance—reflect Congress's policy judgment that individuals should have access to nutritious food, medical care, and affordable housing. *See* 7 U.S.C. § 2011; 42 U.S.C. § 1396-1; 42 U.S.C. § 1437(a)(1). The programs are not exclusively available to the poor. SNAP benefits are generally available to individuals with incomes up to 130% of the federal poverty line. *See* 7 C.F.R. § 273.9(a)(1). Most states have expanded Medicaid to persons with incomes up to 138% of the poverty line. *See* 42 U.S.C. § 1396a(a)(10)(i), (*l*). Individuals who receive these benefits may not be destitute without them, but may accept them anyway because Congress has made a policy choice to provide them without cost.

Primary Dependence. The new DHS rule also departs from the settled understanding that the term "public charge" requires "a complete, or nearly complete, dependence on the Government rather than the mere receipt of some lesser level of financial support." INS Field Guidance at 28,677.

Individuals who obtain small amounts of in-kind benefits do not primarily depend on those benefits. Consider a recipient of SNAP. In 2018, the average SNAP recipient received just $1.39 per meal—or $127 per month.[5] Some individuals at the higher end of income eligibility for SNAP receive as little as 20 cents per day—about $6 per month. *See City & Cty. of S.F. v. USCIS*, 408 F. Supp. 3d 1057, 1099 (N.D. Cal. 2019). Most SNAP recipients who can work do so. *See* SNAP Basics.

Long-Term Dependence. The DHS rule also departs from the long-settled understanding that a person is not a "public charge" merely because he or she temporarily needs government assistance.

The DHS rule covers any noncitizen likely to receive more than 12 months of benefits in any three-year period, and it counts a noncitizen's receipt of multiple benefits in one month as multiple months of benefits. Thus, an individual would be excluded under the public-charge provision if she were deemed likely to receive SNAP, Medicaid, and housing assistance for more than four months spread over any three-year period during her lifetime.

English Proficiency. The DHS rule for the first time provides that a noncitizen's lack of English proficiency will be weighed negatively as part of the "public charge" analysis. Public Charge Rule at 41,503-04.

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[5] *Policy Basics: The Supplemental Nutrition Assistance Program*, Ctr. on Budget & Pol'y Priorities (June 25, 2019), tinyurl.com/yx7dh4v5 (SNAP Basics).

Congress has not authorized, and no historical precedent exists, for considering English proficiency in this way. To the contrary, courts have routinely rejected claims that an individual's lack of English proficiency makes him or her likely to become a "public charge." In *Gegiow*, for example, this Court dismissed arguments that Russian immigrants who lacked knowledge of English were likely to become "public charges." 239 U.S. at 8. In *Matter of Martinez-Lopez*, the Attorney General noted that the fact that the noncitizen "spoke no English" was "no handicap." 10 I. & N. Dec. at 411. Congress has refused to enact legislative proposals imposing a language barrier to obtaining permanent residency. *See* Raise Act, S.1720, 115th Cong. § 5(c) (2017). By contrast, Congress has required immigrants who settle in the United States to gain English proficiency before they become citizens. *See* 8 U.S.C. § 1423.

Millions of immigrants have come to the United States with little or no knowledge of English.[6] Even though immigrants often arrive with imperfect English, many quickly learn the language. One study estimates that "about 91 percent of immigrants in the United States between 1980 and 2010 reportedly spoke English."[7] Temporary language barriers

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[6] Jeanne Batalova & Jie Zong, *Language Diversity and English Proficiency in the United States*, Migration Pol'y Inst. (Nov. 11, 2016), tinyurl.com/vue225q.

[7] Michelangelo Landgrave, *Immigrants Learn English*, CATO Inst. Immigration Res. & Pol'y Br. No. 14 (Sept. 17, 2019), tinyurl.com/scxwtoh.

notwithstanding, "immigrants are less likely to consume welfare benefits" than "native-born Americans."[8]

The predictive nature of the public-charge inquiry makes consideration of English proficiency particularly problematic. A noncitizen's English proficiency at the time of admission has not been shown to bear any relationship to whether the noncitizen is likely to seek public benefits far into the future. There is a serious risk that consideration of English proficiency would invite immigration officials to deem noncitizens "public charges" based on characteristics that are irrelevant at best, or discriminatory at worst.

4. DHS's arguments for deviating from the long-established meaning of "public charge" lack merit.

a. DHS principally argues that, even though Congress retained the "public charge" language in 1996, it impliedly overruled its long-established meaning through separate amendments to the INA and to the federal benefits laws that year. Stay Appl'n 21. To the contrary, Congress elected to make no material change to the public-charge provision and instead chose to promote immigrant self-sufficiency by restricting noncitizen access to public benefits and by requiring reimbursement by noncitizens' sponsors upon request. Congress's decision to make most lawful permanent residents eligible for benefits after five years cannot be reconciled with DHS's view that any

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[8] Alex Nowrasteh & Robert Orr, *Immigration and the Welfare State*, CATO Inst. Immigration Res. & Pol'y Br. No. 6 (May 10, 2018) https://tinyurl.com/ya9ygkt6.

noncitizen likely to receive benefits at any time must be excluded as a "public charge."

DHS supports its argument by citing a provision requiring a noncitizen's sponsor to reimburse the government for any benefits the noncitizen may receive, including Medicaid and SNAP. Stay Appl'n 20-21. But DHS's argument is inconsistent with its own understanding of "public charge." DHS defines "public charge" to mean a person "who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period," Public Charge Rule at 41,295—*not* one who receives one or more *unreimbursed* public benefits during that time period. DHS's definition does not account for whether a benefit would be reimbursed, and it would therefore exclude people that Congress expected would be admitted: noncitizens who collect public benefits subject to reimbursement upon government request.

DHS's argument also ignores that Congress did not require all prospective permanent residents to obtain sponsors, yet it expressly permitted *all* lawful permanent residents to obtain benefits after living in the United States for five years. DHS's argument is inapposite as to noncitizens who are not required to obtain a sponsor but whom Congress has nevertheless authorized to obtain benefits.

b. DHS falls back on the assertion that Congress intended to leave the Executive Branch broad discretion to interpret the meaning of "public charge." Stay Appl'n 24-25. DHS does not, however, have discretion to rewrite the statute contrary to its long-established meaning ratified by Congress. Even where there may

be "some uncertainty" about a provision's meaning, the Executive cannot "expand *Chevron* deference to cover virtually any interpretation." *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 525 (2009). The language adopted by Congress sets the "outer limits" on a provision's meaning, *id.*, and the courts must police those limits using the traditional tools of statutory interpretation.

DHS maintains that the scope of the term "public charge" has varied to some degree over the last century, and that this variation supports its discretion to wholly redefine the term. Stay Appl'n 24-25. This argument, however, ignores that Congress legislated against the backdrop of a century of precedent in which neither Congress, nor the courts, nor the Executive Branch deemed a noncitizen's likelihood of receiving minimal in-kind benefits sufficient to render the noncitizen a "public charge." Even assuming the understanding of the term fluctuated somewhat over the course of the twentieth century, such minor variations cannot support an inference that Congress allowed DHS's radical departure here.

B. DHS's New "Public Charge" Rule Is Irrational.

DHS's new rule would be impossible to apply in practice and would lead to a host of practical problems that Congress did not intend.

The public-charge provision does not ask whether the noncitizen is *currently* a "public charge." Instead, it asks whether a person is "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The

DHS rule thus requires immigration officers to make a prediction about whether a noncitizen "is more likely than not at any time in the future to receive one or more designated public benefits for more than 12 months in the aggregate within any 36-month period." Public Charge Rule at 41,295.

This prediction requires immigration officials to look far into the future. The benefits considered under the rule are generally unavailable to noncitizens until they have lived here for five years. *See* 8 U.S.C. § 1613. Most persons subject to the "public charge" restriction are thus ineligible for these benefits when they apply for lawful permanent residency, and many will remain ineligible for another five years after a public-charge determination is made.

The prediction the rule calls for is impossible to make accurately. Many noncitizens subject to DHS's new definition of "public charge" will be employed and situated above the poverty line when the immigration official is called upon to make the prediction. Others will ordinarily be employed, except that they may have suffered a medical emergency that requires them to collect benefits temporarily. Some might at some point collect merely *de minimis* benefits, hardly adding up to $100 in a particular year. And some will qualify for benefits but have relatives who could support them if they chose to forgo benefits. The DHS rule requires immigration officials to predict whether all these noncitizens will be likely to accept public benefits—beginning five years after their admission until they die.

An immigration official could not hope to make that determination in a rational and consistent manner. *See Judulang v. Holder*, 565 U.S. 42, 56 (2011). It would be impossible for an immigration official to make a reasoned decision about whether an applicant, far in the future, is likely to encounter an unpredictable yet temporary hardship, or is likely at some point to accept small amounts of benefits to supplement her steady income.

This indeterminacy has cascading effects throughout the immigration system. The DHS rule has left prospective immigrants and their immigration counselors in the dark about how to comply. Public Charge Rule at 41,315 (inquiry "inherently subjective"). Some may choose not to apply for permanent residency. Others may altogether forgo benefits to which they are entitled on the belief that their forbearance will improve their prospects for avoiding a public-charge finding. Experts have projected that millions of people may forgo benefits because of this rule, a substantial share unnecessarily so because the rule does not apply to them. *See, e.g.*, C.A.App.244-45, *Make the Road*, No. 19-3595.

The Court can and should deny the stay request based on the equities alone. But it should also decline DHS's invitation to upend the status quo on the merits because the rule departs from language enacted by Congress and is irrational.

CONCLUSION

The Court should deny the Administration's application for a stay pending appeal.

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