IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, CITY OF NEW YORK, STATE OF CONNECTICUT, and STATE OF VERMONT ***Plaintiffs*** ***v.*** **UNITED STATES DEPARTMENT OF HOMELAND SECURITY; KEVIN K. McALEENAN, *in his official capacity as Acting Secretary of the United States Department of Homeland Security*; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; KENNETH T. CUCCINELLI II, *in his official capacity as Acting Director of United States Citizenship and Immigration Services*; and UNITED STATES OF AMERICA** ***Defendants***	**CIVIL ACTION NO. 19 Civ. 07777 (GBD)**
MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, ASIAN AMERICAN FEDERATION, CATHOLIC CHARITIES COMMUNITY SERVICES, and CATHOLIC LEGAL IMMIGRATION NETWORK, INC. ***Plaintiffs*** ***v.*** **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***	**CIVIL ACTION NO. 19 Civ. 07993 (GBD)**

MEMORANDUM OF LAW OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS' OPPOSITION TO INTERIM RELIEF

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INTRODUCTION

In these two related cases, plaintiffs challenge under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), a final rule, *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (hereinafter, the "Rule"), promulgated by the U.S. Department of Homeland Security ("DHS"). The Supreme Court has stayed this Court's preliminary injunction against the Rule, *Dep't of Homeland Sec. v. New York*, 140 S.Ct. 599 (2020), and the plaintiffs in one case — a group of states and one city (hereinafter, the "State and Local Plaintiffs") — now ask this Court to issue new interim relief against the Rule for reasons related to the Covid-19 pandemic.

Plaintiffs who seek interim relief must establish that they likely will succeed on the merits and likely will suffer irreparable harm without interim relief, that the balance of equities favors them over considerations of preventing harm to the defendants from interim relief, and that the public interest favors interim relief. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs cannot make any of these required showings.

In both cases, the plaintiffs invoke a guidance document issued by the former Immigration and Naturalization Service ("INS") on the scope of the "public charge" grounds for excluding an alien under the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 ("INA"). Specifically, in 1999, the INS issued a notice of proposed rulemaking ("NPRM"), *Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,676 (May 26, 1999) (the "1999 NPRM"), and an intra-agency guidance memorandum as "field guidance." *Field Guidance on Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,689 (May 26, 1999) (the "1999 Field Guidance"). As explained below, these prior INS actions do not aid plaintiffs.

ARGUMENT

I. THE STATE AND LOCAL PLAINTIFFS ARE UNLIKELY TO PREVAIL ON THE MERITS.

The first — and most important — *Winter* factor is the likelihood of movants' prevailing. *Winter*, 555 U.S. at 20. The State and Local Plaintiffs stand on this Court's prior finding that they are likely to prevail on the merits, without making a merits case. *See* Pls.' Memo. at 16, 24-25. The State and Local Plaintiffs even claim that this Court's prior consideration of the merits is law of the case and, as such, "dispositive" on the likelihood of their prevailing. *Id.* at 24. That simply ignores that the Supreme Court stayed this Court's prior injunction, *Dep't of Homeland Sec. v. New York*, 140 S.Ct. 599 (2020), and that one of the showings on which DHS necessarily prevailed was that there is "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). *Amicus* IRLI respectfully submits that the law of the case is quite the opposite: "Since the question on the merits is unchanged, it is essentially the 'law of the case' that a stay would be appropriate, unless, of course, the response presents new information." *Volkswagenwerk A. G. v. Falzon*, 461 U.S. 1303, 1304 (1983) (O'Connor, J., Circuit Justice). Because the State and Local Plaintiffs' new information does not go to the merits, this Court must assume that the State and Local Plaintiffs are unlikely to prevail on the merits. Indeed, the State and Local Plaintiffs' exclusive reliance on non-record information that arose *after* the rulemaking and *after* the complaint was filed undermines their likelihood of prevailing even further.

A. The State and Local Plaintiffs lack standing.

Most harm that the State and Local Plaintiffs seek to prevent will fall on their residents who are not citizens or legal permanent residents ("LPRs"). State and local governments lack standing to assert *parens patriae* standing against the Federal Government. *Alfred L. Snapp & Son*

v. Puerto Rico, 458 U.S. 592, 610 n.16 (1982). Harms to third parties, then, form no part of the State and Local Plaintiffs' standing.

With respect to any harm to the State and Local Plaintiffs themselves, the factual showing of harm is inadequate to establish standing. When a plaintiff argues for harm that is not obvious, that plaintiff must establish the nonobvious harm with evidence. *Va. House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945, 1955 (2019) (party asserting federal jurisdiction "bears the burden of doing more than simply alleging a nonobvious harm") (interior quotation marks omitted). For harm to the State and Local Plaintiffs themselves, the motion — like their underlying case — provides merely anecdotal evidence. *See* Pls.' Memo. at 8-10. As statisticians caution, the plural of "anecdote" is not "data." For each anecdotal piece of evidence, there may be other offsetting anecdotes (for example, aliens who shelter in place to avoid both Covid-19 and immigration consequences) so that the net impact on the State and Local Plaintiffs is nonexistent.

In any event, standing that accrues *after* a plaintiff files suit is insufficient to establish standing to sue: "the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis v. FEC*, 554 U.S. 724, 734 (2008); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 190-91 (2000); *Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 177 (2d Cir. 2011) (standing depends "on the facts as they existed when the complaint [was] filed") (internal quotation marks omitted); *cf. Mollan v. Torrance*, 22 U.S. (9 Wheat) 537, 539 (1824) ("the jurisdiction of the court depends upon the state of things at the time of the action brought"). For purposes of the State and Local Plaintiffs' standing, the after-arising pandemic and any pandemic-related injuries do not provide this Court with Article III jurisdiction.

Plaintiffs that lack standing will not prevail on the merits: "Absent an adequate jurisdictional basis for the Court's consideration of the merits, there is *no likelihood* that the Plaintiff will prevail on the merits." *Herwald v. Schweiker*, 658 F.2d 359, 363 (5th Cir. 1981) (emphasis added); *accord Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 328 (D.C. Cir. 1987) (a "plaintiff in this context must carry its affirmative burden of showing a likelihood of success on the merits," which "necessarily includes a likelihood of the court's *reaching* the merits") (Williams, J., concurring and dissenting) (emphasis in original). This Court could deny the motion on this basis alone.

B. <u>The Rule permissibly construes "public charge."</u>

The State and Local Plaintiffs seek to revert to the 1999 Field Guidance, but the Rule permissibly interprets the INA. As argued in Section I.C, *infra*, the 1999 Field Guidance impermissibly interprets the INA, but DHS need not have adopted the only possible INA interpretation. DHS needs only to have adopted a *permissible* one, *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), as it has done.

In previously considering the merits, this Court erred by using congressional inaction to depart from the statute's plain meaning: "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval[.]" *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (interior quotation marks omitted), *abrogated in part on other grounds*, PUB. L. NO. 102-166, §§ 101-102, 105 Stat. 1071, 1072-74 (1991). Instead, the "plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (internal quotation marks omitted). The plain meaning here supports DHS.

While dictionary definitions should suffice, *see, e.g., FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (absent a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning"); *Public Charge*, Black's Law Dictionary (3d ed. 1933) ("one who produces a money charge upon, or an expense to, the public for support and care"); *accord* Black's Law Dictionary (4th ed. 1951), the Rule also is consistent with other INA provisions. *See* 8 U.S.C. § 1601(5) ("a compelling government interest to enact new rules … to assure that aliens be self-reliant"); 8 U.S.C. § 1601(2)(A) ("aliens … [should] not depend on public resources to meet their needs"). "Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes." 8 U.S.C. § 1601(1).[1] "Strong sentiments opposing the immigration of paupers developed in this country long before the advent of federal immigration controls." 5 Gordon *et al.*, *Immigration Law and Procedure*, § 63.05[2] (Rel. 164 2018). Indeed, those sentiments predated the founding of the Nation: "American colonists were especially reluctant to extend a welcome to impoverished foreigners[.] Many colonies protected themselves against public charges through such measures as mandatory reporting of ship passengers, immigrant screening and exclusion upon arrival of designated 'undesirables,' and requiring bonds for potential public charges." JAMES R. EDWARDS, JR., PUBLIC CHARGE DOCTRINE: A FUNDAMENTAL PRINCIPLE OF AMERICAN IMMIGRATION POLICY 2 (Center for Immigration Studies 2001) (citing E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY,

[1] *See* Act of March 3, 1875, § 5, 18 Stat. 477 (excluding convicts and sex workers, thought likely to become dependent on the public coffers for support); Immigration Act of 1882, § 2, 22 Stat. 214 (barring admission of "any person unable to take care of himself or herself without becoming a public charge."); Act of March 3, 1891, § 1, 26 Stat. 1084 (excluding "paupers"); Act of March 3, 1903, § 2, 32 Stat. 1213, 1214 (excluding "professional beggars"); Act of February 5, 1917, § 3, 39 Stat. 874, 875 (excluding "vagrants"); Act of March 3, 1903, § 26; 32 Stat. 1213, 1220 (authorizing bonds that promise, in consideration for admission, that an alien will not become a public charge); Act of February 20, 1907, § 26, 34 Stat. 898, 907.

1798-1965 (Univ. of Penn. Press, 1981)). Nothing about the challenged Rule is inconsistent with the INA.

C. INS's 1999 Field Guidance is a nullity and cannot support a likelihood of the plaintiffs' prevailing.

Neither INS's aborted 1999 NPRM nor the interim 1999 Field Guidance supports the State and Local Plaintiffs' merits claims. Indeed, both are nullities, and both were inconsistent with the INA when promulgated.

First, an NPRM that never matures into a final rule is a nullity: "any notion of ascribing weight to anything that has remained in the 'proposed regulation' limbo for a like period [of 13 years] is totally unpersuasive." *Tedori v. United States*, 211 F.3d 488, 492 n.13 (9th Cir. 2000); *NRDC v. Abraham*, 355 F.3d 179, 201 (2d Cir. 2004) (no deference to agency actions that fail to complete the full notice-and-comment process applicable to the relevant rulemaking context[2]); *Matter of Appletree Markets, Inc.*, 19 F.3d 969, 973 (5th Cir. 1994); *Public Citizen, Inc. v. Shalala*, 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (citing *Public Citizen Health Research Group v. Commissioner, F.D.A.*, 740 F.2d 21, 32-33 (D.C. Cir. 1984)); *Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 829 (10th Cir. 2000). INS's 1999 NPRM does not support relief here.

Second, once shorn of the 1999 NPRM of which it was a part, the 1999 Field Guidance was a mere "interpretative rule[], general statement[] of policy, or rule[] of agency organization, procedure, or practice" that the APA exempts from notice-and-comment requirements. *See* 5 U.S.C. § 553(b)(A). The challenged rulemaking nullified INS's 1999 Field Guidance: "This final

[2] The statute in *Abraham* imposed requirements on rulemakings in addition to the APA requirements. *Id.* The core principle is the same: "it ain't over 'til it's over." Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 260 (1991) (quoting Yogi Berra).

rule supersedes the 1999 Interim Field Guidance on Deportability and Inadmissibility on Public Charge Grounds." 84 Fed. Reg. at 41,292. Since federal courts lack authority under the APA to require any more of an agency when it changes prior APA-exempt guidance, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101-02 (2015), the 1999 Field Guidance has no ongoing administrative-law relevance here.

Third, to the extent that the 1999 Field Guidance remained extant, it obviously violates the INA and so has no claim to deference under the first step of the deference analysis to employ "traditional tools of statutory construction" to determine congressional intent, on which courts are "the final authority." *Chevron,* 467 U.S. at 843 n.9 The INS's 1999 Field Guidance violated the plain meaning of the INA, *see* Section I.B, *supra*, by attempting to insert a new meaning into a longstanding statutory term of art: "But where a phrase in a statute appears to have become a term of art … any attempt to break down the term into its constituent words is not apt to illuminate its meaning." *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990). So, while the 1999 Field Guidance no longer exists, it would not aid the State and Local Plaintiffs' case even if it did.

D. <u>The relief requested is outside the APA's waiver of sovereign immunity.</u>

The State and Local Plaintiffs note — impatiently — that DHS has not responded to a March 6, 2020, letter from the States' attorneys general sent to request a temporary halt to the Rule. Pls.' Memo. at 11. On March 13, 2020, DHS issued guidance that provides relief with respect to Covid-19 and the public-charge rule, *id.*, but the States' attorneys general wrote again on March 19, 2020, to advise DHS that the relief did not address all the harms that their first letter had raised. *Id.* at 12 n.46. Insofar as this is an APA suit, the State and Local Plaintiffs should follow the APA process, and that process does not support relief here.

The APA expressly allows the public to send such letters to petition an agency to amend, promulgate, or repeal a rule. 5 U.S.C. § 553(e). Agency denials are normally reviewable,

Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 336 (2015) (Breyer, J., concurring), as is action unreasonably delayed. *Telecomms. Research & Action Center v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) ("*TRAC*"). Since DHS has not responded directly yet, the proper response by the petitioning officials would be to challenge the inaction as unreasonable delay. The proper response is decidedly *not* to judge the new, changed merits:

> When an administrative agency simply refuses to act upon an application, the proper remedy — if any — is an order compelling agency action, not plenary review of the application by a district court.

McHugh v. Rubin, 220 F.3d 53, 61 (2d Cir. 2000) (citing *TRAC*). In any event, DHS has not come close to the sort of unreasonable delay that would give the State and Local Plaintiffs an action to compel DHS to issue an NPRM, and the Covid-19 emergency would be over before DHS finalized any new rule. Indeed, if DHS issued an NPRM on the petition to adopt additional pandemic-related relief into the Rule, the APA requires an opportunity for public comment — typically 30 days — and an additional 30-day delay before the rule takes effect. 5 U.S.C. § 553(c), (d). While DHS in its discretion could expedite a rulemaking, the APA vests that decision in the agency, not this Court.

By contrast, if the State and Local Plaintiffs ignore the process that the APA provides in § 553(e), they are effectively seeking relief based on non-record evidence that occurred after the filing of the underlying complaint. Recalling that at issue here is the APA's waiver of sovereign immunity, it warrants emphasis that APA review ordinarily follows the administrative record before the agency. *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2573-74 (2019). The State and Local Plaintiffs have not made any showing that would fit within an exception to that rule. *Id.* This Court could reject the motion on that basis alone.

In sum, the APA provides a process for resolving the State and Local Plaintiffs' concerns, and they have initiated that process by petitioning DHS for relief. Neither the APA nor the APA's waiver of the federal government's sovereign immunity allow this Court or the State and Local Plaintiffs to short-circuit that process via this motion.

E. Invoking the Covid-19 emergency does not aid the State and Local Plaintiffs.

The motion attempts to leverage the Covid-19 emergency for relief, but the State and Local Plaintiffs petition the wrong branch of government: "policy arguments are more properly addressed to legislators or administrators, not to judges." *Chevron*, 467 U.S. at 864. Congress holds the power here, except where Congress has delegated its emergency powers to the President. *See* National Emergencies Act, 50 U.S.C. §§ 1601-1651 ("NEA"); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281 (2020) ("CARES Act"). As explained with respect to both standing and sovereign immunity, moreover, the State and Local Plaintiffs' reliance on injuries and arguments that post-date the rulemaking and complaint put their new claims outside this Courts' jurisdiction. *See* Sections I.A, I.D, *supra*.

1. The NEA delegates unreviewable emergency authority to the President.

By invoking the President's Covid-19 emergency, the State and Local Plaintiffs ask this Court to delve into an area that the NEA leaves to Congress and the President, under "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving [the case]." *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (interior quotation marks omitted). As the only unelected branch of government, courts are the *least* fit to answer such questions: "making judges supreme arbiters in political controversies … [would] dethrone [the people] and [make them] lose one of

their … invaluable birthrights." *Luther v. Borden,* 48 U.S. 1, 52-53 (1849). Whatever sympathy the motion elicits, the relief requested belongs to the political branches to consider.

The NEA provides the President with unfettered discretion to *declare* an emergency, subject only to the power of Congress to *terminate* an emergency:

> As a firm believer in a strong Presidency and Executive flexibility, I could not support this bill if it would impair any of the rightful constitutional powers of the President. [The bill] will have no impact on the flexibility to declare a national emergency and to quickly respond if the necessity arises.

121 CONG. REC. 27,632, 27,636 (Sept. 4, 1975) (Rep. Hutchinson), *reprinted in* S. Comm. on Gov't Operations & the Special Comm. on Nat'l Emergencies and Delegated Emergency Powers, 94th Cong., 2d Sess., The National Emergencies Act Source Book: Legislative History, Texts, and Other Documents, at 252-53 (1976) (hereinafter, "NEA Source Book"); 121 CONG. REC. 27,632, 27,645 (Sept. 4, 1975) (Red. Drinan), *reprinted in* NEA Source Book, at 279 ("H.R. 3884 [has] no standard really, whatsoever, when and why the President can proclaim a national emergency"). Consistent with the statutory text, 50 U.S.C. § 1621(a), a President has full discretion to declare an emergency in the first instance.

As enacted, the NEA relied on congressional oversight,[3] 121 CONG. REC. 27,632, 27,636 (Sept. 4, 1975) (Rep. Moorhead), *reprinted in* NEA Source Book, at 254 ("Congress would assume

[3] In *INS v. Chadha*, 462 U.S. 919, 946 (1983), the Supreme Court rejected the one-house veto provisions of former 8 U.S.C. § 1254(c)(2) (1982) for failing to meet the constitutional requirements of bicameralism and presentment. Following Chadha, Congress amended the NEA to replace *concurrent* resolutions with *joint* resolutions, PUB. L. NO. 99-93, § 801, 99 Stat. 405, 448 (1985); H.R. REP. NO. 99-240, at 86 (1985) (Conf. Rep.) ("Senate amendment amends the National Emergencies Act to stipulate that a national emergency may be terminated by joint resolution of the Congress," and "Conference Substitute is identical to the Senate amendment").

the major role of reviewing and overseeing the conduct of the Executive branch in a national emergency situation"), not on judicial review:

> Unlike inherent Presidential powers which can be reviewed by the Supreme Court, emergency powers are specific legal delegations of authority to a President. The Supreme Court has generally given deference to such delegations of authority. The laws are viewed as persuasive evidence of Congressional intent that the President should be permitted special latitude during crises. Thus, *unless the Congress itself imposes controls, emergency powers shall remain largely unchecked*.

120 CONG. REC. 29,975, 29,983 (Aug. 22, 1974) (Sen. Pearson), *reprinted in* NEA Source Book, at 84-85 (emphasis added). *Amicus* IRLI respectfully submits that this Court should not entertain arguments on the President's priorities for dealing with emergencies. It falls exclusively to Congress and legislative processes to terminate or amend an emergency declared by the President. The NEA does not authorize this Court to review or to supplement the President's response to an emergency.

2. <u>The CARES Act makes permissible choices to protect our citizens and LPRs, and those choices are not reviewable here.</u>

The State and Local Plaintiffs implicitly complain that noncitizens need certain forms of welfare because the CARES Act does not provide emergency assistance to "nonresident alien[s]." *See* PUB. L. NO. 116-136, § 2201(a), 134 Stat. at ___ (pagination not available) (enacting 26 U.SC. 6428(d)(1)). While noncitizens theoretically could sue a relevant official over the CARES Act's exclusion of nonresident aliens, two obvious barriers come to mind. First, that would be a separate lawsuit. Second, the exclusive federal power over admitting aliens and setting the terms of their residence might overcome a disparate-treatment claim. *Graham v. Richardson*, 403 U.S. 365, 376, 380 (1971) (successful challenge to states' excluding resident aliens from welfare benefits as inconsistent with equal protection and exclusive federal power regarding aliens). While the State and Local Plaintiffs and the nonresident aliens whom they purport to represent are free to petition

Congress with their concerns, U.S. CONST. amend. I, cl. 6, this Court has no warrant to review or to improve the CARES Act here.

II. THE REMAINING *WINTER* FACTORS WEIGH AGAINST INTERIM RELIEF.

Given the State and Local Plaintiffs' lack of both jurisdiction and a likelihood of prevailing on the merits, this Court could deny the motion without considering the other three *Winter* factors. In any event, each additional *Winter* factor supports denying the State and Local Plaintiffs' motion.

A. The State and Local Plaintiffs' disjointed factual allegations do not establish irreparable harm.

The second *Winter* factor concerns the irreparable harm that a plaintiff would suffer, absent interim relied. *Winter*, 555 U.S. at 20. Even injuries that can qualify as cognizable under Article III can nonetheless fail to qualify under the higher bar for irreparable harm. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010). Here, Petitioners do not even have standing for the relief that they seek. *See* Section I.A, *supra*. But even assuming *arguendo* that Petitioners could satisfy Article III, they still could not show irreparable harm.

Most of the harms that the State and Local Plaintiffs identify befall third-party residents, and the State and Local Plaintiffs lack *parens patriae* standing to press these harms against the federal government. *Alfred L. Snapp*, 458 U.S. at 610 n.16. But even for the nonobvious harms to the State and Local Plaintiffs themselves, the evidence is insufficient.

The motion's evidence is not only disjointed and self-contradicting but also conflicts with judicially noticeable facts and laws:

- The motion claims that affected residents work in essential industries [such as] providing healthcare, preparing and delivering food to residences, cleaning hospitals and public spaces, and caring for the sick or aging, Pls.' Memo. at 7, but somehow lack healthcare, notwithstanding the "employer mandate" in the Affordable Care Act. *See Nat'l Fed'n of*

Indep. Business v. Sebelius, 567 U.S. 519, 539 (2012) ("[m]any individuals will receive the required coverage through their employer").

- The motion seeks to protect the unemployed as well as essential workers, without acknowledging the disconnect between those two sets of injuries.
- The motion focuses on essential workers and the unemployed without acknowledging that overall mortality from Covid-19 falls disproportionately on the elderly and those with pre-existing medical problems — such as those with chronic lung disease, serious heart conditions, severe obesity, or chronic kidney disease undergoing dialysis — that make them unlikely to be workers, much less workers in essential industries. *See* CDC, Coronavirus Disease 2019 (COVID-19): Older Adults ("8 out of 10 deaths reported in the U.S. have been in adults 65 years old and older");[4] CDC, Coronavirus Disease 2019 (COVID-19): People Who Are at Higher Risk for Severe Illness.[5]
- The motion provides data on "noncitizens" who work in essential industries, Pls.' Memo. at 18, but fails to break that data down into relevant subsets of noncitizens who might be affected by the Rule.

While some of these flaws in the motion's evidentiary basis might be correctable — for example, the number of noncitizens actually affected by the Rule in relevant industries might be provided — a movant bears the burden to establish standing and irreparable harm. The State and Local Plaintiffs have not met that burden.

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[4] Available at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html (last visited May 12, 2020).

[5] Available at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited May 12, 2020).

B. The balance of equities favors DHS.

The third *Winter* factor — the balance of equities, *Winter*, 555 U.S. at 20 — tips strongly in DHS's favor for two reasons. First, DHS's advantage on jurisdiction and the substantive merits tips the equities in its favor. *See* Section I, *supra*. Second, Petitioners' tenuous interest — if even cognizable, *see* Section I.A, *supra* — undercuts their ability to assert a countervailing form of irreparable harm. *See* Section II.A, *supra*. For all these overlapping reasons, the balance of the equities tips decidedly in DHS's favor.

C. The public interest favors DHS.

The last *Winter* factor — the public interest, *Winter*, 555 U.S. at 20 — also favors DHS. Where the parties dispute the lawfulness of government programs, this public interest can collapse into the merits. *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). But even a plaintiff likely to prevail on the merits is not automatically entitled to an injunction against the federal government. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law"). In this case — where any interim relief will be vacated on appeal — even the immigrant public that the Court would be trying to aid would rue this Court's intervention in their immigration affairs. An injunction can prevent public-charge actions only while it remains in effect; after it is vacated, DHS can exclude immigrants based on actions they took in misplaced reliance on a preliminary injunction.

The public interest is to have the Executive and Legislative Branches decide these policy issues: "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943). In public-injury cases, equitable relief that affects competing public interests "has never been regarded as strictly a matter

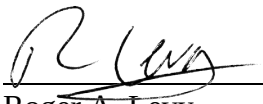
of right, even though irreparable injury may otherwise result to the plaintiff" because courts also consider adverse effects on the public interest. *Yakus v. United States*, 321 U.S. 414, 440 (1944). Because the voters are supposed to decide these policy issues through their elected representatives it would be against the public interest for this Court to intervene in federal immigration policy.

CONCLUSION

For all the foregoing reasons, this Court must deny the State and Local Plaintiffs' motion for interim relief.

Dated: May 12, 2020

Respectfully submitted,



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