reasons. DHS's new definition of "public charge" is likely to be outside the bounds of a reasonable interpretation of the statute. Moreover, plaintiffs are likely to prevail on their entirely independent arguments that defendants acted arbitrarily and capriciously during the legally-required process to implement the changes they propose. Because plaintiffs are likely to prevail and will be irreparably harmed if defendants are permitted to implement the rule as planned on October 15, this court will enjoin implementation of the rule in the plaintiff states until this case is resolved on the merits, as discussed in more detail below.

BACKGROUND

In each of the actions before the court, the plaintiffs challenge and seek to preliminarily enjoin implementation of a proposed rule entitled "Inadmissibility on Public Charge Grounds," proposed by DHS and published in the Federal Register on August 14, 2019. See Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (August 14, 2019) ("the Rule"). The Rule is scheduled to take effect nationwide on October 15, 2019.

A. The Three Actions

In City and County of San Francisco v. U.S. Citizenship and Immigration Services, Case No. 19-cv-04717-PJH, San Francisco and Santa Clara (together, the "Counties") filed a complaint naming as defendants USCIS; DHS; McAleenen as Acting Secretary of DHS; and Cuccinelli as Acting Director of USCIS. The complaint asserts two causes of action under the Administrative Procedure Act ("APA"): (1) Violation of APA, 5 U.S.C. § 706(2)(A)—Not in Accordance with Law; and (2) Violation of APA, 5 U.S.C. § 706(2)(A)—Arbitrary, Capricious, and Abuse of Discretion. The Counties filed the present motion for preliminary injunction on August 28, 2019.

In State of California v. U.S. Department of Homeland Security, Case No. 19-cv-04975-PJH, the States filed a complaint naming the same defendants as the Counties: USCIS; DHS; McAleenen as Acting Secretary of DHS; and Cuccinelli as Acting Director of USCIS. The complaint asserts six causes of action: (1) Violation of APA, 5 U.S.C. § 706—Contrary to Law, the Immigration and Nationality Act and the Illegal Immigration

month period (such that, for instance, receipt of two benefits in one month counts as two months). This Rule defines the term 'public benefit' to include cash benefits for income maintenance, SNAP, most forms of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher (HCV) Program, Section 8 Project-Based Rental Assistance, and certain other forms of subsidized housing." 84 Fed. Reg. at 41,295.

Because the INS directs immigration officers to opine as to whether an alien "is likely at any time to become a public charge," the Rule's new definition requires immigration officers to opine as to whether an alien is likely to receive certain public benefits for more than 12 months in the aggregate within any future 36-month period to determine whether he is likely to become a public charge. The rule sets out a number of positive, negative, heavily-weighted, and normally-weighted factors to assist in making that determination, and those factors are considered as part of a "totality of the circumstances" assessment of whether an alien is likely to use more than 12 months' worth of benefits in any future 36-month period.

DISCUSSION

A. Legal Standard

Federal Rule of Civil Procedure 65 provides federal courts with the authority to issue preliminary injunctions. Fed. R. Civ. P. 65(a). Generally, the purpose of a preliminary injunction is to preserve the status quo and the rights of the parties until a final judgment on the merits can be rendered. See U.S. Philips Corp. v. KBC Bank N.V., 590 F.3d 1091, 1094 (9th Cir. 2010).

An injunction is a matter of equitable discretion and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008); see also Munaf v. Geren, 553 U.S. 674, 689–90 (2008). A preliminary injunction "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam).

"A plaintiff seeking a preliminary injunction must establish that [1] he is likely to

succeed on the merits, that [2] he is likely to suffer irreparable harm in the absence of preliminary relief, that [3] the balance of equities tips in his favor, and that [4] an injunction is in the public interest." Winter, 555 U.S. at 20.

Alternatively, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the Winter test are also met." All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1132 (9th Cir. 2011). "That is, 'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Id. at 1135; see also Disney Enterprises, Inc. v. VidAngel, Inc., 869 F.3d 848, 856 (9th Cir. 2017).

If a plaintiff satisfies its burden to demonstrate that a preliminary injunction should issue, "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979).

Separately, the APA permits this court to "postpone the effective date of action . . . pending judicial review." 5 U.S.C. § 705; Bakersfield City Sch. Dist. of Kern Cty. v. Boyer, 610 F.2d 621, 624 (9th Cir. 1979) ("The agency or the court may postpone or stay agency action pending such judicial review.") (citing 5 U.S.C. § 705). Any such postponement must be made "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury[.]" 5 U.S.C. § 705. The factors considered when issuing such a stay substantially overlap with the Winter factors for a preliminary injunction. See, e.g., Bauer v. DeVos, 325 F. Supp. 3d 74, 104–07 (D.D.C. 2018).

B. Analysis

In considering plaintiffs' motions for preliminary injunction, the court considers the Winter factors (and the alternative All. for the Wild Rockies) factors in turn. First, the court considers whether plaintiffs have demonstrated they are likely to succeed on the merits of their claims, or alternatively whether they have demonstrated serious questions

going to the merits. Because a plaintiff must be within a statute's "zone of interest" to succeed on an APA challenge based on the underlying statute, the court considers whether each plaintiff is within the relevant statute's zone of interests when assessing its likelihood of success on the merits.

Second, the court considers whether plaintiffs have demonstrated they are likely to suffer irreparable harm in the absence of preliminary relief. Because plaintiffs' alleged irreparable harms are also their alleged bases for standing, the court considers whether each plaintiff has standing to bring a ripe claim when assessing its irreparable harms.

Third, the court considers whether plaintiffs have demonstrated that the balance of equities tip in their favor, and whether the balance of hardships tip sharply in their favor.

Fourth, the court considers whether plaintiffs have demonstrated that an injunction is in the public interest.

Fifth, the court addresses the scope of injunctive relief necessary and capable of providing complete relief to the harms plaintiffs have demonstrated they are likely to suffer prior to a determination on the merits, absent such relief.

1. The State and County Plaintiffs Are Likely to Succeed on the Merits and Have Raised Serious Questions

Plaintiffs argue that they are likely to succeed on three of their causes of action, each alleging a violation of the APA: (1) that the Rule violates the APA because it is not in accordance with the term "public charge" as used in the INA; (2) that the Rule violates the APA because it is not in accordance with the Rehabilitation Act § 504; and (3) that the Rule violates the APA because it is arbitrary, capricious, and an abuse of discretion.[5]

Under the APA, "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or

[5] Although some of the arguments supporting these claims are likely to overlap with other claims plaintiffs assert, plaintiffs have made clear that they are not moving for a preliminarily injunction based on any other claim, including, inter alia, the claim that the Rule violates the APA because it is contrary to laws giving the States discretion with respect to the provision of healthcare, the claim under the declaratory judgment act that Cuccinelli was unlawfully appointed, or any of the asserted Constitutional claims.

applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706.

"In the usual course, when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable. This principle is implemented by the two-step analysis set forth in Chevron." Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2124 (2016) (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)). "At the first step, a court must determine whether Congress has 'directly spoken to the precise question at issue.' If so, 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' If not, then at the second step the court must defer to the agency's interpretation if it is 'reasonable.'" Encino Motorcars, 136 S. Ct. at 2124–25 (citations omitted) (quoting Chevron, 467 U.S. at 842–44).

"[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, 467 U.S. at 843; see also Michigan v. E.P.A., 135 S. Ct. 2699, 2707 (2015) ("Even under this deferential standard, however, agencies must operate within the bounds of reasonable interpretation.") (internal quotation marks omitted).

The Chevron analysis calls upon the court to "employ[] traditional tools of statutory construction" to fulfill its role as "the final authority on issues of statutory construction[.]" Chevron, 467 U.S. at 843 n.9; accord Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018).

"Chevron deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be

promulgated pursuant to authority Congress has delegated to the official." Gonzales v. Oregon, 546 U.S. 243, 258 (2006). "The starting point for this inquiry is, of course, the language of the delegation provision itself. In many cases authority is clear because the statute gives an agency broad power to enforce all provisions of the statute." Id. (drawing a distinction between delegation of authority to carry out the act generally, and authority to execute the functions assigned to the agency).

First, the court assesses whether plaintiffs are likely to succeed on their claims under the APA that the Rule is not in accordance with law, as provided in 8 U.S.C. § 1182(a)(4). Second, the court assesses whether plaintiffs are likely to succeed on their claims under the APA that the Rule is not in accordance with law, as provided in the Rehabilitation Act § 504. Third, the court assess whether plaintiffs are likely to succeed on their claims under the APA, that the Rule is arbitrary and capricious. Fourth, the court assesses whether each plaintiff is within the relevant zone of interests, which is required to succeed on an APA claim.

a. Not in Accordance with Law—8 U.S. Code § 1182(a)(4)

Plaintiffs argue that the Rule is not in accordance with the definition of "public charge" as used in 8 U.S. Code § 1182(a)(4) for three reasons: (1) DHS's interpretation should not be accorded any deference, and the Rule's definition is inconsistent with the statute; (2) even if the term is accorded deference, the term plainly and unambiguously means "primarily dependent on the government for subsistence," and the Rule conflicts with that definition; and (3) the Rule's definition of "public charge" is not reasonable or based on a permissible construction of the statute.

The court did not understand plaintiffs to have raised the first argument in their moving papers, although the Counties may have raised it obliquely in their reply. But the court and defendants were surprised to learn at the hearing that plaintiffs were advancing an argument that DHS's promulgation of the Rule was wholly outside of Congressionally-delegated authority. Cf. Counties' Reply at 8–9 ("Counties do not contest DHS's authority to issue rational regulations governing the case-by-case application of the

statutory standard, so long as they do not misconstrue the term 'public charge.'"); States' Reply at 9–10 ("the States have never disputed the commonsense point that Congress in 8 U.S.C. § 1182(a)(4)(A) assigned responsibility to Defendants to make individual public charge determinations"); Organizations' Reply at 9 ("even if Defendants were correct, Congress could delegate to DHS the power only to adopt *reasonable* interpretations of the statute"). Nevertheless, plaintiffs have not sufficiently supported, or even explained, their argument to satisfy their burden to show likelihood of success on the merits based on it.[6] Accordingly, the court analyzes the Rule pursuant to the framework set out by Chevron.

The second and third arguments concern a challenge under Chevron's framework to the meaning of "public charge" as used in § 1182(a)(4). Plaintiffs' second argument requires the court to determine whether the Rule contravenes the statute's unambiguous meaning, and their third argument requires the court to determine whether defendants' chosen definition is reasonable and based on a permissible construction of the statute. Both questions require a discussion of the long usage of the term by Congress, as well as the expansive evaluation of the term by courts and executive agencies.

As preface to that discussion, a brief outline helps set the stage. The phrase "public charge" was used in this country's first-ever general immigration statute in 1882. The immigration statutes have been interpreted and modified many time since then, and although many other excluded categories of persons came and went, with each modification through today the phrase "public charge" remained intact. As a result, the meaning that the persistent term had when first used is relevant to understanding the meaning Congress ascribed to it with each subsequent statutory revision, including the now-operative statute, which most recently saw changes to the relevant provisions in 1990 and 1996.

[6] However, the court notes that whether DHS's promulgation of the Rule falls within the rulemaking authority delegated to it by Congress may benefit from more attention in the parties' future briefing on the merits. See generally 8 U.S.C. § 1103(a).

Id.

The Feld Guidance explained that a compelling reason to limit the public charge definition to those receiving cash is that "certain federal, state, and local benefits are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient. Thus, participation in such non-cash programs is not evidence of poverty or dependence." Id. at 28,692

12. 2013

In 2013, the Senate voted down two amendments to a never-passed bill regarding immigration. The first amendment proposed "expanding the criteria for 'public charge,' such that applicants would have to show they were not likely to qualify even for non-cash employment supports such as Medicaid, the SNAP program, or the Children's Health Insurance Program (CHIP). . . . [T]he amendment was rejected by voice vote." S. Rep. No. 113-40, at 42 (2013).

The second amendment "would have expanded the definition of 'public charge' such that people who received non-cash health benefits could not become legal permanent residents. This amendment would also have denied entry to individuals whom the Department of Homeland Security determines are likely to receive these types of benefits in the future. The amendment was not agreed to by a voice vote." S. Rep. No. 113-40, at 63 (2013).

13. 2019—The Rule

On October 10, 2018, DHS published a Notice of Proposed Rulemaking in the Federal Register. See 83 Fed. Reg. 51,114. The NPRM provided a 60-day public comment period, during which 266,077 comments were collected. See 84 Fed. Reg. at 41,297. On August 14, 2019, DHS published the Rule in the Federal Register.

The Rule supersedes the 1999 Field Guidance's definition of "public charge," establishing a new definition based on a minimum time threshold for the receipt of public

under the first prong of the Chevron analysis. See Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017); see also Whitman v. Am. Trucking Associations, 531 U.S. 457, 471 (2001) (finding a particular construction "unambiguously bar[red]" when "interpreted in its statutory and historical context").

b. Not in Accordance with Law—Rehabilitation Act

The Rehabilitation Act prohibits "any program or activity receiving federal financial assistance" or "any program or activity conducted by any Executive agency," from excluding, denying benefits to, or discriminating against persons with disabilities. 29 U.S.C. § 794(a).

"To establish a violation of § 504 of the RA [Rehabilitation Act], a plaintiff must show that (1) she is handicapped within the meaning of the RA; (2) she is otherwise qualified for the benefit or services sought; (3) she was denied the benefit or services solely by reason of her handicap; and (4) the program providing the benefit or services receives federal financial assistance." Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir. 2002); 29 U.S.C. § 794(a) ("[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be . . . subjected to discrimination under . . . any program or activity conducted by any Executive agency").

The States argue that the Rule will exclude some individuals solely based on disability because a disability will predictably be responsible for a number of negative factors in some individuals: (1) a negative health factor because the Rule adopts a definition of "health" that strongly overlaps with disability; (2) a negative factor if the applicant lacks private insurance; and (3) a negative factor if the applicant has received Medicaid for 12 of the last 36 months, even though use of Medicaid is common for the disabled because it covers services that no other insurer provides.

Defendants first argue that the Rule's multi-factor test means the Rehabilitation Act is not violated because disability cannot be the "sole" determinative factor. Second, they argue that even if the statutes are in conflict, a specific, later statutory command—such as the INA's requirement that the agency consider health—supersedes section

504's general proscription.

First, the Rehabilitation Act requires that a plaintiff show that a disabled person was denied services "solely" by reason of her disability. The Rule does not deny any alien admission into the United States, or adjustment of status, "solely by reason of" disability. All covered aliens, disabled or not, are subject to the same inquiry: whether they are likely to use one or more covered federal benefits for the specified period of time. Even though a disability is likely to be an underlying cause of some individuals qualifying for additional negative factors, it will not be the sole cause. As such, disability is one non-dispositive factor.[16]

Second, the INA explicitly lists "health" as a factor that an officer "shall . . . consider" in making a public charge determination. 8 U.S.C. § 1182(a)(4)(B)(i). "Health" includes an alien's disability and whatever impact the disability may have on the alien's expenses and ability to work. Congress, not the Rule, requires DHS to take this factor into account, and the caselaw has long considered this factor. See, e.g., Knutzen v. Eben Ezer Lutheran Hous. Ctr., 815 F.2d 1343, 1353 (10th Cir. 1987) (section 504 may not "revoke or repeal . . . a much more specific statute . . . absent express language by Congress").

As such, plaintiffs have not demonstrated even serious questions going the merits with respect to this claim.

c. Arbitrary and Capricious

> Section 4 of the APA, 5 U.S.C. § 553, prescribes a three-step procedure for so-called "notice-and-comment rulemaking." First, the agency must issue a "[g]eneral notice of proposed rule making," ordinarily by publication in the Federal Register. § 553(b). Second, if "notice [is] required," the agency must "give interested persons an opportunity to participate in

[16] Plaintiffs' citation to Lovell is unavailing. They claim the case found a multi-factor test violated the Act, "notwithstanding other factors" unrelated to disability. But in Lovell, defendants asked the court to look at a multifactored system, but the court declined and instead looked at treatment of the disabled under a single program. It was "undisputed that disabled people who, but for their disability, were eligible for healthcare benefits from the State under" that single program "were denied coverage because of the categorical exclusion of the disabled from" that program. Lovell, 303 F.3d at 1053.