No. 19-3169

In the United States Court of Appeals for the Seventh Circuit

COOK COUNTY, ILLINOIS, *ET AL.*,
Plaintiffs-Appellees,

v.

CHAD F. WOLF, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF U.S. DEPARTMENT OF HOMELAND SECURITY, *ET AL.*,
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Illinois No. 19-cv-6334 (Feinerman, J.)

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING *EN BANC*

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3169

Short Caption: COOK COUNTY, ILLINOIS v. CHAD F. WOLF

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

The Immigration Reform Law Institute has no parent corporation (no change).

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

The Immigration Reform Law Institute does not issue stock (no change).

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

Not applicable (no change).

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Not applicable (no change).

Attorney's Signature: /s/ Lawrence J. Joseph Date: 8/3/2020

Attorney's Printed Name: Lawrence J. Joseph

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

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Immigration Law Reform Institute ("IRLI") files this brief under cover of a motion for leave to file.[1] IRLI is a nonprofit 501(c)(3) public-interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus* briefs in many important immigration cases. For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's affiliate, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has direct interests in the issues here.

STATEMENT OF THE CASE

After notice-and-comment rulemaking under the Administrative Procedure Act ("APA"), the Department of Homeland Security ("DHS") issued a final rule to set DHS policy on the "public charge" provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 ("INA"). *See Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (hereinafter, the "Rule"). The Rule

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[1] Pursuant to FED. R. APP. P. 29(a)(4)(E) and 29(b)(4), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity — other than *amicus*, its members, and its counsel — contributed monetarily to this brief's preparation or submission.

guides determinations of whether an alien applying to enter or remain in the United States is "likely at any time to become a public charge" under the INA. *See* 8 U.S.C. § 1182(a)(4). In doing so, the Rule requires, *inter alia*, examination of an alien's use of certain public benefits. Over the dissent of Judge Barrett, the panel majority affirmed the district court's preliminary injunction of the Rule. DHS seeks the *en banc* Court's review.

ARGUMENT

I. PLAINTIFFS ARE NOT LIKELY TO PREVAIL ON THE MERITS.

When reviewing a preliminary injunction, the first — and most important — factor is the likelihood of movants' prevailing. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Because Plaintiffs did not make that showing, the *en banc* Court should grant review.

A. The Rule does not "violate" the Rehabilitation Act.

The panel rejected the Rule, in part, because it "penalizes disabled persons in contravention of the Rehabilitation Act." Op. at 28. As DHS explains, this Court should reject that rationale because the later-enacted Personal Responsibility and Work Opportunity Act of 1996, PUB. L. NO. 104-193, 110 Stat. 2105 (1996), is the more specific statute. Pet. at 17. As Judge Barrett explained in dissent, that is not the only temporal problem with an argument under the Rehabilitation Act of 1973: "That argument is belied by the term's historical meaning" and "the text of the current statute." *See* Op. at 42 (Barrett, J., dissenting). As explained in Section I.B.2, *infra*,

the Rule is consistent with the historical statutory record going back even before the Nation's founding. The panel's reading of the Rehabilitation Act would work a repeal by implication of the consistent pre-1973 exclusion of aliens likely to become public charges based on their health. Courts should not presume implied repeals "unless the intention of the legislature to repeal is clear and manifest" and "unless the later statute expressly contradicts the original act or … such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (interior alterations, citations, and quotation marks omitted). The obvious solution is that there is no Rehabilitation Act violation because aliens' remaining in the United States is not a "program or activity" as defined in the Rehabilitation Act. *See* 29 U.S.C. § 794(b). Disabled aliens can have entitlements under the Rehabilitation Act and still have their use of those entitlements counted against them as a public charge.

B. The Rule is not arbitrary and capricious.

Although Judge Barrett in dissent would not have addressed the arbitrary-and-capricious issue, the panel majority did address it. *Compare* Op. at 31-39 *with* Op. at 81 (Barrett, J., dissenting). Finding the Rule arbitrary and capricious put the panel in tension with the Supreme Court's finding that similarly situated plaintiffs are unlikely to prevail. The *en banc* Court should correct or withdraw the panel's

decision on this issue for the following reasons.

1. The Rule aids the government in permissible line drawing.

When federal courts review federal agency action, the question is not whether the court would draw the line in the same place that the agency drew it; the question is whether the agency drew a permissible line. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Significantly, the statute invites law-drawing and inferences about the future:

> Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

8 U.S.C. § 1182(a)(4)(A). The District of Columbia Circuit "has observed that the core concern underlying the prohibition of arbitrary or capricious agency action is that agency 'ad hocery' is impermissible." *Ramaprakash v. FAA*, 346 F.3d 1121, 1130 (D.C. Cir. 2003) (interior quotation marks omitted). That principle should guide the *en banc* Court to conclude that the Rule aids all concerned parties by avoiding "ad hocery" in immigration actions.

2. The Rule is consistent with immigration law.

Although the panel perceived "tension" with federal immigration law, the Rule is entirely consistent with not only current law but also the progression of that law from this Nation's founding.

a. The Rule is consistent with the Nation's historic regulation of immigration.

Considering an alien's status as a future public charge is a simple, common-sense principle that even predates the first federal immigration statutes. "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). America has excluded public-charge aliens since before the United States was founded and has consistently applied this principle across a wide range of categories. "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, 1798-1965 (Univ. of Penn. Press, 1981))[2]. About two hundred years later, excluding public charges became the main purpose of the very first federal statutory

[2] *Available at* https://cis.org/sites/cis.org/files/articles/2001/back701.pdf (last visited Jan. 22, 2020).

immigration exclusion. *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).

Exclusion and deportation statutes using the term "public charge" have been on the books for over 137 years, ever since the first comprehensive federal immigration law, which included a bar against the admission of "any person unable to take care of himself or herself without becoming a public charge." Immigration Act of 1882, § 2, 22 Stat. 214. Congress continued to expand its exclusion of aliens who were public charges through the Progressive Era. *See*, *e.g.*, 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").

Acceptance of a bond promising, in consideration for an alien's admission, that he will not become a public charge was authorized in 1903, reflecting earlier administrative practice. Act of March 3, 1903, § 26; 32 Stat. 1213, 1220. The essential elements of the current immigration bond provision, § 213 of the INA, have been in the law since 1907. *Compare* Act of February 20, 1907, § 26, 34 Stat. 898, 907 *with* 8 U.S.C. § 1183.

By 1990, the INA contained three separate exclusion grounds, which barred aliens who: (a) suffered from a disease or condition that affected their ability to earn

a living; (b) were "paupers, professional beggars, [or] vagrants"; or (c) were "likely to become a public charge." 8 U.S.C. § 1182(a)(7), (a)(8), (a)(15) (1988) (former INA § 212(a)(7), (a)(8), and (a)(15)). The Immigration Act of 1990 removed the first and second as discrete categories (that is, it collapsed them into the "public charge" ground). *See* PUB. L. NO. 101-649, § 601(a), 104 Stat. 4978, 5067-75 (1990). By classifying economic undesirability, indigence, and disability under the remaining public charge ground, Congress intended to improve enforcement efficiency by eliminating obsolete terminology. Gordon, *supra* at § 63.05[4].

b. The Rule is consistent with the Nation's current regulation of immigration.

In the Welfare Reform Act, Congress enacted definitive statements of national policy regarding non-citizen access to taxpayer-funded resources and benefits: "Aliens generally should not depend on public resources to meet their needs," and "the availability of public benefits should not constitute an incentive for immigration to the United States." *See* 8 U.S.C. § 1601(2); *see id.* at § 1601(5) (finding a "a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy"). The legislative history shows an intent that "sponsors — rather than taxpayers — [be] responsible for providing emergency financial assistance during the entire period between an alien's entry into the United States and the date upon which the alien becomes a U.S. citizen." Report of Comm. on

Economic and Educational Opportunities, H.R. REP. NO. 104-75, at 46 (1995) (Conf. Rep.).

In the Illegal Immigration Reform and Immigrant Responsibility Act, PUB. L. NO. 104-208, §505(a), 110 Stat. 3009, 3009-672 (1996) ("IIRIRA"), Congress codified the five minimum factors that must be considered when making public charge determinations, 8 U.S.C. § 1182(a)(4)(B), and authorized consular and immigration officers to consider an enforceable affidavit of support as a sixth admissibility factor, making it a mandatory factor for most family-based immigration. 8 U.S.C. §§ 1182(a)(4)(C), 1183A. IIRIRA's legislative history states that these amendments were designed to further expand the scope of the public charge ground for inadmissibility. H.R. REP. NO. 104-828, at 240-41 (1996) (Conf. Rep.). Not for nothing, the preamble to the final Rule notice refers to self-sufficiency more than 400 times. *See* 84 Fed. Reg. at 41,292-41,507. When "Congress has directly spoken to the precise question at issue," "that is the end of the matter" and a "court … must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Congress has done so here.

C. The panel should not have based its ruling on a hypothetical zero-tolerance policy.

The panel rejected DHS's view in part because the panel saw no stopping point to DHS's view:

> There is nothing in the text of the statute, as DHS sees it, that would prevent the agency from imposing a zero-tolerance rule under which the receipt of even a single benefit on one occasion would result in denial of entry or adjustment of status. … We see no warrant in the Act for this sweeping view.

Op. at 30. IRLI respectfully submits that neither Article III nor the APA's waiver of sovereign immunity allow a federal court to reject *reasonable current* federal action for fear of *hypothetical unreasonable future* action.

While a court reviewing federal administrative action may wish to consider the logical implications of an argument, an agency's mere refusal to concede that a course of action it is *not* taking would be unreasonable does not create grounds for a court to strike down the agency's actual, reasonable action. As relevant here, Congress has authorized courts to review "final agency action," 5 U.S.C. § 704, a term that does not apply to "a purely hypothetical course of action." *First Nat'l Bank v. Comptroller of Currency*, 956 F.2d 1360, 1364 (7th Cir. 1992). For non-APA review, the officer-suit exception to sovereign immunity requires an *ongoing* — that is, current — violation of federal law, *Green v. Mansour,* 474 U.S. 64, 66-67 (1985), not hypothetical future ones:

> Any other rule (assuming it would meet Article III case-or-controversy requirements) would require federal courts to determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable.

Morales v. TWA, 504 U.S. 374, 382 (1992). The *en banc* court should correct the

panel's impermissible trial of the sovereign by hypotheticals.

D. The Rule permissibly uses English proficiency and other factors as criteria for assessing solvency.

Although the INA requires consideration of an alien's "education and skills," 8 U.S.C. § 1182(a)(4)(B)(i)(V), the panel rejected the Rule in part because of its consideration of English-language proficiency. Op. at 37-38. DHS added English proficiency as an "education and skills" factor, citing the correlation between a lack of English skills and public benefit usage, lower incomes, and lower rates of employment. 84 Fed. Reg. at 41432-35. Even if DHS had not explained *why* English proficiency is among the most fundamental of any "education and skills" in the United States, this Court may take judicial notice — as the district court should have — of the fact that English is the *lingua franca* of the United States, and is therefore enormously consequential to a person's self-sufficiency. English is even a compulsory subject within the American educational system, comprising two-thirds of the three R's: Reading, Writing, and 'Rithmetic. *See*, *e.g.*, *Bodum USA, Inc. v. La Cafetiere*, *Inc.*, 621 F.3d 624, 633 (7th Cir. 2010) (Easterbrook, C.J.). ("Because English has become the international lingua franca, it is unsurprising that most Americans, even when otherwise educated, make little investment in acquiring even a reading knowledge of a foreign language."). Objections to DHS's reasonable course are at best "policy arguments [] more properly addressed to legislators or administrators, not to judges." *Chevron*, 467 U.S. at 864.

E. The failure to include a repayment process in the Rule is neither arbitrary nor capricious.

The panel faulted the Rule for failing to include a process for aliens to escape any negative impact of their past reliance on public benefits under the Rule. Op. at 38. Absence of such a process is not a basis to reject the Rule. If Plaintiffs want such a process in the Rule, the proper administrative procedure would be to petition DHS to add such a process. *See* 5 U.S.C. § 553(e). Neither the panel nor Plaintiffs can second-guess the Rule for failure to include such a "safety valve" in the first instance. While it would not be arbitrary or capricious for DHS to deny such a petition, basic prudential principles of administrative exhaustion require raising the issue with the agency first. *See Darby v. Cisneros*, 509 U.S. 137, 146 (1993). The *en banc* Court should reject the repayment rationale.

II. THE REMAINING INJUNCTION FACTORS FAVOR VACATING THE INJUNCTION.

The Supreme Court's stay found that an injunction would irreparably harm DHS and the public interest supports DHS. While plaintiffs *likely to prevail* are not automatically entitled to injunctions against the federal government, *Winter*, 555 U.S. at 32-33, Plaintiffs not only are *unlikely to prevail* but also lack a compelling case on the equities.

CONCLUSION

The case should be reheard *en banc*.

Dated: August 3, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 29(b)(4) because the brief contains 2,600 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: August 3, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit — together with the accompanying motion for leave to file — by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Lawrence J. Joseph
Lawrence J. Joseph