APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-17213

D.C. No. 4:19-cv-04717--PJH

[Filed: April 8, 2021]

CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SANTA CLARA,	)
Plaintiffs-Appellees,	)
v.	)
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; ALEJANDRO MAYORKAS, in his official capacity as Secretary of the U.S. Department of Homeland Security; TRACY RENAUD in her official capacity as Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services,	)
Defendants-Appellants,	)

STATES OF ARIZONA, ALABAMA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA,
Intervenors-Pending.

No. 19-17214

D.C. No. 4:19-cv-04975-PJH

STATE OF CALIFORNIA; DISTRICT OF COLUMBIA; STATE OF MAINE; COMMONWEALTH OF PENNSYLVANIA; STATE OF OREGON,
Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; ALEJANDRO MAYORKAS, in his official capacity as Secretary of the U.S. Department of Homeland Security; TRACY RENAUD in her official capacity as Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services,
Defendants-Appellants,

STATES OF ARIZONA, ALABAMA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI,

MISSOURI, MONTANA, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA,
Intervenors-Pending.

No. 19-35914

D.C. No. 4:19-cv-05210-RMP

STATE OF WASHINGTON; COMMONWEALTH OF VIRGINIA; STATE OF COLORADO; STATE OF DELAWARE; STATE OF ILLINOIS; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; DANA NESSEL, Attorney General on behalf of the People of Michigan; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF RHODE ISLAND; STATE OF HAWAII,
Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; ALEJANDRO MAYORKAS, in his official capacity as Secretary of the U.S. Department of Homeland Security; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; TRACY RENAUD in her official capacity as Senior Official Performing the Duties of the Director, U.S. Citizenship and

Immigration Services,)
Defendants-Appellants,)
)

STATES OF ARIZONA, ALABAMA, ARKANSAS,)
INDIANA, KANSAS, LOUISIANA, MISSISSIPPI,)
MISSOURI, MONTANA, OKLAHOMA,)
SOUTH CAROLINA, TEXAS, AND)
WEST VIRGINIA,)
Intervenors-Pending.)
)

Filed April 8, 2021

Before: Mary M. Schroeder, William A. Fletcher, and Lawrence J. VanDyke, Circuit Judges.

Order;
Dissent by Judge VanDyke

SUMMARY*

Immigration/Intervention

The panel denied motions by the State of Arizona and other states to intervene in cases in which the panel previously issued an opinion in *City and County of San Francisco v. USCIS*, 981 F.3d 742 (9th Cir. 2020) [Schroeder (author) W. Fletcher VanDyke (dissenting)], affirming in part and vacating in part preliminary injunctions enjoining implementation of the Department of Homeland Security's redefinition of the term "public charge," and in which the Supreme

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Court on March 9, 2021, dismissed pending petitions for writ of certiorari pursuant to the stipulation of the parties.

Judge VanDyke dissented from the denial of intervention. Judge VanDyke wrote that with the recent change in federal administrations, the Biden Administration stopped defending certain rules promulgated by the Trump Administration, including the Public Charge rule at issue in this case. Judge VanDyke observed that this in itself is neither surprising nor particularly unusual, as elections have consequences, and new presidential administrations, especially of a different party, often disagree with some of the rules promulgated by their predecessors. But here, Judge VanDyke wrote, the new administration did something quite extraordinary with the Public Charge rule: in concert with the various plaintiffs who had challenged the rule in federal courts across the country, the federal defendants simultaneously dismissed all the cases challenging the rule (including cases pending before the Supreme Court), acquiesced in a single judge's nationwide vacatur of the rule, leveraged that now-unopposed vacatur to immediately remove the rule from the Federal Register, and quickly engaged in a cursory rulemaking stating that the federal government was reverting back to the Clinton-era guidance—all without the normal notice and comment typically needed to change rules.

A collection of states moved to intervene in the various lawsuits challenging the rule around the country (including this one), arguing that because the federal government was now demonstrably in cahoots

with the plaintiffs, the states should be allowed to take up the mantle of defending the Trump-era rule. Pointing to the fact that the Supreme Court had both stayed multiple lower courts' injunctions of the rule and—until the new administration voluntarily dismissed its appeals—planned to review the rule's validity, the states contended there was something amuck about the federal government's new rulemaking-by-collusive-acquiescence.

In Judge VanDyke's view, the states easily met the intervention standard of Federal Rule of Civil Procedure 24. First, because the states quickly intervened within days of discovering that the federal government had abandoned their interests, and the federal government asserted no apparent prejudice in allowing intervention, Judge VanDyke wrote that the motion to intervene was timely. Judge VanDyke wrote that the states also have a "significant protectable interest" in the continuing validity of the rule because invalidating the rule could cost the states as much as $1.01 billion annually. Responding to the plaintiffs' and the federal government's argument that in lieu of joining this litigation, the states could vindicate their interests by participating in an agency review process or asking the agency to promulgate a new rule, Judge VanDyke observed that this argument might have had more merit had the federal government followed the traditional route of asking the courts to hold the public charge cases in abeyance, rescinding the rule per the Administrative Procedure Act, and then promulgating a new rule through notice and comment rulemaking. Judge VanDyke wrote that instead, the federal government intentionally avoided the APA entirely by

acquiescing in a final district court judgment, and altering the federal regulations by unilaterally reinstating the Clinton-era field guidance as the de facto new rule—without any formal agency rulemaking or meaningful notice to the public. Judge VanDyke wrote that by deliberately evading the administrative process in this way, the government harmed the state intervenors by preventing them from seeking any meaningful relief through agency channels. Judge VanDyke wrote that the disposition of this action, together with the federal government's other coordinated efforts to eliminate the rule while avoiding APA review, will impair or impede the states' ability to protect their interest in the 2019 rule's estimated annual savings. Judge VanDyke also wrote that the existing parties obviously do not adequately represent the states' interests because they are now united in vigorous opposition to the rule.

Addressing the plaintiffs' and the government's argument that this case is moot because the court cannot offer adequate relief now that the 2019 rule has been vacated by a different federal judge in the Seventh Circuit, Judge VanDyke wrote that the parties opposing intervention had not met their heavy burden of showing that there is not any effective relief that a court can provide. Judge VanDyke noted that the states could obtain effective relief because they currently have an action pending before the Supreme Court asking that Court to order the Seventh Circuit to reverse or stay the vacatur of the rule, and if successful, that would remove any obstacle to the states ultimately getting relief in this court. Judge VanDyke pointed out that if the states are successful in

their current request that the Supreme Court stay the Seventh Circuit's vacatur of the rule, the panel's denial of intervention will leave the states with no way to prevent one of the district courts in this circuit from immediately imposing a nationwide preliminary injunction of the rule or, worse, vacating the rule (again).

Judge VanDyke observed that there is a final reason why intervention is especially warranted in this case. Judge VanDyke wrote that by granting two stays (and a later petition for certiorari), the Supreme Court repeatedly indicated that the United States had "made a strong showing that [it was] likely to succeed on the merits" in its defense of the rule. Judge VanDyke wrote that absent intervention, the parties' strategic cooperative dismissals preclude those whose interests are no longer represented from pursuing arguments that the Supreme Court has already alluded are meritorious. Judge VanDyke wrote that even more concerning, the dismissals lock in a final judgment and a handful of presumptively wrong appellate court decisions in multiple circuits, and circumvent the APA by avoiding formal notice-and-comment procedures.

Judge VanDyke suggested a possible solution to this novel problem of a new federal administration deliberately short-circuiting the normal APA process. Judge VanDyke observed that the Supreme Court obviously could allow the states to intervene in the Seventh Circuit litigation and defend the 2019 rule in place of the federal government. But Judge VanDyke wrote that there may be a simpler solution here that would not only address what has happened with

respect to the Public Charge rule but, perhaps more importantly, would encourage future administrations to change rules—not through collusive capitulation—but via the familiar and required APA rulemaking process Congress created for that purpose. Judge VanDyke wrote that the Supreme Court could simply clarify that *Munsingwear* vacatur of lower court decisions and judgments is appropriate in this circumstance where the federal government and the plaintiffs jointly mooted litigation by acquiescing in a judgment against the government, which then prevented the normal APA process for removing or replacing a formal rule.

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ORDER

The Motion of State of South Carolina to Join Motion to Intervene by the States of Arizona, et al., is **GRANTED.**

The Motion of State of Missouri to Join Motion to Intervene by the States of Arizona, et al., is **GRANTED.**

The Motion to Intervene by the States of Arizona, et al., is **DENIED.**

VANDYKE, Circuit Judge, dissenting from the denial of intervention:

With the recent change in federal administrations, the Biden Administration stopped defending certain rules promulgated by the Trump Administration, including the Public Charge rule at issue in this case. That in itself is neither surprising nor particularly unusual. Elections have consequences, as they say, and a common enough one is that new presidential administrations, especially of a different party, often disagree with some of the rules promulgated by their predecessors. But here, as I explain in more detail below, the new administration did something quite extraordinary with the Public Charge rule. In concert with the various plaintiffs who had challenged the rule in federal courts across the country, the federal defendants simultaneously dismissed all the cases challenging the rule (including cases pending before the Supreme Court), acquiesced in a single judge's nationwide vacatur of the rule, leveraged that now-unopposed vacatur to immediately remove the rule from the Federal Register, and quickly engaged in a cursory rulemaking stating that the federal government was reverting back to the Clinton-era guidance—all without the normal notice and comment typically needed to change rules.

In short, the new administration didn't just stop defending the prior administration's rule and ask the courts to stay the legal challenges while it promulgated a new rule through the ordinary (and invariably time- and resource-consuming) process envisioned by the APA. Instead, together with the plaintiffs challenging

the rule, it implemented a plan to instantly terminate the rule with extreme prejudice—ensuring not only that the rule was gone faster than toilet paper in a pandemic, but that it could effectively never, ever be resurrected, even by a future administration. All while avoiding the normal messy public participation generally required to change a federal rule. Not bad for a day's work.

But not everyone was impressed with this rare display of governmental efficiency. Swiftly rebounding from the whiplash, a collection of states quickly moved to intervene in the various lawsuits challenging the rule around the country (including this one), arguing that because the federal government was now demonstrably in cahoots with the plaintiffs, the states should be allowed to take up the mantle of defending the Trump-era rule. Pointing to the fact that the Supreme Court had both stayed multiple lower courts' injunctions of the rule *and*—until the new administration voluntarily dismissed its appeals—planned to review the rule's validity, the states contended there is something amuck about the federal government's new rulemaking-by-collusive-acquiescence.

The panel majority denies the states' motion for intervention. I conclude intervention is warranted, and therefore respectfully dissent. Before explaining why, I first provide some background on the Public Charge rule and the legal challenges to it. And after explaining why we should have granted intervention, I briefly conclude with what I think might be a possible solution to this novel problem of a new federal administration

deliberately (1) short-circuiting the normal APA process by using a single judge to engage in de facto nationwide rulemaking and (2) locking in adverse legal precedents that the Supreme Court has already signaled are highly questionable.

I. Background

A. The term "Public Charge"

The term "public charge" has been a part of our country's statutory immigration lexicon for more than a century. *City & County of San Francisco v. USCIS*, 981 F.3d 742, 749 (9th Cir. 2020) (noting the first use in the Immigration Act of 1882). The most recent regulatory interpretation of that term has prompted various circuits across the nation to spill much ink arguing over its precise historical contours. *See, e.g.*, *Cook County v. Wolf*, 962 F.3d 208, 222–29 (7th Cir. 2020); *New York v. U.S. Dep't of Homeland Security*, 969 F.3d 42, 63–80 (2d Cir. 2020); *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 230–34 (4th Cir. 2020), *vacated for reh'g en banc*, 981 F.3d 311 (4th Cir. 2020) (dismissed Mar. 11, 2021); *City & County of San Francisco*, 981 F.3d at 756–58. Throughout much of its history, however, "public charge" has maintained a less-than-precise meaning, even as the term was continuously used in various state and federal statutes denying admission or adjustment of immigration status to noncitizens that were "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A); *see also Cook County* , 962 F.3d at 238–42 (Barrett, J., dissenting) (explaining the statutory usages and inferred meanings of the term "public charge" throughout its history).

In a laudable attempt to give the term a more concrete meaning, the Clinton Administration proposed a rule to define the term "public charge," but the effort was ultimately abandoned and a final rule never issued. *See* Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676 (proposed May 26, 1999). Enduring from that attempt, however, was field guidance defining a "public charge." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,692 (May 26, 1999). This field guidance was not binding, but the Department of Homeland Security (DHS) followed it in the absence of explicit regulatory direction. *See New York*, 969 F.3d at 53.

Under the guidance, an individual was considered a "public charge" if he was likely to receive "[c]ash assistance for income maintenance [or] institutionalization for long-term care at government expense." 64 Fed. Reg. at 28,692. But an individual seeking adjustment of status would *not* be considered a "public charge," even though he would need government-provided housing, government-paid electrical assistance, government-provided food, government health insurance for himself and his children, *and* government-provided childcare while using government-provided job training. *See* 64 Fed. Reg. at 28,692–93. In short, under the de facto rule in existence before the Trump Administration promulgated an actual rule, a noncitizen would *not* be deemed a public charge even though the government furnished essentially his every need (and many of his wants), just as long as the government didn't give him

cash benefits that he could then use to pay for his Netflix subscription.

While the ambiguous concept of a "public charge" no doubt allows for substantial interpretive elasticity, that seems quite a stretch. Indeed, it seems exactly backwards from what most people would think makes someone a "public charge." Nowadays, almost everybody in this country is getting cash stimulus payments from the IRS on what feels like a semi-regular basis, and nobody thinks that alone makes them a public charge. Call me crazy, but I expect most people would say it is being overly reliant on the government to meet your needs that makes one a public charge, not whether the welfare benefits are provided in cash or in kind.

B. New Public Charge Definition

Nearly two decades after the Clinton Administration promulgated its guidance, the Trump Administration in August 2019 issued a final rule—after notice and comment—defining "public charge." Inadmissibility on Public Charge Grounds; Final Rule, 84 Fed. Reg. 41,292 (Aug. 14, 2019). The 2019 rule looked prospectively at applications for admission or adjustment of status to determine whether the individual was "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." *Id.* at 41,295. The rule considered whether an individual would likely receive cash from the government and/or "means-tested non-cash benefits . . . which bear directly on the recipient's self-sufficiency and . . . account for

significant federal expenditures on low-income individuals." *Id.* at 41,296. If, under the totality of circumstances analysis, a noncitizen applying for admission or adjustment of status would likely need specified cash benefits and/or various non-monetizable government-provided housing, food assistance, or medical insurance for more than a collective twelve months, then the noncitizen could be considered a public charge. *Id.* at 41,501 (citing 8 C.F.R. § 212.21).

Because many categories of immigrants are either not eligible for these types of public benefits or are exempted from the public charge exclusion, the rule primarily affected only a limited subset of immigrants—nonimmigrant visa holders applying for green cards. *See Cook County*, 962 F.3d at 235–38 (Barrett, J., dissenting).[1] While not currently eligible for public benefits, upon adjustment of status, those individuals would be eligible in the future—thus, "[t]he public charge rule is concerned with what use a green card applicant would make of this future eligibility." *Id.* at 237.

C. Challenging the 2019 Public Charge Rule

Notwithstanding that the 2019 rule affected only a narrow group of people, almost none of whom have previously used public benefits, a score of outraged

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[1] A lawful permanent resident—already admitted to the U.S. and thus eligible for select public benefits—could also be subject to the 2019 rule if the individual left the United States for more than 180 days, which would bring his residency in to question and prompt the need to seek admission upon returning. *See Cook County*, 962 F.3d at 236 (Barrett, J., dissenting).

entities challenged the rule.[2] In late 2019, district courts in the Second, Fourth, Seventh, and Ninth Circuits all preliminarily enjoined the rule's enforcement. *See New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 353 (S.D.N.Y. 2019); *CASA de Md., Inc. v. Trump*, 414 F. Supp. 3d 760, 788 (D. Md. 2019); *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1014 (N.D. Ill. 2019); *City & County of San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1073 (N.D. Cal. 2019); *Washington v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 1191, 1224 (E.D. Wash. 2019). A divided motions panel of this court stayed the injunctions issued in this circuit in a published opinion, thereby allowing the rule to go into effect. *City & County of San Francisco v. USCIS*, 944 F.3d 773, 7 81 (9th Cir. 2019). Likewise, the Fourth Circuit stayed the preliminary injunction in its circuit. *CASA de Md., Inc.*, 971 F.3d at 237. The Second and Seventh Circuits initially denied stays, but the Supreme Court stepped in and stayed the preliminary injunctions issued in those circuits as well. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599 (2020);*Wolf v. Cook County*, 140 S. Ct. 681, 681 (2020). In sum, although the plaintiffs had a nice run of initial successes

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[2] The states challenging the rule alleged injury in the form of resident noncitizens, confused by the language of the rule, unnecessarily disenrolling from state public benefits. *See New York*, 969 F.3d at 59–60. DHS explained that the new rule would actually save the states money because they would be paying out less in public benefits. *Id.* at 60. The challenging states didn't disagree that the rule would directly save them money, but countered with a response that would delight salespeople everywhere: sometimes you have to spend money to save it. *Id.*; *see also City & County of San Francisco*, 981 F.3d at 755.

challenging the rule, by early 2020, all the injunctions against the rule had been stayed and the rule was in effect nationwide.

Undeterred by the Supreme Court's signal that challenges to the rule were ultimately likely to fail on the merits, lower courts continued to hammer away. The Second Circuit in continuing litigation affirmed the issuance of its circuit's preliminary injunction (with a limited scope), as did divided panels in the Seventh Circuit and this circuit. *See New York*, 969 F.3d at 50 (affirming the preliminary injunction, but with a limited scope); *Cook County*, 962 F.3d at 215; *City & County of San Francisco*, 981 F.3d at 763 (affirming preliminary injunctions, but with a limited scope). But a divided Fourth Circuit panel reversed, noting that the Supreme Court's stay in other circuits' proceedings "would have been improbable if not impossible had the government, as the stay applicant, not made a strong showing that it was likely to succeed on the merits." *CASA de Md., Inc.*, 971 F.3d at 229 (citation and internal quotation marks omitted).

Meanwhile, back in the Seventh Circuit, having moved on from the preliminary injunction stage to the merits phase of litigation, the Northern District of Illinois on November 2, 2020 entered a Rule 54(b) final judgment against the federal government and vacated the rule in its entirety. *Cook County v. Wolf* , No. 1:19-cv-06334, 2020 WL 6393005, at *6–7 (N.D. Ill. Nov. 2, 2020). Notwithstanding the Supreme Court's stay of its earlier preliminary injunction, the district court denied the government's request to stay the vacatur of the rule. *Id.* The Seventh Circuit, perhaps more

experienced at reading the Supreme Court, stepped in and stayed implementation of the district court's judgment pending appeal. Order Granting Motion to Stay Judgment, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Nov. 19, 2020), ECF No. 21.

While all this was going on, the federal government filed multiple petitions for certiorari seeking Supreme Court review of the Second, Seventh, and Ninth Circuit decisions concluding that the rule was likely unlawful. As these petitions were pending, President Biden took office in January 2021. Almost exactly a month later, the Supreme Court on February 22, 2021 granted review of the Second Circuit's case. *See Dep't of Homeland Sec. v. New York*, No. 20-449, 2021 WL 666376, at *1 (U.S. Feb. 22, 2021). While obviously one can never fully predict how the Supreme Court is going to decide a case, the Supreme Court's earlier stays—combined with its later cert grant of a lower court decision at odds with those stays —did not bode well for opponents of the rule.

D. DHS's Rapid Dismissal of the Litigation

One of those opponents was the new Biden Administration, which put the federal government in the awkward position of having a case teed up before the Supreme Court that it knew it was likely to win, but now really wanted to lose. So in the early hours of March 9, 2021, despite the Supreme Court having granted certiorari just two weeks prior in a related case that the government had asked the Court to review, DHS in coordination with the plaintiffs moved to dismiss the Seventh Circuit appeal of the district

court's vacatur of the rule.[3] Approximately an hour and a half later, DHS released a statement explaining that "the Department of Justice will no longer pursue appellate review of judicial decisions invalidating or enjoining enforcement of the 2019 Rule."[4] With a reaction time the envy of every appellate court, the Seventh Circuit only a few hours after DHS's statement granted the motion to dismiss and immediately issued the mandate.[5] Later that same evening, DHS issued another statement noting that "[f]ollowing the Seventh Circuit dismissal this afternoon, the final judgment from the Northern District of Illinois, which vacated the 2019 public charge rule, went into effect." It continued that "[a]s a result, the 1999 interim field guidance on the public charge inadmissibility provision (i.e., the [Clinton-era] policy that was in place before the 2019 public charge rule) is now in effect."[6] A little over 24 hours later, the

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[3] *See* Unopposed Mot ion to Voluntarily Dismiss Appeal, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021), ECF No. 23.

[4] Press Release, U.S. Dep't of Homeland Sec., DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility.

[5] Order Dismissing Appeal, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021), ECF No. 24-1; Notice of Issuance of Mandate, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021), ECF No. 24-2.

[6] Press Release, U.S. Dep't of Homeland Sec., DHS Secretary Statement on the 2019 Public Charge Rule(Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule.

parties filed a joint stipulation to dismiss the case in the Northern District of Illinois.[7] The district court closed the case the following day.[8]

On the same day it dismissed its Seventh Circuit appeal, the federal government, now BFFs with its prior opponents, also filed joint stipulations to dismiss all the cases pending before the Supreme Court, including the Second Circuit case in which the Supreme Court had already granted cert.[9] Consistent with the Supreme Court's Rule 46.1, which allows automatic dismissal of a case by unanimous agreement of the parties, the Clerk of the Supreme Court, "without further reference to the Court," dismissed those cases. Sup. Ct. R 46.1.[10]

In the afternoon of that same day, March 9, 2021, the parties also moved to dismiss their case in the

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[7] Joint Stipulation of Dismissal with Prejudice, *CookCounty v. Wolf*, No. 19-cv-6334 (N.D. Ill. Mar. 11, 2019), ECF No. 253.

[8] Notification of Docket Entry, *Cook County v. Wolf*, No. 19-cv-6334 (N.D. Ill. Mar. 12, 2019), ECF No. 254.

[9] Joint Stipulation to Dismiss, *U.S. Dep't of Homeland Sec. v. New York*, No. 20-449 (U.S. Mar. 9, 2021); Joint Stipulation to Dismiss, *Mayorkas v. Cook County* , No. 20-450 (U.S. Mar. 9, 2021); Joint Stipulation to Dismiss, *USCIS v. City & County of San Francisco*, No. 20-962 (U.S. Mar. 9, 2021).

[10] *Mayorkas v. Cook County*, No. 20-450, 2021 WL 1081063 (U.S. Mar. 9, 2021); *USCIS v. City & County of San Francisco*, No. 20-962, 2021 WL 1081068 (U.S. Mar. 9, 2021); *Dep't of Homeland Sec. v. New York*, No. 20-449, 2021 WL 1081216 (U.S. Mar. 9, 2021).

Fourth Circuit.[11] The Fourth Circuit granted the unopposed motion and issued the mandate two days later, on March 11, 2021, noting the lack of opposition.[12]

On that same day—March 11, 2021, only two days after the federal government's volte-face—fourteen states[13] responded in the Seventh and Fourth Circuits to the parties' synchronized blitzkrieg, collectively filing a Motion to Recall the Mandate to Permit Intervention as Appellant, an Opposed Motion to Reconsider, or alternatively, Rehear, a Motion to Dismiss, and an Opposed Motion to Intervene.[14] The

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[11] *See* Unopposed Motion to Voluntarily Dismiss Appeal, *CASA de Md. v. Biden*, No. 19-2222 (4th Cir. Mar. 9, 2021), ECF No. 210.

[12] *See* Order, *CASA de Md. v. Biden*, No. 19-2222 (4th Cir. Mar. 11, 2021), ECF No. 211; Rule 42(b) Mandate, *CASA de Md. v. Biden*, No. 19-2222 (4th Cir. Mar. 11, 2021), ECF No. 212.

[13] The states are Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia. The day before, on March 10, 2021, the states of Arizona, Alabama, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Montana, Oklahoma, Texas, and West Virginia, filed the Motion to Intervene now denied by this panel. *See* Motion to Intervene, *City and County of San Francisco v. USCIS*, Nos. 19-17213, 19-17214, 19-35914 (9th Cir. Mar. 10, 2021) . South Carolina and Missouri subsequently moved to join the motion before our court.

[14] *See* Motion to Recall the Mandate to Permit Intervention as Appellant, Opposed Motion to Reconsider, or in the Alternative to Rehear, the Motion to Dismiss, Opposed Motion to Intervene-Appellants, *Cook County v. Wolf*, No. 20-3150, (7th Cir. Mar. 11, 2021), ECF Nos. 25-1, 25-2, 25-3; Motion to Recall the Mandate to

states explained that "[b]ecause the Court issued its mandate within hours of the United States' announcement that it would no longer defend the Rule, interested parties had no ability to intervene before it did so," and "because the United States did not inform the States that it intended to cease defending the Rule before abandoning numerous cases supporting the Rule nationwide, the States did not have an opportunity to intervene at an earlier point."[15]

The Seventh Circuit summarily denied the states' motions on March 15, 2021,[16] coincidentally the same day that DHS issued a final rule removing the 2019 rule. The Fourth Circuit also summarily denied the states' motions on March 18, 2021.[17] On March 19, 2021, having been denied intervention or any other relief by the Seventh Circuit, the states asked the Supreme Court to order intervention or grant

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Permit Intervention as Appellant, Opposed Motion to Reconsider, or in the Alternative to Rehear, the Motion to Dismiss, Opposed Motion for Leave to Intervene-Appellants, *CASA de Md. v. Biden*, No. 19-2222 (4th Cir. Mar. 11, 2021), ECF Nos. 213, 214, 215.

[15] *See* Motion to Recall the Mandate t o Permit Intervention as Appellant, *Cook County v. Wolf*, No. 20-3150, (7th Cir. Mar. 11, 2021), ECF Nos. 25-1, at 4.

[16] *See* Order Denying Motions, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 15, 2021), ECF No. 26.

[17] *See* Order Denying Motions, *CASA de Md. v. Biden*, No. 19-2222 (4th Cir. Mar. 18, 2021), ECF No. 216.

alternative relief that would allow them to revive the lower court litigation.[18]

E. DHS's Rescission of the 2019 Rule

On March 15, 2021, DHS issued a final rule "remov[ing] the regulations resulting from [the 2019 rule], which has since been vacated by a Federal district court."[19] Notably, it issued the final rule without a notice and comment period or delayed effective date, stating instead that it was promulgating a rule that was already in effect: "[t]his rule is effective on March 9, 2021, as a result of the district court's vacatur." It explained that "[b]ecause this rule simply implements the district court's vacatur of the August 2019 rule, as a consequence of which the August 2019 rule no longer has any legal effect, DHS is not required to provide notice and comment or delay the effective date of this rule." Accordingly, there was "good cause" to "bypass[] any otherwise applicable requirements of notice and comment and a delayed effective date" as "unnecessary for implementation of the court's order vacating the rule . . . in light of the agency's immediate need to implement the now-effective final judgment."[20]

This is the background against which we are presented the instant motion to intervene. Arguing

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[18] *See* Application for Leave to Intervene & for a Stay of Judgment, *Texas v. Cook County*, No. 20A150 (U.S. Mar. 19, 2021).

[19] Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021) (to be codified at 8 C.F.R. pts. 103, 106, 212–14, 245, 248).

[20] *Id.* at 14,221.

that the federal government managed to snatch defeat from the jaws of victory only by naked capitulation, the states ask for an opportunity to pick up the football and step into the federal government's shoes, just as the formerly adversarial parties are walking off the field together, hand- in-hand, celebrating their "win-win." Meanwhile, the plaintiffs and feds, only months ago bitter enemies, collectively press us to deny intervention. The game is over, they say. You can't put Humpty Dumpty back together again. The horse hasn't just left the barn—it's dead, and never coming back.

II. Analysis

The federal government and the plaintiffs have certainly played their hand well. Not only have they gotten rid of a rule they dislike, but they've done so in a way that allowed them to dodge the pesky requirements of the APA *and* ensure that it will be very difficult for any future administration to promulgate another rule like the 2019 rule. But putting aside one's view of the merits of the rule itself, that doesn't seem like a good thing for good government. Leveraging a single judge's ruling into a mechanism to avoid the public participation in rule changes envisioned by the APA should trouble pretty much everyone, one would hope. Especially when the legal validity of that ruling is highly suspect and left untested only because of the collusive actions of the parties. Left unchecked, it seems quite likely this will become the mechanism of choice for future administrations to replace disfavored rules with prior favored ones.

But of course, just because something is bad policy doesn't always mean there is a legal basis to challenge it. Ultimately, the question currently before this panel is whether the states should be allowed to intervene—that is, not whether they should win the game, but just whether they should be allowed to play. That question is controlled by a well-established standard that favors intervention. As explained below, I think the states have easily met that standard here.

A. The States Meet the Intervention Standard

The states' motion to intervene is governed by Federal Rule of Civil Procedure 24. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007). Per Rule 24(a)(2), applicants can intervene in an action as of right when they meet the following four requirements:

> (1) the intervention application is timely;
> (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest.

Prete v. Bradbury , 438 F.3d 949, 954 (9th Cir. 2006) (citation and internal quotation marks omitted); *see also* Fed. R. Civ. P. 24(a)(2). When determining whether these four "requirements are met, we normally

follow 'practical and equitable considerations' and construe the Rule 'broadly in favor of proposed intervenors.'" *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc) (citation omitted).

To evaluate intervention's timeliness, "we consider (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Peruta v. County of San Diego*, 824 F.3d 919, 940 (9th Cir. 2016) (en banc) (citation and internal quotation marks omitted). If a putative intervenor moves promptly to intervene when it becomes clear that their interests "would no longer be protected . . . there is no reason why [the intervention] should not be considered timely." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394–95 (1977). The states here moved to intervene in the public charge cases within mere days of the federal government making public that it no longer sought to defend the rule. The plaintiffs and the federal government argue against intervention by contending that "[n]either practical nor equitable concerns justify intervention at this late stage in the litigation." But this is hardly the typical case where putative intervenors sat on their hands until the eleventh hour. Instead, the federal government robustly defended the rule for more than a year in courts across the nation before suddenly acquiescing in its vacatur and dismissing all the public charge cases without prior notice. Because the states quickly intervened when they discovered that the federal government had abandoned their interests, and the federal government

has asserted no apparent prejudice in allowing intervention, the motion to intervene is timely.

The states also have a "significant protectable interest" in the continuing validity of the rule because invalidating the rule could cost the states as much as $1.01 billion annually.[21] The federal government contends that in lieu of joining this litigation, the states can vindicate their interests by participating in an agency review process or asking the agency to promulgate a new rule. This argument might have had more merit had the federal government followed the traditional route of asking the courts to hold the public charge cases in abeyance, rescinding the rule per the APA, and then promulgating a new rule through notice and comment rulemaking. But instead, the federal government intentionally avoided the APA entirely by acquiescing in a final district court judgment and altering the federal regulations by unilaterally reinstating the 1999 field guidance. *See* 86 Fed. Reg. at 14,221 ("This rule removes from the Code of Federal Regulations. . . the regulatory text that DHS promulgated in the August 2019 rule and restores the regulatory text to appear as it did prior to the issuance of the August 2019 rule."). Its carefully coordinated actions effectively removed the Trump-era rule and installed the Clinton-era guidance as the de facto new rule—without any formal agency rulemaking or meaningful notice to the public. By deliberately evading the administrative process in this way, the

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[21] Motion to Intervene by the States at 1, 3–5, *City & County of San Francisco v. USCIS*, 981 F.3d 742 (9th Cir. 2021) (Nos. 19-17213, 19-17214, 19-35914).

government harmed the state intervenors by preventing them from seeking any meaningful relief through agency channels. The courts can and should remedy this procedural harm. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("When a litigant is vested with a procedural right, that litigant has standing if the re is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.").

The disposition of this action, together with the federal government's other coordinated efforts to eliminate the rule while avoiding APA review, will impair or impede the states' ability to protect their interest in the 2019 rule's estimated annual savings discussed above. And the existing parties obviously do not adequately represent the states' interests because they are now united in vigorous *opposition* to the rule. *See Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) ("The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties.").

Against the states' arguments in favor of intervention, the federal government and plaintiffs have one main response: this case is moot because the court cannot offer adequate relief now that the 2019 rule has been vacated by a different federal judge in a different circuit.

"The party asserting mootness bears the burden of establishing that there is no effective relief that the court can provide." *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006). "That burden is 'heavy';

a case is not moot where *any* effective relief may be granted." *Id*. (emphasis in original) (citation omitted).

The parties opposing intervention have failed to meet their "heavy" burden here. *Id.* (citation omitted). As the states explain, they could obtain effective relief because they currently have an action pending before the Supreme Court asking that Court to order the Seventh Circuit to reverse or stay the vacatur of the rule. If successful, that would remove any obstacle to the states ultimately getting relief in this court. *See Allied Concrete & Supply Co. v Baker*, 904 F.3d 1053, 1066 (9th Cir. 2018) (distinguishing moot cases where the underlying litigation had concluded from cases where "a potential petition for rehearing or certiorari keeps a case alive"). Indeed, *if* the states are successful in their current request that the Supreme Court stay the Seventh Circuit's vacatur of the rule, given our denial of their intervention here the states will be left with no way to prevent one of the district courts in our circuit from immediately imposing a nationwide preliminary injunction of the rule or, worse, vacating the rule (again). The horse may have left the barn, but the rumors of its death are, if not greatly exaggerated, at least premature.

Since this case is not moot, I would have granted the states' intervention motion because now that the federal government has abandoned the field, only the states themselves can present their arguments in favor of the rule to the Court. By denying the motion to intervene, we are sanctioning a collude-and-circumvent tactic by the parties, who clearly now share the same agenda. *Cf. Knox v. Serv. Emp. Int'l Union, Loc. 1000*,

567 U.S. 298, 307 (2012) (warning that "postcertiorari maneuvers designed to insulate a decision from review by [the Supreme] Court must be viewed with a critical eye").

There is a final reason why intervention is especially warranted in this case. By granting two stays (and a later petition for certiorari), the Supreme Court repeatedly indicated that the United States had "made a strong showing that [it was] likely to succeed on the merits" in its defense of the rule. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). Absent intervention, the parties' strategic cooperative dismissals preclude those whose interests are no longer represented from pursuing arguments that the Supreme Court has already alluded are meritorious. Even more concerning, the dismissals lock in a final judgment and a handful of presumptively wrong appellate court decisions in multiple circuits, and circumvent the APA by avoiding formal notice-and-comment procedures. *See Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transp. Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1180 (9th Cir. 2021) (noting that among "the most fundamental of the APA's procedural requirements" is the requirement that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments for the agency's consideration" (citation and internal quotation marks omitted)). The United States' evasion of one of the APA's most fundamental requirements, especially on such shaky grounds as a district court decision that never withstood the crucible of full appellate review, further supports intervention here.

B. *Munsingwear* Vacatur?

There is truth to the federal government's and plaintiffs' arguments in opposition to intervention that, as things currently stand, the Ninth Circuit's Public Charge cases have been relegated to little more than a rearguard action. So long as the 2019 rule itself remains vacated nationwide by a single judge in the Seventh Circuit, not much can be done in this circuit to affect that. While that doesn't technically make this case moot for purposes of our intervention analysis, it does highlight the expansive reach of the parties' coordinated actions, and how impressively effective those actions are at preventing anyone or any single court from unwinding their multifaceted, calculated capitulation and avoidance of the APA. They really have smashed Humpty Dumpty into pieces spread across the nation, and there isn't a single court (or future administration) that can do much about it.

Except the one court that has yet to address the states' arguments: the Supreme Court. First, the Supreme Court obviously could allow the states to intervene in the Seventh Circuit litigation and defend the 2019 rule in place of the federal government. But I think there may be a simpler solution here that would not only address what has happened with respect to the Public Charge rule but, perhaps more importantly, would encourage future administrations to change rules—not through collusive capitulation—but via the familiar and required APA rulemaking process Congress created for that purpose.

The solution is that the Supreme Court could simply clarify that *Munsingwear* vacatur of lower court

decisions and judgments is appropriate in this circumstance where the federal government and the plaintiffs jointly mooted litigation by acquiescing in a judgment against the government, which then prevented the normal APA process for removing or replacing a formal rule. Under *Munsingwear*, when a civil case is mooted while on appeal to the Supreme Court, "[t]he established practice" is "to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). "Because this practice is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (citation omitted).

For instance, "[v]acatur is in order when mootness occurs through . . . the 'unilateral action of the party who prevailed in the lower court.'" *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71–72 (1997) (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994)). This is to prevent a party from securing "a favorable judgment, tak[ing] voluntary action that moots the dispute, and then retain[ing] the benefit of the judgment." *Arizonans for Off. Eng.*, 520 U.S. at 75 (alterations omitted). By requiring that the lower court judgment be vacated under those circumstances, *Munsingwear* "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 41. That's why vacatur in such circumstances is "generally 'automatic.'" *NASD Dispute Resol., Inc. v. Jud. Council of State of Cal.*, 488 F.3d 1065, 1068 (9thCir. 2007) (citation omitted).

But under the *Bancorp* exception to *Munsingwear*, courts usually won't vacate lower court decisions when the *appellant's* voluntary actions moot the appeal. *See Bancorp*, 513 U.S. at 25. The reason for that is straightforward: generally, if a party lost below, but does something intentional to moot its case while the appeal is pending, you don't need to worry about that losing party deliberately mooting the case on appeal *so that* it can "retain the benefit of the judgment" without risking a future adverse decision. For the party that *lost* below, there isn't generally any "benefit of the judgment" to be retained. If the losing party voluntarily moots the case on appeal, it is invariably for some reason other than trying to manipulate the court system to lock in favorable precedent while insulating that precedent from further review. That is why, in reliance on *Bancorp*, courts rarely *Munsingwear* vacate a lower court decision when the parties voluntarily settle a case. *See generally id.* In those situations, "[t]he judgment is not unreviewable, but simply unreviewed by [the losing party's] own choice." *Id.* Those appellants "voluntarily forfeited [their] legal remedy by the ordinary process of appeal or certiorari, thereby surrendering [their] claim to the equitable remedy of vacatur." *Id.*

The federal government's coordinated settlement of the Public Charge cases falls within the technical parameters of the *Bancorp* exception to *Munsingwear* vacatur because the federal government was the appellant in these cases. But the uniquely inequitable circumstances facing the intervening states here, together with the government's maneuvering precisely so that it could retain the benefit of some questionable

judgments it now really likes, demonstrates that this situation clearly falls far outside any reasonable rationale for *Bancorp*'s exception to *Munsingwear*'s normal rule. The settlements that the states seek to challenge are a transparent attempt by a new federal administration and its prior litigation opponents to not only rid the federal government of a now-disfavored rule, but also to avoid the APA's procedures in changing that rule *and* force any future administration that wants to enact a similar rule to fight against the strong headwinds of dubious Ninth, Seventh, and Second Circuit precedent. This is, in short, precisely an example of a party "tak[ing] voluntary action that moots the dispute, and then retain[ing] the benefit of the judgment." *Arizonans for Off. Eng.*, 520 U.S. at 75 (alterations omitted).

Because both *Munsingwear* and *Bancorp* turn on equity—and even *Bancorp* notes that "exceptional circumstance[s] may . . . counsel in favor of . . . vacatur" when parties settle, *Bancorp*, 513 U.S. at 29—the Supreme Court should make clear that the *Bancorp* exception to *Munsingwear*, which usually counsels against vacating a judgment where the appellant's voluntary actions mooted the appeal, does *not* apply in this circumstance. The states' proceedings before the Supreme Court seem like a perfect vehicle for the Court to address this unique situation where a new administration doesn't like a duly enacted rule and attempts to insulate the lower court's judgment vacating the disfavored rule from further appellate review.

Clarifying that all lower court decisions and judgments should be vacated under these circumstances would have both immediate and long-term salutary effects. First, the current administration will be required to do what every administration before it did with existing rules they didn't like—promulgate a new rule subject to all of the procedural protections provided by the APA. Second, the thicket of suspect lower-court precedents created by the Public Charge litigation, which the Supreme Court seemed poised to correct before the parties' voluntary dismissal, would be cleared away instead of remaining as a calcified obstacle to future executive discretion. And third, future administrations (and courts, and challengers) will be incentivized to follow the APA's rules, rather than attempt procedural workarounds that eliminate the public's participation in administrative rulemaking.[22]

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[22] There is one additional reason why *Munsingwear* vacatur of the lower courts' decisions would be particularly appropriate in the context of the Public Charge rule. By design, the federal government's and plaintiffs' coordinated dismissals act to replace the Trump Administration's Public Charge rule with the Clinton Administration's Public Charge "guidance." Press Release, U.S. Dep't of Homeland Sec., DHS Secretary Statement on the 2019 Public Charge Rule (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule. As discussed, under the Clinton-era guidance, a noncitizen who is *entirely* dependent on in kind government support—for food, housing, medical care, etc.—cannot be considered a "public charge" unless he also receives cash benefits. That seems like it might run into problems under the APA. But the government's circumvention of the APA allowed it to slip back into applying the old guidance without even needing to take that into consideration.

Our court should have allowed the states to intervene in these suits. But one hopes that maybe our incorrect denial of intervention may be as inconsequential as the panel majority's prior incorrect opinion, once the Supreme Court makes clear that our dirty slate must be wiped clean under *Munsingwear*—and with it, all its inequitable repercussions.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-17213

D.C. No. 4:19-cv-04717--PJH

[Filed: December 2, 2020]

CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SANTA CLARA,	)
Plaintiffs-Appellees,	)
v.	)
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; CHAD F. WOLF, in his official capacity as Acting Secretary of the United States Department of Homeland Security; KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services,	)
Defendants-Appellants.	)

No. 19-17214

D.C. No. 4:19-cv-04975-PJH

STATE OF CALIFORNIA; DISTRICT OF COLUMBIA; STATE OF MAINE; COMMONWEALTH OF PENNSYLVANIA; STATE OF OREGON, *Plaintiffs-Appellees*,	)
v.	)
U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; CHAD F. WOLF, in his official capacity as Acting Secretary of the United States Department of Homeland Security; KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services, *Defendants-Appellants.*	)

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, Chief District Judge, Presiding

No. 19-35914

D.C. No. 4:19-cv-05210-RMP

STATE OF WASHINGTON; COMMONWEALTH OF VIRGINIA; STATE OF COLORADO; STATE OF DELAWARE; STATE OF ILLINOIS; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; DANA NESSEL,Attorney General on behalf of the People of Michigan; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF RHODE ISLAND; STATE OF HAWAII,	)
Plaintiffs-Appellees,	)
v.	)
U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; CHAD F. WOLF, in his official capacity as Acting Secretary of the United States Department of Homeland Security; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services,	)
Defendants-Appellants.	)

OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Rosanna Malouf Peterson, District Judge, Presiding

Argued and Submitted September 15, 2020
San Francisco, California

Filed December 2, 2020

Before: Mary M. Schroeder, William A. Fletcher, and Lawrence VanDyke, Circuit Judges.

Opinion by Judge Schroeder;
Dissent by Judge VanDyke

SUMMARY[*]

Immigration

In cases in which two district courts issued preliminary injunctions enjoining implementation of the Department of Homeland Security's redefinition of the term"public charge," which describes a ground of inadmissibility, the panel: 1) affirmed the preliminary injunction of the District Court for the Northern District of California covering the territory of the plaintiffs; and 2) affirmed in part and vacated in part the preliminary injunction of the District Court for the Eastern District of Washington, vacating the portion of the injunction that made it applicable nationwide.

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[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Under 8 U.S.C. § 1182(a)(4)(A), any alien who, in the opinion of the Secretary of Homeland Security, at the time of application for admission or adjustment of status, is likely at any time to become a "public charge," is inadmissible. No statute has ever defined the term. In 1999, the Immigration and Naturalization Service issued guidance (Guidance) defining the term as one who "is or is likely to become primarily dependent on the government for subsistence." The Guidance expressly excluded non-cash benefits intended to supplement income.

In August 2019, the Department of Homeland Security (DHS) issued a rule (the Rule) that defines "public charge" to include those who are likely to participate, even for a limited period of time, in non-cash federal government assistance programs. The Rule defines the term "public charge" to mean "an alien who receives one or more [specified] public benefits . . . for more than 12 months in the aggregate within any 36-month period." Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019). The Rule also directs officials to consider English proficiency in making the public charge determination.

States and municipalities brought suits in California and Washington, asserting claims under the Administrative Procedure Act. The District Court for the Northern District of California issued a preliminary injunction covering the territory of the plaintiffs, and the District Court for the Eastern District of Washington issued a nationwide injunction. A divided motions panel of this court granted DHS's motion for a stay of those injunctions pending appeal.

The panel first concluded that the plaintiffs had established Article III standing. The plaintiffs are states and municipalities that alleged that the Rule is causing them continuing financial harm, as lawful immigrants eligible for federal cash, food, and housing assistance withdraw from these programs and instead turn to state and local programs. The panel concluded that this constituted sufficient injury. Addressing whether the injury is apparent or imminent, the panel explained that: 1) the Rule itself predicts a 2.5 percent decrease in enrollment in federal programs and a corresponding reduction in Medicaid payments of over one billion dollars per year; 2) the Rule acknowledges that disenrollment will cause other indirect financial harm to state and local entities; and 3) declarations in the record show that such entities are already experiencing disenrollment.

Next, the panel concluded that the interest of the plaintiffs in preserving immigrants' access to supplemental benefits is within the zone of interests protected by the "public charge" statute. The panel rejected DHS's suggestion that only the federal government and individuals seeking to immigrate are within the zone of interest. The panel also rejected DHS's suggestion that the purpose of the public charge statute is to reduce immigrants' use of public benefits. Addressing DHS's contention that the statute's overall purpose is to promote self-sufficiency, the panel concluded that providing access to better health care, nutrition, and supplemental housing benefits is consistent with precisely that purpose.

The panel next concluded that the plaintiffs had demonstrated a high likelihood of success in showing that the Rule is inconsistent with any reasonable interpretation of the public charge statute and therefore contrary to law. The plaintiffs pointed to repeated congressional reenactment of the provision after it had been interpreted to mean long-term dependence on government support, noting that the statute had never been interpreted to encompass temporary resort to supplemental non-cash benefits. The plaintiffs contended that this repeated reenactment amounted to congressional ratification of the historically consistent interpretation.

The panel concluded that the history of the provision supported the plaintiffs' position, noting that: 1) from the Victorian Workhouse through the 1999 Guidance, the concept of becoming a "public charge" has meant dependence on public assistance for survival; 2) the term had never encompassed persons likely to make short-term use of in-kind benefits that are neither intended nor sufficient to provide basic sustenance; and 3) the Rule introduces a lack of English proficiency. The panel also noted that the opinions of the Second Circuit and the Seventh Circuit, in affirming preliminary injunctions of the Rule, agreed that the Rule's interpretation was outside any historically accepted or sensible understanding of the term.

The panel next concluded that the Rule's promulgation was arbitrary and capricious, explaining that DHS: 1) failed to adequately consider the financial effects of the Rule; 2) failed to address concerns about

the Rule's effect on public safety, health, and nutrition, as well its effect on hospital resources and vaccination rates in the general population; and 3) failed to explain its abrupt change in policy from the 1999 Guidance.

The panel also concluded that the remaining preliminary injunction factors favored the plaintiffs. The panel explained that the plaintiffs had established that they likely are bearing and will continue to bear heavy financial costs because of withdrawal of immigrants from federal assistance programs and consequent dependence on state and local programs. The panel also observed that the public interest in preventing contagion is particularly salient during the current global pandemic, and noted the financial burdens on the plaintiffs and the adverse effects on the health and welfare of the immigrant as well as general population.

Finally, the panel concluded that a nationwide injunction was not appropriate in this case because the impact of the Rule would fall upon all districts at the same time, and the same issues regarding its validity have been and are being litigated in multiple federal district and circuit courts. Accordingly, the panel vacated that portion of the District Court for the Eastern District of Washington's injunction making it applicable nationwide.

Dissenting, Judge VanDyke, wrote that for the reasons ably articulated by this court in a December 2019 published opinion in this case, by the Fourth Circuit in *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220 (4th Cir. 2020), and by a dissenting Seventh Circuit judge in *Cook County v. Wolf*, 962 F.3d 208,

234–54 (7th Cir. 2020) (Barrett, J., dissenting)—and implied by the Supreme Court's multiple stays this year of injunctions virtually identical to those the majority today affirms—he must respectfully dissent.

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OPINION

SCHROEDER, Circuit Judge:

The phrase "public charge" enjoys a rich history in Anglo-American lore and literature, one more colorful than our American law on the subject. There have been relatively few published court decisions construing the phrase, even though our immigration statutes have barred admission to immigrants who are likely to become a "public charge" for more than a century. Until recently, the judicial and administrative guidance has reflected the traditional concept—rooted in the English Poor Laws and immortalized by Dickens in the workhouse of *Oliver Twist*—of incapacity and reliance on public support for subsistence. The first comprehensive federal immigration law barred entry to "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." Immigration Act of 1882, 22 Stat. 214,

Chap. 376 § 2 (1882). The 1999 Guidance (the Guidance) issued by the Immigration and Naturalization Service (INS), the predecessor of the current agency, defined a "public charge" as one who "is or is likely to become primarily dependent on the government for subsistence." *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999).

In 2019, the Department of Homeland Security (DHS) changed direction, however, and issued a rule (the Rule) that defines the term to include those who are likely to participate, even for a limited period of time, in non-cash federal government assistance programs. The programs designated by the Rule are not intended to provide for subsistence but instead to supplement an individual's ability to provide for basic needs such as food, medical care, and housing. 8 C.F.R. § 212.21(b). Foreseeable participation for an aggregate of twelve months in any of the federal programs within a three-year span renders an immigrant inadmissible as a public charge and ineligible for permanent resident status. § 212.21(a). In other words, a single mother with young children who DHS foresees as likely to participate in three of those programs for four months could not get a green card.

Litigation followed in multiple district courts against DHS and U.S. Citizenship and Immigration Services (USCIS) as states and municipalities recognized that the immediate effect of the Rule would be to discourage immigrants from participating in such assistance programs, even though Congress has made them available to immigrants who have been in the

country for five years. According to the plaintiffs in those cases, the Rule's effect would be to increase assistance demands on state and local governments, as their resident immigrants' overall health and welfare would be adversely affected by non-participation in federal assistance programs.

The challenges to the Rule in the district courts resulted in a chorus of preliminary injunctions holding the Rule to be contrary to law and arbitrary and capricious under the Administrative Procedure Act (APA). 5 U.S.C. § 706(2)(A). These included the two preliminary injunctions before us, one issued by the District Court for the Northern District of California (Northern District) covering the territory of the plaintiffs, and the other by the District Court for the Eastern District of Washington (Eastern District) purporting to apply nationwide. Our court became the first federal appeals court to weigh in when we granted DHS's motion for a stay of those injunctions pending appeal. *City and Cnty. of San Francisco v. USCIS*, 944 F.3d 773, 781 (9th Cir. 2019). Preliminary injunctions were also issued by courts in the Northern District of Illinois and the Southern District of New York, and they were stayed by the United States Supreme Court before appeals could be considered by the circuit courts of appeals.

When the Seventh Circuit and the Second Circuit did consider those preliminary injunction appeals, both courts affirmed the injunctions. Although their reasoning differed in some respects, both circuits concluded that the Rule's definition was both outside any historic or commonly understood meaning of

"public charge," and arbitrary and capricious, in concluding that short-term reliance on supplemental benefits made immigrants dependent on public assistance within the meaning of the statutory public charge immigration bar. *Cook Cnty., Ill. v. Wolf*, 962 F.3d 208, 229, 232–33 (7th Cir. 2020); *New York v. DHS*, 969 F.3d 42, 80–81 (2nd Cir. 2020). The Second Circuit opinion was unanimous, while a dissenting opinion in the Seventh Circuit agreed with DHS that those who receive such supplemental benefits could be considered public charges because, by receiving some assistance, they are not completely self-sufficient. *Cook Cnty.*, 962 F.3d at 250–51 (Barrett, J., dissenting).

The district court in Maryland also enjoined enforcement of the Rule and was reversed by a divided decision of the Fourth Circuit. The majority looked in large measure to the fact that the Supreme Court had stayed the injunctions in the Seventh and Second Circuits. *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 230 (4th Cir. 2020). In dissent, Judge King viewed the Rule as outside the longstanding meaning of "public charge" and would have affirmed the injunction. He also disagreed with the majority about the significance of the Supreme Court's stay, explaining that "[i]f the Court's decision to grant a stay could be understood to effectively hand victory to the government regarding the propriety of a preliminary injunction, there would be little need for an intermediate appellate court to even consider the merits of an appeal in which the Court has granted a stay." *Id.* at 281 n.16 (King, J., dissenting) (citing *Cook Cnty.*, 962 F.3d at 234).

To understand the reason for this recent cascade of litigation after a relatively quiescent statutory and regulatory history, we review the historical background of the Rule. Such a review reveals the extent to which the Rule departs from past congressional and administrative policies.

A. Statutory and Administrative Background

This country has had a federal statutory provision barring the admission of persons likely to become a "public charge" since 1882. The Immigration Act of 1882 barred entry to, among others, "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." The Immigration and Nationality Act now provides that "[a]ny alien who, . . . in the opinion of the [Secretary of Homeland Security] 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). No statute has ever defined the term. For over a century, agencies have routinely applied these provisions in determining admissibility and removal as well as in issuing visas for entry.

In 1996, however, Congress amended the statute to add five factors for agencies to consider in determining whether an individual is likely to be a public charge: the non-citizen's age; health; family status; assets, resources and financial status; and education and skills. § 1182(a)(4)(B)(i). Congress also included a provision requiring applicants to produce an affidavit of support. *See* § 1182(a)(4)(C)–(D) (requiring most

family-sponsored immigrants to submit affidavits of support); § 1183a (affidavit of support requirements).

At nearly the same time, Congress enacted major reforms of public benefit programs that, as relevant here, made only non-citizens with five or more years of residency in the United States eligible for public benefits such as Supplemental Nutrition Assistance Program (SNAP) and Medicaid. Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105, 2265 (1996). Previously, lawful immigrants had generally been eligible for such benefits. Congress thus simultaneously reduced the number of immigrants eligible for this assistance and spelled out the factors to be considered in a public charge determination. The fact that Congress delineated the factors relevant to the public charge determination at the same time it adjusted certain immigrants' eligibility to receive specific supplemental assistance strongly suggests that Congress did not intend for such assistance to be considered as one of the public charge factors.

Judicial guidance in interpreting the phrase was apparently not in need or demand: There are relatively few such decisions. A leading early Supreme Court case resolved the important question of whether the adverse economic conditions in the location where the immigrant intends to live can render an immigrant likely to become a "public charge." *Gegiow v. Uhl*, 239 U.S. 3 (1915). The Supreme Court's answer was no because the statute spoke to the permanent characteristics personal to the immigrant rather than to local labor market conditions. *Id.* at 10. We followed

Gegiow in *Ex parte Sakaguchi*, 277 F. 913 (9th Cir. 1922), where we held that a person temporarily in need of family assistance should not have been excluded as likely to become a public charge. We so held because there was an absence of "any evidence whatever of mental or physical disability or any fact tending to show that the burden of supporting the appellant is likely to be cast upon the public." *Id.* at 916. Thus, our court in *Sakaguchi* understood the standard for determining whether someone is a public charge to be whether the "burden of support" falls on the public.

Administrative decisions followed the Supreme Court's lead by looking to the inherent characteristics of the individual rather than to external circumstances. The Board of Immigration Appeals thus held that only an individual with the inherent inability to be self-supporting is excludable as "likely to become a public charge" within the meaning of the statute. *Matter of Harutunian*, 14 I & N. Dec. 583, 589–90 (BIA 1974); *Matter of Vindman*, 16 I. & N. Dec. 131, 132 (B.I.A. 1977); *see also New York*, 969 F.3d at 69. There has been corollary administrative recognition that even if an individual has been on welfare, that fact does not in and of itself establish the requisite likelihood of becoming a public charge. An Attorney General decision collected authorities indicating that it is the totality of circumstances that must be considered in order to determine whether "the burden of supporting the alien is likely to be cast on the public." *Matter of Martinez-Lopez*, 10 I & N. Dec. 409, 421–22 (BIA 1962; A.G. 1964) (citing *Sakaguchi*, 277 F. at 916). Likely receipt of some public benefits does not automatically

render an immigrant a public charge because the public does not bear the "burden of support."

The 1996 amendments, which added factors to be considered and created the current public charge statutory provision, caused some confusion as to how big a change they represented. The INS, the agency then in charge of administering immigration, decided a regulatory definition would be helpful. It adopted the 1999 Guidance, the first regulatory guidance to interpret the rather ancient notion of "public charge" in light of the myriad, modern forms of public assistance. 64 Fed. Reg. 28,269.

The Guidance defined a "public charge" as a non-citizen who depends on the government for survival, either by receipt of income or confinement in a public institution. It described persons "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long term care at government expense." *Id.* at 28,689. It thus embodied the traditional notion of primary dependence on the government for either income or institutional care.

The Guidance went on to identify the types of public assistance that would typically qualify as evidence of primary dependence: (1) Supplemental Security Income (SSI); (2) Temporary Assistance for Needy Families (TANF); (3) state and local cash assistance programs; and (4) programs supporting people institutionalized for long-term care. *Id.* at 28,692. The Guidance expressly excluded non-cash benefits intended to supplement income and not to provide primary

support. The explanation lay with the changing times that were bringing benefits to more and more families to improve their health and welfare. *See id.* ("[C]ertain 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.").

The Guidance actually encouraged non-citizens to receive supplemental benefits in order to improve their standard of living and to promote the general health and welfare. The Guidance drew a sharp distinction between the receipt of such supplemental benefits and dependence on the government for subsistence income that would render the individual a "public charge." *Id.* at 28,692–93.

The 2019 Public Charge Rule we review in this case effectively reversed that policy by making receipt of supplemental benefits the very definition of a public charge. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019). The Rule defines the term "public charge" to mean "an alien who receives one or more [specified] public benefits . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." *Id.* at 41,501. The public benefits specified by the Rule include most Medicaid benefits, SNAP benefits, Section 8 housing vouchers and rental assistance, and other

forms of federal housing assistance. *Id.* Any receipt of such a benefit, no matter how small, will factor into the public charge determination. The Rule also directs officials to consider English proficiency in making the public charge determination. *Id.* at 41,503–04.

The Rule was greeted with challenges in federal district courts throughout the country. We deal with those in this circuit.

B. The District Court Injunctions

On appeal are two district court decisions granting preliminary injunctions barring enforcement of the Rule. The Northern District considered the challenges of California, the District of Columbia, Maine, Pennsylvania, and Oregon, consolidated with the challenges brought by the City and County of San Francisco, and the County of Santa Clara. The Eastern District heard the challenges brought by Washington, Virginia, Colorado, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, and Rhode Island. Both district courts agreed that the plaintiffs had standing because they had shown that they would likely suffer economic harm and other costs and that their concerns were within the zone of interests of the statute. Both held that the new definition of "public charge" was likely not a permissible interpretation of the statute because it would depart from the longstanding, settled understanding that a person does not become a public charge by receiving short-term aid, and must instead demonstrate an inherent incapacity to provide subsistence. *City and Cnty. of San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1101 (N.D. Cal. 2019),

Washington v. DHS, 408 F. Supp. 3d 1191, 1219 (E.D. Wash. 2019). Both found the Rule to be likely arbitrary and capricious because the agency failed to consider the burdens the Rule would impose on states and municipalities. The Eastern District issued a nationwide injunction, and the Northern District declined to do so.

Within a few weeks of the district court rulings, a divided motions panel of this court, however, stayed both injunctions pending this appeal. *City and Cnty. of SF*, 944 F.3d 773. The panel majority wrote that DHS was likely to prevail because the Rule would probably be viewed as a reasonable interpretation of a statute that had no consistent historical application and gave the agency "considerable discretion." *Id.* at 796, 799. Judge Owens dissented in part and would have denied the stay. *Id.* at 809–10 (Owens, J., dissenting).

The stay was based on a prediction of what this panel would hold in reviewing the merits of the preliminary injunctions. The stay in this case was entered at a particularly early point, less than two months after the district court injunctions. Almost none of the extensive documentation relevant to this appeal was before the motions panel. The brief of the appellant DHS in the Northern District case had been filed only the day before the panel entered its stay, and the opening brief in the Eastern District case was not filed until the day after. Still to come were not only the answering and reply briefs in both appeals, but two dozen amicus briefs, many of which we have found very helpful.

At least equally important, no other circuit court opinions had yet considered the issues. By now we have heard from three. One of those opinions even discussed and disagreed with the reasoning of this court's motions panel stay opinion, pointing out that it "pinn[ed] the definition of 'public charge' on the *form* of public care provided" in concluding that there was no consistent interpretation of the Rule. *New York*, 969 F.3d at 73 (emphasis in original). The court there said our motions panel thereby went "astray." *Id.* This was because the issue was not whether a "public charge" had always received similar assistance. *Id.* The issue should have been whether the "inquiry" under the statute had been consistent. *Id.* The Second Circuit concluded the public charge inquiry had always been whether the non-citizen "is likely to depend on that [assistance] system." *Id.*

We therefore turn to the appeal before us. We deal first with DHS's arguments that the plaintiffs may not maintain the suit because they lack Article III standing or are outside the zone of interests of the immigration statute in question.

C. Plaintiffs' Capacity to Maintain the Action

Plaintiffs are states and municipalities that allege the Rule is causing them to suffer continuing financial harm, as lawful immigrants eligible for federal cash, food, and housing assistance withdraw from these programs to avoid the impact of the Rule. Plaintiffs allege harm because such immigrants will instead turn to assistance programs administered by the state and local entities.

DHS argues that such injuries are speculative and represent only plausible future injury. There is no question that to have Article III standing to bring this action, the plaintiffs must allege that they have suffered, or will imminently suffer, a "concrete and particularized" injury in fact. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). There is also no question that an increased demand for aid supplied by the state and local entities would be such an injury. The only question is whether such demand is, as of yet, apparent or imminent.

That is not a difficult question to answer. The Rule itself predicts a 2.5 percent decrease in enrollment in public benefit programs and a corresponding reduction in Medicaid payments of over one billion dollars per year. Final Rule, 84 Fed. Reg. at 41,302, 41,463. The Rule itself further acknowledges that disenrollment will cause other indirect financial harm to state and local entities by increasing the demand for uncompensated indigent care. Declarations in the record show that such entities are already experiencing disenrollment as a result of the Rule. *See City and Cnty. of SF*, 408 F. Supp. 3d at 1122.

DHS nevertheless asserts that the Rule will result in a long-term cost savings after states compensate for the loss of federal funds by reforming their operations. But such long-term reforms would not remedy the immediate financial injury to the plaintiffs or the harms to the health and welfare of those individuals affected. As the Second Circuit explained, "this simplistic argument fails to account for the fact that the States allege injuries that extend well beyond

reduced Medicaid revenue and federal funding to the States, including an overall increase in healthcare costs that will be borne by public hospitals and general economic harms." *New York*, 969 F.3d at 60. Thus, plaintiffs have established Article III standing.

Those suing under the APA, must also establish that the interest they assert is at least "arguably within the zone of interests to be protected or regulated by the statute" in question. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). The Supreme Court has described the test as "not meant to be especially demanding" and as "not requir[ing] any 'indication of congressional purpose to benefit the would-be plaintiff.'" *Id.*at 225 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–40 (1987)). A plaintiff's interest need only be "sufficiently congruent with those of the intended beneficiaries that the litigants are not 'more likely to frustrate than to further the statutory objectives.'" *First Nat. Bank & Tr. Co. v. Nat'l Credit Union Admin.*, 988 F.2d 1272, 1275 (D.C. Cir. 1993) (quoting *Clarke*, 479 U.S. at 397 n.12).

The statute in question is, of course, the immigration statute that renders inadmissible an individual likely to become a "public charge." 8 U.S.C. § 1182(a)(4)(A). DHS appears to contend that the only entities within the zone of interests are the federal government itself and individuals seeking to immigrate, because the provision deals with immigration and only the federal government controls immigration. If that were to define the zone of interests

regulated by the statute, the scope of permissible immigration litigation against the government would be so narrow as to practically insulate it from many challenges to immigration policy and procedures, even those violating the Constitution or federal laws.

DHS suggests that the purpose of the public charge exclusion is to reduce immigrants' use of public benefits, and that the plaintiffs' suit therefore contradicts this purpose by seeking to make more federal benefits available. But this assumes that Congress's statutory purpose was the same as DHS's purpose here, which is the very dispute before us. As the Second Circuit pointed out, "DHS assumes the merits of its own argument when it identifies the purpose of the public charge ground as ensuring that non-citizens do not use public benefits . . . . Understood in context, [the public charge bar's] purpose is to exclude where appropriate and to not exclude where exclusion would be inappropriate.") *New York*, 969 F.3d at 62–63.

Moreover, DHS maintains that the statute's overall purpose is to promote self-sufficiency. Providing access to better health care, nutrition and supplemental housing benefits is consistent with precisely that purpose. *See Cook Cnty.*, 962 F.3d at 220 (access to affordable basic health care may promote self-sufficiency); Hilary Hoynes, Diane Whitmore Schanzenbach & Douglas Almond, *Long-Run Impacts of Childhood Access to the Safety Net*, 106 Am. Econ. Rev. 903, 921 (2016) (access to food stamps in childhood significantly increases economic self-sufficiency among women). For these reasons, the interests of the

plaintiffs in preserving immigrants' access to supplemental benefits is within the zone of interests protected by the statute.

We therefore conclude that the district courts correctly determined that the plaintiffs are entitled to maintain this action. All ofthe circuits to consider the validity of this Rule have reached a similar conclusion. *See Cook Cnty.*, 962 F.3d at 219–20, *CASA de Maryland*, 971 F.3d at 240–241, *New York*, 969 F.3d at 62–63. We now turn to the question whether they were entitled to the preliminary injunctions entered by the district courts.

D. Contrary to Law

Both district courts concluded that the plaintiffs are likely to prevail in their contention that the Rule violates the statute's public charge provision, and that such a conclusion supports the entry of preliminary injunctions. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). On appeal, DHS contends, as it has throughout the litigation, that the Rule is a permissible interpretation of the statute. The plaintiffs maintain that the Rule violates the statute because the Rule is not a reasonable interpretation of the meaning of "public charge."

History is a strong pillar supporting the plaintiffs' case. Plaintiffs point to repeated congressional reenactment of the provision after it had been interpreted to mean long-term dependence on government support, and had never been interpreted to encompass temporary resort to supplemental non-cash benefits. Plaintiffs contend that this repeated

reenactment amounts to congressional ratification of the historically consistent interpretation. DHS disagrees, arguing that the repeated reenactments reflect congressional intent to have a flexible standard subject to various executive branch interpretations.

Our review of the history of the provision in our law suggests the plaintiffs have the better part of this dispute. From the Victorian Workhouse through the 1999 Guidance, the concept of becoming a "public charge" has meant dependence on public assistance for survival. Up until the promulgation of this Rule, the concept has never encompassed persons likely to make short-term use of in-kind benefits that are neither intended nor sufficient to provide basic sustenance. The Rule also, for the first time, introduces a lack of English proficiency as figuring into the equation, despite the common American experience of children learning English in the public schools and teaching their elders in our urban immigrant communities. 8 C.F.R. § 212.22(b)(5)(ii)(D). Indeed, in *Gegiow*, 239 U.S. 3, the Supreme Court found that the individuals in that case were not likely to become public charges even though they spoke only Russian.

In *New York*, 969 F.3d 42, the Second Circuit essentially agreed with plaintiffs' historical analysis. The court recognized and explained the line of settled judicial and administrative interpretations of a public charge as one who is primarily dependent on the government for subsistence. *Id.* at 65–70. The court traced that history in far more detail than we have outlined and was "convinced" that there was a well-settled meaning of "public charge" even before

congressional passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, and that was a person "unable to support herself, either through work, savings, or family ties." *Id.* at 71. Receipt of cash benefits may be considered in deciding whether a person is dependent on the government but has never been determinative. The Second Circuit persuasively summarized:

> The Plaintiffs do not argue, and we do not hold, that the receipt of various kinds of public benefits is irrelevant to the determination of whether a non-citizen is likely to become a public charge. But defining public charge to mean the receipt, even for a limited period, of any of a wide range of public benefits – particularly . . . ones that are designed to supplement an individual's or family's efforts to support themselves, rather than to deal with their likely permanent inability to do so – is inconsistent with the traditional understanding of what it means to be a "public charge," which was well-established by 1996.

Id. at 78 (emphasis removed).

A few months earlier, the Seventh Circuit had come to a similar conclusion that the Rule violates the statutory meaning of public charge. *Cook Cnty.*, 962 F.3d 208. The Seventh Circuit differed somewhat in its analysis. After a historical survey of court decisions and secondary sources, it determined that the phrase "public charge" was susceptible to various interpretations. *Id.* at 226. It concluded, however, that DHS's interpretation, quantifying the definition to

mean receipt of twelve months' worth of benefits within three years, represented an understanding of its authority to define the phrase that "has no natural limitation." *Id.* at 228–29. If DHS's interpretation were to be accepted, then there is nothing in the statutory text that would prevent a zero-tolerance rule, where foreseeable receipt of a single benefit on one occasion would bar entry or adjustment of status. The majority forcefully rejected such an interpretation, stating:

> We see no warrant in the Act for this sweeping view. Even assuming that the term "public charge" is ambiguous and thus might encompass more than institutionalization or primary, long-term dependence on cash benefits, it does violence to the English language and the statutory context to say that it covers a person who receives only de minimis benefits for a de minimis period of time. There is a floor inherent in the words "public charge," backed up by the weight of history.

Id. at 229.

Although the opinions of the Second Circuit in *New York* and the Seventh Circuit in *Cook County* reflect some disagreement over whether there was any historically established meaning of the phrase "public charge," they agreed that the Rule's interpretation of the statute was outside any historically accepted or sensible understanding of the term. In commenting on the difference between its historical review in *New York* and that of the Seventh Circuit in *Cook County*, the Second Circuit noted that the Seventh Circuit had

not included the significant administrative rulings that preceded the 1996 statute. *New York*, 969 F.3d at 74.

The *New York* opinion was unanimous, but the *Cook County* opinion was not. The lengthy dissenting opinion in *Cook County* focused on other statutory provisions aimed at preventing entry of persons who could become dependent on the government. The most significant of these provisions is the requirement that family-sponsored immigrants, and employment-sponsored immigrants whose employment is tied to a family member, must furnish an affidavit from the sponsor. 8 U.S.C. §§ 1182(a)(4)(C)–(D). In the affidavit, the sponsor must agree to support the immigrant at annual income of at least 125 percent of the poverty level and pay back the relevant governmental entity in the event the immigrant receives "any means-tested public benefit." 8 U.S.C. § 1183a(a)(1)(b).

The dissent focused on the fact that the affidavit provision forces sponsors to bear responsibility for "any means-tested public benefit" that an immigrant may receive. It concluded that the affidavit provision reflects Congress's view that "public charge" may encompass receipt of supplemental benefits as well as primary dependence. *See Cook Cnty.*, 962 F.3d at 246 (Barrett, J., dissenting).

In its focus on the provisions in a related but different section of the statute, the dissent did not address the significance of the history of the public charge provision itself, nor did it address the majority's objection to the duration of the receipt of benefits as a standard having no limiting principle. The dissent concluded only that the choice of an aggregate of twelve

months is "not unreasonable." *Id.* at 253. Moreover, the dissent's interpretation of the affidavit requirement's application here seems to suggest that it would approve a public charge rule excluding individuals who received "any means-tested benefit," no matter how small, as in line with congressional intent.

In this appeal, DHS also relies upon the affidavit of support provisions to contend that the Rule is consistent with the statutory public charge bar. The public charge bar and affidavit of support provisions were parts of two separate acts. The two have no historic or functional relationship to each other. The public charge bar dates back to the 19th century, embodying an age-old concept of excluding those who may become primarily dependent on the government. Congress enacted the affidavit of support provision, however, in 1996 as part of more recent specific immigration reforms including the financial responsibilities of families and employers sponsoring individual immigrants. *See* PRWORA, Pub. L. No. 423, 110 Stat. 2271 (1996); IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009 (1996). The section of the affidavit provision that refers to public benefits serves as a post-admission remedy to help local and federal governments recoup funds. § 1183a(b). The changes to the affidavit provisions were aimed at problems with the unenforceability of such affidavits prior to 1996. Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 Creighton L. Rev. 741, 743-44, 752-53 (1998) (article by INS Associate General Counsel).

DHS also points to the provision that permits entry of battered women without regard to receipt of "any benefits." *See* 8 U.S.C. § 1182(s). DHS argues that this reflects Congress's belief that the receipt of any public benefits would be a consideration in admission for most other public charge determinations. Had Congress intended to make non-cash benefits a factor for admission or permanent residence, it would have done so directly and not through this ancillary provision. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes"). It is more likely that Congress created this provision in order to provide sweeping protections for battered migrant women, as it did throughout Section 1182. *See* § 1182(a)(6)(ii), (a)(9)(B)(iii)(IV).

For these reasons we conclude the plaintiffs have demonstrated a high likelihood of success in showing that the Rule is inconsistent with any reasonable interpretation of the statutory public charge bar and therefore is contrary to law.

E. Arbitrary and Capricious

Both district courts also ruled that the plaintiffs were likely to succeed in their contention that the Rule is arbitrary and capricious. The APA standard in this regard is inherently deferential. The task of the courts is to ensure that the agency's action relied on appropriate considerations, considered all important aspects of the issue, and provided an adequate explanation for its decision. The Supreme Court summed it up in its leading decision, *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*

("*State Farm*"), 463 U.S. 29 (1983). The Court explained the general rule:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43.

The plaintiffs argue that DHS failed the test in three principal respects: It failed to take into account the costs the Rule would impose on state and local governments; it did not consider the adverse effects on health, including both the health of immigrants who might withdraw from programs and the overall health of the community; and it did not adequately explain why it was changing the policy that was thoroughly explained in the 1999 Guidance.

1. Disenrollment and Financial Costs

We first turn to DHS's consideration of the financial impact of the proposed Rule. During the comment period, there was repeated emphasis on the financial burdens that would befall state and local governments because immigrants fearing application of the Rule would disenroll from the supplemental programs, even if the Rule did not apply to them. DHS's response was a generality coupled with an expression of uncertainty. It said that, despite these effects, the Rule's "overriding

consideration" of self-sufficiency formed "a sufficient basis to move forward." 84 Fed. Reg. at 41,312. DHS added that there was no way of knowing with any degree of exactitude how many individuals would disenroll or how much of a burden it would place on the state and local governments. *Id.* at 41,312–13.

DHS provided no analysis of the effect of the Rule on governmental entities like the plaintiffs in these cases. As the Northern District found, DHS had not "grapple[d] with estimates and credible data explained in the comments." *City and Cnty. of SF*, 408 F. Supp. 3d at 1106.

Our law requires more from an agency. A bald declaration of an agency's policy preferences does not discharge its duty to engage in "reasoned decisionmaking" and "explain the evidence which is available." *State Farm*, 463 U.S. at 52. The record before DHS was replete with detailed information about, and projections of, disenrollment and associated financial costs to state and local governments. *See, e.g.,* Ninez Ponce, Laurel Lucia, & Tia Shimada, How Proposed Changes to the 'Public Charge' Rule Will Affect Health, Hunger and the Economy in California, 32 (Nov. 2018), https://healthpolicy.ucla.edu/newsroom/Documents/2018/public-charge-seminar-slides-nov2018.pdf (estimating over 300,000 disenrollments from Medicaid in California alone); Fiscal Policy Institute, Only Wealthy Immigrants Need Apply: The Chilling Effects of "Public Charge," 5 (Nov. 2019), http://fiscalpolicy.org/wp-content/uploads/2019/11/FINAL-FPI-Public-Charge-2019-MasterCopy.pdf (estimating over $500 million combined in lost state tax

revenue). DHS was required to "reasonably reflect upon" and "grapple with" such evidence. *Fred Meyers Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017). But DHS made no attempt to quantify the financial costs of the Rule or critique the projections offered.

Similarly, DHS's repeated statements that the Rule's disenrollment impacts are "difficult to predict" do not satisfy its duty to "examine the relevant data" before it. *State Farm*, 463 U.S. at 43. The Supreme Court held in *State Farm* that an agency may not, without analysis, cite even "'substantial uncertainty' . . . as a justification for its actions." *Id.* at 52; *see also Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1200 (9th Cir. 2008) (rejecting as arbitrary and capricious agency's characterization of greenhouse gas reductions as "too uncertain to support their explicit valuation and inclusion" in analysis). DHS's analysis thus fell short of the standard established by the Supreme Court and recognized by our circuit. DHS did not adequately deal with the financial effects of the Rule.

2. Health Consequences

Although DHS wrote the Rule was intended to make immigrants healthier and stronger, commenters stressed the Rule's likely adverse health consequences for immigrants and the public as a whole, including infectious disease outbreaks and hospital closures. While acknowledging these comments, DHS concluded, without support, that the Rule "will ultimately strengthen public safety, health, and nutrition." 84 Fed. Reg. at 41,314. The Northern District aptly found

that DHS impermissibly "simply declined to engage with certain, identified public-health consequences of the Rule." *City and Cnty. of SF*, 408 F. Supp. 3d at 1111–12.

Commenters provided substantial evidence that the Rule would in fact harm public safety, health, and nutrition. DHS itself repeatedly acknowledged that hospitals might face financial harms as a result of the Rule, but DHS repeatedly declined to quantify, assess, or otherwise deal with the problem in any meaningful way. *See, e.g.*, 84 Fed. Reg. at 41,313–14, 41,384, 41,475, 41,476. This is inadequate and suggests that DHS's position was intractable. As the D.C. Circuit has observed, making some mention of evidence but then coming to a contrary, "unsupported and conclusory" decision "add[s] nothing to the agency's defense of its thesis except perhaps the implication that it was committed to its position regardless of any facts to the contrary." *Chem. Mfrs. Ass'n. v. EPA*, 28 F.3d 1259, 1266 (D.C. Cir. 1994). DHS responded by excluding certain programs for children and pregnant women from the ambit of the Rule, but never addressed the larger concerns about the Rule's effect on health as well as on hospital resources.

There were other serious health concerns. For example, comments demonstrated that the Rule would endanger public health by decreasing vaccination rates in the general population. DHS insisted that vaccines would "still be available" to Medicaid-disenrolled individuals because "local health centers and state health departments" would pick up the slack, *id.* at 41,385, despite objections voiced by such local health

centers and state health departments themselves showing that the Rule will put the populations they serve—citizens and non-citizens alike—in danger. *See, e.g.*, Mass. Dep't of Pub. Health, Comments on Inadmissibility on Public Charge Grounds (Dec.2018),https://www.regulations. gov/document?D= USCIS-2010-0012-45697; HilltownCmty. Health Ctr., Comments on Inadmissibility on Public Charge Grounds (Dec. 2018), https://www.regulations.gov/ document?D=USCIS-2010-0012-45675. A decision that "runs counter to the evidence" or "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise" is arbitrary and capricious. *State Farm*, 463 U.S. at 43. The promulgation of this Rule is such a decision. DHS claims no expertise in public health, unlike the scores of expert commenters who weighed in against the Rule.

3. Reversal of Position

Above all, DHS failed to explain its abrupt change in policy from the 1999 Guidance. An agency reversing a prior policy "must show that there are good reasons for the new policy" and provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009). The district courts below found that DHS had failed to satisfy this standard. *City and Cnty. of SF*, 408 F. Supp. 3d at 1111–12; *Washington v. DHS*, 408 F. Supp. 3d at 1220.

The 1999 Guidance had been issued after the 1996 statutory amendments setting out the general factors to be taken into account in making a public charge

determination. The Guidance considered all of the different types of public assistance governments offered, including programs providing subsistence income and those providing supplemental benefits. The Guidance expressly provided that receipt of supplemental assistance for food, healthcare and housing were not to be considered in assessing an immigrant's likelihood of becoming a public charge. As discussed above, this provision was consistent with over a century of judicial and administrative decisions interpreting the public charge bar. The Rule, however, provides that the prospect of receiving those same supplemental benefits, for even a few months, renders an individual inadmissible. This is directly contrary to the 1999 Guidance.

Yet DHS promulgated the Rule without any explanation of why the facts found, and the analysis provided, in the prior Guidance were now unsatisfactory. This is a practice the Supreme Court has rejected: an agency about-face with no "reasoned explanation . . . for disregarding" the findings underlying the prior policy. *Fox*, 556 U.S. at 516. Here is an illustration of the about-face. The 1999 Guidance had found that deterring acceptance of "important health and nutrition benefits" had yielded "an adverse impact . . . on public health and the general welfare." 64 Fed. Reg. at 28,692. In contrast, DHS now says that the new Rule "will ultimately strengthen public safety, health, and nutrition." 84 Fed. Reg. at 41,314. DHS provides no basis for this conclusion or for its departure from the empirical assessments underlying the prior policy.

In light of this policy change, coupled with the "serious reliance interests" engendered by over two decades of reliance on the Guidance, DHS was required to provide a "more detailed justification" for the Rule. *Fox*, 556 U.S. at 515. DHS provides no justification, other than the repeated conclusory mantra that the new policy will encourage self-sufficiency. DHS in effect says that by creating a disincentive for immigrants to use available assistance, the Rule will "ensur[e] that [admitted immigrants] be self-sufficient and not reliant on public resources." 84 Fed. Reg. at 41,319. DHS does not substantiate, and the record does not support, this empirical prediction. *See, e.g.*, Hilary Hoynes, Diane Whitmore Schanzenbach & Douglas Almond, *Long-Run Impacts of Childhood Access to the Safety Net*, 106 Am. Econ. Rev. 903, 930 (finding that having access to food stamps during childhood leads to "significant improvement in adult health" and "increases in economic self-sufficiency," including decreased welfare participation). Plaintiffs urge that their experience is contrary to DHS's conclusion. Also to the contrary is the experience related in multiple amicus briefs. *See, e.g.*, Brief for the Institute for Policy Integrity as Amicus Curiae Supporting Petitioners at 9 (citing evidence that reductions in SNAP participation increase homelessness); Brief for National Housing Law Project et al. as Amici Curiae Supporting Petitioners at 13 (citing evidence that Medicaid made it easier for recipients to work and find work).

4. Arbitrary and Capricious

In sum, DHS adopted the Rule, reversing prior, longstanding public policy, without adequately taking

into account its potential adverse effects on the public fisc and the public welfare. We must conclude that the Rule's promulgation was arbitrary and capricious as well as contrary to law within the meaning of the APA. 5 U.S.C. § 706(2)(A).

F. Remaining Injunction Factors

1. Irreparable Harm

Plaintiffs have shown a likelihood of success on the merits of their claim that the Rule violates the standards of the APA in that it is both contrary to law and arbitrary and capricious. To support entry of an injunction, Plaintiffs must also show a likely threat of irreparable injury in the absence of an injunction. *Winter*, 555 U.S. at 22. Plaintiffs have established that they likely are bearing and will continue to bear heavy financial costs because of withdrawal of immigrants from federal assistance programs and consequent dependence on state and local programs.

There is no dispute that such economic harm is sufficient to constitute irreparable harm because of the unavailability of monetary damages. *See California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018); 5 U.S.C. § 702 (providing for relief "other than monetary damages"). DHS counters that such harm in this case is speculative, amounting to no more than the possibility of future injury. *See Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011).

We have, however, already seen that in this case such harm is more than speculative. Plaintiffs have presented evidence that they are already experiencing

harm and DHS itself has projected significant disenrollment from federal programs, likely leading to enrollments in state and local ones. The district courts both made factual findings as to harm that DHS does not refute with citations to the record.

2. Balance of Equities and Public Interest

There was no error in finding that the balance of equities and public interest support an injunction. The Northern District pointed to the need for "continuing the provision of medical services through Medicaid to those who would predictably disenroll absent an injunction" in light of the explanations given by "parties and numerous amici . . . [of the] adverse health consequences not only to those who disenroll, but to the entire populations of the plaintiff states, for example, in the form of decreased vaccination rates." *City and Cnty. of SF*, 408 F. Supp. 3d at 1127. The public interest in preventing contagion is particularly salient during the current global pandemic.

Although DHS nevertheless argues that it is harmed by not being able to implement its new definition of public charge, if it is ultimately successful in defending the merits of the Rule, the harm will amount to no more than a temporary extension of the law previously in effect for decades. Given the financial burdens that plaintiffs have persuasively demonstrated will befall them as a result of disenrollment from federal programs, coupled with adverse effects on the health and welfare of the immigrant as well as general population, we cannot say the district courts abused their discretion in finding that the balance of equities and public interest weigh in favor the injunction.

G. Propriety of a Nationwide Injunction

The Northern District issued a preliminary injunction limited to the territory of the plaintiff state and local entities before it. The Eastern District issued a nationwide injunction, explaining that a more limited injunction would not prevent all the harms alleged. The court was concerned about protecting immigrants from harm if they moved outside of the plaintiff jurisdictions, about the economic impact on plaintiff states if immigrants moved to them to evade the consequences of the Rule, and about lawful immigrants being subject to the Rule at points of entry after travel abroad. *Washington*, 408 F. Supp. 3d at 1223.

The appropriateness of nationwide injunctions in any case has come under serious question. *See, e.g.*,*DHS v. New York*, 140 S Ct. 599, 599–601 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring). In explaining the limited scope of its injunction, the Second Circuit questioned the propriety of one court imposing its will on all:

> It is not clear to us that, where contrary views could be or have been taken by courts of parallel or superior authority entitled to determine the law within their own geographical jurisdictions, the court that imposes the most sweeping injunction should control the nationwide legal landscape.

New York, 969 F.3d at 88.

Whatever the merits of nationwide injunctions in other contexts, we conclude a nationwide injunction is

not appropriate in this case. This is because the impact of the Rule would fall upon all districts at the same time, and the same issues regarding its validity have been and are being litigated in multiple federal district and circuit courts.

Accordingly, we vacate that portion of the Eastern District's injunction making it applicable nationwide, but otherwise affirm it.

H. Rehabilitation Act

The plaintiffs also contend that the Rule violates the Rehabilitation Act, which bans discrimination on the basis of disabilities. 29 U.S.C. § 794(a). The Seventh Circuit looked favorably on this contention, and the Second Circuit expressly did not address it. *Cook Cnty.*, 962 F.3d at 228, *New York*, 969 F.3d at 64 n.20. Because we have held that the Rule violates the APA as contrary to law and arbitrary and capricious, we similarly do not address the Rehabilitation Act.

I. Conclusion

The order of the District Court for the Northern District of California is **AFFIRMED**. The order of the District Court for the Eastern District of Washington is **AFFIRMED in part and VACATED in part**. Costs are awarded to the plaintiffs.

VANDYKE, Circuit Judge, dissenting:

For the reasons ably articulated by our court in a December 2019 published opinion,[1] by the Fourth Circuit in an August 2020 opinion,[2] and by a dissenting Seventh Circuit judge in a June 2020 opinion (particularly notable for its erudition)[3]—and implied by the Supreme Court's multiple stays this year of injunctions virtually identical to those the majority today affirms[4]—I must respectfully dissent.

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[1] *City & County of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019).

[2] *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220 (4th Cir. 2020).

[3] *Cook County v. Wolf*, 962 F.3d 208, 234–54 (7th Cir. 2020) (Barrett, J., dissenting).

[4] *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020); *Wolf v. Cook County*, 140 S. Ct. 681 (2020).

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-17213

D.C. No. 4:19-cv-04717-PJH

[Filed: December 5, 2019]

CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SANTA CLARA,	)
Plaintiffs-Appellees,	)
v.	)
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; CHAD F. WOLF, in his official capacity as Acting Secretary of the United States Department of Homeland Security; KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services,	)
Defendants-Appellants.	)

No. 19-17214

D.C. No. 4:19-cv-04975-PJH

STATE OF CALIFORNIA; DISTRICT OF COLUMBIA; STATE OF MAINE; COMMONWEALTH OF PENNSYLVANIA; STATE OF OREGON, *Plaintiffs-Appellees*,	)
v.	)
U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; CHAD F. WOLF, in his official capacity as Acting Secretary of the United States Department of Homeland Security; KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services, *Defendants-Appellants*.	)

No. 19-35914

D.C. No. 4:19-cv-05210-RMP

STATE OF WASHINGTON; COMMONWEALTH OF VIRGINIA; STATE OF COLORADO; STATE OF DELAWARE; STATE OF ILLINOIS; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; DANA NESSEL,Attorney General on behalf of the People of Michigan; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF RHODE ISLAND; STATE OF HAWAI'I,	)
Plaintiffs-Appellees,	)
v.	)
U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency; CHAD F. WOLF, in his official capacity as Acting Secretary of the United States Department of Homeland Security; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency; KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services,	)
Defendants-Appellants.	)

ORDER

App. 93

Filed December 5, 2019

Before: Jay S. Bybee, Sandra S. Ikuta, and John B. Owens, Circuit Judges.

Order;
Concurrence by Judge Bybee;
Partial Concurrence and Partial Dissent by Judge Owens

SUMMARY*

Immigration

The panel granted the Department of Homeland Security's petitions for stays of two district court preliminary injunctions against the implementation of the Department of Homeland Security's redefinition of the term, "public charge."

Under the Immigration and Nationality Act ("INA"), any alien who, in the opinion of a relevant immigration officer, at the time of application for admission or adjustment of status, is likely at any time to become a public charge, is inadmissible. In 1999, the Immigration and Naturalization Service defined "public charge" as an "alien . . . who is likely to become . . . primarily dependent on the government for subsistence" as demonstrated by either "institutionalization for long-term care at government expense" or "receipt of public cash assistance." In August 2019, the Department of Homeland Security ("DHS") adopted a new rule, redefining the term

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

"public charge" to also require consideration of certain *non-cash* benefits. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("Final Rule").

Various states, municipalities and organizations brought suits in California and Washington seeking a preliminary injunction against the Final Rule's implementation. The California and Washington district courts issued preliminary injunctions based on plaintiffs' claims under the Administrative Procedure Act ("APA"). DHS then sought stays of both preliminary injunctions before this court.

The panel first concluded that the injuries plaintiffs ("the States") alleged – loss of federal funds and increase in operational costs related to individuals disenrolling from benefits – were sufficient for Article III standing. The panel also addressed mootness because district courts in Maryland and New York had issued nationwide injunctions of the Final Rule. The court concluded that, even if an injunction from another court has a fully nationwide scope, this court nevertheless retains jurisdiction under the exception to mootness for cases capable of repetition, yet evading review.

The panel next concluded that DHS had demonstrated a strong likelihood of success on the merits, explaining that the Rule's definition of "public charge" is consistent with the relevant statutes, and DHS's action was not arbitrary or capricious. In rejecting the States' argument that the Final Rule is contrary to the INA, the panel concluded that the new definition of "public charge" was entitled to deference

under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). At *Chevron* step one, the panel explained that the statute is ambiguous, noting that Congress chose not to define "public charge" and, instead, described various factors to be considered "at a minimum." The panel also concluded that the history of the use of the term demonstrated that the term does not have an unambiguous meaning. Addressing the fact that Congress twice considered, but failed to enact, a definition of "public charge" that is similar to the definition adopted in the Final Rule, the panel explained that the failure of Congress to compel DHS to adopt a particular rule is not the logical equivalent of forbidding DHS from adopting that rule. The panel also rejected the States' contention that DHS exceeded its authority by determining what makes a person "self-sufficient."

At *Chevron* step two, the panel concluded that DHS's interpretation of "public charge" is a permissible construction of the statute, explaining that: 1) the INA grants DHS considerable discretion to determine if an alien is likely to become a public charge; 2) there is no statutory basis from which to conclude that addition of certain categories of inkind benefits makes DHS's interpretation untenable; and 3) the receipt of non-cash public assistance is relevant to the self-sufficiency principle underlying U.S. immigration law. The panel also rejected the States' argument that the Final Rule is inconsistent with the Rehabilitation Act, which provides that a qualified individual with a disability cannot, solely by reason of that disability, be excluded from participation in Executive agency programs.

In rejecting the States' argument that the Final Rule is arbitrary and capricious, the panel concluded that DHS had adequately explained the reasons for the rule because it was sufficient for DHS to consider whether, in the long term, the overall benefits of its policy change would outweigh the costs of retaining the current policy and because DHS addressed public health concerns.

The panel noted that, were it reviewing the preliminary injunctions on direct review, its determination on the likelihood of success on the merits would be sufficient to reverse the district court's orders. But because the panel was addressing DHS's motion for a stay, it went on to consider the additional factors of irreparable injury, balance of the equities and the public interest. Addressing irreparable injury, the panel concluded that DHS had shown that it would be irreparably injured absent a stay, explaining that the preliminary injunctions would force DHS to irrevocably grant status to those who are not legally entitled to it.

Next, the panel explained that balancing the harms was particularly difficult in this case because the harms are not comparable and are also, to a degree, speculative. The panel concluded that it could not state with any confidence which set of harms was greater. The panel explained that the public interest in this case was likewise difficult to calculate with precision. In the end, the panel concluded that the "critical" factors were that DHS had mustered a strong showing of likelihood of success on the merits and some irreparable harm, and that those factors weighed in favor of granting a stay, despite the potential harms to

the States. For that reason, the panel concluded that the stay was in the public interest.

Concurring, perplexed and perturbed, Judge Bybee wrote separately to note that: 1) even as the courts are embroiled in recent immigration controversies, no one should mistake the court's judgments for its policy preferences; 2) given the fact that the courts may only review policy decisions for arbitrariness and caprice, the courts are not the proper foil to this or any other administration as it crafts immigration policies; and 3) because Congress is no place to be found in recent immigration debates, it is time for a feckless Congress to come to the table and grapple with these issues, instead of leaving the table and expecting the court to clean up.

Concurring in part and dissenting in part, Judge Owens concurred with the majority's jurisdiction analysis, but otherwise dissented. In light of the: (1) government's heavy burden due to the standard of review, 2) opaqueness of the legal questions before the court, (3) lack of irreparable harm to the government at this early stage, (4) likelihood of substantial injury to the plaintiffs, and (5) equities involved, Judge Owens would deny the government's motions to stay and let these cases proceed in the ordinary course.

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ORDER

BYBEE, Circuit Judge:

Since 1882, when the Congress enacted the first comprehensive immigration statute, U.S. law has

prohibited the admission to the United States of "any person unable to take care of himself or herself without becoming a public charge." Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214 (1882). Although the precise formulation of this provision has been amended regularly in the succeeding century and a quarter, the basic prohibition and the phrase "public charge" remains. Most recently, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress amended the Immigration and Nationality Act (INA) to provide that "[a]ny 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). In making this determination, "the consular officer or the Attorney General shall at a minimum" take five factors into account: age; health; family status; assets, resources, and financial status; and education and skills. *Id.* § 1182(a)(4)(B)(i). Under long-standing practice, consular officers and the Attorney General consider these factors under a "totality of the circumstances" test.

In 1999, the Immigration and Naturalization Service (INS), providing guidance to the public and INS field officers, defined "public charge" as an "alien . . . who is likely to become . . . primarily dependent on the government for subsistence" as demonstrated by either "institutionalization for long-term care at government expense" or "receipt of public cash assistance for income maintenance." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed.

Reg. 28,689, 28,689 (May 26, 1999) (*1999 Field Guidance*) (internal quotation marks omitted). Although INS determined that the receipt of *cash* benefits received under a public program would be considered a factor in determining whether an alien was likely to become a public charge, it stated that *non-cash* benefits would not be taken into account for public-charge purposes. *Id.*

In August 2019, following notice and comment, the Department of Homeland Security adopted a new rule, redefining the term "public charge" to require a consideration of not only *cash* benefits, but also certain *non-cash* benefits. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,292 (Aug. 14, 2019) (Final Rule). Under DHS's Final Rule a public charge is "an alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period." *Id.* at 41,501. In turn, DHS defined "public benefits." Consistent with the *1999 Field Guidance*, DHS still considers receipt of cash assistance from Supplemental Security Income (SSI); Temporary Assistance for Needy Families (TANF); and federal, state, or local general assistance programs to be public benefits. To that list, DHS added non-cash assistance received through the Supplemental Nutrition Assistance Program (SNAP), Section 8 housing assistance, Section 8 project-based rental assistance, Medicaid (with certain exceptions), and Section 9 public housing. *Id.* DHS's rule exempts public benefits received for emergency medical conditions, benefits received under the Individuals with Disabilities Education Act, and school-based services or benefits. *Id.* It also exempts those benefits received by

aliens under 21 years of age, women during pregnancy, and members of the armed forces and their families. *Id.* DHS repeated that "[t]he determination of an alien's likelihood of becoming a public charge at any time in the future must be based on the totality of the alien's circumstances." *Id*. at 41,502.

Prior to the Final Rule taking effect in October 2019, various states, municipalities, and organizations brought suits in California and Washington seeking a preliminary injunction against the implementation of the rule. In Nos. 19-17213 and 19-17214, California, Maine, Oregon, Pennsylvania, and the District of Columbia; the City and County of San Francisco and the County of Santa Clara; and various organizations brought suit in the Northern District of California against the United States under the Due Process Clause of the Fifth Amendment; the Administrative Procedure Act (APA), 5 U.S.C. § 706; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02. The district court granted a preliminary injunction on the basis of the APA, effective against implementation of the rule in the plaintiff states. *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 2019 WL 5100718 (N.D. Cal. Oct. 11, 2019). In No. 19-35914, thirteen states—Washington, Virginia, Colorado, Delaware, Hawai'i, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, and Rhode Island—filed suit in the Eastern District of Washington against DHS under the Due Process Clause of the Fifth Amendment and the APA. The district court granted a preliminary injunction on the basis of the APA claims and issued a nationwide

injunction. *Washington v. U.S. Dep't of Homeland Sec.*, 2019 WL 5100717 (E.D. Wash. Oct. 11, 2019).

DHS seeks a stay of both preliminary injunctions.[1] Our authority to issue a stay of a preliminary injunction is circumscribed. Nevertheless, for the reasons explained below, we will grant the stay. DHS has shown a strong likelihood of success on the merits, that it will suffer irreparable harm, and that the balance of the equities and public interest favor a stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

I. BACKGROUND AND PROCEDURE

We begin with the governing statutory framework, the proposed change to this framework, and the proceedings below.

A. *Statutory Framework*

The INA requires all aliens who seek lawful admission to the United States, or those already present but seeking to become lawful permanent residents (LPRs), to prove that they are "not inadmissible." 8 U.S.C. § 1361; *see also id.* §§ 1225(a), 1255(a). Section 212 of the INA lists the grounds on which an alien may be adjudged inadmissible. *Id.* § 1182(a)(1)–(10). One of the grounds for inadmissibility is a determination that the alien is likely to become a "public charge." *Id.* § 1182(a)(4). Section 212(a)(4) of the INA reads as follows:

(4) PUBLIC CHARGE. —

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[1] For clarity, we will refer to the plaintiffs below as "the States" and the defendants as "DHS."

(A) IN GENERAL.—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.

(B) FACTORS TO BE TAKEN INTO ACCOUNT.—

(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General[2] shall at a minimum consider the alien's—

(I) age;

(II) health;

(III) family status;

(IV) assets, resources, and financial status; and

(V) education and skills.

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[2] The Homeland Security Act of 2002 transferred much of the Attorney General's immigration authority to the newly created office of the Secretary of Homeland Security. *See In re D-J-*, 23 I. & N. Dec. 572, 573–74 & n.2 (Op. Att'y Gen. 2003) (citing Homeland Security Act of 2002, Pub. L. No. 108-7, 117 Stat. 531 (2003)). Though the Attorney General retains authority over the Executive Office for Immigration Review, *id*. n.3, the Secretary of Homeland Security is now responsible with the general administration and enforcement of immigration law, *id*. n.2.

> (ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support[3] under section 1183a of this title for purposes of exclusion under this paragraph.

Id.

This provision is applied at different times by different government agencies. When an alien seeks a visa to travel to the United States, a Department of State (DOS) consular officer must make an admissibility determination. *See* 84 Fed. Reg. at 41,294 n.3. When an alien arrives at a port of entry without a visa, DHS makes that determination. *Id*. An alien may also be deemed "inadmissible" even when the alien is already in the country. For example, when an alien seeks an adjustment of status from non-immigrant to LPR, DHS must determine that the alien is not inadmissible. *See id*. And when an alien is processed in immigration court, the Department of Justice (DOJ) through immigration judges and the Board of Immigration Appeals (BIA) must determine whether that alien is inadmissible. *Id*.

Though § 212 of the INA lays out the factors an immigration official must consider "at a minimum" when making a public-charge determination, the INA does not define the term "public charge," or restrict

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[3] An affidavit of support is a binding pledge, often made by an employer or family member of the alien, to financially support the alien at 125 percent of the Federal poverty line. 8 U.S.C. § 1183.

how officials are to consider age, health, family status, financial resources, and education. Indeed, as explained in more detail below, in the context of immigration law, the term "public charge" has had several meanings. Since 1999, however, the term has been defined according to guidelines issued by the INS Field Guidance on the matter. *See 1999 Field Guidance*, 64 Fed. Reg. at 28,689. The *1999 Field Guidance* defined a public charge as an alien who "is likely to become (for admission/adjustment purposes) primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." *Id*. (internal quotation marks omitted). The *1999 Field Guidance* did not permit immigration officers to "place any weight on the receipt of non-cash public benefits," *id.*, and allowed consideration of only cash-benefit programs like SSI, TANF, and "[s]tate and local cash assistance programs that provide benefits for income maintenance," *id*. at 28,692.

B. *The Proposed Rule*

On October 10, 2018, DHS published a Notice of Proposed Rulemaking (NPRM) indicating its intent to abandon the *1999 Field Guidance* and redefine the term "public charge." *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018).[4] It did so acting under the authority vested

[4] The proposed rule would not change the definition of public charge for removability determinations, only for determinations of inadmissibility. 83 Fed. Reg. at 51,134. And though the rule only

in the Secretary of Homeland Security to establish immigration regulations and enforce immigration law. *See* 8 U.S.C. § 1103(a)(3) ("[The Secretary of Homeland Security] shall establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter."). The proposed rule redefined the term "public charge" in two ways.

First, the proposed rule for the first time established a required length of time for which the alien would have to rely on public benefits before being labeled a public charge. Under the *1999 Field Guidance*, a public charge was defined as an individual "primarily dependent" on government benefits, but the *1999 Field Guidance* prescribed no specific time period for which this determination should be made. *See* 64 Fed. Reg. at 28,689, 28,692. Under the new rule, an alien would be considered a public charge if he or she "receives one or more [designated] public benefits . . . for more than 12 months in the aggregate within a 36-month period." 83 Fed. Reg. at 51,157–58. Moreover, the proposed rule counts each public benefit received, so that "receipt of two different non-monetizable benefits in one month counts as two months." *Id.* at 51,166.

Second, the proposed rule expanded which benefits contributed to a public-charge determination. The proposed rule still included those cash-benefit programs that were listed in the *1999 Field Guidance*,

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applies to DHS, DHS is currently working with DOS and DOJ to ensure that all three agencies apply a consistent definition of the term in their admissibility inquiries. 84 Fed. Reg. at 41,294 n.3.

but now also includes various in-kind programs, such as:

> (A) Supplemental Nutrition Assistance Program (SNAP, formerly called "Food Stamps"), 7 U.S.C. 2011 to 2036c;
>
> (B) Section 8 Housing Assistance under the Housing Choice Voucher Program, as administered by HUD under 24 CFR part 984; 42 U.S.C. 1437f and 1437u;
>
> (C) Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation) under 24 CFR parts 5, 402, 880 through 884 and 886; and
>
> . . .
>
> (i) Medicaid, 42 U.S.C. 1396 *et seq.*, [with several exceptions, discussed below]
>
> . . .
>
> (iv) Subsidized Housing under the Housing Act of 1937, 42 U.S.C. 1437 *et seq*.

Id. at 51,290 (to be codified at 8 C.F.R. § 212.21).[5]

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[5] DHS altered the Final Rule to make clear that certain benefits were exempt from consideration, including "Medicaid [collected] by aliens under the age of 21[, Medicaid collected by] pregnant women during pregnancy and during the 60-day period after pregnancy," school-based services, Individuals with Disabilities Education Act (IDEA) services, Medicare Part D Low-Income Subsidies, and

Additionally, the proposed rule added other factors for immigration officers to consider when making a public-charge determination. The rule still required consideration of the alien's age, health, family status, financial status, education, and skills, as well as any affidavits of support the alien presents. *See* 83 Fed Reg. 51,178 (to be codified at 8 C.F.R. § 212.22). But the proposed rule also laid out new factors to be afforded extra weight. Four factors weigh heavily against the alien in a public-charge determination: (1) a finding that the alien "is not a full-time student and is authorized to work," but cannot demonstrate "current employment, employment history, or [a] reasonable prospect of future employment"; (2) a previous finding of inadmissibility on public-charge grounds; (3) a medical diagnosis that would likely require extensive medical treatment or interfere with the alien's ability to be self-sufficient; and (4) receipt of benefits for more than twelve months within a thirty-six month period. *Id*. at 51,198–201 (to be codified at 8 C.F.R. § 212.22). Conversely, two factors would weigh heavily in favor of the alien in a public-charge determination: (1) assets or household income over 250 percent of the Federal poverty line, and (2) individual income over 250 percent

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emergency medical care. 84 Fed. Reg. at 41,296–97 (codified at 8 C.F.R. § 212.21). Further, in certain circumstances, the proposed rule excuses receipt of covered public benefits. *See id.* (codified at 8 C.F.R. § 212.21) (exempting public benefits from consideration when the recipient has received certain humanitarian relief, the recipient or his spouse was in the Armed Forces, or the recipient received a waiver).

of the Federal poverty line.[6] *Id*. at 51,292 (to be codified at 8 C.F.R. § 212.22(c)(2)).

During the sixty-day public comment period that followed the NPRM, DHS collected 266,077 comments, "the vast majority of which opposed the rule." 84 Fed. Reg. at 41,297. On August 14, 2019, DHS published the Final Rule in the Federal Register. *Id*. at 41,292. In its 216-page Final Rule, DHS made some changes to the proposed rule (which are not relevant here) and addressed the comments it received. The Final Rule was scheduled to take effect on October 15, 2019, and would apply to anyone applying for admission or adjustment of status after that date. *Id.*

C. *The Proceedings*

1. *The Northern District of California Case*

On August 13, 2019, the City and County of San Francisco and the County of Santa Clara sued several government agencies and officials, including U.S. Citizenship and Immigration Services (USCIS), the Acting Director of USCIS Kenneth T. Cuccinelli, DHS, and the then Acting Director of DHS Kevin McAleenan. They brought suit in the United States District Court for the Northern District of California, claiming that the proposed rule violated the APA on two grounds: (1) the rule was not made in accordance with the law, and (2) the rule was arbitrary, capricious, and an abuse of discretion. *See* 5 U.S.C. § 706(2). Three days later, on August 16, 2019, California, Maine, Oregon,

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[6] The Final Rule added a third factor: private health insurance not subsidized under the Affordable Care Act. 84 Fed. Reg. at 41,504.

Pennsylvania, and the District of Columbia, sued the same defendants in the same court. They claimed that (1) the proposed rule violated § 706 of the APA because (a) it was not made in accordance with the INA, the IIRIRA, the Rehabilitation Act, or state healthcare discretion, (b) it was arbitrary, capricious, and an abuse of discretion, and (2) the proposed rule violated the Fifth Amendment's Due Process Clause because it denied equal protection based on race and unconstitutional animus.

Each set of plaintiffs filed a motion to preliminarily enjoin enforcement of the proposed rule. On August 27, 2019, the district court ordered the two cases consolidated.[7]

The district court heard oral argument on October 2, 2019, and on October 11, granted the preliminary injunction. *See City & Cty. of San Francisco*, 2019 WL 5100718 at *1, 53. The court first held that both the Counties and the States had standing to sue because they showed imminent financial injury. *Id.* at *46–47. It held that they were in the statute's zone of interests because, in enacting the public-charge provision of the INA, "Congress intended to protect states and their political subdivisions' coffers." *Id.* at *41. On the merits, the district court found that the States satisfied the four-factor test for a preliminary injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20

[7] Several legal and health-care organizations were also parties to the motion for a preliminary injunction below. The district court found that they failed to establish that they were within the zone of interests. *City & Cty. of San Francisco*, 2019 WL 5100718, at *53. They are not parties to this appeal.

(2008). The court held that the States had a likelihood of success on the merits for at least some of their claims. It found the States were likely to successfully show that the proposed rule was contrary to law because it unreasonably defined the term "public charge," and thus failed the second step of the *Chevron* analysis. *City & Cty. of San Francisco*, 2019 WL 5100718, at *28. Alternatively, the court found that the States had shown a serious question as to whether the INA unambiguously foreclosed the proposed change to the definition of public charge, thus causing the Final Rule to fail at *Chevron* step one. *Id.* The court also concluded that the States had demonstrated a likelihood of success on the arbitrary-and-capricious claim because DHS failed to adequately consider the adverse economic and public healthrelated costs of the proposed rule. *Id.* at *34, *37.

Further, the court found that the rule's implementation would irreparably harm the Counties and States by causing them to lose millions of dollars in federal reimbursements and face increased operational costs. *Id.* at *46–49. Focusing on the public's interest in the continued provision of medical services and the prevention of communicable diseases, the district court found both the balance of the equities and the public interest weighed in favor of granting an injunction. *Id.* at *50–51. However, because the court found that the States had failed to show why a nationwide injunction would be necessary, the court granted an injunction that applied only to those persons living in plaintiff states or counties. *Id.* at *53.

On October 25, 2019, DHS sought a stay of the preliminary injunction. DHS informed the court that it would seek appellate relief if the court did not act by November 14.

2. *The Eastern District of Washington Case*

On August 14, 2019, Washington, Virginia, Colorado, Delaware, Hawai'i, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Rhode Island, and the state attorney general on behalf of Michigan sued USCIS, Cuccinelli, DHS, and McAleenan in the United States District Court for the Eastern District of Washington. They alleged claims similar to those presented in the California cases: (1) the proposed rule violated the APA because (a) it was not in accordance with immigration law or the Rehabilitation Act, (b) it exceeded DHS's statutory jurisdiction or authority, and (c) it was arbitrary, capricious, and an abuse of discretion, and (2) the proposed rule violated the Fifth Amendment's Due Process Clause because it denied equal protection based on race and unconstitutional animus.

The district court heard oral argument on October 3, 2019, and on October 11, granted the preliminary injunction. *See Washington*, 2019 WL 5100717, at *23. The court's conclusions largely mirrored those of the Northern District of California, though there were some differences. Citing the States' anticipated economic, administrative, and public-health costs, the court held that the States had standing and that the matter was ripe. *Id.* at *11. Finding that the INA was enacted "to protect states from having to spend state money to provide for immigrants who could not provide

for themselves," the court concluded that the States were within the INA's zone of interests. *Id*.

On the merits, the court held that the States had shown a likelihood of success on the arbitrary-and-capriciousness claim and the *Chevron* claim, though the Washington court was less clear than the California court had been about at which step of the *Chevron* analysis the proposed rule would fail. *Id*. at *13–17. Unlike the California court, the Washington court also found that the States were likely to succeed in proving that DHS had violated the Rehabilitation Act, and that DHS acted beyond its congressionally delegated authority in defining self-sufficiency. *Id*. at *17–18. Noting that "the Plaintiff States provide a strong basis for finding that disenrollment from non-cash benefits programs is predictable, not speculative," and that such disenrollment would financially harm the States, the court found that the States would suffer irreparable harm if the injunction were not issued. *Id*. at *20–21. On these same grounds, the court found that the balance of the equities and public interest both "tip[ped] in favor" of granting a preliminary injunction. *Id*. at *21. However, unlike the California court, the Washington court found a geographically limited injunction untenable, in part because a limited injunction might give immigrants an incentive to move from unprotected states to protected states. Accordingly, the Washington court granted the States a nationwide injunction. *Id*. at *22–23.

On October 25, 2019, DHS sought a stay of the preliminary injunction. DHS informed the court that it

would seek appellate relief if the court did not act by November 14.

* * *

By November 14, neither district court responded to the respective motions to stay. On November 15, 2019, DHS filed a motion in this court for an emergency stay of the injunction.

II. JURISDICTION

DHS contends that the plaintiffs do not have Article III standing to sue and that their claims do not fall within the zone of interests protected by the INA. We have an obligation to ensure that jurisdiction exists before proceeding to the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–95 (1998).[8] Additionally, although no party has raised the issue, we must address whether DHS's request for a stay pending appeal is moot in light of the fact that two courts outside our circuit have also issued nationwide injunctions, and any decision we issue here would not directly affect those orders. We conclude that, at this preliminary stage of the proceedings, the States have sufficiently alleged grounds for Article III standing and that DHS's petition for a stay is not moot.

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[8] Both district courts also held that the States' claims fall within the INA's "zone of interests." *See City & Cty. of San Francisco*, 2019 WL 5100718, at *41; *Washington*, 2019 WL 5100717, at *11. For present purposes, because the issue is close and raises a prudential rather than jurisdictional concern, *see Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302 (2017), we will assume that the States' claims satisfy the requirement.

A. *Article III Standing*

Article III of the Constitution limits the federal judicial power to the adjudication of "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1. This fundamental limitation "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "One of the essential elements of a legal case or controversy is that the plaintiff have standing to sue." *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018). "[B]uilt on separation-of-powers principles," standing ensures that litigants have "a personal stake in the outcome of the controversy as to justify the exercise of the court's remedial powers on their behalf." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (internal citations and alterations omitted).

To demonstrate Article III standing, a plaintiff must show a "concrete and particularized" injury that is "fairly traceable" to the defendant's conduct and "that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). "At least one plaintiff must have standing to seek each form of relief requested," *Town of Chester*, 137 S. Ct. at 1651, and that party "bears the burden of establishing" the elements of standing "with the manner and degree of evidence required at the successive stages of the litigation," *Lujan*, 504 U.S. at 561. "At this very preliminary stage," plaintiffs "may rely on the allegations in their

Complaint and whatever other evidence they submitted in support of their [preliminaryinjunction] motion to meet their burden." *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017) (per curiam). And they "need only establish a *risk* or *threat* of injury to satisfy the actual injury requirement." *Harris v. Bd. of Supervisors*, 366 F.3d 754, 762 (9th Cir. 2004); *see Spokeo*, 136 S. Ct. at 1548 (noting that the injury must be "actual or imminent, not conjectural or hypothetical" (quoting *Lujan*, 504 U.S. at 560)).

The district courts concluded that the States had standing based on their alleged loss of federal funds and increase in operational costs related to individuals disenrolling from the non-cash public benefits at issue. DHS challenges this finding, arguing that predictions of future financial harm are based on an "'attenuated chain of possibilities' that does not show 'certainly impending' injury."[9] DHS's argument is unavailing for several reasons.

First, the injuries alleged are not entirely speculative—at least for standing purposes. DHS acknowledges that one result of the Final Rule will be to encourage aliens to disenroll from public benefits. It predicted a 2.5 percent disenrollment rate when proposing the rule. 84 Fed. Reg. at 41,463. This disenrollment, DHS predicted, would result in a reduction in Medicaid reimbursement payments to the States of about $1.01 billion. *Id.* at 41,301. DHS also acknowledged increased administrative costs that

[9] DHS raises no argument about the second and third elements of the standing analysis.

would result from the Final Rule. *Id.* at 41,389. To be sure, the predicted result is premised on the actions of third parties, but this type of "predictable effect of Government action on the decisions of third parties" is sufficient to establish injury in fact. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019).

Moreover, according to evidence supplied by the States, the predicted results have already started. As more individuals disenroll from Medicaid, the States will no longer receive reimbursements from the federal government for treating them. Similarly, the States have sufficiently alleged that they are facing new and ongoing operational costs resulting from the Final Rule. *See City & Cty. of San Francisco*, 2019 WL 5100718, at *48. These costs are predictable, likely, and imminent. It is disingenuous for DHS to claim that they are too attenuated at this point when it acknowledged these costs in its own rulemaking process.

Finally, DHS's reliance on *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), is unfounded. There, the Court found that various human rights, labor, legal, and media organizations did not have standing to challenge the constitutionality of a law authorizing governmental electronic surveillance of communications for foreign intelligence purposes. *Id.* at 414. The alleged injury was that the threat of surveillance would compel them to travel abroad to have in-person conversations with sources and witnesses, in addition to other costs related to protecting the confidentiality of sensitive communications. *Id.* at 406–07. The Court found that

the injury was not "certainly impending" because it was highly speculative whether the government would imminently target communications between the plaintiffs and foreign individuals. *Id.* at 410–11. The assumption that their communications would be targeted was not enough to demonstrate injury in fact. *Id.* at 411–14. Here, the States are not making assumptions about their claimed injuries. Unlike in *Clapper*, the States present evidence that the predicted disenrollment and rising administrative costs are currently happening.

Thus, based on the available evidence at this early stage of the proceedings, we conclude that the States have shown that they have suffered and will suffer direct injuries traceable to the Final Rule and thus have standing to challenge its validity.

B. *Mootness*

Finally, we raise on our own the question of whether we can consider DHS's request for a stay of the district court's preliminary injunctions. *See Demery v. Arpaio*, 378 F.3d 1020, 1025 (9th Cir. 2004) ("[W]e have an independent duty to consider *sua sponte* whether a case is moot."). The stay would, presumably, allow the Final Rule to go into effect pending further proceedings in the district court and this court. The question of mootness arises because, contemporaneous with the district courts' orders here, district courts in Maryland and New York also issued nationwide injunctions. *Casa de Md., Inc. v. Trump*, 2019 WL 5190689 (D. Md. Oct. 14, 2019); *New York v. U.S. Dep't of Homeland Sec.*, 2019 WL 5100372 (S.D.N.Y. Oct. 11,

2019).[10] Thus, unless a stay also issues in those cases, any stay we might issue would not allow the Final Rule to go into effect; the Final Rule would still be barred by those injunctions.

We recently addressed this precise question in *California v. U.S. Department of Health & Human Services*, 941 F.3d 410, 423 (9th Cir. 2019), and we concluded that even if an injunction from another court "has a fully nationwide scope, we nevertheless retain jurisdiction under the exception to mootness for cases capable of repetition, yet evading review." Similarly, we conclude that DHS's petition is not moot, and we proceed to the merits of its petition.

III. STANDARD OF REVIEW

DHS requests that we stay the district courts' preliminary injunctions pending resolution of the consideration of the merits of DHS's appeals. We have authority to do so under the All Writs Act, 28 U.S.C. § 1651, which provides that the courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *See Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9–10 (1942) (finding that a federal court may stay judgments pending appeal "as part of its traditional equipment for the administration of justice"); *In re McKenzie*, 180 U.S. 536, 551 (1901) (noting the "inherent power of the appellate court to

[10] In a third case out of the Northern District of Illinois, the district court issued an order enjoining enforcement of the Final Rule in Illinois only. *Cook Cty. v. McAleenan*, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019).

stay . . . proceedings on appeal"); *see also* Fed. R. Civ. P. 62(g).

Two standards affect our determination, the standard applicable to district courts for preliminary injunctions, and the standard for appellate courts for stays pending appeal. The district court must apply a four-factor standard:

> A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.

Winter, 555 U.S. at 20.

Alternatively, "'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." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

Generally, the purpose of a preliminary injunction is to "preserve the status quo and the rights of the parties until a final judgment issues in the cause." *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984)). An

injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. It "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) (citation omitted).

The standard we apply to DHS's request for a stay is similar, although the burden of proof is reversed. "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion," and our analysis is guided by four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 556 U.S. at 433–34 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "The first two factors . . . are the most critical," and the "mere possibility" of success or irreparable injury is insufficient to satisfy them. *Id.* at 434 (internal quotation marks omitted). At this stage of the proceedings, it is now DHS's burden to make "a strong showing that [it] is likely to" prevail against the States' claims. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken*, 556 U.S. at 426). We consider the final two factors "[o]nce an applicant satisfies the first two." *Nken*, 556 U.S. at 435.

"A stay is an 'intrusion into the ordinary process of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Id.* at 427 (citations omitted). "It is instead 'an exercise of judicial discretion,' and 'the propriety of its issue is dependent upon the circumstances of the particular case.'" *Id.* at 433 (alteration omitted) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672–73 (1926)).

There is significant overlap in these standards. The first prong in both tests—likelihood of success on the merits—is the same. And the Supreme Court has made clear that satisfaction of this factor is the irreducible minimum requirement to granting any equitable and extraordinary relief. *Trump v. Hawai'i*, 138 S. Ct. at 2423. The analysis ends if the moving party fails to show a likelihood of success on the merits of its claims. *Id.*

IV. LIKELIHOOD OF SUCCESS ON THE MERITS

Any "person suffering legal wrong . . . or adversely affected or aggrieved" by an agency's final action may seek judicial review. 5 U.S.C. § 702. The scope of our review is determined by the APA. As a reviewing court, we must "set aside" a final rule if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). In making this determination, we may "decide all relevant questions of law, interpret . . . statutory provisions, and determine the meaning or applicability of the terms of an agency action." *Id.* § 706.

DHS argues that it is likely to succeed on the merits of its appeal because, contrary to the conclusions of the district courts, the Final Rule is neither contrary to law nor arbitrary and capricious. We agree. The Final Rule's definition of "public charge" is consistent with the relevant statutes, and DHS's action was not arbitrary or capricious.

A. *Contrary to Law*

The States argue that the Final Rule is invalid under the APA because the Final Rule's definition of "public charge" is contrary to (1) the INA and (2) the Rehabilitation Act. We disagree and find that DHS is likely to succeed in its argument that the Final Rule is not contrary to law.[11]

1. The INA and "Public Charge"

When confronted with an argument that an agency's interpretation of a statute that it administers is wrong, we employ the familiar *Chevron* two-step test. First, we ask "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If it has, "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." *Id.* at

[11] The States also brought claims in both courts under the equal protection component of the Due Process Clause. U.S. CONST. art. V. Neither district court reached this issue. We also decline to reach this issue. We will consider the likelihood of success on the merits only as to those issues that formed the bases for the district courts' injunctions. In any further proceedings, the district courts are free to consider any issues fairly before them.

842–43. But if Congress has not spoken directly to the issue at hand, we proceed to the second step and ask "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

We must keep in mind why *Chevron* is an important rule of construction:

> *Chevron* is rooted in a background presumption of congressional intent: namely, that Congress, when it left ambiguity in a statute administered by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows. *Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.

Arlington v. FCC, 569 U.S. 290, 296 (2013) (quotation marks and citations omitted).

The district courts found that the Final Rule failed the *Chevron* test at one or both steps because the Final Rule's definition of "public charge" was an

impermissible reading of that phrase in the INA. We will consider each step in turn.

a. *Chevron* Step 1

At *Chevron*'s first step, we determine whether Congress has directly spoken to the issue at hand by "employing traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. That means we start with the text. *Afewerki v. Anaya Law Grp.*, 868 F.3d 771, 778 (9th Cir. 2017). We will then examine the history of interpretation to see if there has been a judicial construction of the term "public charge" that "follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Finally, we will consider other factors raised by the district courts and the States.

(1) *Text*. Under § 212 of the INA, an alien is inadmissible if, "in the opinion of" the immigration official, the alien "is likely at any time to become a public charge." In making that determination, the immigration official must consider "at a minimum" the alien's age, health, family status, financial resources, education, and skills. 8 U.S.C. § 1182(a)(4)(A). Congress did not define these terms and placed no further restrictions on what these officers may consider in the public-charge assessment. Nor did Congress prescribe how the officers are to regard the five enumerated factors.

We have four quick observations. First, the determination is entrusted to the "opinion" of the

consular or immigration officer.[12] That is the language of discretion, and the officials are given broad leeway. Depending on the context in which the "opinion" is given, the decision may be nonreviewable. Under the rule of consular nonreviewability, only the most egregious abuses of discretion may be reviewed. *See Kerry v. Din*, 135 S. Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring); *see also Cardenas v. United States*, 826 F.3d 1164, 1171–72 (9th Cir. 2016) (holding that Justice Kennedy's concurring opinion in *Din* is the controlling opinion and summarizing the consular nonreviewability rule). Indeed, we have previously held that the phrase "in the opinion of the Attorney General" in a now-repealed immigration statute conferred "unreviewable" discretion to the Executive Branch. *See Kalaw v. I.N.S.*, 133 F.3d 1147, 1151–52 (9th Cir. 1997), *superseded by statute on other grounds*. And to the extent the federal courts may review such determinations, our review is narrow. *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002) (holding that judicial review of discretionary acts by the BIA is limited to "the purely legal and hence non-discretionary" aspects of the BIA's action); *see also Allen v. Milas*, 896 F.3d 1094, 1106–07 (9th Cir. 2018) (noting that judicial review of visa denials is "limited . . . to constitutional challenges" and does not extend to APA-based challenges (emphasis omitted)).

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[12] The text of the INA does not mention immigration officers. Rather, it commits the public-charge determination to the "opinion of the Attorney General." 8 U.S.C. § 1182(a)(4)(A). As we explained above, Congress has since transferred the authority granted by the INA to DHS's immigration officers

Second, the critical term "public charge" is not a term of art. It is not self-defining. That does not mean that officials may pour any meaning into the term, but it does mean that there is room for discretion as to what, precisely, being a "public charge" encompasses. In a word, the phrase is "ambiguous" under *Chevron*; it is capable of a range of meanings. So long as the agency has defined the term within that range of meanings, we have no grounds for second-guessing the agency, "even if the agency's reading differs from what [we] believe[] is the best statutory interpretation." *Brand X*, 545 U.S. at 980 (citing *Chevron*, 467 U.S. at 843–44 & n.11). It also means that an agency "must consider varying interpretations and the wisdom of its policy on a continuing basis," including "in response to changed factual circumstances, or a change in administrations." *Id.* at 981 (quotations marks and citations omitted).

Third, Congress set out five factors to be taken into account by immigration officials, but expressly did not limit the discretion of officials to those factors. Rather the factors are to be considered "at a minimum." Other factors may be considered as well, giving officials considerable discretion in their decisions.

Fourth, Congress granted DHS the power to adopt regulations to enforce the provisions of the INA. When Congress created DHS, Congress vested the Secretary of Homeland Security "with the administration and enforcement of . . . all [] laws relating to the immigration and naturalization of aliens" and authorized the Secretary to "establish such regulations . . . as he deems necessary." 8 U.S.C. § 1103(a)(1) & (3); *see also* 6 U.S.C. § 112(b)(1) (authorizing the Secretary

to "delegate any of the Secretary's functions to any [DHS] officer, employee, or organizational unit"); *Matter of D-J-*, 23 I. & N. Dec. at 573–74. By granting regulatory authority to DHS, Congress intended that DHS would resolve any ambiguities in the INA. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme."). As we have already noted, the INA's text is ambiguous. DHS has attempted to elucidate that ambiguity in the Final Rule. In short, we do not read the text of the INA to unambiguously foreclose DHS's action.

(2) *Historical Understanding.* Although the foregoing would ordinarily be sufficient to end our inquiry, the current provision, which was most recently rewritten in 1996 in IIRIRA, is merely the most recent iteration of federal immigration law to deem an alien inadmissible if he or she is likely to become a "public charge." There is a long history of judicial and administrative interpretations of this phrase in the immigration context that predates the enactment of the INA. Because "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), we must examine this history to determine if "public charge" has a well-defined and congressionally understood meaning that limits DHS's discretion.

The history of the term "public charge" confirms that its definition has changed over time to adapt to the way in which federal, state, and local governments have cared for our most vulnerable populations. "Public charge" first appeared in this country's immigration law in 1882. That statute excluded a would-be immigrant from the United States if the person was a "convict, lunatic, idiot, or a[] person unable to take care of himself or herself without becoming a public charge." Act of Aug. 3, 1882 ch. 376, § 2, 22 Stat. 214.

Congress did not define "public charge" in the 1882 act. We thus ascribe to that phrase its commonly understood meaning at the time, as evidenced by contemporary sources. *See Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 633–34 & nn.6–8 (2012) (citing contemporary dictionary definitions to interpret statutory phrases). An 1828 dictionary defined "charge" as "[t]hat which is enjoined, committed, entrusted or delivered to another, implying care, custody, oversight, or duty to be performed by the person entrusted," or a "person or thing committed to anothers [sic] custody, care or management." Charge, WEBSTER'S DICTIONARY (1828 Online Edition), http://webstersdictionary1828.com/Dictionary/charge; *see also* Stewart Rapaljb & Robert L. Lawrence, DICTIONARY OF AMERICAN AND ENGLISH LAW, WITH DEFINITIONS OF THE TECHNICAL TERMS OF THE CANON AND CIVIL LAWS 196 (Frederick D. Linn & Co. 1888) (defining "charge" as "an obligation or liability. Thus we speak . . . of a pauper being chargeable to the parish or town"). That is a broad, common-sense definition, which was reflected in Nineteenth-Century judicial opinions using the phrase. *See, e.g.*, *In re Day*, 27 F. 678, 681 (C.C.S.D.N.Y. 1886)

(defining a "public charge" as a person who "can neither take care of themselves, nor are under the charge or protection of any other person"); *State v. The S.S. "Constitution"*, 42 Cal. 578, 584–85 (1872) (noting that those who are "liable to become a public charge" are "paupers, vagabonds, and criminals, or sick, diseased, infirm, and disabled persons"); *City of Alton v. Madison Cty.*, 21 Ill. 115, 117 (1859) (noting that a person is not a "public charge" if the person has "ample means" of support).

The 1882 act did not consider an alien a "public charge" if the alien received merely some form of public assistance. The act itself established an "immigrant fund" that was designed to provide "for the care of immigrants arriving in the United States." Act of Mar. 26, 1910 ch. 376, § 1, 22 Stat. 214. Congress thus accepted that providing some assistance to recent immigrants would not make those immigrants public charges. But Congress did not draw that line with any precision. Instead, we read "public charge" in the 1882 act to refer generally to those who were unwilling or unable to care for themselves. In context that often meant that they were housed in a government or charitable institution, such as an almshouse, asylum, or penitentiary.

The term "public charge" endured through subsequent amendments to the 1882 act. In 1910, Congress enacted a statute that deemed "paupers; persons likely to become a public charge; professional beggars;" and similar people inadmissible. ch. 128, § 2, 36 Stat. 263 (1910). Relying on the placement of "public charge" between "paupers" and "professional beggars,"

the Supreme Court held that a person is likely to become a public charge if that person has "permanent personal objections" to finding employment. *Gegiow v. Uhl*, 239 U.S. 3, 10 (1915). In that case, the petitioners, Russian emigrees, arrived in the United States with little cash and the intention of going to Portland, Oregon. The immigration officials considered them likely to become public charges because Portland had a high unemployment rate. In a spare, three-page opinion by Justice Holmes, the Court noted that the "single question" before the Court was "whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked." *Id.* at 9–10. The Court answered in the negative. In making the public-charge determination, immigration officers must consider an alien's "personal" characteristics, not a localized job shortage. *Id.* at 10. The Court observed that "public charge" should be "read as generically similar to the other[] [statutory terms] mentioned before and after" that phrase. *Id.* Five years later, we followed the Supreme Court's lead, holding that "the words 'likely to become a public charge' are meant to 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) (citing *Howe v. United States*, 247 F. 292, 294 (2d Cir. 1917)), *aff'd in part and rev'd in part on other grounds*, 259 U.S. 276 (1922).[13] Thus, as of 1920, we considered the likelihood

[13] In *Ng Fung Ho*, the petitioner had been admitted to the United States, based partly on his holding a "certificate" that allowed him to be a "merchant." *Id.* at 768. Several years after his admission,

of being housed in a state institution to be the primary factor in the public-charge analysis.

By the mid-Twentieth Century, the United States had largely abandoned the poorhouse in favor of direct payments through social welfare legislation. At the federal level, the government had created Social Security and Aid to Families With Dependent Children (AFDC). At the state level, governments supplemented family income through programs such as unemployment insurance and worker's compensation. Similar changes were being made in other programs such as mental health care, where we moved from institutionalizing the mentally ill to a program of treatment with the end of releasing them. As Chief Justice Burger observed:

> Historically, and for a considerable period of time, subsidized custodial care in private foster homes or boarding houses was the most benign form of care provided incompetent or mentally ill persons for whom the States assumed responsibility. Until well into the 19th

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he pleaded guilty to gambling. *Id.* at 769. It was then determined that the petitioner was no longer a merchant. The government argued that the petitioner was deportable because he had been likely to become a public charge at the time of his admission. Because there was no evidence that the certificate he had produced prior to admission had been fraudulent, we held that merely pleading guilty to gambling and paying a $25 fine three years after being admitted did not "prove that the alien . . . was likely to become a public charge" at the time of admission. *Id.* We thus rejected the government's assertion that the petitioner should be deported on that basis. *Id.* at 770.

> century the vast majority of such persons were simply restrained in poorhouses, almshouses, or jails.

O'Connor v. Donaldson, 422 U.S. 563, 582 (1975) (Burger, C.J., concurring). "[T]he idea that States may not confine the mentally ill except for the purpose of providing them with treatment [was] of very recent origin." *Id.* (footnote omitted). The way in which we regarded the poor and the mentally infirm not only brought changes in the way we treated them, but major changes in their legal rights as well. *See, e.g.*, *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245, 248–50 (1972) (requiring a hearing before a person who has completed his criminal sentence can be committed to indefinite confinement in a mental institution); *cf. Goldberg v. Kelly*, 397 U.S. 254, 260–61 (1970) (holding that a recipient of public assistance payments is constitutionally entitled to an evidentiary hearing before those payments are terminated).

The movement towards social welfare was soon reflected in the definition of "public charge." In *Matter of B-*, 3 I. & N. Dec. 323 (BIA 1948), the recently created BIA articulated a new definition of "public charge." Permanent institutionalization would not be the sole measure of whether an alien was a public charge. The BIA said it would also consider whether an alien received temporary services from the government. At the same time, the BIA recognized that mere "acceptance by an alien of services provided by" the government "does not in and of itself make the alien a public charge." *Id.* at 324. Instead, the BIA stated that an alien becomes a public charge if three elements are

met: "(1) The State or other governing body must, by appropriate law, impose a charge for the services rendered to the alien. . . . (2) The authorities must make demand for payment of the charges . . . . And (3) there must be a failure to pay for the charges." *Id.* at 326. In other words, the government benefit received by the alien must be monetized, a bill must be presented to the alien, and the alien must refuse to pay. Ultimately, in *Matter of B-*, the BIA held that the petitioner had not become a public charge, even though she had been involuntarily committed to a mental institution, because the state of Illinois had not charged her or demanded payment. *Id.* at 327. The BIA's order was subsequently affirmed by the Attorney General. *Id.* at 337.

Four years later, Congress substantially revised the immigration laws in the Immigration and Nationality Act of 1952. The amended statute retained the term "public charge," but, for the first time, made clear that the decision was committed to the opinion of a consular officer or the Attorney General. The INA deemed inadmissible "[a]liens 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, are likely at any time to become public charges." Title 2, ch. 2, § 212, 66 Stat. 163, 183 (1952). Although *Matter of B-* was not mentioned in the legislative history accompanying the 1952 act, it is notable that Congress chose to insert this "opinion" language following the BIA's articulation of a new definition of "public charge" that departed from prior judicial interpretations of the term.

In 1974, the BIA altered course again. The BIA limited *Matter of B-*'s three-part test to determining whether a person had become a public charge after having been admitted to the United States. *See Matter of Harutunian*, 14 I. & N. Dec. 583, 585 (BIA 1974). After noting that the phrase "public charge" had been interpreted differently by various courts, the BIA held:

> [A]ny alien who is incapable of earning a livelihood, who does not have sufficient funds in the United States for his support, and has no person in the United States willing and able to assure that he will not need public support is excludable as likely to become a public charge whether or not the public support which will be available to him is reimbursable to the state.

Id. at 589–90. The BIA thus pegged the public-charge determination to whether the alien was likely to "need public support," irrespective of whether the alien was likely to be institutionalized for any length of time and billed for the cost by the state. *Id.* at 589.

That definition of "public charge" was subsequently amended by the INS. In 1987, the INS issued a final rule that deemed an applicant for adjustment of status to be a "public charge" if the applicant had "received public cash assistance." Adjustment of Status for Certain Aliens, 52 Fed. Reg. 16,205, 16,211 (May 1, 1987). INS did not state how much "public cash assistance" an alien had to receive, but left the decision to officers who would judge the totality of the circumstances. *See id.* at 16,211 (noting that "all [the]

evidence produced by the applicant will be judged"), 16,212 ("The weight given in considering applicability of the public charge provisions will depend on many factors . . . ."). INS did make clear that "public cash assistance" would not include the value of "assistance in kind, such as food stamps, public housing, or other non-cash benefits," including Medicare and Medicaid. *Id.* at 16,209.

In 1996, through IIRIRA, Congress enacted the current language appearing in § 212 of the INA. Omnibus Consolidated Appropriations Act, Title 5 § 531, 110 Stat. 3009 (1996). As detailed above, Congress added a requirement that an immigration officer consider an alien's "age;" "health;" "family status;" "assets, resources and financial status;" and "education and skills" when determining if a person is likely to become a public charge. 8 U.S.C. § 1182(a)(4)(B).

Responding to the 1996 act, INS published the *1999 Field Guidance* to "establish clear standards governing a determination that an alien is inadmissible or ineligible to adjust status . . . on public charge grounds." 64 Fed. Reg. at 28,689. In the *1999 Field Guidance*, INS defined "public charge" as "an alien . . . who is likely to become (for admission/adjustment purposes) primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." *Id.* (internal quotation marks omitted). The *1999 Field Guidance* made clear that the public-charge determination remained a "totality of the

circumstances test." *Id.* at 28,690. Within this totality-of-the-circumstances assessment, only the receipt of "cash public assistance for income maintenance" should be considered; "receipt of noncash benefits or the receipt of special-purpose cash benefits not for income maintenance should not be taken into account." *Id.* The *1999 Field Guidance* thus largely reaffirmed INS's 1987 rule. For the past twenty years, the *1999 Field Guidance* has governed, until it was replaced by the Final Rule.

So what to make of this history? Unlike the district courts, we are unable to discern one fixed understanding of "public charge" that has endured since 1882. If anything has been consistent, it is the idea that a totality-of-the circumstances test governs public-charge determinations. But different factors have been weighted more or less heavily at different times, reflecting changes in the way in which we provide assistance to the needy. Initially, the likelihood of being housed in a government or charitable institution was most important. Then, the focus shifted in 1948 to whether public benefits received by an immigrant could be monetized, and the immigrant refused to pay for them. In 1974, it shifted again to whether the immigrant was employable and self-sufficient. That was subsequently narrowed in 1987 to whether the immigrant had received public cash assistance, which excluded in-kind benefits. Congress then codified particular factors immigration officers must consider, which was followed by the *1999 Field Guidance*'s definition of "public charge." In short, we find that the history of the use of "public charge" in federal immigration law demonstrates that "public

charge" does not have a fixed, unambiguous meaning. Rather, the phrase is subject to multiple interpretations, it in fact has been interpreted differently, and the Executive Branch has been afforded the discretion to interpret it.

Congress simply has not spoken to how "public charge" should be defined. We must presume that when Congress enacted the current version of the INA in 1996, it was aware of the varying historical interpretations of "public charge." *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009). Yet Congress chose not to define "public charge" and, instead, described various factors to be considered "at a minimum," without even defining those factors. It is apparent that Congress left DHS and other agencies enforcing our immigration laws the flexibility to adapt the definition of "public charge" as necessary.

(3) *Other Factors*. Both district courts found it significant that Congress twice considered, but failed to enact, a definition of "public charge" that is similar to the definition adopted in the Final Rule. *City & Cty. of San Francisco*, 2019 WL 5100718 at *27; *Washington*, 2019 WL 5100717, at *17. During the debates over IIRIRA in 1996, Congress considered whether to enact the following definition of "public charge": "the term 'public charge' includes any alien who receives [certain means-tested] benefits . . . for an aggregate period of at least 12 months or 36 months" in some cases. 142 Cong. Rec. 24,313, at 24,425 (1996). Senator Leahy argued that this was "too quick to label people as public charges for utilizing the same public assistance that many Americans need to get on their feet," and that the

phrase "means tested" was "unnecessarily uncertain." S. Rep. No. 104-249, at 63–64 (1996). Nevertheless, the Senate passed the bill containing the definition of "public charge." Before the House considered the bill, however, President Clinton implicitly threatened to veto it because it went "too far in denying legal immigrants access to vital safety net programs which could jeopardize public health and safety." Statement on Senate Action on the "Immigration Control and Financial Responsibility Act of 1996," 32 Weekly Comp. Pres. Doc. 783 (May 6, 1996). Ultimately, Congress chose not to enact this "public charge" definition. In 2013, the Senate rejected an amendment to the INA that "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." S. Rep. No. 113-40, at 63 (2013).

The district courts viewed these failed legislative efforts as evidence that Congress specifically rejected the interpretation of "public charge" DHS articulated in the Final Rule, and that the Final Rule is thus an impermissible reading of the INA. *City & Cty. of San Francisco*, 2019 WL 5100718, at *27; *Washington*, 2019 WL 5100717, at *17. We disagree. If this legislative history is probative of anything, it is probative only of the fact that Congress chose *not* to codify a particular interpretation of "public charge."[14] *See Cent. Bank of*

[14] Sometimes it is appropriate to consider language Congress has rejected, primarily when Congress rejected language in favor of the

Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 184 (1994) ("[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." (quotation marks and citation omitted)). But the failure of Congress to *compel* DHS to adopt a particular rule is not the logical equivalent of *forbidding* DHS from adopting that rule. The failure to adopt a new rule is just that: no new rule.[15] And no change to § 212 means that consular officers, the Attorney General, and DHS retain all the discretion granted them in the INA.

A second argument made by the States and relied upon by the Eastern District of Washington is that DHS exceeded its authority by determining what makes a person "self-sufficient." *Washington*, 2019 WL 5100717, at *17–18. This argument is refuted by the statute itself. As we have discussed, the INA requires

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statute adopted and under review. *See*, *e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441–42 (1987) (contrasting Congress's decision to adopt the House proposal over the Senate version)

[15] We can speculate as to the reasons that members of Congress declined to adopt these legislative proposals, but the speculation will not help us. "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170 (2001). Although some members may have thought the rule too harsh, others may have thought it too lenient, while a third group may have thought the rule should be left flexible and in the hands of the immigration agencies. If anything, this legislative history proves only that Congress decided not to constrain the discretion of agencies in determining who is a public charge. That discretion had long been vested in the agencies, and these failed legislative efforts did not alter that discretion.

immigration officers to consider an alien's "health," "family status," "assets, resources, [] financial status," "education and skills." 8 U.S.C. § 1182(a)(4)(B)(i)(II)–(V). The concept of self-sufficiency is subsumed within each of these factors. And even if it were not, the statutory factors are not exhaustive; DHS may add to them. *See id.* § 1182(a)(4)(B)(i). Because DHS has been "charged with the administration and enforcement" of all "laws relating to the immigration and naturalization of aliens," *Id.* § 1103(a)(1); *see also* 6 U.S.C. § 112(b)(1), determining what constitutes self-sufficiency for purposes of the public-charge assessment is well within DHS's authority.[16]

* * *

In short, Congress has not spoken directly to the interpretation of "public charge" in the INA. Nor did it

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[16] The Eastern District of Washington also held that, because the states have a "central role in formulation and administration of health care policy," DHS "acted beyond its Congressionally delegated authority" when it adopted the Final Rule. *Washington*, 2019 WL 5100717, at *18; *see also id.* ("Congress cannot delegate authority that the Constitution does not allocate to the federal government in the first place . . . ."). Congress, of course, has plenary authority to regulate immigration and naturalization. U.S. CONST. art. I, § 8, cl. 4. Pursuant to that authority, Congress adopted the "public charge" rule, which no one has challenged on constitutional grounds. Further, Congress has authorized DHS to adopt regulations. 8 U.S.C. § 1103(a)(3). DHS thus did not overstep its authority by promulgating the Final Rule. Indeed, under the district court's analysis, even the *1999 Field Guidance* might be unconstitutional. But neither the district court nor the States question the lawfulness of the *1999 Field Guidance*. We see no meaningful difference between INS's authority to promulgate the *1999 Field Guidance* and DHS's authority to adopt the Final Rule.

unambiguously foreclose the interpretation articulated in the Final Rule. Instead, the phrase "public charge" is ambiguous under *Chevron*. DHS has the authority to interpret it and "must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863–64. Indeed, "the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute." *Id.* at 864. We thus proceed to the second step of the *Chevron* analysis.

b. *Chevron* Step 2

At *Chevron*'s second step, we ask whether the agency's interpretation is "reasonable—or 'rational and consistent with the statute.'" *Diaz-Quirazco v. Barr*, 931 F.3d 830, 840 (9th Cir. 2019) (quoting *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990)). If it is, we must defer to it, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1073–74 (9th Cir. 2016) (quoting *Brand X*, 545 U.S. at 980).

The Final Rule easily satisfies this test. As we have explained, the INA grants DHS considerable discretion to determine if an alien is likely to become a public charge. To be sure, under the Final Rule, in-kind benefits (other than institutionalization) will for the first time be relevant to the public-charge determination. We see no statutory basis from which a court could conclude that the addition of certain categories of in-kind benefits makes DHS's

interpretation untenable.[17] And whether the change in policy results from changing circumstances or a change in administrations, the wisdom of the policy is not a question we can review. *See Brand X*, 545 U.S. at 981.

Our conclusion is reinforced by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which Congress enacted contemporaneous with IIRIRA. PRWORA set forth our "national policy with respect to welfare and immigration." 8 U.S.C. § 1601. In relevant part, PRWORA provides, "Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes." *Id.* § 1601(1). As a result, "[i]t continues to be the immigration policy of the United States that . . . aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations." *Id.* § 1601(2). Receipt of non-cash public assistance is surely relevant to "self-sufficiency" and whether immigrants are "depend[ing] on public resources to meet their needs." *See id.* § 1601(1)–(2); *see also Korab v. Fink*, 797 F.3d 572, 580 (9th Cir. 2014). PRWORA thus lends support to DHS's interpretation of the INA.

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[17] Cash benefits and in-kind benefits are often treated under the single rubric of a "direct subsidy." *Witters v. Wash. Dep't of the Servs. for the Blind*, 474 U.S. 481, 487 (1986). In certain contexts, such as settlement, "compensation in kind is worth less than cash of the same nominal value," *In re Mex. Transfer Litig.*, 267 F.3d 743, 748 (9th Cir. 2001), but the Final Rule does not deal with the valuation of such services. It deals only with whether in-kind benefits have been received under certain specified programs.

We conclude that DHS's interpretation of "public charge" is a permissible construction of the INA.

2. The Rehabilitation Act

The States argue, and the Eastern District of Washington found, that the Final Rule is inconsistent with the Rehabilitation Act. *Washington*, 2019 WL 5100717, at *18. The Northern District of California rejected that argument. *City & Cty. of San Francisco*, 2019 WL 5100718, at *29–30. The Rehabilitation Act provides: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . . conducted by any Executive agency." 29 U.S.C. § 794(a). "Program or activity" is defined as "all of the operations of . . . [an] agency." *Id.* § 794(b).

This argument need not detain us long. First, under the INA, immigration officers are obligated to consider an immigrant's "health" when making the public-charge determination. 8 U.S.C. § 1182(a)(4)(B)(i)(II). To the extent that inquiry may consider an alien's disability, the officers have been specifically directed by Congress to do so. Indeed, Congress's express direction that immigration officers consider an alien's "health" came twenty-three years *after* the Rehabilitation Act. We cannot see how a general provision in one statute constrains an agency given a specific charge in a subsequent law. The INA does not violate the Rehabilitation Act. Second, nothing in the Final Rule changes DHS's practice with respect to considering an alien's health. Nothing in the Final Rule suggests that

aliens will be denied admission or adjustment of status "solely by reason of her or his disability." Throughout the Final Rule, DHS confirms that the public-charge determination is a totality-of the-circumstances test. *See* 84 Fed. Reg. at 41,295, 41,368. And DHS specifically addressed this argument in the Final Rule: "it is not the intent, nor is it the effect of this rule to find a person a public charge solely based on his or her disability." *Id.* at 41,368. DHS has shown a strong likelihood that the Final Rule does not violate the Rehabilitation Act.

* * *

In sum, DHS is likely to succeed in its argument that the Final Rule should not be set aside as contrary to law. We will not minimize the practical impact of the Final Rule, but we will observe that it is a short leap in logic for DHS to go from considering in-cash public assistance to considering both incash and in-kind public assistance. DHS has shown that there is a strong likelihood that its decision to consider the receipt of in-kind government assistance as part of its totality-of-the-circumstances test is a reasonable interpretation of the INA and does not violate the Rehabilitation Act.

B. *Arbitrary and Capricious*

Arbitrary and capricious review under the APA addresses the reasonableness of the agency's decision. The classic statement of our scope of review is *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automotive Insurance Co.*, 463 U.S. 29 (1983):

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that could not be ascribed to a difference in view of the product of agency expertise.

Id. at 43 (quotation marks and citations omitted); *see Org. Vill. of Kake v. Dep't of Agric.*, 795 F.3d 956, 966–67 (9th Cir. 2015). An agency's failure to respond to any particular comment or point put forward by a rule's opponents is not a ground for finding per se arbitrary-and-capricious action. *See Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1150–52 (9th Cir. 2002) (explaining that there is no per se violation of the APA when an agency fails to address comments); *Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984) ("[The APA] has never been interpreted to require the agency to respond to every comment, or to analyse [sic] every issue or alternative raised by the comments, no matter how insubstantial.").

The fact that DHS has changed policy does not substantially alter the burden in the challengers' favor. DHS must, of course, "show that there are good reasons for the new policy," but, it

> need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.

FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

The district courts raised two objections to DHS's consideration that the district courts found made the Final Rule arbitrary and capricious: (1) DHS's failure to properly weigh the costs to state and local governments and healthcare providers, such as hospitals, resulting from disenrollment from public benefits programs; and (2) DHS's inadequate consideration of the Final Rule's impact on public health. *City & Cty. of San Francisco*, 2019 WL 5100718, at *31–35; *Washington*, 2019 WL 5100717, at *19. We will consider each in turn.

1. Costs of Disenrollment

The Northern District of California's principal concern was the higher costs that state and local governments will face as a result of "disenrollment [from] public benefits." *City & Cty. of San Francisco*,

2019 WL 5100718, at *31. Specifically, the district court concluded that "DHS appears to have wholly failed to engage with [comments on the costs of the change]. DHS failed to grapple with the [Final] Rule's predictable effects on local governments, and instead concluded that the harms—whatever they may be—are an acceptable price to pay." *Id.* at *32. The court further faulted DHS for "refus[ing] to consider the costs associated with predicted, likely disenrollment of those not subject to the public charge determination." *Id.*

We begin with the observation that DHS addressed at length the costs and benefits associated with the Final Rule. *See* 84 Fed. Reg. at 41,300–03 (summarizing costs and benefits); *id.* at 41,312–14 (estimating costs to health care providers, states, and localities); *id.* at 41,463–81 (responding to various comments on costs and benefits); *id.* at 41,485–41,489 (responding to Executive Orders requiring an assessment of the costs and benefits of regulatory alternatives).[18] In addition, DHS prepared an "Economic Analysis Supplemental Information for Analysis of Public Benefits Programs," www.regulations.gov/document?D=U SCIS-2010-0012-63742.

DHS's analysis began by stating, "This rule will impose new costs on this population applying to adjust

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[18] Indeed, DHS's notice is quite comprehensive. In no fewer than 216 pages (which DHS estimated would take sixteen to twenty hours to read), DHS explained the changes proposed, estimated costs and savings, and addressed scores of comments on topics ranging from potential public-health concerns to whether DHS should consider immigrants' credit scores. *See generally* 84 Fed. Reg. at 41,292–508.

status . . . that are subject to the public charge ground of inadmissibility." 84 Fed. Reg. at 41,300. It estimated the direct costs to the federal government of the rule to be $35,202,698 annually. Some of these direct costs to the federal government would be offset by "individuals who may choose to disenroll from or forego enrollment in a public benefits program." *Id.* DHS estimated the reduction in federal transfer payments would be about $2.47 billion annually. *Id.* at 41,301. It further estimated that there would be a reduction in state transfer payments of about $1.01 billion annually. *Id.* DHS also acknowledged that the Final Rule would impose direct and indirect costs on individuals and entities. The first of these, it suggested, were "familiarization costs," which was "a direct cost of the rule." *Id.* Organizations that work with immigrant communities would similarly experience indirect costs of familiarization. *Id.*

Elsewhere, DHS responded to comments claiming that the Final Rule would cause aliens to disenroll from or forego enrollment in public benefit programs and that this "would be detrimental to the financial stability and economy of communities, States, local organizations, hospitals, safety net providers, foundations, and healthcare centers." *Id.* at 41,312; *see also id.* (suggesting that the Final Rule would increase the use of hospital emergency rooms). DHS identified three categories of aliens who might be affected by the Final Rule. First, there are aliens who are entitled to public benefits and seek to immigrate or adjust status. Their receipt of some public benefits are simply not covered by the rule. DHS noted, for example, that "emergency response, immunization, education, or

[certain] social services" are not included in its revised definition of "public benefits." *Id.* On the other hand, there are public benefits to which such an alien is entitled but which will be considered by DHS in its determination whether such alien is a "public charge." DHS "acknowledge[d] that individuals subject to this rule may decline to enroll in, or may choose to disenroll from, public benefits for which they may be eligible under PRWORA, in order to avoid negative consequences as a result of this final rule." *Id.* DHS could not estimate how many aliens in this category would be affected by the Final Rule "because data limitations provide neither a precise count nor reasonable estimate of the number of aliens who are both subject to the public charge ground of inadmissibility and are eligible for public benefits in the United States." *Id.* at 41,313.

The second category of aliens are those who are unlawfully in the United States. These are "generally barred from receiving federal public benefits other than emergency assistance." *Id.* (footnote omitted). Nevertheless, DHS announced that it will *not* consider "for purposes of a public charge inadmissibility determination whether applicants for admission or adjustment of status are receiving food assistance through other programs, such as exclusively state-funded programs, food banks, and emergency services, nor will DHS discourage individuals from seeking such assistance." *Id.*

Third are those aliens and U.S. citizens who are *not* subject to the Final Rule, but erroneously think they are and disenroll from public benefits out of an

abundance of caution. *Id.* Disenrollment by this category of persons should not be influenced by the Final Rule because their receipt of public benefits will "not be counted against or made attributable to immigrant family members who are subject to this rule." *Id.* DHS understood "the potential effects of confusion" over the scope of the Final Rule that might lead to over-disenrollment. DHS stated that it would "issue clear guidance that identifies the groups of individuals who are not subject to the rule." *Id.*

The Northern District of California pointed out that DHS's response "fails to discuss costs being borne by the states, hospitals, or others, other than to say DHS will issue guidance in an effort to mitigate confusion." *City & Cty. of San Francisco*, 2019 WL 5100718, at *34. The court further criticized DHS for "flatly refus[ing] to consider the costs associated with predicted, likely disenrollment of those not subject to the public charge determination." *Id.* at *35.

We think several points must be considered here. First, the costs that the states, localities, and various entities (such as healthcare providers) may suffer are indirect. Nothing in the Final Rule imposes costs on those governments or entities; the Final Rule does not regulate states, localities, and private entities. Disenrollment will be the consequence of either (1) the free choice of aliens who wish to avoid any negative repercussions for their immigration status that would result from accepting public benefits, or (2) the mistaken disenrollment of aliens or U.S. citizens who can receive public benefits without any consequences for their residency status. DHS addressed both groups.

DHS said it did not have data to calculate the size of the first group (and, presumably, the value of the benefits from which they will disenroll), and it had no way to estimate the second. 84 Fed. Reg. at 41,313. DHS stated that it would try to compensate for the latter group's error by publishing clear guidance, and it also noted that other organizations, public and private, would have an incentive to provide accurate information to persons who might mistakenly disenroll. *Id.* at 41,486.

Second, DHS did acknowledge the indirect costs the Final Rule might impose

> downstream . . . on state and local economics, large and small businesses, and individuals. For example, the rule might result in reduced revenues for healthcare providers participating in Medicaid, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, agricultural producers who grow foods that are eligible for purchase using SNAP benefits, or landlords participating in federally funded housing programs.

Id. It did not attempt to quantify those costs, but it recognized the overall effect of the Final Rule, and that is sufficient. *See Irvine Med. Ctr. v. Thompson*, 275 F.3d 823, 835 (9th Cir. 2002) ("[T]he Secretary acknowledged that some Medicare beneficiaries would possibly have to shoulder an additional financial burden as a result of the repeal of the carry-forward provision. This acknowledgment did not render the

Secretary's rulemaking statement or reliance upon it arbitrary, however." (internal citation omitted)) .

Third, DHS is not a regulatory agency like EPA, FCC, or OSHA. Those agencies have broad mandates to regulate directly entire industries or practices, sometimes on no more instruction from Congress than to do so in the "public convenience, interest or necessity," 47 U.S.C. § 303 (FCC), or as "appropriate and necessary," 42 U.S.C. § 7412(n)(1)(A) (EPA). When Congress has vested such broad regulatory authority in agencies, the Supreme Court has sometimes insisted that the agencies perform some kind of a cost-benefit analysis. *See*, *e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (EPA cannot "ignore cost when deciding whether to regulate power plants"); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 644 (1980) (plurality opinion) (OSHA must "undertake some cost-benefit analysis before [it] promulgates any [safety and health] standard"). *But see Am. Textile Mfs. Inst. Inc. v. Donovan*, 452 U.S. 490, 510–11 (1981) ("Congress uses specific language when intending that an agency engage in cost-benefit analysis."). By contrast, DHS is defining a simple statutory term—"public charge"—to determine whether an alien is admissible. Its only mandate is to regulate immigration and naturalization, not to secure transfer payments to state governments or ensure the stability of the health care industry. Any effects on those entities are indirect and well beyond DHS's charge and expertise. Even if it could estimate the costs to the states, localities, and healthcare providers, DHS has a mandate from Congress with respect to admitting aliens to the United States. As DHS explained,

> DHS does not believe that it is sound policy to ignore the longstanding self-sufficiency goals set forth by Congress or to admit or grant adjustment of status applications of aliens who are likely to receive public benefits designated in this rule to meet their basic living needs in . . . hope that doing so might alleviate food and housing insecurity, improve public health, decrease costs to states and localities, or better guarantee health care provider reimbursements. DHS does not believe that Congress intended for DHS to administer [§ 212] in a manner that fails to account for aliens' receipt of food, medical, and housing benefits so as to help aliens *become* self-sufficient.

84 Fed. Reg. at 41,314. Even had DHS been able to calculate the indirect costs that states, localities, and healthcare providers might bear as a result of the Final Rule, it is not clear what DHS was supposed to balance. Rather, it was sufficient—and not arbitrary and capricious—for DHS to consider whether, in the long term, the overall benefits of its policy change will outweigh the costs of retaining the current policy.

2. Public-Health Concerns

The Northern District of California also found that DHS did not sufficiently respond to certain public-health concerns. *City & Cty. of San Francisco*, 2019 WL 5100718, at *35–37. Specifically, the court worried that by disenrolling from public-health benefits like Medicaid, people may forgo vaccinations, which could have serious public-health consequences. *Id.* The

district court also pointed out that the *1999 Field Guidance* declined to define "public charge" to include receipt of "health and nutrition benefits" out of fear of possible public-health ramifications. *Id.* at *37 (citing 64 Fed. Reg. at 28,692).

DHS not only addressed these concerns directly, it changed its Final Rule in response to the comments. 84 Fed. Reg. at 41,297. With respect to vaccines, DHS stated that it "does not intend to restrict the access of vaccines for children or adults or intend to discourage individuals from obtaining the necessary vaccines to prevent vaccine-preventable diseases." *Id.* at 41,384. The Final Rule "does not consider receipt of Medicaid by a child under age 21, or during a person's pregnancy, to constitute receipt of public benefits." DHS said that would address "a substantial portion, though not all, of the vaccinations issue." *Id.* Accordingly, DHS "believes that vaccines would still be available for children and adults even if they disenroll from Medicaid." *Id.* at 41,385.

Both the Northern District of California and the Eastern District of Washington expressed concern that the Final Rule was a departure from the *1999 Field Guidance*, which raised the vaccine issue, and that the *1999 Field Guidance* had "engendered reliance." *City & Cty. of San Francisco*, 2019 WL 5100718, at *37; *see also Washington*, 2019 WL 5100717, at *19. The question is not whether an agency can change a policy that people have come to rely on; clearly, it can. The real question is whether the agency has acknowledged the change and explained the reasons for it. DHS knew well that it was adopting a change in policy; that was

the whole purpose of this rulemaking exercise. *See Encino Motorcars*, 136 S. Ct. at 2126 (holding that a Department of Labor regulation was "issued without . . . reasoned explanation" where there was "decades of industry reliance on the Department's prior policy" and the new rule was "offered [with] barely any explanation")*; INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (distinguishing "an irrational departure from [established] policy" from "an avowed alteration of it"). "[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox Television Stations*, 556 U.S. at 515. Because DHS has adequately explained the reasons for the Final Rule, it has demonstrated a strong likelihood of success on the merits.

V. OTHER FACTORS

We have concluded that DHS is likely to succeed on the merits. Were we reviewing the preliminary injunctions on direct review, this would be sufficient to reverse the district courts' orders. *See Trump v. Hawai'i*, 138 S. Ct. at 2423. But because we are here on DHS's motion for a stay, DHS bears the burden of satisfying three additional factors: that DHS will suffer some irreparable harm, that the balance of the hardships favors a stay, and that the stay is in the public interest. *Nken*, 556 U.S. at 434.

A. *Irreparable Harm*

We first consider whether DHS has shown that it "will be irreparably injured absent a stay." *Nken*, 556

U.S. at 434 (quoting *Hilton*, 481 U.S. at 776). The claimed irreparable injury must be *likely* to occur; "simply showing some 'possibility of irreparable injury'" is insufficient. *Id.* (citation omitted). DHS has carried its burden on this factor.

DHS contends that as long as the Final Rule is enjoined,

> DHS will grant lawful-permanent-resident status to aliens whom the Secretary would otherwise deem likely to become public charges in the exercise of his discretion. DHS currently has no practical means of revisiting public-charge determinations once made, so the injunctions will inevitably result in the grant of LPR status to aliens who, under the Secretary's interpretation of the statute, are likely to become public charges.

The States do not deny that LPR status might be irrevocably granted to some aliens, but they claim that DHS has "exaggerate[d] the effect of the injunction" because the public-charge exclusion has "never played a significant role in immigration. In contrast, in just 8 of the 14 Plaintiff States [in the *Washington* case] over 1.8 million lawfully present residents may be driven from federal and state assistance programs if the injunction is lifted." They argue that preserving the status quo will not harm DHS pending adjudication on the merits, especially considering that the Final Rule replaces a policy that had been in place for decades.

Several points emerge from the parties' claims. First, the States appear to concede that decisions to

grant adjustment of status to aliens who could otherwise not be eligible are not reversible. Second, although the States argue that "public charge" exclusions have not been an important component of our immigration scheme in the past, the whole point of DHS's Final Rule is that "public charge" inadmissibility has been underenforced.

Moreover, to the extent the States are contesting the magnitude of the harm to DHS, the claim is irrelevant here. We have said that this "analysis focuses on irreparability, 'irrespective of the magnitude of the injury.'" *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (quoting *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999)). But even if we look at the magnitude, the States' own evidence is double-edged. The States claim that they will suffer harm because millions of persons will disenroll to avoid potential immigration consequences. This seems to prove DHS's point. If millions of "lawfully present residents" are currently receiving public benefits and may choose to disenroll rather than be found to be a "public charge" and inadmissible, the harm cited by DHS is not only irreparable, but significant.

Finally, we think the tenability of DHS's past practice is of no import here. Congress has granted DHS the authority to enact and alter immigration regulations and DHS has done that, and it has done so in a way that comports with its legal authority. Thus, as of October 15, 2019, DHS had an obligation to deny admission to those likely to become public charge, as defined by the Final Rule. This is true regardless of DHS's prior policy. As a consequence, the preliminary

injunctions will force DHS to grant status to those not legally entitled to it. DHS has satisfied its burden to show irreparable harm to the government absent a stay of the injunctions.

B. *Balance of Hardships and Public Interest*

Since DHS has satisfied the first two factors, we proceed to the final two: balance of equities and the public interest. *Nken*, 556 U.S. at 435. "Because the government is a party, we consider [these two factors] together." *California v. Azar*, 911 F.3d at 581.

To balance the equities, we consider the hardships each party is likely to suffer if the other prevails. *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843–44 (9th Cir. 2007) (citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987). We have discussed above the irreparable, non-monetary harm to the government. On the other hand, the States contend that they face financial, public-health, and administrative harms if the Final Rule takes effect and otherwise eligible individuals disenroll from public benefits. These effects are indirect effects of the Final Rule and they are largely short-term, since they will only result during the pendency of the proceedings in the district courts and any appeals to this court and the Supreme Court.[19] Those proceedings are likely to be conducted on an expedited basis, limiting further any potential harm to be considered by this court. DHS does not dispute that

[19] This is not to say that the States will not continue to incur harms after the litigation terminates, but these potential harms are not relevant to the question of a preliminary injunction or a stay.

the States will incur some financial harm if the Final Rule is not stayed. It cannot, because DHS repeatedly addressed the potential costs to the States in its Final Rule. *See, e.g.*, 84 Fed. Reb. at 41,300, 41,312–14, 41,385–85, 41,469–70, 41,474. And while ordinarily, we do not consider purely economic harm irreparable, we have concluded that "such harm is irreparable" when "the states will not be able to recover monetary damages." *California v. Azar*, 911 F.3d at 581. Yet the States' financial concerns will be mitigated to some extent. As DHS explained in the Final Rule, disenrollment from public benefits means a reduction in federal and state transfer payments, so the States will realize some savings in expenditures. 84 Fed. Reg. at 41,485–86. Nevertheless, we consider the harms to the States, even if not readily quantifiable, significant.

Balancing these harms is particularly difficult in this case. First, the harms are not comparable. DHS's harm is not monetary, but programmatic. The policy behind Congress's decision not to admit those who are likely to become a public charge may have a fiscal component, but it is not the reason for DHS's Final Rule, nor has DHS argued financial harm as a reason for seeking a stay. By contrast, the States' proffered harms are largely financial. Second, both parties' proffered harms are, to a degree, speculative. We cannot say for certain how many residents of the plaintiff states and counties will disenroll from public benefits programs, nor how much any over-disenrollment will cost the States. Nor can we say for certain how many aliens might be found admissible during the pendency of the preliminary injunction, and would have been found inadmissible under the Final

Rule. Given the largely predictive nature of both parties' alleged harms, we cannot state with any confidence which is greater.

For the same reasons, the public interest in this case is likewise difficult to calculate with precision. DHS contends it is in the public's interest not to grant immigration status to persons likely to become public charges. The States contend that it is in the public's interest to avoid increased administrative and public-health costs. Both of these contentions are likely true. But on balance, we have few standards for announcing which interest is greater.

We recently observed that "balancing the equities is not an exact science." *Azar*, 911 F.3d at 582. Indeed, Justice Frankfurter once remarked that the balancing of the equities was merely "lawyers' jargon for choosing between conflicting public interests." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring). Whether the stay is granted or denied, one party's costs will be incurred and the other avoided. In the end, the "critical" factors are that DHS has mustered a strong showing of likelihood of success on the merits and some irreparable harm. *Nken*, 556 U.S. at 434. Those factors weigh in favor of granting a stay, despite the potential harms to the States. And for that reason, the stay is in the public interest.

VI. CONCLUSION

The motion for a stay of the preliminary injunction in Nos. 19-17213 and 19-17214 is **GRANTED**. The motion for stay of the preliminary injunction in No. 19-

35914 is **GRANTED**. The cases may proceed consistent with this opinion.

BYBEE, Circuit Judge, concurring, perplexed and perturbed:

I join the majority opinion in full. I write separately to emphasize two points—points that I feel must be made, but are better said in a separate opinion.

We as a nation are engaged in titanic struggles over the future of immigration in the United States. These are difficult conversations. As a court, the Ninth Circuit in particular has felt the effects of the recent surge in immigration. As we observed last year with respect to the asylum problem:

> We have experienced a staggering increase in asylum applications. Ten years ago we received about 5,000 applications for asylum. In fiscal year 2018 we received about 97,000—nearly a twenty-fold increase. Our obligation to process these applications in a timely manner, consistent with our statutes and regulations, is overburdened. The current backlog of asylum cases exceeds 200,000—about 26% of the immigration courts' total backlog of nearly 800,000 removal cases. In the meantime, while applications are processed, thousands of applicants who had been detained by immigration authorities have been released into the United States.

E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 754 (9th Cir. 2018) (citations omitted). Because of our proximity to Mexico, Central America, and East Asia,

the brunt of these cases will find their way into our court. And we are well aware that we are only seeing the matters that find their way into federal court, and that the burdens of the increase in immigration are borne not only by our judges, but by the men and women in the executive branch charged with enforcing the immigration laws.

Our court has faced an unprecedented increase in emergency petitions arising out of the administration's efforts to administer the immigration laws and secure our borders. These controversial efforts have met with mixed success in our court and the Supreme Court. *See, e.g.*, *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir.) (construction of wall on the border with Mexico), *stay issued*, 140 S. Ct. 1 (2019) (mem.); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018) (aliens entering outside a port of entry are ineligible for asylum); *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018) (DACA), *cert. granted*, 139 S. Ct. 2779 (2019) (mem.); *Trump v.Hawai'i*, 878 F.3d 662 (9th Cir. 2017) (per curiam) (entry restrictions), *rev'd*, 138 S. Ct. 2392 (2018); *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017) (treatment of detained alien minors under *Flores* agreement); *Hawai'i v. Trump*, 859 F.3d 741 (9th Cir.) (per curiam) (travel ban), *vacated as moot*, 138 S. Ct. 377 (2017) (mem.); *Washington v. Trump*, 847 F.3d 1151 (9th Cir.) (per curiam) (travel ban), *cert. denied sub nom. Golden v. Washington*, 138 S. Ct. 448 (2017) (mem.).

My first point is that even as we are embroiled in these controversies, no one should mistake our judgments for our policy preferences. Whether "the iron

fist [or an extended velvet glove] would be the preferable policy. . . . our thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government's policy." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003); *see Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 165 (1993) ("The wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is not a matter for our consideration."); *Lochner v. New York*, 198 U.S. 45, 69 (1905) (Harlan, J., dissenting) ("Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation.").

Oh, I am not so naive as to think that a simple declaration of judicial neutrality will quell inquiry into judges' backgrounds, prior writings, and opinions. The battles over judicial nominations provide ample proof that our generation of lawyers bear a diverse set of assumptions about the nature of law, proper modes of constitutional interpretation, and the role of the judiciary. These are fair debates and they are likely to continue for some time. We can only hope that over time our differences can be resolved by reason and persuasion rather than by politics by other means. But I don't know of any judge—at least not this judge—who can say that every opinion and judgment she issued was in accord with her preferred policy outcomes. "[I]n our private opinions, [we] need not concur in Congress' policies to hold its enactments constitutional. Judicially we must tolerate what personally we may regard as a

legislative mistake." *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952).

My second point is less politic. In this case, we are called upon to review the merits of DHS's Final Rule through the lens of the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 706. Our review is quite circumscribed. We can set aside agency action if it is contrary to law, if it exceeds the agency's jurisdiction or authority, or if the agency failed to follow proper procedure. *Id.* § 706(2)(B)–(D). Those are largely *legal* judgments, which we can address through the traditional tools judges have long used. With respect to the *policy* behind the agency's action, we are largely relegated to reviewing the action for arbitrariness and caprice. *Id.* § 706(2)(A). That is not a very rigorous standard and, as a result, an agency has broad discretion to administer the programs entrusted to it by Congress. *Cf. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("[F]undamental policy questions appropriately resolved in Congress . . . are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action.").

In the immigration context, whatever dialogue we have been having with the administration over its policies, we are a poor conversant. We are limited in what we can say and in our ability—even if anyone thought we were qualified to do so—to shape our immigration policies. We lack the tools of inquiry, investigation, and fact-finding that a responsible policymaker should have at its disposal. In sum, the APA is the meagerest of checks on the executive. We

are not the proper foil to this or any other administration as it crafts our immigration policies.

By constitutional design, the branch that is qualified to establish immigration policy and check any excesses in the implementation of that policy is Congress. *See* U.S. CONST. Art. I, § 8, cl. 4. And, so far as we can tell from our modest perch in the Ninth Circuit, Congress is no place to be found in these debates. We have seen case after case come through our courts, serious and earnest efforts, even as they are controversial, to address the nation's immigration challenges. Yet we have seen little engagement and no actual legislation from Congress. It matters not to me as a judge whether Congress embraces or disapproves of the administration's actions, but it is time for a feckless Congress to come to the table and grapple with these issues. Don't leave the table and expect us to clean up.

OWENS, Circuit Judge, concurring in part and dissenting in part:

While I concur with the majority's jurisdiction analysis, I otherwise respectfully dissent. In light of the: (1) government's heavy burden due to the standard of review, (2) opaqueness of the legal questions before us, (3) lack of irreparable harm to the government at this early stage, (4) likelihood of substantial injury to the plaintiffs, and (5) equities involved, I would deny the government's motions to stay and let these cases proceed in the ordinary course. *See Nken v. Holder*, 556 U.S. 418, 427, 433–34 (2009) (holding that a "stay is an 'intrusion into the ordinary processes of administration

and judicial review,'" and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion" (citation omitted)).

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 19-cv-04717-PJH
Case No. 19-cv-04975-PJH
Case No. 19-cv-04980-PJH
Related Cases

[Filed: October 11, 2019]

CITY AND COUNTY OF SAN FRANCISCO, et al., Plaintiffs, v. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, et al., Defendants.
STATE OF CALIFORNIA, et al., Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.

LA CLINICA DE LA RAZA, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

PRELIMINARY INJUNCTION

This order concerns three motions for a preliminary injunction filed in three related actions. Each of the plaintiffs in those actions moved for preliminary injunctive relief. The motions came on for hearing before this court on October 2, 2019.

Plaintiff the City and County of San Francisco ("San Francisco") appeared through its counsel, Matthew Goldberg, Sara Eisenberg, and Yvonne Mere. Plaintiff the County of Santa Clara ("Santa Clara" and together with San Francisco, the "Counties") appeared through its counsel, Ravi Rajendra, Laura Trice, and Luke Edwards. Plaintiffs the State of California, District of Columbia, State of Maine, Commonwealth of Pennsylvania, and State of Oregon (together, including D.C., the "States") appeared through their counsel, Anna Rich, Lisa Cisneros, and Brenda Ayon Verduzco. Plaintiffs La Clinica De La Raza and California Primary Care Association (the two together are the "Healthcare Organizations"), Maternal and Child Health Access, Farmworker Justice, Council on American Islamic Relations-California, African Communities Together, Legal Aid Society of San Mateo County, Central American Resource Center, and

Korean Resource Center (the "Legal Organizations") (the Legal Organizations and the Healthcare Organizations together are the "Organizations") appeared through their counsel, Alvaro Huerta, Nicholas Espiritu, Joanna Cuevas Ingram, Kevin Herrera, Tanya Broder, Max Wolsen, and Mayra Joachin.

Defendants U.S. Citizenship and Immigration Services ("USCIS"), Department of Homeland Security ("DHS"), Kevin McAleenen as Acting Secretary of DHS, Kenneth T. Cuccinelli as Acting Director of USCIS, and Donald J. Trump, as President of the United States appeared through their counsel, Ethan Davis, Eric Soskin, and Kuntal Cholera.

Additionally, papers submitted by numerous amici curiae were before the court. Prior to the hearing, the court granted motions to file amicus briefs on behalf of the following non-parties, all of which the court considered in its analysis: American Public Health Association, et al.; Asian Americans Advancing Justice, et al.; City of Los Angeles, et al.; Justice in Aging, et al.; and Members of Congress. A number of other requests to file amici briefs were denied due to the court's insufficient time to consider them on this particular motion, given the already-voluminous filings from the parties, the briefing schedule, and the time-sensitive nature of plaintiffs' request for preliminary relief.

Having read the papers filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS CERTAIN PLAINTIFFS' MOTIONS

AND ISSUES A PRELIMINARILY INJUNCTION, the scope of which is discussed below, for the following reasons.

EXECUTIVE SUMMARY

In 1883, Emma Lazarus penned the now-famous sonnet, The New Colossus. Later affixed to the Statue of Liberty in New York Harbor, the poem has been incorporated into the national consciousness as a representation of the country's promise to would-be immigrants:

> Not like the brazen giant of Greek fame,
> With conquering limbs astride from land to land;
> Here at our sea-washed, sunset gates shall stand
> A mighty woman with a torch, whose flame
> Is the imprisoned lightning, and her name
> Mother of Exiles. From her beacon-hand
> Glows world-wide welcome; her mild eyes command
> The air-bridged harbor that twin cities frame.
>
> "Keep, ancient lands, your storied pomp!" cries she
> With silent lips. "Give me your tired, your poor,
> Your huddled masses yearning to breathe free,
> The wretched refuse of your teeming shore.
> Send these, the homeless, tempest-tost to me,
> I lift my lamp beside the golden door!"

But whether one would prefer to see America's borders opened wide and welcoming, or closed because the nation is full, laws—not poetry—govern who may enter. And the year before Lazarus wrote The New Colossus, Congress had enacted its first comprehensive

immigration law, barring entry to "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge," among others. An Act to Regulate Immigration, 22 Stat. 214, Chap. 376 § 2. (1882). Although various iterations of similar laws have since come and gone (the operative statute no longer refers to "lunatics" or "idiots"), since the very first immigration law in 1882, this country has consistently excluded those who are likely to become a "public charge."

Although Congress has never authored an explicit definition of the term, courts and the executive branch have been considering its meaning as used in the statute for over one hundred and twenty years. As interpretations from those two branches accreted toward a consistent understanding, Congress repeatedly enacted statutes adopting the identical phrase.

In 1999, the executive branch reviewed its historical application of the term and issued formal guidance to executive employees, explaining that the public charge determination has historically, and should continue to, focus on whether an individual is primarily dependent on the government for subsistence.

In 2018, DHS published a new rule (scheduled to take effect October 15, 2019) that proposed to dramatically expand the definition of "public charge." Rather than include only those who primarily depend on the government for subsistence, DHS now proposes for the first time to categorize as a public charge every person who receives 12 months of public benefits (including many in-kind benefits, like Medicaid and

SNAP/Food Stamps) over any 36-month period, regardless of how valuable those benefits are, or how much they cost the government to provide (receiving two types of benefits in one month would count as receiving benefits for two months).

Today, the court is presented with a challenge to DHS's new definition. The plaintiffs seek to prevent defendants from implementing it before this court can consider this case on the merits. The plaintiffs argue that the new definition will lead to widespread disenrollment[1] from public benefits by those who fear being labeled a public charge (and by those confused that they may be swept up in the rule), which will cause plaintiffs to lose a substantial amount funding (for example, the federal government heavily subsidizes state expenses for those enrolled in Medicaid).

The court finds that the plaintiffs are likely to prevail on the merits, for numerous 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

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[1] When plaintiffs refer to harms caused by those who will disenroll from public benefits in addition to those who will forego enrollment. This order considers the two categories together, and refers to them interchangeably.

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 Reform and Immigrant Responsibility Act; (2) Violation of APA, 5 U.S.C. § 706—Contrary to Law, Section 504 of the Rehabilitation Act, codified at 29 U.S.C. § 794 (the "Rehabilitation Act"); (3) Violation of APA, 5 U.S.C. § 706—Contrary to Law, State Healthcare Discretion; (4) Violation of APA, 5 U.S.C. § 706—Arbitrary and Capricious; Violation of the Fifth Amendment's Due Process clause requiring Equal Protection based on race; (6) Violation of the Fifth Amendment's Due Process clause, based on a violation of Equal Protection principles based on unconstitutional animus. The States filed the present motion for preliminary injunction on August 26, 2019. On August 27, 2019, this court ordered the action brought by the States related to the action brought by the Counties.

In La Clinica De La Raza v. Trump, Case No. 19-cv-04980-PJH, the Organizations filed a complaint naming the same defendants as the Counties, and also added Donald J. Trump: USCIS; DHS; McAleenen as Acting Secretary of DHS; and Cuccinelli as Acting Director of USCIS; and Donald J. Trump, as President of the United States. The complaint asserts four causes of action: (1) Violation of APA, 5 U.S.C. § 706—Contrary to the Statutory Scheme; (2) Violation of APA, 5 U.S.C. § 706—Arbitrary, Capricious, or otherwise not in accordance with law; (3) Violation of the Fifth Amendment based on Equal Protection for discriminating against non-white immigrants;

(4) under the Declaratory Judgment Act, seeking a determination that the Rule is invalid because it was issued by an unlawfully-appointed agency director. On August 30, 2019, this court ordered the action brought by the Organizations related to the action brought by the Counties. The Organizations filed the present motion for preliminary injunction on September 4, 2019.

B. The Dispute

The Immigration and Nationality Act, 8 U.S.C. §§ 1101, et seq. ("INA"), requires that all noncitizens seeking to be lawfully admitted into the United States or to become lawful permanent residents ("LPRs") prove they are not inadmissible. 8 U.S.C. § 1361; 8 U.S.C. § 1225(a). A noncitizen may be deemed inadmissible on any number of grounds, including that they are "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A).

The specific INA provision relating to whether an alien is likely to become a "public charge" at issue in this litigation provides, in relevant part:

> Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
> . . . .
>
> (4) Public charge
>
> (A) In general

> 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.
>
> (B) Factors to be taken into account
>
> (i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's—
>
> (I) age;
> (II) health;
> (III) family status;
> (IV) assets, resources, and financial status; and
> (V) education and skills.
>
> (ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 1183a[2] of this title for purposes of exclusion under this paragraph.

8 U.S.C. § 1182(a)(4).

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[2] Section 1183a is titled "Requirements for sponsor's affidavit of support" and sets forth the requirements of an "affidavit of support . . . to establish that an alien is not excludable as a public charge under section 1182(a)(4) of this title[.]" 8 U.S.C. § 1183a(a)(1).

The statute directs a "consular officer" or "the Attorney General" to form an opinion as to whether the applicant "is likely at any time to become a public charge." Id. In forming that opinion, immigration officers must consider "at a minimum" five statutorily-defined factors: (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; (5) education and skills. 8 U.S.C. § 1182(a)(4)(B)(i).

An officer may additionally consider an affidavit of support, which is a legally-enforceable contract between the sponsor of the applicant and the Federal Government. See 8 U.S.C. § 1182(a)(4)(B)(ii); 8 U.S.C. § 1183a(a). The sponsor pledges to accept financial responsibility for the applicant and to maintain the applicant at an income of "not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable[.]" 8 U.S.C. § 1183a(a)(1)(A).

Certain groups of noncitizens, such as asylum seekers and refugees, are not subject to exclusion based on an assessment that they are likely to become a public charge. See 8 U.S.C. § 1157 (refugee); 8 U.S.C. § 1158 (asylum); 8 U.S.C. § 1159(c) (refugee).

An alien found to be inadmissible as a public charge may "be admitted in the discretion of the Attorney General . . . upon the giving of a suitable and proper bond or undertaking approved by the Attorney General, in such amount and containing such conditions as he may prescribe . . . holding the United States and all States . . . harmless against such alien becoming a public charge." 8 U.S.C. § 1183.

The public charge ground may arise when, inter alia, an alien seeks LPR status, or when noncitizens apply for visas. 8 U.S.C. § 1182(a); 8 U.S.C. § 1255(a). Aliens "to whom a permit to enter the United States has been issued to enter the United States" are also subject to an inadmissibility determination by DHS at ports of entry when they enter and re-enter the United States. 8 U.S.C. § 1185(d).

Immigrants with LPR status may also be subject to the public charge analysis. For example, an LPR is considered to be "seeking admission" under various circumstances, for example when returning to the United States after being "absent from the United States for a continuous period in excess of 180 days" or after engaging in any "illegal activity after having departed the United States[.]" 8 U.S.C. § 1101(a)(13)(C)(ii)–(iii). LPRs can also be denied citizenship and/or placed in removal proceedings if DHS determines retrospectively that they were inadmissible as a public charge at the time of their adjustment. 8 U.S.C. § 1227(a)(1)(A); 84 Fed. Reg. at 41,328 & n.176 (discussing possible impact on naturalizations).

Under a separate provision in the INA, an alien can be deported upon a determination that he has in fact become a public charge since his admission, from causes "not affirmatively shown to have arisen since entry[.]" 8 U.S.C. 1227(a)(5).[3]

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[3] Confusingly, DHS's Rule would use completely distinct definitions for the term "public charge" when assessing whether an alien "has become a public charge" (8 U.S.C. 1227(a)(5)) and

On October 10, 2018, DHS began the rule-making process to create a new framework for the public charge assessment by publishing a Notice of Proposed Rulemaking. See Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (Oct. 10, 2018) (the notice of proposed rulemaking is the "NPRM"). 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. Id. at 41,292. It is set to become effective on October 15, 2019. On October 2, 2019—the morning of the hearing on the pending motions for preliminary injunction—DHS published a 25-page list of "corrections" to the proposed final rule.[4] See Case No. 19-cv-04717-PJH, Dkt. 106, Ex. A. DHS stated that its October 2 amendments to the rule would not delay its planned implementation on October 15.

The Rule sets out what the parties have referred to as the "12/36 standard." That is, the Rule "redefines the term 'public charge' to mean an alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one

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whether an alien "is likely at any time to become a public charge" (8 U.S.C. 1182(a)(4)(A).

[4] Although defendants described the changes as fixes to "technical and typographical errors" (Case No. 19-cv-04717-PJH, Dkt. 106, Ex. A at 2), the States argued at the hearing that upon their limited review of the corrections (a review that was necessarily limited given the eleventh-hour disclosure of DHS's changes to the rule), the amendments mooted at least one issue underlying the States' motion, regarding treatment of military families.

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 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

[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.

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'

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[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).

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.

Ultimately, this dispute concerns the meaning of a statutory term passed in 1990—with clarifying language passed in 1996. As such, the court considers the meaning ascribed to the term by Congress at that time, but in doing so it must afford due consideration to Congress's understanding of the term given the long historical context it was operating within, which the court presently endeavors to describe. See Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239–40 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (quoting Lorillard v. Pons,

434 U.S. 575, 580 (1978)); United States v. Argueta-Rosales, 819 F.3d 1149, 1159 (9th Cir. 2016) (same); J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 951 (9th Cir. 2010) (Congress does no "abrogate[] *sub silentio* the Supreme Court's decision[s]"); Bob Jones Univ. v. United States, 461 U.S. 574, 600–01 (1983) (interpretation informed by the fact that Congress had a "prolonged and acute awareness" of an established agency interpretation of a statute, considered the precise issue, and rejected bills to overturn the prevailing interpretation); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 381–82 (1982) (Congress is aware "of the 'contemporary legal context' in which" it legislates, and amending a statute while leaving certain statutory provisions intact "is itself evidence that Congress affirmatively intended to preserve that" context); see also I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 442–43 (1987) ("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."); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975) (rejecting construction of statute that would implement substance of provision that Conference Committee rejected).

1. 1882 Act

In 1882, Congress enacted the country's first general immigration statute. See An Act to Regulate Immigration, 22 Stat. 214 (1882) (the "1882 Act"). That statute provided, in part:

> That the Secretary of the Treasury . . . shall have power to . . . provide for the support and relief of such immigrants therein landing as may fall into distress or need public aid . . . and it shall be the duty of such State . . . to examine into the condition of passengers arriving at the ports . . . and if on such examination there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge . . . such persons shall not be permitted to land.

22 Stat. 214, Chap. 376 § 2.

Legislative debate on the 1882 Act shows that at least one member of Congress sought to prevent foreign nations from "'send[ing] to this country blind, crippled, lunatic, and other infirm paupers, who ultimately become life-long dependents on our public charities.'" 13 Cong. Rec. 5108-10 (June 19, 1882) (statement of Rep. Van Voorhis).

The 1882 Act also imposed on each noncitizen who entered the United States a 50-cent head tax for the purpose of creating an "immigrant fund":

> That there shall be levied, collected, and paid a duty of fifty cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States. . . . The money thus collected shall . . . constitute a fund to be called the immigrant fund, and shall be used . . . to defray the expense of regulating immigration

> under this act, and for the care of immigrants arriving in the United States, for the relief of such as are in distress[.]

22 Stat. 214, Chap. 376, § 1; see also Edye v. Robertson, 112 U.S. 580, 590–91 (1884) ("This act of congress is similar, in its essential features, to many statutes enacted by states of the Union for the protection of their own citizens, and for the good of the immigrants who land at sea-ports within their borders. That the purpose of these statutes is humane, is highly beneficial to the poor and helpless immigrant, and is essential to the protection of the people in whose midst they are deposited by the steam-ships, is beyond dispute.").

Nineteenth-century dictionaries defined "charge" as "That which is enjoined, committed, entrusted or delivered to another, implying care, custody, oversight, or duty to be performed by the person entrusted" and "The person or thing committed to anothers [sic] custody, care or management; a trust. Thus the people of a parish are called the ministers *charge*." Charge, Webster's Dictionary (1828 Online Edition), http://webstersdictionary1828.com/Dictionary/charge; Charge, Webster's Dictionary (1886 Edition), https://archive.org/details/websterscomplete00webs/page/218 ("person or thing committed or intrusted [sic] to the care, custody, or management of another; a trust; as, to abandon a *charge*").[7]

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[7] Defendants cite Frederic Jesup Stimson, Glossary of Technical Terms, Phrases, and Maxims of the Common Law (1881), but that source does not provide a relevant definition. The first-listed

Another contemporary source defines charge "In its general sense, a charge is an obligation or liability. Thus we speak of . . . a pauper being chargeable to the parish or town." Stewart; Lawrence Rapalje, Robert L., Dictionary of American and English Law, with Definitions of the Technical Terms of the Canon and Civil Laws (1888), at 196.

Prior to the 1882 Act's enactment, states had played a larger role in immigration than they do today, and state governments had used and interpreted the term "public charge," although of course not in relation to any Congressional act.

For example, the New Jersey Supreme Court, when interpreting a statute concerning the procedures to remove an individual from a township in New Jersey, considered whether a pauper was "either chargeable, or likely to become chargeable, to the township of Princeton." Overseers of Princeton Twp. v. Overseers of S. Brunswick Twp., 23 N.J.L. 169, 170 (Sup. Ct. 1851). Although the case does not make clear what precise relief is necessary to qualify as a public charge, it contemplated that one became a public charge upon seeking such relief from "the church wardens or overseers of the poor[.]" Id. at 173. The concurrence

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definition is the most plausibly-relevant: "A burden, incumbrance, or lien; as when land is charged with a debt." Id. at 56. But that definition concerns how the word charge relates to real property, which makes sense because at the time, "[m]ore frequently, however, charge is applied to property" as "a general term[.]" Stewart; Lawrence Rapalje, Robert L., Dictionary of American and English Law, with Definitions of the Technical Terms of the Canon and Civil Laws (1888), at 196.

clarified that an "application for relief" is distinct from being "chargeable," although "[t]he probability of his becoming chargeable is sufficiently shown by his application for relief." Id. at 179 (Carpenter, J. concurring). The case does not explain the type or quantum of relief necessary to constitute one's status as a "charge."

Another state court opinion, People ex rel. Durfee v. Commissioners of Emigration, 27 Barb. 562, 1858 WL 7084 (N.Y. Sup. Ct. 1858), addressed a statute which contemplated bonds being paid on behalf of immigrants, and required the commissioners of immigration who held those bonds to "indemnify so far as may be the several cities, towns and counties of the state, for any *expense* or *charge* which may be incurred for the maintenance and support of the" immigrants. 27 Barb. at 570. The court held that the statute required indemnification of all expenses made on behalf of the immigrants—whether temporary or permanent—so long as the expenses were lawfully made. Id. However, the case did not draw a clean line holding that any expense spent on an individual makes him a public charge. Rather, an equally-plausible reading of the opinion is that the statute requires immunity of all expenses paid to support immigrants for whom bonds have been paid, regardless of whether they are formally considered public charges.[8]

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[8] The latter reading would be in accordance with the current interpretation of "public charge" as used elsewhere in the INA, which requires an alien to be presented with a bill and prove unable or unwilling to pay it to be deemed a public charge. E.g., Matter of B-, 3 I. & N. Dec. 323 (A.G. 1948); Field Guidance on

City of Bos. v. Capen, 61 Mass. 116, 121 (1851) concerned a statute which required a bond for someone likely to become a public charge. The court explained that the statute described various categories of people identified as being at risk of becoming a public charge, and for whom bond may be required. However, what assistance or payment qualified one as a "public charge" was not addressed.[9]

As a whole, the statutory language and authority underlying the 1882 Act provide some clear guidance as to the definition of public charge. For example, the 1882 Act contemplated that admitted aliens (not excluded on public charge grounds) would receive some assistance from the state. That is made clear by the same statute's establishment of a fund "for the care of immigrants arriving in the United States, for the relief of such as are in distress[.]" 22 Stat. 214, Chap. 376, § 1. Although the quantum of state support necessary to render one a public charge is less clear, the 1882 Act did not consider an alien a public charge for simply receiving some assistance from the state. Also, it appears that contemporary uses of the term would

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Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999); 84 Fed. Reg. at 41,295.

[9] The opinion also suggested that those who were "paupers in a foreign land" must have been "a public charge in another country," and then stated without explanation that "the word 'paupers' being used in this connection in its legal, technical sense." Capen, 61 Mass. at 121. Even looking past the confusion, the court might be interpreted as finding that all paupers have been public charges, but from that the conclusion cannot be drawn that all public charges must have been paupers.

deem one a public charge after taking on a particular, chargeable debt from the state and failing to repay it.

2. 1891

In 1891, Congress amended the 1882 Act. That amended statute provided, in part:

> That the following classes of aliens shall be excluded from admission into the United States . . . : All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and . . . .

An Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens Under Contract or Agreement to Perform Labor, 26 Stat. 1084, Chap. 551 ("1891 Act") § 1 (1891).

The 1891 amendment also provided that "any alien who becomes a public charge within one year after his arrival in the United States from causes existing prior to his landing therein shall be deemed to have come in violation of law and shall be returned" pursuant to the procedures outline in the statute regarding aliens entering unlawfully. 1891 Act § 11. So, the 1891 Act set out the now-familiar practice of subjecting aliens to two "public charge" assessments—one in which the government is called on to make a forward-looking prediction, and another in which the government is called on to make a backward-looking assessment. The first asks at the time of entry whether the alien is

likely to become a public charge. The second asks whether, after some period of time, the alien has in fact become a public charge due to causes existing before he arrived. Although the relevant time periods of the assessments have grown, this scheme generally remains in place today.

The 1891 Act made a notable change to the law by adding the category "pauper," and including the term pauper with "persons likely to become a public charge" to form a single entry in an expanded list of excluded categories of people.

An early case interpreting the act considered whether "the act of 1891 confers upon the inspection officer power to detain and send back an alien immigrant as being a person liable to become a public charge, in the absence of any evidence whatever tending to establish that fact." In re Feinknopf, 47 F. 447, 448 (E.D.N.Y. 1891). Although it did not define the term "public charge" in the abstract, the court provided an explanation given the facts before it that essentially laid out a totality-of-the-circumstances test. It held that "[o]f course" the following facts, "if believed, would not warrant the conclusion that the petitioner was a person likely to become a public charge," and that the case is "devoid of any evidence whatever of any fact upon which to base a determination that the petitioner is likely to become a public charge":

> the petitioner is 40 years old; that he is a native of Austria; that he is a cabinet-maker by trade, and has exercised that trade for 25 years; that he has no family; that he has baggage with him, worth $20, and 50 cents in cash; that he is a

> man who can find employment in his trade, and is willing to exercise the same. . . . [I]n addition, that the immigrant has not been an inmate of an almshouse, and has not received public aid or support, and has not been convicted of crime.

Id. at 447–48. A fair reading suggests that each of the enumerated facts could be relevant to predicting whether someone is likely to become a public charge.

A subsequent court provided even more guidance. In United States v. Lipkis, 56 427 (S.D.N.Y. 1893), a man had arrived in America before his wife and child. The wife and child were required to pay a bond because the superintendent of immigration deemed them "likely to become a public charge" based on "the poverty and character of the husband," whose residence gave the appearance of "extreme poverty." Id. at 427. However, that poverty alone did not mean he or the family was a public charge—rather, it meant the family was likely to become a public charge. "About six months after the arrival of the mother she became insane, and was sent to the public insane asylum of the city under the direction of the commissioners of charities and correction, where only poor persons unable to pay for treatment are received, and she was there attended to for a considerable period at the expense of the municipality." Id. at 428. Thus, the mother became a public charge only when she was committed to the public insane asylum with "no effort to provide for her at his [the husband's] own expense[.]" Id.

But the court did not require commitment to an institution to make one a public charge. It reasoned in dicta that the family's financial condition generally

subjected the family to the risk of becoming "a public charge under the ordinary liabilities to sickness, or as soon as any other additional charges arose beyond the barest needs of existence. . . . The liability of his family to become a public charge through any of the ordinary contingencies of life existed when the bond was taken, because of his poverty and inefficiency." Id. So, a number of different financial shocks could have rendered the family a public charge.

The court's analysis drew a distinction between being a public charge (in this case, someone committed to an insane asylum with no effort to cover the expense), and someone likely to become a public charge (in this case, someone who can pay for "the barest needs of existence," yet whom an extreme illness could ruin).

The parties cite to state court decisions published during this time using the term public charge, which are informative of what the term generally meant at the time. Those opinions address the duration of benefits that render one a public charge rather than the quantum, and they tend to suggest that temporary relief did not make one a public charge as the term was understood at the time. However, they do not address whether longer-term receipt of a small amount of public benefits qualifies one as a public charge (as the Rule would do). See Yeatman v. King, 2 N.D. 421 (1892) (state loaning seed grain to farmer using the general tax fund, with obligation of repayment, is designed to prevent farmers "from becoming a public charge by affording them temporary relief"); Cicero v. Falconberry, 14 Ind. App. 237 (1895) ("The mere fact

that a person may occasionally obtain assistance from the county does not necessarily make such person a pauper or a public charge.").[10]

Following the 1891 Act, two points are relatively clear. First, reaffirming the best interpretation of the 1882 Act, the term was not used at the time to include short-term or temporary relief from the state, as the case law continued to demonstrate. Second, Lipkis could be read to support either of two non-controversial points: either state-funded institutionalization constitutes becoming a public charge, or state-funded institutionalization with "no effort" to pay the expense after being billed does so. Simply being able to pay for the barest needs of existence and nothing more does not render one a public charge (although it may make one likely to become a public charge). A third point begins to materialize in the case law, which is that absent some particularly-identified negative factor, an employable individual is not a public charge. E.g., In re Feinknopf, 47 F. at 447–48 (40-year-old man willing to exercise his trade); Lipkis, 56 F. at 428 (notwithstanding poverty, working man's family is not a public charge until financial calamity strikes); Yeatman, 2 N.D. at 421 (public aid to working farmer).

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[10] The parties also cite Edenburg Borough Poor Dist. v. Strattanville Borough Poor Dist., 5 Pa. Super. 516, 528 (1897), but that case concerns an individual who appears to have formally registered as a pauper by seeking public assistance under state or local law. It does not concern any immigration statutes, nor does the opinion use the word "charge" or the phrase "public charge."

3. 1903

In 1903, Congress passed a revised version of the act. That amended statute provided, in part:

> That the following classes of aliens shall be excluded from admission into the United States: All idiots, insane persons, epileptics, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with a loathsome or with a dangerous contagious disease; persons who have been convicted of a felony or other crime or misdemeanor involving moral turpitude; polygamists; anarchists, or . . . ."

An Act to Regulate the Immigration of Aliens Into the United States, 32 Stat. 1213, Chap. 1012 § 2 (1903).

This change separated out "paupers" from "persons likely to become a public charge," which the previous act had grouped together as a single item in the list.

The 1903 amendment also provided that any alien who "shall be found a public charge . . . from causes existing prior to landing, shall be deported . . . at any time within two years after arrival[.]" Id. § 20.

4. 1907

In 1907, Congress passed a revised version of the act. That amended statute provided, in part:

> That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are . . . mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or . . . ."

An Act to Regulate the Immigration of Aliens Into the United States, 34 Stat. 898, Chap. 1134 § 2 (1907).

Nothing relevant to the present action appears to have been changed by this revision.[11]

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[11] The only notable change is the introduction of an exclusion for individuals not otherwise captured by the categories who cannot earn a living based on mental or physical defect. That suggests that earlier-listed categories also include such people, but not all such people.

5. 1910

In 1910, Congress amended the 1907 act. The new statute provided, in part:

> That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are . . . mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or . . . ."

An Act to Amend an Act entitled An Act to Regulate the Immigration of Aliens Into the United States, 36 Stat. 263, Chap. 128 § 2 (1910).

Nothing relevant to the present action appears to have been changed by this revision.

In 1915, the Supreme Court addressed the 1910 act in Gegiow v. Uhl, 239 U.S. 3 (1915). "The single question" in that case was "whether an alien can be declared likely to become a public charge on the ground

that the labor market in the city of his immediate destination is overstocked." Id. at 9–10. The immigration commissioners in that action determined that the immigrants were "bound for Portland, Oregon, where the reports of industrial conditions show that it would be impossible for these aliens to obtain employment[.]" Id. at 8.

The court held that "[t]he statute deals with admission to the United States, not to Portland . . . . It would be an amazing claim of power if commissioners decided not to admit aliens because the labor market of the United States was overstocked." Id. at 10. Because the immigration authorities could not consider labor conditions in a single location to determine whether immigrants would be able to obtain employment, the factual findings that the immigrants could not find work in Portland was insufficient to support a determination that they were likely to become public charges.

The court also reasoned that, because the "public charge" ground for exclusion was "mentioned between paupers and professional beggars, and along with idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living," the term should be construed as similar with the rest. Id. Under that construction, the court held that those likely to become public charges "are to be excluded on the ground of **permanent personal objections accompanying them** irrespective of local

conditions[.]" Id.[12] That is, the court focused on an alien's general ability and willingness to work and earn a living, rather than the particular wages or labor conditions that existed in the alien's destination.

A court in 1916 considered "whether the fact that petitioner entered the United States as a gambler, and as one having no other permanent means of support, actual or contemplated, makes him a person 'likely to become a public charge' within the meaning of the Immigration Act." Lam Fung Yen v. Frick, 233 F. 393, 396 (6th Cir. 1916):

> It seems clear that the term 'persons likely to become a public charge' is not limited to paupers or those liable to become such; 'paupers' are mentioned as in a separate class. In United States v. Williams (D.C.) 175 Fed. 274, 275, the term 'persons likely to become a public charge' is construed as including, '**not only those persons who through misfortune cannot be self-supporting, but also those who will not undertake honest pursuits, and who are likely to become periodically the inmates of prisons**.' We think this a reasonable construction. . . . Inmates of jails and prisons are for the time being public charges, and we think it open to conclusion by reasonable minds that those who will not work for a living, but rely for

[12] The Gegiow opinion was subject to some skepticism following a later amendment to the statute, but the Ninth Circuit subsequently held that its reasoning remained controlling. See Ex parte Hosaye Sakaguchi, 277 F. 913 (9th Cir. 1922); see also Ex parte Mitchell, 256 F. 229 (N.D.N.Y. 1919).

> that purpose upon gambling, are more likely than citizens following the ordinary pursuits of industry to become, at least intermittently, public charges.

Id. at 396–97 (emphasis added).

The court reasoned that because the alien was a gambler and gambling is regarded "within the domain of police supervision and public security," the petitioner is reasonably likely to become periodically an inmate of a prison. Id. at 397. Under the court's reasoning, someone in a prison is a public charge, akin to someone in an almshouse or insane asylum. Id.; see also United States v. Williams, 175 F. 274, 275 (S.D.N.Y. 1910) ("They are surely public charges, at least during the term of their incarceration.").

In 1917, the Second Circuit relied on Gegiow's statutory analysis when deciding a case under the 1910 statute. Howe v. United States, 247 F. 292 (2d Cir. 1917). In Howe, a Canadian who had allegedly "drawn a check . . . which proved bad," among other things, entered the United States, and an immigration inspector "believed him guilty of dishonest practice in Canada." Id. at 293–94. Because the plaintiff had not admitted to or been convicted of a felony, the provision excluding criminals did not apply to him. The court reasoned that (1) the term "public charge" needed to be read in context of its position in the statute's list, and (2) it cannot be interpreted to overlap with other items in the list (e.g., idiots, imbeciles, insane persons, criminals). As such, "[i]f the words covered jails, hospitals, and insane asylums, several of the other categories of exclusion would seem to be unnecessary."

Id. at 294. Instead, "Congress meant the act to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future." Id. The Howe court provided a very specific, restrictive, and clear definition of the term. This also demonstrates an early split in the case law as to whether prison inmates are considered public charges.

By 1917, the Supreme Court, the Second Circuit, and the Sixth Circuit had all published opinions construing the term as used in the 1910 act. These are precisely the sorts of constructions Congress is presumed knowledgeable of when reenacting statutory language. See Forest Grove, 557 U.S. at 239–40. The Supreme Court held that predicting whether someone will become a public charge requires consideration of "permanent personal objections accompanying them irrespective of local conditions[.]" Gegiow, 239 U.S. at 10. The two Circuit decisions are more difficult to reconcile. First, they directly contradicted one another with respect to whether jail inmates were public charges. Second, Howe broke with the weight of prior authority in holding that the term was limited to those occupying almshouses for want of a means of support.

6. 1917

In 1917, Congress amended the Act. That amended statute provided, in part:

> That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had

> one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority; persons with chronic alcoholism; paupers; professional beggars; vagrants; persons afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are . . . mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or . . . . ; persons likely to become a public charge . . . ."

An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, 39 Stat. 874, Chap. 29 § 3 (1917).

The statute also provided for the deportability of "any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing[.]" Id. § 19.

The "public charge" language remains unchanged, although moved within the list. The Congressional Record suggests that Congress intentionally moved the category of "persons likely to become a public charge" later in the list in response to Gegiow. See 70 Cong. Rec. 3560 (1929) ("persons likely to become a public charge (this clause excluding aliens on the ground likely to become a public charge has been shifted from its position in section 2 of the immigration act of 1907

to its present position in section 3 of this act in order to indicate the intention of Congress that aliens shall be excluded upon said ground for economic as well as other reasons and with a view to overcoming the decision of the Supreme Court in Gegiow v. Uhl, 239 U. S. 3"); see also 80 Cong. Rec. 5829 (1936) (same).

A district court in 1919 reasoned that although the exact same phrase was shifted within the list, "I am unable to see that this change of location of these words in the act changes the meaning that is to be given them. A 'person likely to become a public charge' is one who for some cause or reason appears to be about to become a charge on the public, one who is to be supported at public expense, by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty, or, it might be, by reason of having committed a crime which, on conviction, would be followed by imprisonment." Ex parte Mitchell, 256 F. 229, 230 (N.D.N.Y. 1919). In that case, there was "no evidence whatever that the alien at any time has relied in any degree on the charity of others," but rather the alien "is able to earn her own living and always has done so[.]" Id.

The court then stated that mere speculation about the possibility of becoming a public charge does not make one likely to become a public charge: "The alien may become sick; she may lose her house by fire; she may lose her personal property by bad investments. All this is possible, but not probable. There is no claim that this alien is suffering, or that she has suffered at any time, from any mental or physical defect. It is not claimed this alien has been convicted, or even charged

with the commission, of any crime, or that she came to the United States, or is in the United States, for any immoral or improper purpose." Id. at 231.

The Ninth Circuit agreed in 1922, holding that the 1917 Amendment's movement of the "public charge" exclusion "does not change the meaning that should be given" the exclusion. Ex parte Hosaye Sakaguchi, 277 F. 913, 916 (9th Cir. 1922). The court recognized the legislative change and that Gegiow's reliance on the phrase's relative position in the statute was compromised, yet it held:

> Although in the act of February 5, 1917, under which the present case is to be determined, the location of the words 'persons likely to become a public charge' is changed,we agree with Judge Ray in Ex parte Mitchell (D.C.) 256 Fed. 229, that this change of location of the words does not change the meaning that should be given them, and that it is still to be held that **a person 'likely to become a public charge' is one who, by reason of poverty, insanity, or disease or disability, will probably become a charge on the public.**

Id. (emphasis added).[13]

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[13] In 1923 a district court in Washington state did not cite these precedents and held instead that Congress's shift was an effective modification in response to Gegiow. Ex parte Horn, 292 F. 455 (W.D. Wash. 1923). Interpreting the phrase anew based on its plain meaning, the court reasoned that "a public charge" is "a person committed to the custody of a department of the government by due course of law," and that committing someone to prison makes him a public charge. Id. at 457.

A 1921 Second Circuit opinion relying on Howe and Ex parte Mitchell held that "A person likely to become a public charge is one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty. We think that the finding by the administrative authorities, showing a physical defect of a nature that may affect the ability of the relator and appellee to earn a living, is sufficient ground for exclusion. His physical condition, together with his financial condition, having but $100 with him, justified the conclusion of the administrative authorities in finding that he and his children were aliens likely to become public charges." Wallis v. U.S. ex rel. Mannara, 273 F. 509, 511 (2d Cir. 1921) (citation omitted).

A number of courts around this time also held that imprisonment was one way to become a public charge. E.g., Ex parte Fragoso, 11 F.2d 988, 989 (S.D. Cal. 1926) ("The fact is this petitioner did become a public charge. He was confined in a jail for a period of nine months."); U.S. ex rel. Lehtola v. Magie, 47 F.2d 768, 770 (D. Minn. 1931) (noting a circuit split as to whether "dependency rather than imprisonment" is grounds for finding a public charge); Ex parte Horn, 292 F. 455, 458 (W.D. Wash. 1923).

In 1933, the third edition of Black's Law Dictionary was the first to define "public charge." The definition relied upon many of the above-cited cases, so for that reason it is derivative of and less probative than those cases themselves. Nevertheless, the definition is instructive. It defined the term as: "A person whom it is necessary to support at public expense by reason of

poverty, insanity and poverty, disease and poverty, or idiocy and poverty. . . . As used in [the 1917 Act], one who produces a money charge on, or an expense to, the public for support and care." See Black's Law Dictionary 311 (3d Ed. 1933). The term includes paupers as well as those who will not undertake honest pursuits or who are likely to go to prison.

In 1948, the Board of Immigration Appeals ("BIA") issued an order, which the acting Attorney General thereafter issued an order approving. The order set out a very explicit test for the term "public charge" as used elsewhere in the act, which concerned deportation proceedings of aliens who are later determined to have actually become a public charge during their time in the country. Matter of B-, 3 I. & N. Dec. 323 (A.G. 1948).

When interpreting the term as used in the deportation context, the BIA set out a 3-part test requiring (1) an individualized bill for charges incurred, that is (2) presented to the alien (or a family member) by the government, and (3) which the alien (or family member) fails to pay.

> the following test must be applied to determine whether an alien has become a public charge within the reach of the 1917 act: (1) The State or other governing body must, by appropriate law, impose a charge for the services rendered to the alien. In other words, the State must have a cause of action in contract against either the person taking advantage of the State services or other designated relatives or friends. If there is no charge made, and if the State does not have

> a cause of action, the alien cannot be said to be a public charge. (2) The authorities must make demand for payment of the charges upon those persons made liable under State law. And (3) there must be a failure to pay for the charges. If there is a failure to pay either because of lack of demand or because the State authorities do not perform their duty to collect the charges, the alien cannot be said to have become a public charge.

Id. at 326 (footnote omitted).

The BIA also reasoned that the same definition would apply to the identical term used earlier in the statute with respect to predicting whether an alien is likely to become a public charge—i.e., the provision at issue in the present action:

> First, we wish to make the following preliminary observation for the purpose of clarifying the issue. The acceptance by an alien of services provided by a State or by a subdivision of a State to its residents, services for which no specific charge is made, does not in and of itself make the alien a public charge within the meaning of the 1917 act. To illustrate, an alien who participates, without cost to him, in an adult education program sponsored by the State does not become a public charge. Similiarly [sic] with respect to an alien child who attends public school, or alien child who takes advantage of the free-lunch program offered by schools. We could go on *ad infinitum* setting forth the countless municipal and State services which are provided

> to all residents, alien and citizen alike, without specific charge of the municipality or the State, and which are paid out of the general tax fund. The fact that the State or the municipality pays for the services accepted by the alien is not, then, by itself, the test of whether the alien has become a public charge. . . . [I]f it were to be held that all aliens became public charges by accepting such services, such a holding would necessarily result in making aliens seeking admission to the United States excludable under that clause of section 3 of the act of February 5, 1917, which bars aliens likely to become public charges from entering the United States, provided it were shown the alien would accept the free municipal and State services.

Id. at 324–25 & n.1.

District courts had independently adopted the same meaning under the 1917 Act. E.g., Ex parte Orzechowska, 23 F. Supp. 428, 429 (D. Or. 1938) (individual not a public charge so long as they will "pay the full amount of the cost of keeping the girl at the Oregon State Hospital"); Ex parte Kichmiriantz, 283 F. 697, 698 (N.D. Cal. 1922) (same).

This three-part test is still used for determining whether to deport those who in fact become public charges currently, and DHS proposes to continue doing is in the Rule.

Prior to the 1952 Act's passage, at least one principle had seemingly coalesced in the case law. The reasoning in Gegiow was reaffirmed, and multiple

circuits (also recognized by Black's Law Dictionary) agreed that someone likely to become a public charge is one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, or idiocy and poverty. Although that oft-used definition (or a close derivative) is not particularly descriptive as to what quantum of support qualifies as "necessary to support" someone at public expense, it reaffirms the principle expressed in Gegiow and prior cases that the inquiry is focused on the individual's inherent ability to support himself. This definition also accords with prior interpretations generally finding that, absent some particularly-identified negative factor, those who appear generally capable and willing to work are not likely to become public charges. And unlike the Howe case, it allows reading the definition of public charge in light of the surrounding categories of excluded persons, such that someone who is excluded due to his disease alone may also be excluded because his disease, in combination with another factor like poverty, is likely to render him a public charge. This remains in line with other historically-supported, consistent principles described above, namely that temporary assistance does not render one a public charge and that actual incursion of debt to the state and refusal to pay could render one a public charge.

The Attorney General's order in 1948 for the first time offered a single, clear definition of the term "public charge" to be applied consistently throughout the Act. And it also specifically ruled that acceptance of publicly-funded services "for which no specific charge is made" does not make one a public charge. The

three-part test requiring presentation of a bill and inability or refusal to pay was certainly in accordance with a line of precedential caselaw, but it was by no means the only or even dominant line at that time. Nevertheless, this Attorney-General-issued order was controlling as administrative law between its issuance in 1948 and at least Congress's next codification of the immigration statutes in 1952.

7. 1952

In 1952, Congress again revised the laws relating to immigration. That revised statute provided, in part:

> Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
> (1) Aliens who are feeble-minded;
> (2) Aliens who are insane;
> (3) Aliens who have had one or more attacks of insanity;
> . . .
> (7) Aliens not comprehended within any of the foregoing classes . . . having a physical defect, disease, or disability . . . to be of such a nature that it may affect the ability of the alien to earn a living, unless the alien affirmatively establishes that he will not have to earn a living;
> (8) Aliens who are paupers, professional beggars, or vagrants;
> . . .
> (15) Aliens 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, are likely at any time to become public charges"

An Act to Revise the Laws Relating to Immigration, Naturalization, and Nationality; and for Other Purposes, 66 Stat. 163, 183, Title 2, Chap. 2 ("1952 Act") § 212 (1952).

The 1952 Act also provided for deportation of any alien who, "in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry[.]" Id., Chap. 5 § 241(a)(8).

The changes appear to be relatively minor for the purposes of this dispute. Notably, Congress added the phrase "at any time" to specify the scope of time the public charge determination is meant to consider. But no alteration to the phrase "public charge" appears in the statute.

The 1951 edition of Black's Law Dictionary, like the 3rd edition in 1933, assembled its definition based on precedent discussed above:

> A person whom it is necessary to support at public expense by reason of poverty, insanity and poverty, or idiocy and poverty. As used in [the 1917 Act] . . ., one who produces a money charge on, or an expense to, the public for support and care. As so used, the term is not limited to paupers or those liable to become such, but includes those who will not undertake honest pursuits, or who are likely to become periodically the inmates of prison.

Charge, Public Charge, Black's Law Dictionary (4th ed. 1951) (citations omitted).

BIA dispositions following the passage of the 1952 Act addressed the term. One such disposition surveyed caselaw interpreting the term and held "the statute requires more than a showing of a possibility that the alien will require public support. Some 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. **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**." Matter of Martinez-Lopez, 10 I. & N. Dec. 409, 421–22 (BIA 1962) (emphasis added) (collecting cases).

In that case, the agency held that the individual at issue was not likely to become a public charge given his characteristics, which essentially showed he was able to perform honest work:

> When respondent applied for a visa he was 22 years of age. He was sound of body and had about ten years of farming experience. He had no specialized training, but had five years of schooling and apparently planned to seek work for which he was qualified. He spoke no English, but this was no handicap for he would work among people who spoke Spanish. He had about $50 in assets. He had a brother gainfully

> employed in the United States and he had other close relations who were interested in his welfare and who worked to bring him to the United States. The brother was making $85 a week in permanent employment; he was unmarried; he had been sending money to his family in Mexico, and he was interested in helping his brother. Respondent had previous experience in the United States, having spent about three months here as a contract worker. At that time he worked both in the fields and in a cannery. His services appear to have been satisfactory for he was retained here until his contract was completed. Respondent had no criminal record.

Id. at 411.

A 1974 BIA decision emphasized that the public charge determination must consider the totality of the circumstances, and that prior welfare use alone cannot be determinative. Matter of Perez, 15 I. & N. Dec. 136, 137 (BIA 1974) ("The respondent's reliance on welfare for support is a condition which she herself can remedy.").

Another 1974 BIA decision confused matters. Matter of Harutunian, 14 I. & N. Dec. 583, 584 (BIA 1974). The decision outlined "[t]he stages in decisional interpretations of the deportation statute, culminating in Matter of B-":

> 1. The words "public charge" had their ordinary meaning, that is to say, a money charge upon or

> an expense to the public for support and care, the alien being destitute.
>
> 2.The alien had not yet become a public charge, even though he personally was destitute and his care and support were being paid for by public funds, if there existed close relatives, ready, willing and able to pay the bill, but the appropriate government agency had failed to submit any bill.
>
> 3. The alien had not become a public charge where the alien's mother had offered to make reimbursement, but under state law payment could not be accepted for maintenance and treatment of the institutionalized alien.
>
> 4. The alien had not become a public charge where the circumstances were like those described in 3, above, except that no one had offered reimbursement.

Id. at 586 (citations omitted).

However, it reasoned that the Attorney General's opinion in Matter of B- "is not necessarily controlling in relation to the provisions for exclusion." Id. at 585. The BIA reasoned that "[w]hile it may normally be assumed that identical words used in different parts of the same statute are intended to have an identical meaning, this assumption readily yields when the legislative intent requires variant meanings in different contexts." Id. at 586. The BIA then discussed legislative history in search of congressional intent. Id. The decision notes that the Senate Judiciary Committee discussed that courts had given different definitions to the term, and

ultimately it decided not to define the term, "but rather [decided] to establish the specific qualification that the determination of whether an alien falls into that category rests within the discretion of the consular officers or the Commissioner." Id. at 588 (citing S. Rep. 1515, 81st Cong., 2d Sess., April 20, 1950, p. 349).

The BIA stated that the phrase "public charge" must be "strictly construed" in the deportation context, but not in the exclusion context. Id. It then reasoned that the old-age benefits at issue in the case were "individualized public support to the needy, as distinguished from essentially supplementary benefits, directed to the general welfare of the public as a whole." Id. at 589. Even though the state would never ask for repayment of those old-age benefits—and therefore they could not constitute assistance qualifying one as a public charge under the Matter of B- test—the court reasoned that it would not consider "the element of reimbursement" when determining whether someone is likely to become a public charge. Id.

So, the BIA rejected the Matter of B- test and constructed alternate definitions for the same term depending on whether the executive is predicting whether someone is likely to become a public charge or deciding whether someone has already become a public charge. "Therefore, in our opinion any alien who is incapable of earning a livelihood, who does not have sufficient funds in the United States for his support, and has no person in the United States willing and able to assure that he will not need public support is excludable as likely to become a public charge whether

or not the public support which will be available to him is reimbursable to the state." Id. at 589–90.

These BIA decisions are useful to understand the administrative practices and interpretations operating when Congress reenacted the same language. Although this period saw confusion within the agency about the proper way to interpret the phrase as used in different contexts, each of the discussed decisions support the now-consistent theme that a healthy person in the prime of life who can work cannot be considered likely to become a public charge, absent some particularly-identified circumstance evaluated under a totality of the circumstances. E.g., Matter of Martinez-Lopez, 10 I. & N. Dec. at 422 (collecting cases); Matter of Harutunian, 14 I. & N. Dec. at 589 ("alien who is incapable of earning a livelihood"); Matter of Perez, 15 I. & N. Dec. at 137 (totality of circumstances).

8. 1987

In 1987, the INS issued a final rule, effective May 1, 1987, following notice and comment. See Adjustment of Status for Certain Aliens, 52 Fed. Reg. 16,205 (May 1, 1987). The rule implemented section 245A of the Immigration and Nationality Act as amended by section 201 of the Immigration Reform and Control Act of 1986. Id. at 16,205. So, the 1987 rule concerned the term "public charge" as used elsewhere in the INA, specifically for aliens adjusting their status to that of aliens lawfully admitted for temporary residence. The "key issues" subject to comments "were the public charge and special rule for determination of public charge[.]" 52 Fed. Reg. at 16,206.

That rule provided: "An applicant . . . is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance. . . . If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance." 52 Fed. Reg. at 16,211.

Essentially, this provision exempted aliens who had been working domestically from the normal public charge analysis, so long as they could prove a work history and that they had not relied on public cash assistance. The rule defined cash assistance to exclude in-kind benefits. 52 Fed. Reg. at 16,209 ("'Public cash assistance' means income or needs-based monetary assistance, to include but not limited to supplemental security income, received by the alien or his or her immediate family members through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work-related compensation or certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).").

This use of the term is somewhat of an aberration given that it essentially concerned an exception to the statute at issue here—and it did not define the term. However, it did reinforce the long-standing principle underlying the construction of the term that, when considering whether someone should be admitted to the country, the concept of "public charge" concerns primarily the prospect of gainful employment or some other private source of support.

9. 1990

In 1990, Congress revised the laws relating to immigration. That revised statute provided, in part:

> Except as otherwise provided in this Act, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:
>
> (1) Health-Related Grounds
> . . .
> (2) Criminal and Related Grounds
> . . .
> (3) Security and Related Grounds
> . . .
> (4) Public Charge.—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 excludable.

Immigration Act of 1990, 104 Stat. 4978, Title 6 § 601 (1990).

This version of the bill removed language referring to the feeble-minded, paupers, professional beggars, and vagrants. There is a suggestion in the Congressional Record that the removed terms were meant to be consolidated within the public charge category:

> The bill removes some of the antiquated and unused exclusions that have been in our law since the early 1900's, such as the exclusions based on illiteracy, and the exclusions for aliens who are "paupers, professional beggars, or vagrants." These relics have been replaced by one generic standard which exclude aliens who are "likely to become a public charge."

136 Cong. Rec. 36797, 36844 (1990).

In 1990, Black's Law Dictionary defined "public charge" as "an indigent. A person whom it is necessary to support at public expense by reason of poverty alone or illness and poverty." Charge, Public Charge, Black's Law Dictionary (6th ed. 1990).

Although a statutory term is not defined by reference to one preferred interpretation memorialized in the Congressional Record, that interpretation is consistent with the courts' and executive's general treatment of the term since Gegiow. That is, following Gegiow and later cases applying it to the 1917 Act, courts had read the term public charge in context of those surrounding terms rather than in exclusion of them, and focused on the alien's ability to work or

otherwise provide for himself, which each of the omitted surrounding terms also ultimately spoke to. But see Howe, 247 F. at 294.

10. 1996

In 1996, Congress again revised the laws relating to immigration. That revised statute provided, in part:

> (4) PUBLIC CHARGE.—
>
> > (A) IN GENERAL.—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 excludable.
> >
> > (B) FACTORS TO BE TAKEN INTO ACCOUNT.—
> >
> > > (i) In determining whether an alien is excludable under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's—
> > >
> > > > (I) age;
> > > > (II) health;
> > > > (III) family status;
> > > > (IV) assets, resources, and financial status; and
> > > > (V) education and skills.
> > >
> > > (ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of

> support under section 213A for purposes of exclusion under this paragraph.

Omnibus Consolidated Appropriations Act, 110 Stat. 3009, Title 5 § 531 (1996). This act is often referred to as the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). Elsewhere, the Act provided that "Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable." 8 U.S.C. § 1251(a)(5) (effective April 24, 1996).

The revised law used the same relevant language as all previous versions—public charge. However, the statute then listed five factors that Congress instructed must be considered when determining whether an alien is likely to become a public charge, and it identified another factor that "may also" be considered.

Contemporaneously, the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Pub. L. 104-193, restricted most aliens from accessing many public support programs for a period of time.

During legislative efforts that ultimately resulted in the IIRIRA, a group of legislators proposed to define "public charge" with particularity in the statute to include "any alien who receives benefits described in subparagraph (D) for an aggregate period of at least 12 months" (or 36 months in the case of a battered spouse or child). 142 Cong. Rec. 24313, 24425 (1996). The benefits listed in subparagraph D (that would qualify an alien as a public charge) included "means-tested public benefits," but it's not entirely clear what specific

benefits that section refers to.[14] That definition was not enacted into law.

11. 1999

The INS attempted in 1999 to engage in rulemaking to guide immigration officers, aliens, and the public in understanding the public charge determinations. No final rule was ever issued. Instead, the agency published Field Guidance addressing the issue. See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999) (the "1999 Field Guidance").

The notice was published prior to final rulemaking because it was deemed "necessary to help alleviate public confusion over the meaning of the term 'public charge' in immigration law and its relationship to the receipt of Federal, State, and local public benefits." 64 Fed. Reg. at 28,689. "The Department decided to publish a proposed rule defining 'public charge' in order to reduce the negative public health consequences generated by the existing confusion and to provide aliens with better guidance as to the types of public benefits that will and will not be considered in public charge determinations." Id. The notice "both summarizes longstanding law with respect to public charge and provides new guidance on public charge determinations in light of the recent changes in law,"

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[14] The record refers to Section 213A(e)(1), which appears to have been codified at 8 U.S.C § 1183a(e), but that does not describe means-tested benefits. The currently-operative version of 8 U.S. Code § 1183a(a)(1)(B) also appears to errantly refer to subsection (e) for a list of means-tested benefits, so this error is not unique.

notably the "Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and welfare reform laws." Id.

The notice proposed "that 'public charge' means an alien who has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) 'primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.' Institutionalization for short periods of rehabilitation does not constitute such primary dependence." Id.

Following the implementation of that interpretation, "officers should not place any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance with respect to determinations of admissibility or eligibility for adjustment on public charge grounds." Id.

Summarizing current agency practice, the memo explained:

> The standard for adjudicating inadmissibility under section 212(a)(4) has been developed in several Service, BIA, and Attorney General decisions and has been codified in the Service regulations implementing the legalization provisions of the Immigration Reform and Control Act of 1986. These decisions and regulations, and section 212(a)(4) itself, create a "totality of the circumstances" test.

> In determining whether an alien is likely to become a public charge, Service officers should assess the financial responsibility of the alien by examining the "totality of the alien's circumstances at the time of his or her application * * * The existence or absence of a particular factor should never be the sole criterion for determining if an alien is likely to become a public charge. The determination of financial responsibility should be a prospective evaluation based on the alien's age, health, family status, assets, resources and financial status, education, and skills, among other factors. An alien may be considered likely to become a public charge even if there is no legal obligation to reimburse the benefit-granting agency for the benefits or services received, in contrast to the standards for deportation, discussed below.

Id. at 28,690 (footnotes omitted).

The 1999 Field Guidance then explained that the three-part test for paying back public debt continues to apply, but only as an additional test on top of the totality of the circumstances test for deportation decisions:

> Repayment is relevant to the public charge inadmissibility determination only in very limited circumstances. If at the time of application for admission or adjustment of status the alien is deportable on public charge grounds under section 237(a)(5) of the INA due to an outstanding public debt for a cash benefit

> or the costs of institutionalization, then the alien is inadmissible. Only a debt that satisfies the three-part [Matter of B-] test under section 237(a)(5), described below, will render an alien deportable as a public charge and therefore ineligible for admission or adjustment. If the debt is paid, then the alien will no longer be inadmissible based on the debt, and the usual totality of the circumstances test would apply.

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 benefits. Under the newly-proposed "12/36 standard," a public charge is defined as an individual who receives designated public benefits for more than 12 months in the aggregate within a 36-month period, although a single month where multiple types of benefits are received is counted as multiple months of receiving aid. 84 Fed. Reg. at 41,295. The "public benefits" included are extended by the Rule to include many non-cash benefits, for example Supplemental Nutrition Assistance Program ("SNAP"), Section 8 Housing Programs, Medicaid, and Public Housing. Id. at 41,501. Receipt of two categories of benefits in the same months counts as two months of

receipt for benefits, so some will qualify as public charges without receiving benefits for 12 months. Moreover, the rule is agnostic to the value (or cost to the government) of the benefits. To take a plausible example, someone receiving $182 over 36 months—or an average of less than 17 cents a day—in SNAP benefits is a public charge under the Rule. See Shing Decl. ¶ 17.

The Rule does not change the definition of public charge in the context of deportability, described elsewhere in the INA. 84 Fed. Reg. at 41,295 ("This rule does not interpret or change DHS's implementation of the public charge ground of deportability."). Rather, DHS will continue to enforce the 1999 Field Guidance in the deportation context. Id. at 41,304 ("DHS currently makes public charge determinations in accordance with the 1999 Interim Field Guidance. . . . This guidance explains how the agency determines . . . whether a person has become a public charge within five years of entry"). The 1999 Field Guidance, which will continue to govern, provided that "the definition of public charge is the same for both admission/adjustment and deportation," although "the standards applied to public charge adjudications in each context are significantly different" because one is forward-looking and one is backward-looking. 64 Fed. Reg. at 28,689. As such, following the implementation of the Rule, "public charge" will continue to be defined in the deportation context as "an alien who has become . . . 'primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term

care at government expense.'" Id. To assess whether an alien qualifies under that definition in the deportability context, the 1999 Field Guidance prescribes the 3-part test established in Matter of B-, 3 I. & N. Dec. 323.

So, the Rule proposes to simultaneously apply multiple definitions for the term public charge. First, its new definition will be used to predict whether an alien is likely at any time to become a public charge. Second, the 1999 Field Guidance's "primary dependence" definition is left unaltered in the deportation context, and it is evaluated pursuant to the well-known 3-part Matter of B- test.

Each step in the Chevron analysis requires the court to consider the terms of the statute in context. The court first looks to the statutory text, in light of prior agency and judicial interpretation—as explained at length above, although the court notes that judicial and agency interpretation following the most-recent 1996 revision is not particularly relevant to understanding the meaning of the text as enacted in 1996. Cf. Sec'y of the Interior v. California, 464 U.S. 312, 375 n.36 (1984) (the "view of a subsequent Congress . . . is not without persuasive value").

The analysis is also informed to some degree by what Congress decided not to pass, in addition to what it specifically rejected. "Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." Cardoza-Fonseca, 480 U.S. at 442–43; Albemarle Paper Co., 422 U.S. at 414 n.8 (rejecting construction of statute that would implement provision Conference Committee rejected); Bob Jones Univ., 461 U.S. at 600–01

(interpretation of statute informed by the fact that Congress had a "prolonged and acute awareness" of an established agency interpretation of a statute, considered the precise issue, and rejected bills to overturn the prevailing interpretation); see also Merrill Lynch, 456 U.S. at 381–82 (interpretation of statute informed by the fact that Congress amended large portions of statute, but not provision at issue).

Of particular relevance here, parts of Congress have explicitly and repeatedly rejected efforts to define "public charge" to include those who receive certain in-kind benefits for a period of 12 months—efforts that are strikingly similar to the definition now adopted for the first time by the executive in the Rule. E.g., 142 Cong. Rec. 24313, 24425 (1996); S. Rep. No. 113-40, at 42 (2013); S. Rep. No. 113-40, at 63 (2013). Congress's rejection in 1996 is particularly instructive. As described above, Congress at that time considered a scheme similar to the Rule, wherein use of means-tested benefits for 12 months would qualify one as a public charge. On September 24, 1996, the conference committee recommended passage of a version of the bill with that definition. See 142 Cong. Rec. 24389 (conference committee recommendation), 24425 (public charge definition). President Clinton had previously praised the legislation generally, but specifically criticized that bill's disincentive to obtain public benefits. He called for revision of the statute. He said "it still goes too far in denying legal immigrants access to vital safety net programs which could jeopardize public health and safety. Some work still needs to be done. I urge the Congress to move quickly to finalize and send me this key legislation." Statement

on Senate Action on the "Immigration Control and Financial Responsibility Act of 1996", President William J. Clinton, Weekly Compilation of Presidential Documents Volume 32, Issue 18 (May 6, 1996) at p. 783. On September 30, 1996, the bill was signed into law, following the removal of the definition of public charge that included use of means-tested public benefits. This exchange, which deals with the precise issue presented by this litigation, is particularly instructive not because of the president's words but because of Congress's response to those words—it intentionally considered and rejected a definition similar to what the Rule now proposes. Afterall it is Congress, not the President, who is responsible for writing legislation.

Given the term's long-standing focus on the individual's ability and willingness to work or otherwise support himself, and its longstanding allowance for short-term aid, and the legislative history of the 1996 revision, it is likely that the Rule's interpretation defining anyone who receives any quantity of benefits for 12 months (or fewer) out of a floating 36-month window as a public charge is not a permissible or reasonable construction of the statute. For example, defendants do not contest that someone receiving less than 50 cents per day—which is a standard SNAP benefit amount for recipients at the higher end of income eligibility, Shing Decl. ¶ 17—would be deemed a public charge under the Rule. That could also be calculated as $182 over 36 months—or an average of less than 17 cents a day. At no point over the long history described above could that have qualified one as a public charge, unless the

bill for those charges was presented to the recipient and he refused to pay. Moreover, the Rule's double-counting of months where multiple benefits are received raises serious questions with respect to whether the Rule impermissibly considers temporary or short-term relief, receipt of which has never been sufficient to qualify someone as a public charge (absent repayment, following presentation of an invoice).

Deciding otherwise would put this court at odds with persuasive Supreme Court and Ninth Circuit precedent. The Supreme Court has defined the term to allow exclusion only "on the ground of permanent personal objections accompanying them [the excluded aliens] irrespective of local conditions[.]" Gegiow, 239 U.S. at 10. In that case, "the aliens came from a remote province of Russia. They knew no trade. They knew no language but their own. Only one could read or write in his own language. They had sums aggregating slightly more than $25 each. They were not employed, and had no promise of employment. They were ticketed through to Portland, Or., where, owing to depressed labor conditions, the prospect of their obtaining work 'was most unfavorable.'" Ex parte Hosaye Sakaguchi, 277 F. at 916 (citing Gegiow, 239 U.S. at 10). Still, they were not likely to become public charges within the meaning of the statute. The Ninth Circuit reaffirmed that definition following reorganization of the statute. Id. ("change of location of the words does not change the meaning that should be given them"). Since Gegiow and Ex parte Hosaye Sakaguchi, Congress has not altered the term "public charge," which the Ninth Circuit has defined standing alone, irrespective of its placement or context within the list of excluded persons

in the statute. The court therefore sees no good reason to depart from those precedential opinions, which suggest that an able-bodied, working-age individual who is willing to engage in honest work is not excludable based on a prediction that he will become a public charge unless a particular reason can be articulated to exclude him. This reasoning does not allow for exclusion based on the increasing generosity of society's public assistance to provide for more than the barest requirements of subsistence. Gegiow, in fact, explicitly precludes consideration of local labor conditions.

The likely unreasonableness of the rule is further demonstrated by just how expansive the definition is. The history of the term, evidenced by its repeated verbatim reenactment, excluded those who were likely to become public charges based on poverty, or idiocy and poverty, or disease and poverty, etc. But plaintiffs demonstrate that in a single year, roughly a quarter U.S.-born citizens receive one or more benefits used to define who is a public charge under the Rule. And plaintiffs demonstrate that, over the course of their lifetimes, about 40% of U.S.-born citizens are expected to receive one or more of those benefits. Although these figures do not indicate what percent of U.S.-born citizens would actually be deemed public charges under the Rule (that would require determining how many individuals receive multiple benefits per month, in addition to how many months benefits are received over any 3-year period), it suggests that the Rule is substantially outside the bounds of a reasonable interpretation of the statute.

With regard to plaintiffs' claim that the Rule is not in accordance with law, for the foregoing reasons, and given the above discussion of the term's long-standing use and evolution in the immigration statutes, this court finds that plaintiffs are likely to succeed on the merits with respect to their claim that the Rule's definition of public charge is unreasonable and not based on a permissible construction of the statute, under the second prong of the Chevron analysis.[15] Alternatively, plaintiffs have raised at least serious questions with respect to whether "the statute, read in context, unambiguously forecloses" the precise question at issue, namely DHS's expansive interpretation of the term to include individuals willing and able work productively in the national economy, 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

[15] For the same reasons that plaintiffs are likely to succeed on this question, they have undoubtedly raised serious questions with respect to it.

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.

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[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.

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 the rule making through submission of written data, views, or arguments." § 553(c). An agency must consider and respond to significant comments received during the period for public comment. Third, when the agency promulgates the final rule, it must include in the rule's text "a concise general statement of [its] basis and purpose." § 553(c). Rules issued through the notice-and-comment process are often referred to as "legislative rules" because they have the "force and effect of law." Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015) (citations omitted).

"'[A]rbitrary and capricious' review under the APA focuses on the reasonableness of an agency's decision-making *processes*." CHW W. Bay v. Thompson, 246 F.3d 1218, 1223 (9th Cir. 2001). Agency action is invalid if the agency fails to give adequate reasons for its decisions, fails to examine the relevant data, or offers no "rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also Encino Motorcars, 136 S. Ct. at 2125. A rule is arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Id.

Agencies are required to "reflect upon the information contained in the record and grapple with contrary evidence." Fred Meyer Stores, Inc. v. NLRB, 865 F.3d 630, 638 (D.C. Cir. 2017). Where "the agency has failed to 'examine the relevant data' or failed to 'articulate a rational explanation for its actions,'" its decision is arbitrary and capricious. Genuine Parts Co. v. EPA, 890 F.3d 304, 311–12 (D.C. Cir. 2018). And where an agency is uncertain about the effects of agency action, it may not rely on "'substantial uncertainty' as a justification for its actions." Greater Yellowstone Coal., Inc. v. Servheen, 665 F.3d 1015, 1028 (9th Cir. 2011). Instead, it must "rationally explain why the uncertainty" supports the chosen approach. Id. ("Otherwise, we might as well be deferring to a coin flip."). "[A]n internally inconsistent analysis is arbitrary and capricious." Nat'l Parks

Conservation Ass'n v. E.P.A., 788 F.3d 1134, 1141 (9th Cir. 2015).

But "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43; San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 601 (9th Cir. 2014) ("Although our inquiry must be thorough, the standard of review is highly deferential; the agency's decision is 'entitled to a presumption of regularity,' and we may not substitute our judgment for that of the agency."). An agency's obligation to respond to comments on a proposed rulemaking is "not 'particularly demanding.'" Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 441–42 (D.C. Cir. 2012). "[T]he agency's response to public comments need only 'enable [courts] to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'" Pub. Citizen, Inc. v. FAA, 988 F.2d 186, 197 (D.C. Cir. 1993).

Rule changes face a higher burden when departing from prior policy:

> Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. When an agency changes its existing position, it need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. But the agency must at least display awareness that it is changing position and show that there are good reasons for the new policy. In explaining its changed position, an agency

> must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy. It follows that an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice. An arbitrary and capricious regulation of this sort is itself unlawful and receives no Chevron deference.

Encino Motorcars, 136 S. Ct. at 2125–26 (internal quotation marks and citations omitted); accord F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate . . . when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account").

Plaintiffs raise numerous procedural challenges to the Rule. The court addresses them in two general categories. First, the court considers plaintiffs arguments that DHS failed to adequately consider and address the Rule's costs and benefits. Second, the court considers plaintiffs' remaining procedural challenges.

i. DHS Failed to Adequately Consider Costs and Benefits

Plaintiffs argue that DHS failed to consider costs and benefits in three ways. First, DHS failed to adequately consider significant costs to local and state governments raised in comments, as well as the related issue of DHS's failure to consider evidence when estimating disenrollment figures. Second, DHS failed to consider concerns about health effects like disease outbreaks. Third, DHS acted impermissibly with respect to the burden the I-944 form would impose.

Based on plaintiffs' first and second arguments, discussed presently, this court finds that they are likely to succeed on the merits with respect to their claim that the Rule is arbitrary and capricious.[17]

A. Local and State Government Costs and Disenrollment Rates

Plaintiffs argue that commenters documented the dangers to individuals and public health generally that stem from disenrollment in public benefits, and explained that local and state governments will face higher costs because of this disenrollment. See 84 Fed. Reg. at 41,310-12 (explaining that "[m]any commenters particularly emphasized that disenrollment or foregoing enrollment would be detrimental to the financial stability and economy of communities, States, local organizations, hospitals, safety net providers,

[17] For the same reasons that plaintiffs are likely to succeed on this claim, they have undoubtedly raised serious questions with respect to it.

foundations, and healthcare centers"); id. at 41,469–70; Case No. 19-cv-04717-PJH, Dkt. 44, Exs. C–E (letters submitted in response to NPRM). Numerous comments included specific cost calculations. See, e.g., 84 Fed. Reg. at 41,475 (citing specific cost estimates from comments); Cho Decl., Ex. C at 22–23 (estimating losses to California at $1.76 billion in revenue from federal government and 17,700 jobs), Ex. J at 11 (estimating that the Rule would cost hospitals more than $17 billion in uncompensated care), Ex. K at 5–7 (detailing expected costs to hospitals).

Plaintiffs relatedly argue that DHS under-estimated disenrollment figures and the accompanying effects, including the effects on state and local governments.[18] For example, despite its concession that the Rule will cause members of mixed-status households (i.e., those including U.S. citizens) to disenroll from benefits, 84 Fed. Reg. at 41,300, DHS refused to consider the costs associated with such disenrollment, stating: "DHS believes that it would be unwarranted for U.S. citizens and aliens exempt from public charge inadmissibility to disenroll from a public benefit program or forego enrollment in response to

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[18] DHS argues that it's 2.5% figure is not part of the regulatory analysis and cannot be challenged because it was calculated pursuant to an executive order. The court disagrees. See Council of Parent Attorneys & Advocates, Inc. v. DeVos, 365 F. Supp. 3d 28, 54 n.11 (D.D.C. 2019) ("The government contended . . . that because its regulatory impact analysis was conducted pursuant to Executive Orders, it is not subject to judicial review. . . . These arguments are contrary to D.C. Circuit precedent. Because the government relied on its cost-benefit analysis . . . a flaw in that analysis can render the regulation arbitrary and capricious.").

this rule when such individuals are not subject to this rule. DHS will not alter this rule to account for such unwarranted choices." Id. at 41,313.

Defendants correctly argue that they are not required to quantify every potential cost and benefit and precisely weigh them out. They respond to these challenges both in the Rule and before the court with three essential points. First, DHS read the comments, but the forward-looking economic impact to states, cities, hospitals, and others was too difficult to assess. Second, with respect to the disenrollment of those who will not be subject to a public charge assessment in the future, the Rule's effect was too difficult to assess. Third, even if DHS had assessed those costs, they would be outweighed by the benefits of excluding aliens who would rely on public assistance, and of promoting self-sufficiency of aliens already in the United States. Those benefits are in line with Congressional statements of policy.

DHS was required to a certain extent to grapple with estimates and credible data explained in the comments, and in turn explain why DHS chose not to credit them. See Ctr. for Biological Diversity v. Zinke, 900 F.3d 1053, 1068–69 (9th Cir. 2018) (finding agency action arbitrary and capricious where the agency did not explain why it did not credit available data that did not support its action). Defendants are correct that DHS was not required to parse costs and benefits precisely. But to the extent the exact harms are unknown or difficult to predict, that does not justify "disregarding the effect entirely." Pub. Citizen v. Fed.

Motor Carrier Safety Admin., 374 F.3d 1209, 1219 (D.C. Cir. 2004).

Here, even under the deferential APA analysis, DHS appears to have wholly failed to engage with this entire category of comments. DHS failed to grapple with the Rule's predictable effects on local governments, and instead concluded that the harms—whatever they may be—are an acceptable price to pay. At minimum, the APA requires more than reading public comments and responding with a general statement that, however correct the comments may be, the agency declines to consider the issues and costs identified because doing so would contravene the government's favored policy.

For example, under the heading "Increased Costs to Health Care Providers, States, and Localities," the government summarized the comments it was responding to:

> Many commenters particularly emphasized that disenrollment or foregoing enrollment would be detrimental to the financial stability and economy of communities, States, local organizations, hospitals, safety net providers, foundations, and healthcare centers. Commenters offering estimates on the number of people who would disenroll from Medicaid under the proposed rule warned that the costs associated with the resultant rise in uncompensated care would be borne by health systems, hospitals, and insured patients.

84 Fed. Reg. at 41,312.

The government's response, in part, was:

> Response: With respect to the rule's potential "chilling effects" or disenrollment impacts, DHS notes that (1) the rule's overriding consideration, i.e., the Government's interest as set forth in PRWORA, is a sufficient basis to move forward; (2) it is difficult to predict the rule's disenrollment impacts with respect to the regulated population, although DHS has attempted to do so in the accompanying Final Regulatory Impact Analysis; and (3) it is also difficult to predict the rule's disenrollment impacts with respect to people who are not regulated by this rule, although, again, DHS has attempted to do so in the accompanying Final Regulatory Impact Analysis.
>
> First, as discussed above, this rule is rationally related to the Government's interest, as set forth in PRWORA, to: (1) Minimize the incentive of aliens who attempt to immigrate to, or adjust status in the United States due to the availability of public benefits; and (2) Promote the self-sufficiency of aliens within the United States. DHS has defined public benefits by focusing on cash assistance programs for income maintenance, and an exhaustive list of non-cash food, housing, and healthcare, designed to meet basic living needs. This definition does not include benefits related exclusively to emergency response, immunization, education, or social services, nor does it include exclusively state and local non-cash aid programs. DHS acknowledges

that individuals subject to this rule may decline to enroll in, or may choose to disenroll from, public benefits for which they may be eligible under PRWORA, in order to avoid negative consequences as a result of this final rule. However, DHS has authority to take past, current, and likely future receipt of public benefits into account, even where it may ultimately result in discouraging aliens from receiving public benefits.

Although individuals may reconsider their receipt of public benefits as defined by this rule in light of future immigration consequences, this rule does not prohibit an alien from obtaining a public benefit for which he or she is eligible. DHS expects that aliens seeking lawful permanent resident status or nonimmigrant status in the United States will make purposeful and well-informed decisions commensurate with the immigration status they are seeking. But regardless, DHS declines to limit the effect of the rulemaking to avoid the possibility that individuals subject to this rule may disenroll or choose not to enroll, as self-sufficiency is the rule's ultimate aim.

Second, DHS finds it difficult to predict how this rule will affect aliens subject to the public charge ground of inadmissibility, because data limitations provide neither a precise count nor reasonable estimate of the number of aliens who are both subject to the public charge ground of inadmissibility and are eligible for public

benefits in the United States. This difficulty is compounded by the fact that most applicants subject to the public charge ground of inadmissibility and therefore this rule are generally unlikely to suffer negative consequences resulting from past receipt of public benefits because they will have been residing outside of the United States and therefore, ineligible to have ever received public benefits.

. . . .

Third, DHS finds it difficult to predict the rule's disenrollment impacts with respect to people who are not regulated by this rule, such as people who erroneously believe themselves to be affected. . . . This rule does not prohibit or otherwise discourage individuals who are not subject to the public charge inadmissibility from receiving any public benefits for which they are eligible.

. . . .

Because DHS will not consider the receipt of public benefits by U.S. citizens and aliens not subject to public charge inadmissibility, the receipt of public benefits by these individuals will not be counted against or made attributable to immigrant family members who are subject to this rule. Accordingly, DHS believes that it would be unwarranted for U.S. citizens and aliens exempt from public charge inadmissibility to disenroll from a public benefit program or

forego enrollment in response to this rule when such individuals are not subject to this rule. DHS will not alter this rule to account for such unwarranted choices.

DHS appreciates the potential effects of confusion regarding the rule's scope and effect, as well as the potential nexus between public benefit enrollment reduction and food insecurity, housing scarcity, public health and vaccinations, education health-based services, reimbursement to health providers, and increased costs to states and localities. In response to comments, DHS will also issue clear guidance that identifies the groups of individuals who are not subject to this rule, including, but not limited to, U.S. citizens, lawful permanent residents returning from a trip abroad who are not considered applicants for admission, and refugees.

. . . .

In sum, DHS does not believe that it is sound policy to ignore the longstanding self-sufficiency goals set forth by Congress or to admit or grant adjustment of status applications of aliens who are likely to receive public benefits designated in this rule to meet their basic living needs in an [sic] the hope that doing so might alleviate food and housing insecurity, improve public health, decrease costs to states and localities, or better guarantee health care provider reimbursements. . . . DHS believes that it will ultimately strengthen public safety, health, and nutrition through this rule by denying admission or

> adjustment of status to aliens who are not likely to be self-sufficient.

84 Fed. Reg. at 41,312–14 (footnotes omitted).

That answer entirely fails to discuss costs being borne by the states, hospitals, or others, other than to say DHS will issue guidance in an effort to mitigate confusion. The answer discusses disenrollment rates being difficult to measure, but flatly refuses to account for certain types of disenrollment (for example those who "erroneously believe themselves to be affected" and make "unwarranted choices"). DHS's response constitutes a thinly-veiled abdication of the responsibility to consider the issue. Rather than engage, the response simply elides the issue that the APA requires consideration of.

Ending the analysis with the conclusion that "DHS believes that it will ultimately strengthen public safety, health, and nutrition through this rule" fails to show that DHS "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Encino Motorcars, 136 S. Ct. at 2125 (quoting Motor Vehicle Mfrs. Assn., 463 U.S. at 43); Sorenson Commc'ns Inc. v. F.C.C., 755 F.3d 702, 708 (D.C. Cir. 2014) ("Though an agency's predictive judgments about the likely economic effects of a rule are entitled to deference, deference to such judgments must be based on some logic and evidence, not sheer speculation.") (internal quotation marks and citations omitted). DHS fails to explain how those benefits will come about with any evidentiary support. In fact, ample evidence cited in the comments shows exactly

the opposite—that use of public benefits improves public health and welfare. DHS's bare assertion to the contrary simply is not enough to satisfy its obligations. Even ignoring the fact that the conclusion lacks a reasoned explanation of how it was reached, DHS also fails to address why the supposed benefits will outweigh the likely costs (DHS had at this point already declined to discuss what the likely costs are in fact are). Plaintiffs have shown it is likely that, with respect to consideration of costs imposed on states and localities by the Rule, DHS offers no "path [that] may reasonably be discerned" in its reasoning. Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.

Moreover, DHS may not discount an undisputed impact of the Rule simply because DHS believes it is "unwarranted." See Michigan, 135 S. Ct. at 2707 ("reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions"). DHS flatly refused to consider the costs associated with predicted, likely disenrollment of those not subject to the public charge determination by stating: "DHS believes that it would be unwarranted for U.S. citizens and aliens exempt from public charge inadmissibility to disenroll from a public benefit program or forgo enrollment in response to this rule when such individuals are not subject to this rule. DHS will not alter this rule to account for such unwarranted choices." 84 Fed. Reg. at 41,313. But DHS's disagreement with the source of a cost does not make it go away, and it does not discharge DHS's obligation to consider it. DHS must consider the costs of widespread disenrollment that it anticipates—it cannot ignore costs by calling their causes "unwarranted."

Plaintiffs have shown it is likely that DHS understood that individuals would disenroll even though they are not subject to the public charge determination, yet DHS refused to consider that cost entirely. Doing so would have been arbitrary and capricious. Michigan, 135 S. Ct. at 2707 ("'cost' includes more than the expense of complying with regulations; any disadvantage could be termed a cost. . . . Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."); accord Metlife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 223 (D.D.C. 2016) ("focus[ing] exclusively on the presumed benefits . . . and ignor[ing] the attendant costs . . . is itself unreasonable under the teachings of Michigan v. Environmental Protection Agency"); Regents of Univ. of California v. United States Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1046 (N.D. Cal.), aff'd sub nom. Regents of the Univ. of California v. U.S. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018), cert. granted sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of California, 139 S. Ct. 2779 (2019) (same).

B. Health Effects

Plaintiffs argue that DHS ignored comments describing how loss of benefits would trigger negative health consequences, including the spread of disease and aggravation of chronic illness. DHS received ample commentary regarding this issue. See, e.g., 84 Fed. Reg. at 41,384 (summarizing certain comments); Cho Decl., Ex. M at 4 (Kaiser Permanente comment linking the rule's impacts on prescription adherence with

increased chance of outbreaks of communicable disease), Ex. N at 9 (Pub. Health Inst. Comment: "We cannot achieve universally agreed upon public health goals, such as reducing chronic diseases throughout the U.S., when we directly or indirectly deny large segments of our population the very building blocks they need for good health"), Ex. O at 4 (Nat'l Assoc. Ped. Nurse Practitioners comment discussing "worse health outcomes"), P at 7 (Children's HealthWatch comment warning of "increased prevalence of communicable diseases").

Defendants offer the same general defenses in response. First, DHS read the comments, but the forward-looking impact to health was too difficult to assess. Second, even if DHS had assessed those costs, they would be outweighed by the benefits of excluding aliens who would rely on public benefits and promoting self-sufficiency of aliens already in the United States. Those benefits are in line with Congressional statements of policy.

Relevantly here, similar negative health outcomes were a key rationale for prior agency action. When issuing the 1999 guidance, INS described its primary motivation "to reduce the negative public health consequences generated by the existing confusion." 64 Fed. Reg. at 28,689; see also id. at 28,692 (adopting regulation on an interim basis because "confusion . . . has deterred eligible [immigrants] and their families, including U.S. citizen children, from seeking important health and nutrition benefits," and that "reluctance to access benefits has an adverse impact not just on the potential recipients, but on public health and the

general welfare"). In reversing the 1999 guidance, defendants must "'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" Encino Motorcars, 136 S. Ct. at 2126 (quoting FCC v. Fox, 556 U.S. at 515). Moreover, where the prior policy engendered reliance, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." Id.

Under the heading "Vaccinations," the government summarized the comments it was responding to:

> Commenters indicated that the public charge rule would make immigrant families afraid to seek health-care, including vaccinations against communicable diseases, and therefore, endanger the U.S. population. . . . . The commenter indicated that engaging with the public health system was critical to ensuring robust immunization to protect the population overall; if a subset of the community were fearful to access government healthcare services, regardless of whether a specific type of service qualified for a narrow exception, it would have a significant impact on the country's ability to protect and promote the public health. Another commenter indicated that its health department anticipated that promulgation of the rule, as written in the NPRM, will result in decreased utilization of children's healthcare, including vaccinations, which will increase the risk for vaccine preventable diseases . . . increasing the likelihood of an outbreak.

> Some commenters stated that since many immigrants live in communities alongside people of the same national origin, reduced vaccinations could result in unvaccinated or under-vaccinated clusters of individuals. Commenters warned that research shows that uninsured individuals are much less likely to be vaccinated. One commenter stated that a recent study found that even a five percent reduction in vaccine coverage could trigger a significant measles outbreak. . . . Another commenter stated that the rule would increase the incidence of childhood diseases like chickenpox, measles, mumps and rubella and deter parents from vaccinating their children.

84 Fed. Reg. at 41,384.

The government's response was:

> With this rulemaking, DHS does not intend to restrict the access of vaccines for children or adults or intend to discourage individuals from obtaining the necessary vaccines to prevent vaccine-preventable diseases. The purpose of this rulemaking is to ensure that those seeking admission to the United States are self-sufficient and rely on themselves or family and friends for support instead of relying on the government for subsistence. As noted above, this final rule does not consider receipt of Medicaidbya child under age 21, orduringa person's pregnancy, to constitute receipt of public benefits. This should addressa substantialportion, though not all, of the vaccinations issue.

> Vaccinations obtained through public benefits programs are not considered public benefits under 8 CFR 212.21(b), although if an alien enrolls in Medicaid for the purpose of obtaining vaccines, the Medicaid itself qualifies as a public benefit. DHS also notes that free or low cost vaccines are available to children who are not insured or underinsured through the Vaccines for Children (VFC) Program. In addition, local health centers and state health departments provide preventive services that include vaccines that may be offered on a sliding scale fee based on income. Therefore, DHS believes that vaccines would still be available for children and adults even if they disenroll from Medicaid.

84 Fed. Reg. at 41,384–85 (footnotes omitted).

DHS's response to the comments was essentially that it understood that fewer people would get vaccines following the Rule, which would present a risk, but there are ways to get vaccines without Medicaid. As a result, DHS acknowledged that fewer people will get vaccines, but it failed engage at all in the consequences of that fact.

Plaintiffs have demonstrated a likelihood of success based upon this argument. This change departs from a longstanding prior policy, as explained in the 1999 Field Guidance, that is likely to have engendered reliance. That guide explained that certain rules were needed because uncertainty had "deterred eligible aliens and their families, including U.S. citizen children, from seeking important health and nutrition benefits[, which] . . . **has an adverse impact not just**

on the potential recipients, but on **public health** and the general welfare." 64 Fed. Reg. at 28,692 (emphasis added). Given that the 1999 Field Guidance was both longstanding precedent and specifically concerned benefits supporting general public health (not simple health of the aliens—e.g., vaccines), DHS must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." FCC v. Fox, 556 U.S. at 515–16; accord Encino Motorcars, 136 S. Ct. at 2126 ("an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice") (internal quotation marks omitted).

Although DHS acknowledged departure from the 1999 Field Guidance as a general matter (e.g., 84 Fed. Reg. at 41,307–08), DHS simply declined to engage with certain, identified public-health consequences of the Rule. It made no attempt, whatsoever, to investigate the type or magnitude of harm that would flow from the reality which it admittedly recognized would result—fewer people would be vaccinated. Instead, and just as with its refusal to consider "unwarranted" choices to disenroll from Medicaid discussed above, DHS responded only that it "believes that vaccines would still be available" through some other channels. The response is devoid of rationale, but additionally it fails entirely to provide a reasoned explanation for disregarding the facts and circumstances underlying the prior policy.

C. Form I-944

Plaintiffs argue that defendants' estimate of the time and cost burden that the new Form I-944, entitled Declaration of Self Sufficiency, will have on applicants is implausible. They argue that the Rule provides too-low of an estimate for the time required to fill out the form, based on its estimate about the time it takes to fill out another related form. They argue that DHS did not adequately consider the differences between the forms when arriving at their estimate. Yet DHS considered and responded to comments regarding the time commitment required by Form I-944. In response DHS modified the form, removed some duplicative questions, and explained that it is important to be filed separately because it is filed by the immigrant himself. 84 Fed. Reg. at 41,484. Plaintiffs have not demonstrated a likelihood of success or serious questions with respect to this argument.

ii. Other Challenges

Plaintiffs raise a number of other procedural challenges under the APA. The court finds that plaintiffs have not demonstrated a likelihood of success on the merits or serious questions with respect to any, and it will address some of them briefly.

Plaintiffs argue that the Rule stops treating sponsors' affidavits of support as sufficient assurance that immigrant applicants will not become overly dependent on public benefits, yet Congress specified in 8 U.S.C. § 1182(a)(4)(B)(ii) that the executive simply "may also" consider such affidavits. Although plaintiffs argue that in practice USCIS has accepted affidavits of

support as conclusive, the controlling statute and 1999 Field Guidance make clear that this is not a change in policy. See 64 Fed. Reg. at 28,690 ("Where such an AOS has been filed on an alien's behalf, it should be considered along with the statutory factors in the public charge determination.").

Plaintiffs argue the Rule is inconsistent because DHS included an exemption for individuals under the age of 21 who receive Medicaid benefits, but did not include a similar exemption for individuals under the age of 21 who receive SNAP benefits. DHS considered this issue and provided a reasoned explanation for providing Medicaid to children, including that it can provide funding for "in-school health services and serve as an important way to ensure that children receive the vaccines needed to protect public health and welfare." 84 Fed. Reg. at 41,380.

Plaintiffs argue the Rule is inconsistent because the statute requires consideration of "education and skills" and "health," but the Rule requires a much more searching inquiry into health than education and skills. For example, the Rule considers details about an individual's health insurance, benefits receipt, and financial status of household members, but inconsistently fails to take into account admission or attendance in a college or trade school. But the Rule in fact allows for consideration of admission or attendance in a college or trade school, and DHS adequately addressed these issues in response to comments. See 84 Fed. Reg. at 41,436 ("the exact nature of the education (or lack thereof) and employment would have to be considered").

Plaintiffs argue the Rule is inconsistent because it considers past immigration-related fee waivers, which may be submitted before a noncitizen is legally eligible to work and as a result punish that individual for applying to work legally. DHS adequately responded, noting that "[s]ince fee waivers are based on an inability to pay, seeking or obtaining a fee waiver for an immigration benefit suggests an inability to be self-sufficient." 84 Fed. Reg. at 41,424–25.

Plaintiffs argue the Rule is inconsistent because Medicaid use by pregnant women or children (who are not penalized for using Medicaid under the rule) is counted against them, because Medicaid is not counted as an asset that could offset the negative factor of their illness that Medicaid is paying to treat. Plaintiffs argue that is not consistent, because private insurance is considered an asset. Defendants argue that the Rule does not count a severe medical condition as a heavily weighed negative factor if the alien has "the financial resources to pay for reasonably foreseeable medical costs related to such medical condition," and such "financial resources" can include Medicaid benefits for those pregnant or under 21. See 84 Fed. Reg. at 41,504 ("resources . . . to pay for reasonably foreseeable medical costs" includes "health insurance not designated as a public benefit under 8 CFR 212.21(b)").

Plaintiffs argue the Rule is irrational because an income of 125% of the federal poverty guideline rate counts as a positive factor, yet individuals whose incomes exceed that qualify for non-cash benefits considered under the Rule. But not all factors in a

multifactor test are required to align in outcome to be rational.

Plaintiffs argue the Rule is irrational because while it considers large family size as a negative factor in a public charge assessment, DHS's own data indicates that non-cash benefit is higher among families of three than families of four, and that noncitizens' use of cash benefits decreases as family size grows. 84 Fed. Reg. at 41,395. The parties appear to disagree about which studies are "good studies" here, but DHS's response explained its interpretation of the studies and concluded that "the data properly reflects that receipt of noncash benefits generally increases with an increase in family size." Id.

Plaintiffs argue the Rule is irrational because it considers the mere application for benefits in the public charge determination. Plaintiffs argue that an application for benefits does not indicate a noncitizen is actually financially and otherwise eligible for the benefit or will decide to use the benefit. DHS reasonably explained that an "application for a public benefit is not the same as receipt but is indicative of an alien's intent to receive such a benefit." 84 Fed. Reg. at 41,422.

Plaintiffs argue the Rule is irrational because it is ultimately a vague and entirely unpredictable framework for weighing the statutorily-authorized and newly-added factors, which results in limitless discretion. The precise nature of the procedural challenge is unclear here, but the underlying statute requires consideration of "at minimum" five factors, and then specifically mentions another factor that

"may" be considered. Moreover, the statute specifically targets those who are likely to be a public charge "in the opinion of the Attorney General," who as DHS recognized has long been given discretion to make such determinations under the statute. 84 Fed. Reg. at 41,398 ("DHS notes that officer discretion is not a new concept in USCIS immigration benefits adjudications.").

Plaintiffs argue the Rule is irrational because some factors are actually determinative, and impossible to overcome because the factors significantly overlap. As a result, the Rule funnels officials' decision-making towards favoring high-income individuals at the expense of the poor and other marginalized groups. To the extent plaintiffs challenge the Rule favoring admission of the wealthy over the poor, the plaintiffs' appropriate target is the underlying statute rather than the Rule implementing it. The statute itself calls for consideration of a number of factors, ultimately aimed at excluding from the country a group comprised of those who are more likely to be poor than rich.

d. Zone of Interests

In order to succeed on the merits, plaintiffs must be within the zone of interests of the statute that forms the basis of their challenge. The zone of interests analysis asks "whether Congress created a private cause of action in legislation" (Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 964 (9th Cir. 2015)), such that "this particular class of persons has a right to sue under this substantive statute" (Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 (2014)). It is "not a question of Article III

standing" (Organized Vill. of Kake, 795 F.3d at 964), but rather is more appropriately assessed with plaintiffs' likelihood of success.[19]

"[A] person suing under the APA must satisfy not only Article III's standing requirements, but an additional test: The interest he asserts must be 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224 (2012) (quoting Ass'n of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970)). In the APA context, "[t]he 'zone of interest' test is a guide for deciding whether, in view of Congress' evident intent [when enacting the APA] to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399–400 (1987) (footnote omitted);

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[19] The "zone of interests" requirement was formerly referred to as an assessment of "prudential standing," but "prudential standing is a misnomer as applied to the zone-of-interests analysis[.]" Lexmark, 572 U.S. at 127 (internal quotation marks omitted); accord Organized Vill. of Kake, 795 F.3d at 964 (9th Cir. 2015).

see also Pottawatomi Indians, 567 U.S. at 225–26 (2012).

"Whether a plaintiff comes within the 'zone of interests' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." Lexmark, 572 U.S. at 127. "In answering this question, we recognize that 'the breadth of the [applicable] zone of interests varies according to the provisions of law at issue.'" Sierra Club v. Trump, 929 F.3d 670, 700 (9th Cir. 2019) (quoting Lexmark, 572 U.S. at 130). "When the [Supreme] Court has applied the zone of interests test in APA actions, however, it has analyzed the zone of interests of the statute the agency is alleged to have violated, not any zone of interests of the APA itself." Id. at 702; accord Mendoza v. Perez, 754 F.3d 1002, 1016 (D.C. Cir. 2014). Nevertheless, "when analyzing whether a plaintiff falls within the zone of interests of a particular statute, courts should be particularly lenient if a violation of that statute is being asserted through an APA claim." Id. at 703 n.26; accord Pottawatomi Indians, 567 U.S. at 225 ("we have always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff"); Pit River Tribe v. Bureau of Land Mgmt., 793 F.3d 1147, 1155–56 (9th Cir. 2015) ("The zone-of-interests test should be applied consistent with Congress's intent 'to make agency action presumptively reviewable' under the APA.").

Procedural and substantive challenges under the APA are subject to the same analysis, because "a party

within the zone of interests of any substantive authority generally will be within the zone of interests of any procedural requirement governing exercise of that authority[.]" Int'l Bhd. of Teamsters v. Pena, 17 F.3d 1478, 1484 (D.C. Cir. 1994).

"Whether a plaintiff's interest is 'arguably ... protected ... by the statute' within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question (here [in the context of the Endangered Species Act], species preservation), but by reference to the particular provision of law upon which the plaintiff relies." Bennett v. Spear, 520 U.S. 154, 175–76 (1997). Put differently, "the plaintiff must establish that the injury he complains of ... falls within the 'zone of interests' sought to be protected *by the statutory provision whose violation forms the legal basis for his complaint*." Id. at 176 (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990)) (citing Air Courier Conference v. Postal Workers, 498 U.S. 517, 523–24 (1991)). For example, an allegation that § 4 of the Bank Service Corporation Act was violated considers whether plaintiffs are within the zone of interests of § 4 itself, not "the overall purpose of the Bank Service Corporation Act of 1962[.]" Id. (citing Data Processing, 397 U.S. at 155–156); accord Air Courier Conference, 498 U.S. at 529–30 (The "relevant statute" is generally not the entire act, because "to accept this level of generality in defining the 'relevant statute' could deprive the zone-of-interests test of virtually all meaning."); Pit River Tribe, 793 F.3d at 1157 ("ability to challenge . . . cannot be determined by looking to the broad objectives of the" act); but see E. Bay Sanctuary

Covenant v. Trump, 932 F.3d 742, 768 n.9 (9th Cir. 2018) ("E. Bay Sanctuary I") ("'[W]e are not limited to considering the [specific] statute under which [plaintiffs] sued, but may consider any provision that helps us to understand Congress' overall purposes in the [INA].'") (quoting Clarke, 479 U.S. at 401).

Although the relevant statute "is the statute whose violation is the gravamen of the complaint" and not the entire act, the court may also look to provisions that "have any integral relationship" with the relevant statute. Air Courier Conference, 498 U.S. at 529–30 (quoting Lujan, 497 U.S. at 886) (citing Clarke, 479 U.S. at 388). For example, when the challenged statutory section operates as an enumerated exception to another section, the court may consider both sections when determining whether a plaintiff falls within the zone of interests of the challenged section. Clarke, 479 U.S. at 401 (considering related statutory section to which challenged statute was an exception); accord Air Courier Conference, 498 U.S. at 529 (recognizing the exception in Clarke as limited: "This statement [that the court may look beyond the specific challenged section], like all others in our opinions, must be taken in the context in which it was made. In the next paragraph of the opinion, the Court pointed out that 12 U.S.C. § 36, which the plaintiffs in that case claimed had been misinterpreted by the Comptroller, was itself 'a limited exception to the otherwise applicable requirement of [12 U.S.C.] § 81,' . . . . Thus the zone-of-interests test was to be applied not merely in the light of § 36, which was the basis of the plaintiffs' claim on the merits, but also in the light of § 81, to which § 36 was an exception.").

i. The County and State Plaintiffs

The County and State plaintiffs' interests are squarely within the challenged statute's zone of interests. For example, that statute allows the Attorney General to consider an affidavit of support under 8 U.S. Code § 1183a when determining whether to exclude an alien as a likely public charge. See 8 U.S.C. §§ 1182(a)(4)(B)(ii). Although distinct, Section 1183a is specifically referred to and incorporated into the public charge analysis set out in the challenged statute. As a result, § 1183a has an integral relationship with § 1182(a)(4), such that it should be considered when determining whether plaintiffs are within the zone of interests of the challenged statute.

Section 1183a explains that someone can sponsor an alien by guaranteeing to financially support him, and thereby alleviate the concern that he may become a public charge. That statute also provides that any such sponsorship can only be considered in the public charge analysis if it is supported by an affidavit that is "legally enforceable against the sponsor by . . . any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit[.]" § 1183a(a)(1)(B); see also § 1183a(b)(1)(A) ("Upon notification that a sponsored alien has received any means-tested public benefit, the . . . appropriate entity of the Federal Government, a State, or any political subdivision of a State shall request reimbursement by the sponsor in an amount which is equal to the unreimbursed costs of such benefit."). Moreover, the sponsor must agree to submit to jurisdiction in state

courts for actions to compel reimbursement of benefits those states paid to the alien. §§ 1183a(a)(1)(C), (e)(2).

By recognizing that states (and political subdivisions of states) would be paying means-tested public benefits to those subject to a public charge analysis, requiring that states and their subdivisions have legally-enforceable rights to recover those expenses when an alien is admitted based on consideration of an affidavit of support, and guaranteeing state-court jurisdiction for such enforcement actions, Congress clearly intended to protect states and their political subdivisions with the challenged statute.

Moreover, given the attention paid to states' rights to recover payment of "any means-tested public benefit" from affiants in § 1183a, it is also more than arguable that Congress intended to protect states and their political subdivisions' coffers when providing for the exclusion of any alien "likely at any time to become a public charge" in the first place. 8 U.S.C. §§ 1182(a)(4)(A). So, the State and County plaintiffs' financial interests are also at least arguably protected by the statute for this independent reason.

Therefore, the States' and Counties' interests are more than arguably related to the challenged statute's purpose, and they satisfy the zone-of-interests requirement.

ii. The Organizations

The Organizations move for an injunction based on one claim that the Rule violates the APA because it is substantively contrary to the term "public charge" as

used in 8 U.S.C. § 1182(a)(4), and a related procedural APA claim based on the same underlying statute. As such, the Organizations must be within that statute's zone of interest.

Their papers argue that they are within the statute's zone of interests for three reasons. First, the Rule itself counts health care providers and nonprofit organizations among those who will be affected by it. Second, plaintiffs' interests in serving low-income, immigrant communities by providing medical or legal services and advice are related to and consistent with the statute's purpose to provide procedures and policies for immigration relief. Third, and relatedly, the Ninth Circuit has recently held that similar plaintiffs are within the INA's zone of interests.

First, the Organizations argue the Rule itself contemplates that organizations like them will be adversely affected by it. But being negatively affected by a rule implementing a statute is not sufficient to establish that the statute conferred a cause of action encompassing that plaintiff's claim. The Organizations' argument that they will be hurt by the Rule speaks to their standing to challenge it, rather than whether they are within the statute's zone of interest. See Air Courier Conference, 498 U.S. at 524 ("injury in fact does not necessarily mean one is within the zone of interests to be protected by a given statute"); see also Lujan, 497 U.S. at 883 ("for example, the failure of an agency to comply with a statutory provision requiring 'on the record' hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but

since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be 'adversely affected within the meaning' of the statute").

Second, the Organizations argue that their interests align with the statute. Yet their briefing failed to identify or explain what statutory provisions support their argument. That failure is fatal given the Supreme Court's direction that the zone of interests analysis "requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." Lexmark, 572 U.S. at 127. When asked at the hearing what specific statutory provisions they are relying upon, the Organizations for the first time identified 8 U.S.C. § 1611. That section outlines the federal public benefits for which aliens are eligible. But the Organizations do not assert a challenge based on a violation of § 1611, and it is not at all clear that § 1611 has "any integral relationship with" 8 U.S.C. § 1182(a)(4) such that it is proper for the court to consider it in the zone of interests inquiry. See Air Courier Conference, 498 U.S. at 529 (without a particular reason to suggest otherwise, sections within the same act are not sufficiently related); cf. Clarke, 479 U.S. at 401 (considering related statutory section to which challenged statute was an exception).

Even if the court were to consider § 1611, the Organizations leave the court to guess at what connection those statutory provisions share, much less how 8 U.S.C. § 1182(a)(4) is related to the Organizations' purposes in light of § 1611. Finally, the

Organizations do not even explain how their interests are more than marginally related to § 1611 itself—which does not even "give institutions like the Organizations a role[.]" E. Bay Sanctuary I, 932 F.3d at 769.

At this stage of litigation, the Organizations have not met their burden to demonstrate that there are serious questions concerning whether they are within the challenged statute's zone of interest, and certainly they have failed to demonstrate a likelihood that they are able to bring the APA actions underlying their present motion.

Taking a step back, the Organizations simply fail to explain how their interests relate to § 1182(a)(4)'s purpose of excluding immigrants likely to become public charges. This may be because the Organizations identify, without explanation, the statute's purpose as providing "procedures and policies for immigration relief." That may be based on an argument about the INA's overall statutory purpose, untethered to the statutory challenge underlying this motion. In support of that argument, the Organizations rely on E. Bay Sanctuary I, 932 F.3d at 771. But the statute at issue in that action concerned asylum seekers, and the very statute underlying that challenge contained a provision requiring the Attorney General to refer asylum seekers to pro bono legal aid organizations, such as the plaintiff entities in that action. The court identified specific references to the role of pro bono legal organizations within the challenged statute itself, and it found that was sufficient. That is very different from the facts presented here. See E. Bay Sanctuary I, 932 F.3d at

768 ("Within the asylum statute [underlying the preliminary injunction, 8 U.S.C. § 1158(a)(1)], Congress took steps to ensure that pro bono legal services of the type that the Organizations provide are available to asylum seekers. See 8 U.S.C. § 1158(d)(4)(A)–(B)").[20]

2. Plaintiffs are Likely to Suffer Irreparable Harm

The three distinct issues of (i) standing, (ii) ripeness, and (iii) irreparable harm in the absence of an injunction are supported by the same factual analysis for each plaintiff. Although each of the three requirements is independent for plaintiffs to succeed on this motion, a finding that plaintiffs are likely to suffer irreparable harm in the absence of an injunction here is sufficient to establish standing and ripeness. For the Organizations, the court assesses only standing and ripeness.

The court first addresses the legal standards, and then assesses each plaintiff's demonstrated harms.

a. Legal Standards

i. Standing

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[20] To the extent the Organizations argue that E. Bay Sanctuary I, 932 F.3d at 771 allows this court to look to unrelated provisions in the INA for a section justifying their interest in the action, the court is at a loss as how to how reconcile that interpretation with Bennett, 520 U.S. at 175–76, Air Courier Conference, 498 U.S. at 529, and Pit River Tribe, 793 F.3d at 1157. Absent clarity from an en banc determination of this issue, the court hews to Supreme Court and prior panel authority on the question.

Federal courts may adjudicate only actual cases or controversies, see U.S. Const. Art. III, § 2, and may not render advisory opinions as to what the law ought to be or affecting a dispute that has not yet arisen. Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240 (1937). Article III's "standing" requirements limit the court's subject matter jurisdiction. See Cetacean Cmty. v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004). The burden of establishing standing rests on the party asserting the claim. Renne v. Geary, 501 U.S. 312, 316 (1991).

The "irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (citations and internal quotation marks omitted); see also Spokeo Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016).

"At least one plaintiff must have standing to seek each form of relief requested, and that party bears the burden of establishing the elements of standing with the manner and degree of evidence required at the successive stages of the litigation." E. Bay Sanctuary I,

932 F.3d at 763–64 (internal quotation marks and citations omitted). At this preliminary stage, plaintiffs "may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their" motion to meet their burden. Id. at 764. They "need only establish a *risk* or *threat* of injury to satisfy the actual injury requirement." Id.

Organizations can establish standing two different ways.

First, "Organizations can demonstrate organizational standing by showing that the challenged 'practices have perceptibly impaired [their] ability to provide the services [they were] formed to provide.'" Id. at 765. "[A] diversion-of-resources injury is sufficient to establish organizational standing for purposes of Article III if the organization shows that, independent of the litigation, the challenged policy frustrates the organization's goals and requires the organization to expend resources in representing clients they otherwise would spend in other ways." Id. (internal quotation marks and citations omitted) (citing inter alia, Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 943 (9th Cir. 2011) (en banc) (advocacy groups had organizational standing to challenge an anti-solicitation ordinance that targeted day laborers based on the resources spent by the groups in assisting day laborers during their arrests and meetings with workers about the status of the ordinance); Nat'l Council of La Raza v. Cegavske, 800 F.3d 1032, 1039–40 (9th Cir. 2015) (civil rights groups had organizational standing to challenge alleged voter registration violations where the groups had to "expend

additional resources" to counteract those violations that "they would have spent on some other aspect of their organizational purpose"); El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review, 959 F.2d 742, 748 (9th Cir. 1991) (legal services groups had organizational standing to challenge a policy of providing only partial interpretation of immigration court proceedings, noting that the policy "frustrate[d]" the group's "efforts to obtain asylum and withholding of deportation in immigration court proceedings" and required them "to expend resources in representing clients they otherwise would spend in other ways."); Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1018 (9th Cir. 2013) (finding organizational standing where the plaintiffs "had to divert resources to educational programs to address its members' and volunteers' concerns about the [challenged] law's effect")).

In E. Bay Sanctuary I, the Ninth Circuit held that plaintiffs established organizational standing by declaring that enforcement of a regulation "frustrated their mission of providing legal aid" to asylum applicants by "significantly discourage[ing] a large number of those individuals from seeking asylum given their ineligibility." 932 F.3d at 766. That regulation would require plaintiffs "to partially convert their affirmative asylum practice into a removal defense program, an overhaul that would require 'developing new training materials' and 'significant training of existing staff.'" Id. "Finally, the [plaintiff] Organizations have each undertaken, and will continue to undertake, education and outreach initiatives regarding the new rule, efforts that require the diversion of resources away from other efforts to

provide legal services to their local immigrant communities." Id.

Second, "Organizations can demonstrate organizational standing by showing that the Rule will cause them to lose a substantial amount of funding. For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.' We have held that an organization that suffers a decreased amount of business and lost revenues due to a government policy easily satisfies the 'injury in fact' standing requirement." Id. at 766–67 (internal quotation marks and citations omitted).

In E. Bay Sanctuary I, the Ninth Circuit held that plaintiffs established organizational standing by declaring that they received a large portion of their funding based on the number of asylum applications they pursue, and that if their prospective clients "became categorically ineligible for asylum, East Bay would lose a significant amount of business and suffer a concomitant loss of funding." Id. at 767.

ii. Ripeness

"Ripeness is an Article III doctrine designed to ensure that courts adjudicate live cases or controversies and do not 'issue advisory opinions [or] declare rights in hypothetical cases.' A proper ripeness inquiry contains a constitutional and a prudential component." Bishop Paiute Tribe v. Inyo Cty., 863 F.3d 1144, 1153 (9th Cir. 2017) (citations omitted).

"For a case to be ripe, it must present issues that are definite and concrete, not hypothetical or abstract. Constitutional ripeness is often treated under the

rubric of standing because ripeness coincides squarely with standing's injury in fact prong." Id. (internal quotation marks and citations omitted); Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138–39 (9th Cir. 2000) ("Sorting out where standing ends and ripeness begins is not an easy task. . . . . [I]n 'measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing.'"). Allegations that a "threat" to a "concrete interest is actual and imminent" are sufficient to allege "an injury in fact that meets the requirements of constitutional ripeness." Bishop Paiute Tribe, 863 F.3d at 1154. Therefore, if plaintiffs satisfy the Article III standing requirements under Lujan v. Defs. of Wildlife, addressed above, the action here is ripe. In this case, the analysis for both requirements is the same. See, e.g., Thomas, 220 F.3d at 1139 ("Whether the question is viewed as one of standing or ripeness, the Constitution mandates that prior to our exercise of jurisdiction there exist a constitutional 'case or controversy,' that the issues presented are 'definite and concrete, not hypothetical or abstract.' . . . We need not delve into the nuances of the distinction between the injury in fact prong of standing and the constitutional component of ripeness: in this case, the analysis is the same.").

"In evaluating the prudential aspects of ripeness, our analysis is guided by two overarching considerations: 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" Thomas, 220 F.3d at 1141. When the question presented "is 'a purely legal one'" that

"constitutes 'final agency action' within the meaning of § 10 of the APA," that suggests the issue is fit for judicial decision. Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 812 (2003). However, an issue may not be ripe for review if "further factual development would 'significantly advance our ability to deal with the legal issues presented.'" Id.

iii. Irreparable Harm

"A plaintiff seeking preliminary relief must 'demonstrate that irreparable injury is likely in the absence of an injunction.'" California v. Azar, 911 F.3d 558, 581 (9th Cir. 2018) (quoting Winter, 555 U.S. at 22); Boardman v. Pac. Seafood Grp., 822 F.3d 1011, 1023 (9th Cir. 2016) ("A threat of irreparable harm is sufficiently immediate to warrant preliminary injunctive relief if the plaintiff 'is likely to suffer irreparable harm before a decision on the merits can be rendered.'") (quoting Winter, 555 U.S. at 22)).

"There must be a 'sufficient causal connection' between the alleged irreparable harm and the activity to be enjoined, and showing that 'the requested injunction would forestall' the irreparable harm qualifies as such a connection." Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 886 F.3d 803, 819 (9th Cir. 2018) (citing Perfect 10, Inc. v. Google, Inc., 653 F.3d 976, 981–82 (9th Cir. 2011)). "However, a plaintiff 'need not further show that the action sought to be enjoined is the exclusive cause of the injury.'" Id. (quoting M.R. v. Dreyfus, 697 F.3d 706, 728 (9th Cir. 2012)).

The irreparable harm "analysis focuses on irreparability, 'irrespective of the magnitude of the injury.'" Azar, 911 F.3d at 581 (quoting Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 725 (9th Cir. 1999)). "[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." Sampson v. Murray, 415 U.S. 61, 90 (1974). But the general rule that "[e]conomic harm is not normally considered irreparable" does not apply where there is no adequate remedy to recover those damages, such as in APA cases. Azar, 911 F.3d at 581 (citing 5 U.S.C. § 702).

b. The Plaintiffs' Harms

First, the court assesses the Counties' and States' standing, the ripeness of their claims, and whether they have demonstrated irreparable harm in absence of an injunction. Second, the court assesses the Organizations' standing and the ripeness of their claims.

i. The States and Counties

The States and Counties argue that they will suffer five categories of irreparable harm: (A) loss of federal funds, mostly in Medicaid reimbursement; (B) increased operational costs; (C) increased costs to their own healthcare operations (D) public health problems and resulting increased costs; and (E) reduced economic activity due to a decrease in federal funds in the community.

A. Loss of Federal Funds

The Counties argue that they will lose millions of dollars in federal Medicaid reimbursement funds. Each provides a broad array of health services to low-income residents, many of which are at least partially reimbursed with federal Medicaid dollars. DHS itself estimates that 2.5% of individuals in households with a noncitizen will disenroll from Medicaid, which would translate to a roughly $7.5 million loss in Medicaid reimbursement funds.

The States similarly argue that DHS itself estimates that the Rule will cause a reduction in payments from the federal government due to disenrollment or foregone enrollment by eligible individuals to be over $1.5 billion, nationwide. 83 Fed. Reg. at 51,267–69.

Defendants argue the harm is too speculative, caused only by third-party actions, and not imminent because the merits can be resolved quickly on summary judgment. Defendants argue that even assuming a 2.5% rate of disenrollment, plaintiffs fail to show that the States and Counties will be harmed, rather than individuals residing within their boundaries. Defendants argue that harm individual citizens will suffer cannot support the States and Counties claims of irreparable harm. Finally, defendants argue that any financial harms the States and Counties identify are not sufficiently large to establish irreparable harm.

First, regarding the speculative nature of the harm, defendants themselves predict a 2.5% disenrollment rate when assessing the Rule, subject to the procedural

requirements of the APA. 84 Fed. Reg. at 41,463. The Rule itself also estimated that it will cause a reduction in payments from the federal government due to disenrollment or foregone enrollment by eligible individuals of over $1.5 billion. 83 Fed. Reg. at 51,267–69; see also Cisneros Decl. A at 98-99, Table 18 (annual estimates of $1.46 billion to $4.37 billion in reduced payments). Those figures, which underlie DHS's analysis in support of the Rule pursuant to the APA's requirements, are not speculative conjectures as to what might possibly occur. They are meant to be serious efforts by an agency to assess the impact of a proposed rule, and it is difficult to fathom how defendants can argue otherwise. And plaintiffs offer sufficient evidence to demonstrate that disenrollment or non-enrollments will reach at least that level. See 84 Fed. Reg. at 41,463; Wong Decl. ¶¶ 18-45; Shing Decl. ¶ 30; Weisberg Decl. ¶12; Ponce Decl. ¶¶ 4–11, 25. This type of predictable result from a broad policy, although not precise to the level of the individual actor, is sufficiently-specific to allege irreparable harm. See Dep't of Commerce v. New York, 139 S. Ct. 2551, 2565 (2019). Moreover, plaintiffs offer evidence showing that disenrollment due to the public charge rulemaking has already begun. See, e.g., Cody Decl. ¶ 8; Newstrom Decl. ¶ 43; Weisberg Decl. ¶¶ 12–14; Shing Decl. ¶¶ 23–24; Chawla Decl. ¶ 13; Fanelli Decl. ¶ 38; Neville-Morgan Decl. ¶ 16; Ruiz Decl. ¶¶ 10, 12; Kofman Decl. ¶ 6; Medina Decl. ¶¶ 18–22. Plaintiffs offer strong evidence that disenrollment is likely to continue between now and the resolution of this issue on the merits, absent an injunction.

Plaintiffs also adequately demonstrate that the loss of Medicaid reimbursement is sure to be immediate, once individuals disenroll. That is apparent from the very mechanics of the harm. Today, the States and Counties are partially reimbursed by the federal government for care provided to Medicaid enrollees. As individuals disenroll, the plaintiffs will no longer be reimbursed for treating them. This will have obvious adverse budgetary consequences. For one, there will indisputably be fewer individuals covered by Medicaid seeking treatment. So, the States and Counties will not be reimbursed for treating those disenrolled individuals (whether they treat them or not). The States and Counties would experience this terminated revenue stream even if they turned away patients without medical insurance (which they will not). Put differently, there will be fewer people on Medicaid to treat and get reimbursed for.

To the extent defendants argue that the mechanics will work out as a budgetary boon to plaintiffs, the argument is not plausible in the context of this preliminary injunction motion. Although it could potentially work out as a total budgetary savings for the plaintiff entities if they reconfigured their operations, reduced staff, reduced provision of services, and undertook other cost-savings measures, such savings could not plausibly be realized prior to the determination of this action's merits. See, e.g., Lorenz Decl. ¶¶ 19–22. Instead, the plaintiffs will be continuing to operate with most of the costs and expectations associated with the status quo, with one change—no reimbursements.

Second, the States and Counties' argument regarding loss of Medicaid funding does not rely on harms to their citizens. Rather, the arguments concern the plaintiffs' own loss of funds.

Third, plaintiffs must demonstrate that they are likely to suffer irreparable harm, but they need not establish a particular quantum of harm to satisfy the requirement. Azar, 911 F.3d at 581 (irreparable harm "analysis focuses on irreparability, 'irrespective of the magnitude of the injury'"). Nor do defendants explain why San Francisco's likely loss of $7.5 million in Medicaid reimbursements (based on a 2.5% disenrollment rate) is not sufficiently large even under their theory of the requirement. See Wagner Decl. ¶ 5. Santa Clara similarly estimates $4.6 million in foregone Medicaid funds due to more conservative 1.9% decline in enrollment. Shing Decl. ¶ 32 (estimating $4.6 million in Medicaid fund losses due to 1.9% decline in enrollment). The States similarly demonstrate the harms they are likely to suffer from the loss of Medicaid reimbursements. See Cantwell Decl. ¶¶ 6, 14 (2.5 million noncitizen Medicaid beneficiaries in California); Ferrer Decl. ¶ 19 (predicted disenrollment figures in L.A. County); Lucia Decl. ¶ 23 (estimates of $957 million in lost funding in California, assuming 15% disenrollment rate); Buhrig I Decl. ¶¶ 4, 8, 10, 27 (330,000 Pennsylvania Medicaid beneficiaries are part of a household with a noncitizen); Allen Decl. ¶¶ 10, 18, 36-40 (63,000 noncitizens participate in the Oregon Health Plan system, a federal/state partnership program; other participants are citizen children part of a household with a noncitizen); Byrd Decl. ¶¶ 18–20 & Ex. A at 2, 4 (16,000 children in the District of

Columbia receive Medicaid assistance, and 28% of the District's children are part of a household with a noncitizen; 9,800 immigrants enrolled in Medicaid reside in the District); Probert Decl. ¶¶ 4–8, 15 (13,918 noncitizens enrolled in Medicaid in Maine).

B. Increased Operational Costs

The States argue that the Rule will impose burdens on their ongoing operations. Defendants argue that such costs are self-imposed and not cognizable.

Governmental administrative costs caused by changes in federal policy are cognizable injuries. See Cal. v. Trump, 267 F. Supp. 3d 1119, 1126 (N.D. Cal. 2017) (states' "administrative costs" caused by a disruption to healthcare exchanges they administer were sufficient to demonstrate standing) (collecting cases); see also Azar, 911 F.3d at 573–74.[21]

The Counties have submitted evidence of cognizable, irreparable costs. Santa Clara explains that they have already spent over 1,000 hours answering questions about the Rule, processing disenrollment, analyzing the impact of the rule on their services and undertaking community education and outreach—and these activities are likely to continue to be necessary. E.g., Shing Decl. ¶¶ 8, 11–12; see also Lorenz Decl. ¶ 19; Márquez Decl. ¶¶ 9–10. San Francisco has

[21] The government relies on inapposite case law, most notably Crane v. Johnson, 783 F.3d 244, 253-54 (5th Cir. 2015), which addressed individual public employee claims (not claims by the public entity itself) that they might have to change their job practices because of a policy change.

submitted evidence of similar measures it has already taken and will continue to take in direct response to the Rule. See Pon Decl. ¶¶ 13–16; Rhorer Decl. ¶ 11; Smith Decl. ¶¶ 4–9. California and Oregon have submitted evidence showing they are likely to imminently suffer similar harms absent an injunction. Ruiz Decl. ¶ 19 (California); Fernandez Decl. ¶¶ 34–36 (California); Fanelli Decl. ¶ 40 (California); Salazar Decl. ¶ 37 (Oregon). Other states submit declarations regarding these issues, but they are too vague or speculative to support issuance of an injunction. E.g., Byrd Decl. ¶¶ 22–23 (discussing past efforts in D.C., and stating the District will generally "need to train staff" on the issue); Probert Decl. ¶ 16 (speculation concerning costs Maine may face).

Additionally, certain plaintiff states use Medicaid and SNAP enrollment to automatically certify children into school lunch programs, meaning that those states would face higher administrative costs to certify student eligibility for free lunch following disenrollment caused by the Rule. To the extent states' administrative costs increase to assess eligibility for free lunch as children disenroll from the federal programs (as opposed to merely an increased burden on the applicants), that administrative cost increase is cognizable harm. California and D.C. submit competent evidence demonstrating that their costs in administering school lunch programs will increase. See Palmer Decl. ¶ 16 (declaring D.C.'s costs would go up to process school lunch applications); Fernandez Decl. ¶ 30 (declaring California's "administrative streamlining and efficiency" will suffer when enrolling students for free lunch); see generally Neville-Morgan

Decl. ¶ 22 (in California, "paperwork is more burdensome for those without an automatic qualification through Medi-Cal or SNAP, and immigrant eligible families are less likely to obtain school lunch benefits in this way").

These costs that the States and Counties have identified are predictable, likely, and imminent. In fact, DHS specifically contemplated certain of these costs when formulating the Rule. E.g., 83 Fed. Reg. at 51,260 ("The primary sources of the consequences and **indirect impacts of the proposed rule would be costs to** various entities that the rule does not directly regulate, such as hospital systems, **state agencies**, and other organizations that provide public assistance to aliens and their households. Indirect costs associated with this rule **include familiarization with the rule** for those entities that are not directly regulated but still want to understand the changes in federal and state transfer payments due to this rule.") (emphasis added); see also 84 Fed. Reg. at 41,389 ("DHS agrees that some entities, such as State and local governments or other businesses and organizations would incur costs related to the changes commenters identify.").

Because the States and Counties have each demonstrated sufficient likely irreparable injury in the form of loss of federal funds to support a preliminary injunction, and the Counties, California, D.C., and Oregon have demonstrated additional irreparable injury in the form of operational costs, the court need not address the remaining three categories of irreparable harm plaintiffs argue they will imminently suffer.

ii. The Organizations

"[C]ourts have an 'independent obligation' to police their own subject matter jurisdiction, including the parties' standing. Accordingly, we must assure ourselves that Plaintiffs have alleged an injury in fact, fairly traceable to the defendant's conduct, and likely to be redressed by a favorable judicial decision." Animal Legal Def. Fund v. United States Dep't of Agric., 935 F.3d 858, 866 (9th Cir. 2019) (citations omitted).

"[A] diversion-of-resources injury is sufficient to establish organizational standing for purposes of Article III if the organization shows that, independent of the litigation, the challenged policy frustrates the organization's goals and requires the organization to expend resources in representing clients they otherwise would spend in other ways." E. Bay Sanctuary I, 932 F.3d at 765 (internal quotation marks and citations omitted).

Defendants argue that the Organizations fail to identify any injury they will suffer if they do not divert resources towards addressing their concerns, apart from harm to the health care they are able to provide to low income communities. For example, if they failed to divert resources, they would not face staff shortages or provide worse health services.

In E. Bay Sanctuary I, the court found standing based on an organization partially converting an asylum practice into a removal defense program, a prediction that applications filed on behalf of the organizations' clients would become more difficult and

reduce available funds for other activities, and education and outreach initiatives regarding the new rule. 932 F.3d at 766; see also, e.g., El Rescate Legal Services, 959 F.2d at 748 (standing where legal services groups had expended "resources in representing clients they otherwise would spend in other ways"); Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1219 (9th Cir. 2012) (finding organizational standing where the plaintiff responded to allegations of discrimination by "start[ing] new education and outreach campaigns targeted at discriminatory roommate advertising").

The Healthcare Organizations' missions are to provide high quality health care to low-income and immigrant communities. Castellano-García Decl. ¶ 5; García Decl. ¶ 3, 7–10. La Clínica and California-Primary-Care-Association-member-organization Asian Health Services have diverted resources from their core missions to address community and individual patient concerns about the public charge determination. García Decl. ¶¶ 13, 16, 21; Quach Decl. ¶¶ 26–29 (evidence of $1 million diversion to education campaigns about the Rule). These education efforts take away from their ability to serve their core organizational purposes. Moreover, they will have to lay off employees and change or cancel programs in response to the Rule. García Decl. ¶ 18; see also Ku Decl. ¶ 65 (estimating nationwide community health center staffing losses of 3,400 to 6,100 employees).

The Legal Organizations' missions are to provide advocacy and/or legal services to their clients and members, including obtaining immigration relief and

helping to secure public benefits. Kassa Decl. ¶¶ 3–7; Ayloush Decl. ¶¶ 4–7; Sharp Decl. ¶¶ 4–7; Goldstein Decl. ¶¶ 4–5; Seon Decl. ¶¶ 3–7; Nakamura Decl. ¶¶ 3–8; Kersey Decl. ¶¶ 6– 7, 14–20.

Plaintiffs have adequately alleged frustration of their purpose because many of their clients will no longer be eligible for immigration relief, or will choose to not enroll or to disenroll from benefits to remain eligible for immigration relief. The Rule plainly hinders their clients' ability to obtain immigration relief and/or public benefits.

Plaintiffs have also adequately alleged that they will have to divert funding because those who may still be eligible for relief or choose to apply for benefits will require additional time and resources from plaintiffs to address the effects of the Rule, and this additional time and rising ineligibility or disenrollment means that plaintiffs will be able to file fewer cases and help fewer clients. See Kassa Decl. ¶¶ 10–13, 16; Ayloush Decl. ¶¶ 11–14; Sharp Decl. ¶¶ 12–15, 18; Goldstein Decl. ¶ 8; Seon Decl. ¶¶ 10–14; Nakamura Decl. ¶¶ 12, 14–15; Kersey Decl. ¶¶ 23–30. Kassa Decl. ¶¶ 10, 12–13; Ayloush Decl. ¶¶ 11–12; Sharp Decl. ¶ 13; Seon Decl. ¶¶ 10–14; Nakamura Decl. ¶¶ 14–16; Kersey Decl. ¶¶ 34, 36.

Some plaintiffs also have increased operational costs as they address the impact of the Rule on their services, such as by hiring additional staff or adding new programs or services. Ayloush Decl. ¶ 14; Seon Decl. ¶ 14; Nakamura Decl. ¶¶ 13–14, 16–17; Kersey Decl. ¶¶ 21, 26–30, 35. Some plaintiffs have had to divert resources from other core services and priorities

to staffing, training, education, and public outreach addressing the Rule. Kassa Decl. ¶¶ 11, 14–17; Ayloush Decl. ¶¶ 13, 15–16; Sharp Decl. ¶¶ 14–16; Goldstein Decl. ¶ 7–12; Seon Decl. ¶ 16–19, 21; Nakamura Decl. ¶¶ 13–14, 16–17; Kersey Decl. ¶¶ 26–29, 35–36.

Defendants would have this court require more than the Ninth Circuit does for standing. Here, it is enough for plaintiffs to allege that their goals of providing healthcare and legal services to low-income immigrants are frustrated, and that the challenged policy has stimulated the organizations into spending money on things they would not otherwise have spent money on. Plaintiffs' public education efforts, changes to their programs, increased costs of assisting clients, and other diversions of resources qualify under the Ninth Circuit's requirements.[22]

3. The Balance of Equities and Hardships Tip Sharply in Plaintiffs' Favor

"A court must 'balance the interests of all parties and weigh the damage to each' in determining the balance of the equities." CTIA - The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 852 (9th Cir. 2019) (quoting Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138 (9th Cir. 2009)).

There is little question that the balance of equities and hardships tip sharply in favor of the States and Counties. Defendants have been operating under a

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[22] As the issue was not meaningfully addressed by the parties, the court does not decide at this time whether California Primary Care Association satisfies the requirements for associational standing.

consistent definition of "public charge" since at least 1999, when the INS issued Field Guidance specifying "that 'public charge' means an alien . . . who is likely to become (for admission/adjustment purposes) 'primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.'" 64 Fed. Reg. at 28,689. That standard is specific and workable, and defendants have been administering it for decades. In fact, defendants conceded that do not argue that they would suffer any hardship in the face of an injunction prohibiting them from replacing those standards with the new Rule until resolution of this case on the merits. Defendants' only argument with respect to the balance of equities or hardships and the public interest is that Congress has made a policy judgment that aliens should be self-sufficient, and the executive should not be prevented from implementing a rule that advances that policy.

On the other hand, implementing the change defendants propose would upend state and local governments' operations as they support immigrants while determining how to adjust to the new Rule and provide services that the federal government once predictably assisted with. To the extent this factor is merged with the public interest and considers the effects on non-parties, the most severely affected individuals are the aliens seeking LPR status themselves, who would face uncertainty regarding their access to healthcare and subsidized nutrition as

they learn to adapt to and attempt to navigate the Rule's deterrents.

In short, implementing the Rule after decades of a consistent policy prior to a determination of this action on the merits—which defendants argue will be accomplished in short order—does little to advance the defendants' interests, and it would entirely upend the plaintiffs' (and the non-party aliens') interests.

4. An Injunction Is in the Public's Interest

"When the government is a party, the last two factors merge." Azar, 911 F.3d at 575. Therefore, the public interest analysis is subsumed in the balance of equities and hardships, addressed above, and the public interest therefore favors and injunction.

Even though the public's interest generally merges with the balance of equities, it can be "appropriate to consider the factors separately," for example when intervenors present distinct interests. League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton, 752 F.3d 755, 766 (9th Cir. 2014). In those instances, "[t]he public interest inquiry primarily addresses impact on non-parties rather than parties." Id.

Here, the public interest cuts sharply in favor of an injunction. Specifically, the public interest supports continuing the provision of medical services through Medicaid to those who would predictably disenroll absent an injunction, for numerous reasons. Although the court has not reached the issue as to whether plaintiffs' arguments regarding the impacts on public health support their argument for imminent harm, the

parties and numerous amici have explained that the predictable disenrollment from Medicaid absent an injunction would have adverse health consequences not only to those who disenroll, but to the entire populations of the plaintiff states, for example, in the form of decreased vaccination rates. The public certainly has an interest in decreasing the risk of preventable contagion.

As such, the public interest supports preserving the long-standing status quo pending final, coherent resolution on the merits.

5. Scope of the Injunction Necessary to Redress Plaintiffs' Imminent Harms

a. Legal Standard

When 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, 442 U.S. at 702; accord L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 664 (9th Cir. 2011) (injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court") (internal quotation mark omitted); Lamb-Weston, Inc. v. McCain Foods, Ltd., 941 F.2d 970, 974 (9th Cir. 1991) ("Injunctive relief . . . must be tailored to remedy the specific harm alleged."). "'The purpose of such interim equitable relief is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward.'" Azar, 911 F.3d at 582.

But "[t]here is no general requirement that an injunction affect only the parties in the suit." Bresgal v. Brock, 843 F.2d 1163, 1169 (9th Cir. 1987). "[A]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled*." Id. at 1170; accord Regents of the Univ. of California v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 511 (9th Cir. 2018), cert. granted sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of California, 139 S. Ct. 2779 (2019).

With respect to immigration matters in particular, the Ninth Circuit has "consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis." E. Bay Sanctuary I, 932 F.3d at 779 (citing Regents of the Univ. of Cal., 908 F.3d at 511; Hawaii v. Trump, 878 F.3d 662, 701 (9th Cir. 2017), rev'd on other grounds and remanded, 138 S. Ct. 2392 (2018); Washington v. Trump, 847 F.3d 1151, 1166–67 (9th Cir.), reconsideration en banc denied, 853 F.3d 933 & 858 F.3d 1168 (9th Cir. 2017), and cert. denied sub nom. Golden v. Washington, 138 S. Ct. 448 (2017)). "These are, however, 'exceptional cases.'" E. Bay Sanctuary Covenant v. Barr, 934 F.3d 1026, 1029 (9th Cir. 2019) ("E. Bay Sanctuary II") (quoting City & Cty. of San Francisco v. Trump, 897 F.3d 1225, 1244 (9th Cir. 2018)). That is because, even though courts have the *authority* to issue nationwide preliminarily injunctions, doing so still requires "an articulated connection to a plaintiff's particular harm[.]" Id. ("nationwide injunction is [not] appropriate simply

because this case presents a rule that applies nationwide"); see also Azar, 911 F.3d at 582–84. That requirement is not lifted in the immigration context. E.g., E. Bay Sanctuary II, 934 F.3d at 1029 ("Under our case law, however, all injunctions—even ones involving national policies—must be 'narrowly tailored to remedy the specific harm shown.'"); E. Bay Sanctuary I, 932 F.3d at 779 (nationwide scope appropriate where it "is necessary to provide the plaintiffs here with complete redress" and district court could not "have crafted a narrower remedy that would have provided complete relief to the [plaintiffs]") (quoting Regents of the Univ. of Cal., 908 F.3d at 512) (internal quotation mark omitted).[23]

The Ninth Circuit has emphasized that any preliminary injunction must be supported by evidence in the record identifying the likely effect the enjoined conduct would have on the particular plaintiffs. E.g.,

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[23] The Ninth Circuit requires an articulated connection to a plaintiff's particular harms notwithstanding "the need for uniformity in immigration policy." See Regents of the Univ. of Cal., 908 F.3d at 511 ("Allowing uneven application of nationwide immigration policy flies in the face of these requirements."); Hawaii v. Trump, 878 F.3d at 701 ("Because this case implicates immigration policy, a nationwide injunction was necessary to give Plaintiffs a full expression of their rights."); see also San Francisco v. Trump, 897 F.3d at 1244 ("These exceptional cases are consistent with our general rule that '[w]here relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown'—'an injunction is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit ... if such breadth is necessary to give prevailing parties the relief to which they are entitled.'") (quoting Bresgal, 843 F.2d at 1170–71).

San Francisco v. Trump, 897 F.3d at 1244 (the "record is not sufficient to support a nationwide injunction" where "the Counties' tendered evidence is limited to the effect of the Order on their governments and the State of California. . . . However, the record is not sufficiently developed on the nationwide impact of the Executive Order."); Azar, 911 F.3d at 584 ("On the present record, an injunction that applies only to the plaintiff states would provide complete relief to them. It would prevent the economic harm extensively detailed in the record. Indeed, while the record before the district court was voluminous on the harm to the plaintiffs, it was not developed as to the economic impact on other states."). "District judges must require a showing of nationwide impact or sufficient similarity to the plaintiff states to foreclose litigation in other districts, from Alaska to Puerto Rico to Maine to Guam." Azar, 911 F.3d at 584.

Finally, although the scope of the injunction in this action is governed by the controlling Ninth Circuit law explained above, the court notes that the Ninth Circuit and the Supreme Court have both credited prudential considerations supporting their admonition that nationwide preliminary injunctions are appropriate only in "exceptional cases." See San Francisco v. Trump, 897 F.3d at 1244; E. Bay Sanctuary II, 934 F.3d at 1029. First, nationwide injunctions unconnected to a plaintiff's particular harm "unnecessarily 'stymie novel legal challenges and robust debate' arising in different judicial districts." E. Bay Sanctuary II, 934 F.3d at 1029; see also Azar, 911 F.3d at 583 ("The Supreme Court has repeatedly emphasized that nationwide injunctions have

detrimental consequences to the development of law and deprive appellate courts of a wider range of perspectives."). That consideration is relevant here, where actions raising similar changes are also currently pending in district courts in New York, Maryland, and Washington, and perhaps more. Second, nationwide injunctions may fail to adequately recognize "the equities of non-parties who are deprived the right to litigate in other forums," who "are essentially deprived of their ability to participate[.]" Azar, 911 F.3d at 583. Third, "[n]ationwide injunctions are also associated with forum shopping, which hinders the equitable administration of laws." Id.

b. Analysis

Here, the Counties and the States have demonstrated a likelihood of irreparable harm based on their loss of Medicaid funding from the federal government and increased operational costs they are likely to carry.[24] Those harms stem directly from disenrollment of individuals seeking medical care in their jurisdictions, residing in their jurisdictions, and enrolling in certain other public benefits in their jurisdictions (for example, school lunch programs). Those harms, and the supporting record, are discussed in detail above. In order to preserve the status quo

[24] Because the Organizations have not demonstrated a likelihood of success on—or serious questions going to—the merits of their APA causes of action (the only claims underlying their motion for preliminary injunction), they have not demonstrated that an injunction should issue to prevent the harms they are likely to suffer, so the court does not consider their alleged harms in determining the scope of the injunction.

pending resolution on the merits and to prevent certain of these irreparable harms, it is necessary to enjoin implementation of the Rule with respect to those who reside in the States and Counties any time following the date of this order, until this action is resolved on the merits. Moreover, defendants must be additionally enjoined from applying the Rule to any individual who is part of a household (as defined in the Rule, 8 C.F.R. § 212.21(d)) that includes a person who has resided in a plaintiff State or County any time following the date of this order, until this action is resolved on the merits.

Defendants may, of course, continue to process applications and otherwise operate pursuant to the standards employed prior to October 15, 2019—that is, pursuant to the status quo.

The plaintiffs request a nationwide injunction based primarily on what they argue would be the inadministrability of an immigration policy that is not administered uniformly nationally. But a nationwide injunction is not "appropriate simply because this case presents a rule that applies nationwide." E. Bay Sanctuary II, 934 F.3d at 1029; accord San Francisco v. Trump, 897 F.3d at 1244 (record must also be independently "developed on the nationwide impact" and the statewide impact).

Plaintiffs also argue that a nationwide injunction is necessary to provide certainty to the public and quell confusion about the implementation of the Rule. They argue that general, nationwide confusion will cause disenrollment even in the States and Counties, causing the above-discussed harms. Plaintiffs have certainly demonstrated that confusion about the nation's

immigration policies is a cause of disenrollment, even for those who will not be subject to the public charge assessment. However, plaintiffs have not demonstrated the marginal effect a nationwide injunction would have on curing that confusion for their residents over and above an injunction limited to their own borders. Although it is conceivable that a nationwide injunction pending resolution on the merits would lead to less disenrollment due to confusion within California than this injunction covering all of California (and the other States), it is plaintiffs' obligation to demonstrate the necessity of such relief. This court does not suggest that no evidence could support such an injunction. Nor does the court suggest that the record evidence is necessarily insufficient. Rather plaintiffs, by devoting only a few cursory paragraphs in their briefs to the scope the injunction, have failed to sufficiently tie that evidence to the need for an injunction beyond their borders in order to remedy the specific harms alleged and accepted by the court as likely, imminent, and irreparable.

CONCLUSION

For the foregoing reasons, the States and Counties' motion for a preliminary injunction is GRANTED, as explained above. The Organizations' motion is DENIED, because they do not fall within the zone of interests of the statute forming the basis of their APA claims.

PRELIMINARY INJUNCTION

Defendants U.S. Citizenship and Immigration Services, Department of Homeland Security, Kevin

McAleenen as Acting Secretary of DHS, Kenneth T. Cuccinelli as Acting Director of USCIS, and Donald J. Trump, as President of the United States, are hereby enjoined from applying the Rule, in any manner, to any person residing (now or at any time following the issuance of this order) in San Francisco City or County, Santa Clara County, California, Oregon, the District of Columbia, Maine, or Pennsylvania, or to anyone who is part of a household (as defined by the Rule, 8 C.F.R. § 212.21(d)) that includes such a person. The injunction will remain in effect until a resolution of this action on the merits.

IT IS SO ORDERED.

Dated: October 11, 2019

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO: 4:19-CV-5210-RMP

[Filed October 11, 2019]

STATE OF WASHINGTON; COMMONWEALTH OF VIRGINIA; STATE OF COLORADO; STATE OF DELAWARE; STATE OF HAWAI'I; STATE OF ILLINOIS; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; DANA NESSEL, Attorney General on behalf of the people of Michigan; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; and STATE OF RHODE ISLAND,	)
Plaintiffs,	)
v.	)
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, a federal agency; KEVIN K. MCALEENAN, in his official capacity as Acting Secretary of the United States Department of Homeland Security; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal	)

agency; and KENNETH T. CUCCINELLI, II, in his official capacity as Acting Director of United States Citizenship and Immigration Services,	)
Defendants.	)

ORDER GRANTING PLAINTIFF STATES' MOTION FOR SECTION 705 STAY AND PRELIMINARY INJUNCTION

Fourteen states challenge the Department of Homeland Security's expansive revision of the Public Charge Rule. Congress and the U.S. Constitution authorize this Court to provide judicial review of agency actions. The Plaintiff States ask the Court to serve as a check on the power asserted by the Department of Homeland Security to alter longstanding definitions of who is deemed a Public Charge. After reviewing extensive briefing and hearing argument, the Court finds that the Plaintiff States have shown that the status quo should be preserved pending resolution of this litigation.[1] Therefore, the

[1] The Court has reviewed the Motion for Preliminary Injunction, ECF No. 34, and supporting declarations and materials, ECF Nos. 35–87; the Plaintiff States' First Amended Complaint, ECF No. 31; the Briefs of Amici Curiae submitted in support of the Plaintiff States' Motion, ECF Nos. 111 (from nonprofit anti-domestic violence and anti-sexual assault organizations), 109 (from Health Law Advocates and other public health organizations), 110 (from nonprofit organizations support of the disability community), 149 (from hospitals and medical schools), 150 (from nonprofit

Court **GRANTS** the motion to stay the effective date of the Public Charge Rule until the issues can be adjudicated on their merits.

The Motion for a Section 705 Stay and for Preliminary Injunction, ECF No. 34, is brought by Plaintiffs State of Washington, Commonwealth of Virginia, State of Colorado, State of Delaware, State of Hawai'i, State of Illinois, State of Maryland, Commonwealth of Massachusetts, Attorney General Dana Nessel on behalf of the People of Michigan, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, and State of Rhode Island (collectively, "the Plaintiff States").

Defendants are the United States Department of Homeland Security ("DHS"), Acting Secretary of DHS Kevin K. McAleenan, United States Citizenship and Immigration Services ("USCIS"), and Acting Director of USCIS Kenneth T. Cuccinelli II (collectively, "the Federal Defendants"). Pursuant to the Administrative Procedure Act and the guarantee of equal protection under the Due Process Clause of the U.S. Constitution, the Plaintiff States challenge the Federal Defendants' redefinition of who may be denied immigration status as a "public charge" in federal immigration law among applicants for visas or legal permanent residency.

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organizations supporting seniors), 151 (from health care providers and health care advocates), 152 (from professional medical organizations), and 153 (from the Fiscal Policy Institute, the Presidents' Alliance on Higher Education and Immigration, and other organizations addressing economic impact); the Federal Defendants' Opposition to Preliminary Relief, ECF No. 155; and the Plaintiff States' Reply, ECF No. 158.

I. BACKGROUND

On August 14, 2019, DHS published in the Federal Register a final rule, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245 and 248) ("Public Charge Rule"), that redefines whether a visa applicant seeking admission to the United States and any applicant for legal permanent residency is considered inadmissible because DHS finds him or her "likely at any time to become a public charge." *See* 8 U.S.C. § 1182(a)(4). The Public Charge Rule is scheduled to take effect on October 15, 2019. 84 Fed. Reg. at 41,292.

A. The Immigration and Nationality Act's Public Charge Ground of Inadmissibility

The Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1101 *et seq.*, requires visa applicants and individuals applying to become permanent legal residents to demonstrate that they are not "inadmissible." 8 U.S.C. §§ 1361, 1225(a), and 1255(a).[2] The INA sets forth ten grounds of inadmissibility, all of which make a person "ineligible to receive visas and ineligible to be admitted to the United States." 8 U.S.C.

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[2] The INA "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 587 (2011) (quoting *De Canas v. Bica*, 424 U.S. 351, 353 (1976)).

§ 1182(a). This case concerns one of those grounds: a likelihood of becoming a public charge. *Id.* § 1182(a)(4)(A).

In its current form, the INA provides that "[a]ny 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."[3] 8 U.S.C. § 1182(a)(4)(A). The same provision requires the officer determining whether an applicant is inadmissible as a public charge to consider "at a minimum" the applicant's

> (I) age;
> (II) health;
> (III) family status;
> (IV) assets, resources, and financial status; and
> (V) education and skills.

8 U.S.C. § 1182(a)(4)(B)(i).

The officer "may also consider any affidavit of support under section 213A [8 U.S.C. § 1183a] for purposes of exclusion" on the public charge ground. *Id.* § 1182(a)(4)(B)(ii).

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[3] When Congress transferred the adjudicatory functions of the former Commissioner of the Immigration and Naturalization Service ("INS") to the Secretary of DHS, the Attorney General's authority regarding the public charge provision was delegated to the Director of USCIS, a division of DHS. *See* 6 U.S.C. § 271(b)(5).

B. Public Charge Rulemaking Process and Content of the Public Charge Rule

The Public Charge Rule followed issuance of a proposed rule on October 10, 2018. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245 and 248). According to the Public Charge Rule, DHS received "266,077 comments" on the proposed rule, "the vast majority of which opposed the rule." 84 Fed. Reg. at 41,297.

The final rule made several changes to the proposed rule. *See* 84 Fed. Reg. at 41,297–300. For instance:

> Under the proposed rule, DHS would not have considered the receipt of benefits below the applicable threshold in the totality of the circumstances. As a consequence, USCIS would have been unable to consider an alien's past receipt of public benefits below the threshold at all, even if such receipt was indicative, to some degree, of the alien's likelihood of becoming a public charge at any time in the future. Under this final rule, adjudicators will consider and give appropriate weight to past receipt of public benefits below the single durational threshold described above in the totality of the circumstances.

84 Fed. Reg. at 41,297.

In addition, while the proposed rule provided for consideration of the receipt of Medicaid benefits by applicants under age 21, the Public Charge Rule does not negatively assess applicants for being enrolled in

Medicaid while under the age 21, while pregnant, or "during the 60-day period after pregnancy." 84 Fed. Reg. at 41,297.

1. Redefinition of "Public Charge"

The Public Charge Rule, in its final format, defines "public charge" to denote "an alien who receives one or more public benefits, as defined in paragraph (b) of this section, for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." 84 Fed. Reg. at 41,501 (to be codified at 8 C.F.R. § 212.21(a)) [4]. The Public Charge Rule redefines "public benefit" to include: "(1) [a]ny Federal, State, local, or tribal cash assistance for income maintenance (other than tax credits)," including Supplemental Security Income ("SSI"), Temporary Assistance for Needy Families ("TANF") or state "General Assistance"; (2) Supplemental Nutrition Assistance Program ("SNAP," colloquially known as "food stamps"); (3) housing assistance vouchers under Section 8 of the U.S. Housing Act of 1937; (4) Section 8 "Project-Based" rental assistance, including "Moderate Rehabilitation"; (5) Medicaid, with exceptions for benefits for an emergency medical condition, services or benefits under the Individuals with Disabilities Education Act ("IDEA"), school-based services or benefits, and benefits for immigrants under age 21 or to a woman during pregnancy or within 60 days after

[4] The Court's subsequent references to the provisions of the Public Charge Rule will use the C.F.R. citations scheduled to take effect on October 15, 2019.

pregnancy; and (6) public housing under Section 9 of the U.S. Housing Act of 1937. 8 C.F.R. § 212.21(b).

2. Weighted Factors for Totality of the Circumstances Determination

The Public Charge Rule instructs officers to evaluate whether an applicant is "likely to become a public charge" using a "totality of the circumstances" test that "at least entail[s] consideration of the alien's age; health; family status; education and skills; and assets, resources, and financial status" as described in the Rule. 8 C.F.R. § 212.22(a), (b). The Public Charge Rule then prescribes a variety of factors to weigh "positively," in favor of a determination that an applicant is not a public charge, and factors to weigh "negatively," in favor of finding the applicant inadmissible as a public charge. 8 C.F.R. § 212.22(a), (b), and (c); *see also, e.g.,* 84 Fed. Reg. 41,295 ("Specifically, the rule contains a list of negative and positive factors that DHS will consider as part of this determination, and directs officers to consider these factors in the totality of the alien's circumstances. . . . The rule also contains lists of heavily weighted negative factors and heavily weighted positive factors."). The Public Charge Rule attributes heavy negative weight to the following circumstances:

> (1) "not a full-time student and is authorized to work, but is unable to demonstrate current employment, recent employment history, or a reasonable prospect of future employment";
>
> (2) "certified or approved to receive one or more public benefits . . . for more than 12 months in the aggregate within any 36-month

> period, beginning no earlier than 36 months prior to the alien's application for admission or adjustment of status";
>
> (3) "diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide for himself or herself, attend school, or work; and . . . uninsured and has neither the prospect of obtaining private health insurance, nor the financial resources to pay for reasonably foreseeable medical costs related to such medical condition"; and
>
> (4) "previously found inadmissible or deportable on public charge grounds[.]"

8 C.F.R. § 212.22(c)(1)(i)–(iv).

Conversely, the Public Charge Rule attributes heavy positive weight to three factors:

> (1) an annual household income, assets, or resources above 250 percent of the Federal Poverty Guidelines ("FPG") for the household size;
>
> (2) an annual individual income of at least 250 percent of the FPG for the household size; and
>
> (3) private health insurance that is not subsidized under the Affordable Care Act.

See C.F.R. § 212.22(c)(2)(i)–(iii).

The Public Charge Rule also directs officers to consider whether the applicant (1) is under the age of 18 or over the minimum early retirement age for social

security; (2) has a medical condition that will require extensive treatment or interfere with the ability to attend school or work; (3) has an annual household gross income under 125 percent of the FPG; (4) has a household size that makes the immigrant likely to become a public charge at any time in the future; (5) lacks significant assets, like savings accounts, stocks, bonds, or real estate; (6) lacks significant assets and resources to cover reasonably foreseeable medical costs; (7) has any financial liabilities; (8) has applied for, been certified to receive, or received public benefits after October 15, 2019; (9) has applied for or has received a USCIS fee waiver for an immigration benefit request; (10) has a poor credit history and credit score; (11) lacks private health insurance or other resources to cover reasonably foreseeable medical costs; (12) lacks a high school diploma (or equivalent) or a higher education degree; (13) lacks occupational skills, certifications, or licenses; or (14) is not proficient in English. *See* 8 C.F.R. § 212.22(b).

The officer administering the public charge admissibility test has the discretion to determine what factors are relevant and may consider factors beyond those enumerated in the rule. *See* 8 C.F.R. § 212.22(a)

C. Applicability of the Rule

The Public Charge Rule applies to any non-citizen subject to section 212(a)(4) of the INA, 8 U.S.C. § 1182(a)(4), who applies to DHS anytime on or after October 15, 2019, for admission to the United States or for adjustment of status to that of lawful permanent resident. 8 C.F.R. § 212.20.

D. Summary of the Counts of the First Amended Complaint

On the same day that the Public Charge Rule was published in the federal register, the fourteen Plaintiff States filed a lawsuit seeking to enjoin the Federal Defendants from enacting the rule. The Plaintiff States subsequently filed a First Amended Complaint, ECF No. 31, stating four causes of action: (1) a violation of the APA, 5 U.S.C. § 706(2)(C), for agency action "not in accordance with law"; (2) a violation of the APA, 5 U.S.C. § 706(2)(C), for agency action "in excess of statutory jurisdiction [or] authority" or "*ultra vires*"; (3) a violation of the APA, 5 U.S.C. § 706(2)(C), for agency action that is "arbitrary, capricious, [or] an abuse of discretion"; and (4) a violation of the guarantee of equal protection under the U.S. Constitution's Fifth Amendment Due Process Clause on the basis that the Public Charge Rule allegedly was motivated by an intent to discriminate based on race, ethnicity, or national origin. ECF No. 31 at 161–70.

The Federal Defendants have not yet filed an answer, but they have responded to the pending motion. ECF No. 155. In their response, the Federal Defendants challenge the Plaintiff States' standing to bring this action. *Id.* at 18.

II. JURISDICTION

The Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

III. STANDING AND RIPENESS

A. Standing Requirement

Article III, section 2 of the Constitution extends the power of the federal courts to only "Cases" and "Controversies." U.S. Const., Art. III, sect. 2. "Those two words confine 'the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.'" *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

To establish standing to sue under Article III, "a plaintiff must demonstrate 'that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.'" *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017) (quoting *Massachusetts*, 549 U.S. at 517)). While an injury sufficient for constitutional standing must be concrete and particularized rather than conjectural or hypothetical, "an allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotations omitted).

The Federal Defendants assert that the Plaintiff States lack standing because their injuries are speculative and do not qualify as injuries-in-fact. ECF No. 155 at 18–21.The Federal Defendants further maintain that the Plaintiff States' described injuries

would be the result of third parties' independent decisions to "unnecessarily . . . forgo all federal benefits," which the Federal Defendants argue is too weak a basis to support that the injury is fairly traceable to the Public Charge Rule. ECF No. 155 at 19–21.

At this early stage in the litigation, the Plaintiff States may satisfy their burden with allegations in their Amended Complaint and other evidence submitted in support of their Motion for a Section 705 Stay and Preliminary Injunction. *See Washington*, 847 F.3d at 1159. *Amici* briefs also may support the Plaintiff States' showing of the elements of standing. *See SEC v. Private Equity Mgmt. Grp., Inc.*, No. CV 09-2901 PSG (Ex), 2009 U.S. Dist. LEXIS 75158, at *18 n.5, 2009 WL 2488044 (C.D. Cal. Aug. 10, 2009) (exercising the court's discretion to consider evidence submitted by *amicus curiae* where it was "in a sense, the same evidence produced by a party").

B. Alleged Harms

1. Missions of State Benefits Programs

The Plaintiff States allege that they "combine billions of dollars of federal funds from Medicaid with billions of dollars of state funds to administer health care programs for millions" of the Plaintiff States' residents. ECF No. 34 at 26; *see* ECF Nos. 37 at 4; 38 at 4; 40 at 4. The Plaintiff States argue that the health programs administered by them enable beneficiaries in varying degrees to access preventative care, chronic disease management, prescription drug treatment, mental health treatment, and immunizations. *See, e.g.,*

ECF No. 40 at 5–7. The Plaintiff States contend that they administer their programs "to ensure the health, well-being, and economic self-sufficiency" of all of their residents and to provide "comprehensive and affordable health insurance coverage" to State residents. ECF Nos. 41 at 7; 45 at 5.

Multiple submissions from the Plaintiff States and the *amici* briefs endorse an estimate that "the Public Charge Rule could lead to Medicaid disenrollment rates ranging from 15 percent to 35 percent" among Medicaid and Children's Health Insurance Program enrollees who live in mixed-status households, which "equates to between 2.1 and 4.9 million beneficiaries disenrolling from the programs." ECF No. 151 at 20–21; *see also* ECF Nos. 111-1 at 69; 149 at 15–16. The Plaintiff States argue that residents' disenrollment or foregoing enrollment "unwinds all the progress that has been achieved" and results "in a sicker risk pool and increase[d] premium costs for all remaining residents enrolled in commercial coverage" through the state plans. ECF Nos. 37 at 14; 43 at 7.

As stated in the comments submitted to DHS by the Dana-Farber Cancer Institute, "regulations that will make immigrant families fearful of seeking health care services like primary care and routine health screenings will increase the burden of both disease and healthcare costs across the country." ECF No. 35-2 at 3.

In addition to making receipt of Medicaid health insurance and other public benefit programs a negative factor, the Plaintiff States proffer that the Public Charge Rule disincentivizes individuals from seeking

medical diagnoses and treatment because a diagnosis of a medical condition requiring extensive medical treatment or institutionalization will be weighed as a heavy negative factor when combined with a lack of health insurance or independent resources to cover the associated costs; or weighed as a negative factor even with health insurance or independent resources to cover the associated costs. *See* ECF Nos. 35-2 at 3; 35-1 at 158, 165, and 168.

Health care professionals noted that the weighting of these factors "creates a strong incentive for immigrants to avoid medical examinations and tests to prevent identification of any serious health problem." ECF No. 35-2 at 3; *see also* ECF No. 65 at 14 ("Fear of the rule change and its effects on utilizing cancer-screening services for people of a variety of citizenship status can lead to grave consequences both in lives lost from treatable cancers and intensive financial costs of late stage treatment and related care."). Delaying diagnosis and treatment until a condition results in a medical emergency compromises the health and wellbeing of individuals and families and increases the cost of health care for the hospitals, the Plaintiff States, and the Plaintiff States' residents as a whole. *See* ECF Nos. 35-2 at 3; 109 at 18, 47.

Health care providers within the Plaintiff States' health systems likely will incur harms as well. A larger uninsured population is likely to "generate significant uncompensated care costs," which, in turn, are likely to "fall disproportionately on providers in low-income communities who rely on Medicaid for financial support." ECF No. 109 at 48. Service cuts to make up

for the uncompensated care costs would then result in fewer patients being able to access primary care services. *Id.*

Another filing supports that the Public Charge Rule likely will burden the doctor-patient relationship. *See* ECF No. 151. First, *amici* health care providers highlight the "well-established state interest in protecting doctor-patient consultations from state intrusion so that patients and doctors may work together to determine the best course of medical care." *Id.* at 19. By "entwining medical decision-making" with immigration considerations, the health care providers maintain that the Public Charge Rule will constrain "clinicians' abilities to recommend public benefit programs as well as their access to reliable forthright disclosures from their patients." *Id.*; *see also* ECF No. 60 at 9 ("Families have asked our providers about applying for Medicaid or SNAP in the past, but our providers note that they rescinded these requests" after hearing about the proposed public charge rule.). Furthermore, health care providers anticipate that "forcing non-citizens to choose between medical treatment or potential deportation or family separation" will induce "patients to miss follow-up appointments or forego treatment" that a clinician has prescribed. *Id.* at 20.

The Plaintiff States submitted declarations and copies of the comments submitted to DHS during the rulemaking process supporting the conclusion that disenrollment from publicly-funded health insurance programs and related benefits already has begun to occur in anticipation of the effective date of the Public

Charge Rule. *See* ECF Nos. 35-2 at 3; 35-3 at 11; *see also* ECF Nos. 152 at 8; 153 at 17.

2. Health and Well-Being of Plaintiff State Residents

The Plaintiff States' evidence supports that decreased utilization of immunizations against communicable diseases "could lead to higher rates of contagion and worse community health," both in the immigrant population and the U.S. citizen population because of the nature of epidemics. ECF No. 65 at 14 (further recounting that "[d]isease prevention is dependent upon access to vaccines and high vaccination rates"); *see also, e.g.,* ECF No. 44 at 9.

State health officials anticipate that the Public Charge Rule and its potential to incentivize disenrollment from "critical services" "will unduly increase the number of people living in poverty and thus destabilize the economic health" of communities in the Plaintiff States. ECF No. 37 at 14.

The *amici* briefs submitted for the Court's consideration, in addition to the Plaintiff States' submissions, detail harm specific to particular vulnerable groups in the Plaintiff States and throughout the country.

a. Children and Pregnant Women

Perhaps best documented in the extensive submissions in support of the instant motion are the anticipated harms to children from disenrollment as a result of the Public Charge Rule. DHS acknowledges in the Public Charge Rule notice that the Public Charge

Rule may "increase the poverty of certain families and children, including U.S. citizen children." 84 Fed. Reg. at 41,482. The Plaintiff States focus on harm to children stemming from lack of access to health care, sufficient and nutritious food, and adequate housing.

A chilling effect from the Public Charge Rule will deter eligible people, including U.S. Citizen children of immigrant parents, from accessing non-cash public benefits, which will result in further injury to the Plaintiff States. For instance, disenrolling from SNAP benefits and other supplemental nutrition services is likely to lead to food insecurity with resultant injuries. *See, e.g.,* ECF No. 35-2 at 7. Forgoing medical care for children or adult family members because of fear of using non-cash public benefits will lead to less preventative care and result in increased hospital admissions and medical costs, and poor health and developmental delays in young children. ECF No. 35-2 at 278–79. Food insecurity and poor health care ultimately result in long-term health issues and lower math and reading achievement test scores among school children. *Id*.

With respect to housing, fair market rent without non-cash public benefits may be unaffordable in higher-cost areas of the Plaintiff States even for a family with two household members who each work full-time minimum wage jobs. *See* ECF No. 77 at 17 (providing detail regarding the Massachusetts housing market). Therefore, "[f]or immigrants who work low-wage jobs and their families, many of which include U.S. citizen children, dropping housing benefits to avoid adverse immigration consequences . . . can be

reasonably expected to upend their financial stability and substantially increase homelessness." *Id.* The Plaintiff States submitted evidence that homelessness and housing instability during childhood "can have lifelong effects on children's physical and mental health." ECF No. 35-2 at 39. When families lose their residences because they no longer receive financial assistance with rent, children in those households "are more likely to develop respiratory infections and asthma," among other harms. ECF No. 37 at 14.

b. Disabled Individuals

Amici provide a compelling analysis of how the factors introduced by the Public Charge Rule disproportionately penalize disabled applicants by "triple-counting" the effects of being disabled. ECF No. 110 at 23. The medical condition and use of Medicaid or other services used to facilitate independence for disabled individuals each may be assessed negatively against an applicant. *See* 8 C.F.R. § 212.22(b); *see also* ECF No. 110 at 23. An individual who is disabled with a medical condition likely to require extensive medical treatment would be disqualified from the positive "health" factor, even if he or she is in good health apart from the disability. *See id.* Therefore, there is a significant possibility that disabled applicants who currently reside in the Plaintiff States, or legal permanent residents who return to the U.S. after a 180-day period outside of the U.S., would be deemed inadmissible primarily on the basis of their disability.

In addition, the chilling effect arising out of predictable confusion from the changes in the Public Charge Rule may cause immigrant parents to refuse

benefits for their disabled U.S. citizen children or legal permanent resident children. ECF No. 110 at 26. Notably, disenrollment of disabled individuals from services in childhood is the type of harm that may result in extra costs to Plaintiff States far into the future because of the citizen and legal permanent resident children reaching adulthood with untreated disabilities.

c. Elderly

Amici have argued convincingly that the Public Charge Rule will have a substantial negative impact on the elderly. Many of the Public Charge Rule's negative factors inherently apply to the elderly. For instance, being over the age of sixty-two may be weighed negatively against an applicant. ECF No. 150 at 16; *see* 8 C.F.R. § 212.22(b)(1)(i). Additionally, many elderly people rely on their families for support. *See id.* at 19–20. Although immigration law in the United States has traditionally favored family unification, the Public Charge Rule may penalize people for living with their families, counting their family reliance against them. *See* ECF No. 150 at 19 (citing the "preference allocation for family-sponsored immigrants" in 8 U.S.C. § 1153(a)). Furthermore, the new rule penalizes people with a medical diagnosis that will require extensive treatment, and most adults over fifty years old have at least one chronic health condition. *Id.* at 18 (citing AARP Public Policy Institute, *Chronic Care: A Call to Action for Health Reform*, 11–12, 16 (2009); University of New Hampshire Institute on Disability/ UCED, 2017 *Disability Statistics Annual Report* (2018)); *see* 8 C.F.R. § 212.22(b)(2)(ii)(B). Many elderly people rely on

non-cash forms of public assistance like Medicaid, SNAP, and public housing and rental assistance. ECF No. 150 at 15. That assistance will be counted against them by the Public Charge Rule, predictably leading to disenrollment from such programs. *See id.* at 27; 8 C.F.R. § 212.22(d). *Amici* persuasively argue that without assistance from important programs like Medicaid elderly people will experience additional and exacerbated medical problems, "creating a new and uncompensated care burden on society." ECF No. 150 at 27.

Moreover, many elderly people do not satisfy the Public Charge Rule's positive factors. For instance, one of the Rule's positive factors is having an income that exceeds 250 percent of the federal poverty level. *Id.* at 16; 8 C.F.R. § 212.22(c)(2)(ii). *Amici* state that most people over the age of sixty-two live in moderate to low-income households, making them ineligible for this positive factor. *See* ECF No. 150 at 16 (citing *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard*, Mannat (Oct. 11, 2018)). Many people also will have their income level counted negatively against them because having an income of less than 125 percent of the federal poverty level is a negative factor. *Id.*; *see* 8 C.F.R. § 212.22(b)(4)(i).

d. Domestic Violence Victims

Amici organizations who support victims of domestic violence identify an overlap between the assistance a woman may seek or receive as she leaves an abusive relationship and establishes independence and the new definition of "public benefit" in the Public Charge Rule. *See* ECF No. 111 at 20–32. In addition,

the Public Charge Rule does not except health issues resulting from abuse from the negative medical condition factors. *See id.*; 8 C.F.R. § 212.22(b). The *amici* represent that the chilling effect is occurring in anticipation of the Public Charge Rule, with "victims . . . already foregoing critical housing, food, and healthcare assistance out of fear that it will jeopardize their immigration status." ECF No. 111 at 22. Foregoing non-cash public benefits by domestic violence victims risks "broader impacts" to the health and wellbeing of residents throughout the Plaintiff States "as a result of unmitigated trauma to victims and their families." *Id.* at 24.

3. Financial Harm to Plaintiff States

The Plaintiff States and the *amici* briefs make a cohesive showing of ongoing financial harm to the States as disenrollment from "safety net" benefits programs predictably occurs among vulnerable populations. As noted above, both immigrant and U.S. citizen children of immigrants are more likely to experience poorer long-term outcomes, including impaired growth, compromised cognitive development, and obesity without access to non-cash public benefits. ECF No. 149 at 21. Further, exposure to housing insecurity and homelessness often is associated with increased vulnerability to a range of adult diseases such as heart attacks, strokes, and smoking-related cancers. *Id.* at 22. Even if the immigrant children no longer reside in the Plaintiff States, the affected U.S. citizen children will remain entitled to live in the Plaintiff States, or in other states not plaintiffs before this Court, once they are adults. Therefore, the

Plaintiff States face increased costs to address the predictable effects of the adverse childhood experiences over the course of these U.S. citizen children's lifetimes, potentially fifty years or more down the road.

The Plaintiff States further face likely pecuniary harm from contagion due to unvaccinated residents, resulting in outbreaks of influenza, measles, and a higher incidence of preventable disease among immigrants as well as U.S. citizens. ECF No. 38 at 7–8. It is reasonably certain that any outbreaks would result in "reduced days at work, reduced days at school, lower productivity, and long-term negative economic consequences," as well as the cost of responding to an epidemic for state and local health departments. *Id.*

The Plaintiff States also allege that they will incur additional administrative costs as a result of the Public Charge Rule, including "training staff, responding to client inquiries related to the Final Rule, and modifying existing communications and forms. ECF No. 40 at 7–8 (declaration from the Deputy Commissioner of the New Jersey Department of Human Services, adding "Because the rules for determining whether someone is a public charge are technical and confusing, it will be extremely difficult to train frontline staff to have the requisite understanding necessary to help potential applicants determine whether they would be deemed a public charge under the proposed Final Rule."). The Plaintiff States also may incur the expense of developing alternative programming and enacting new eligibility rules across multiple systems of benefits to "mirror" the effect of Medicaid and other federal programs and to

mitigate the negative effects from the Public Charge Rule on individual and community health. *See* ECF No. 37 at 15.

C. Application of Harms to Standing Requirements

The Plaintiff States argue that they have made a clear showing of each element of standing by showing that "the Rule will lead to a cascade of costs to states as immigrants disenroll from federal and state benefits programs, . . . thereby frustrating the States' mission in creating such programs and harming state residents." ECF No. 158 at 11 (citing cases supporting state standing based on a proprietary interest and a quasi-sovereign interest in the health and wellbeing of the state's residents). The Plaintiff States further allege future economic harm. *Id.* at 35 (citing a declaration at ECF No. 66 at 19 estimating an annual reduction in total economic output of $41.8 to $97.5 million and other damage to the Washington State economy alone).

The Federal Defendants argue that the Plaintiff States' alleged harm is not fairly traceable to the Public Charge Rule but would be the result of third-party decisions, such as "unnecessarily choosing to forgo all federal benefits." *See* ECF No. 155 at 19–21. The Supreme Court recently addressed the Federal Defendants' traceability argument in *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019), in which a group of states and other plaintiffs challenged the Secretary of Commerce's decision to inquire about citizenship status on the census questionnaire. *Id.* at 2557. There, the Government argued "that any harm to

respondents is not fairly traceable to the Secretary's decision, because such harm depends on the independent action of third parties choosing to violate their legal duty to respond to the census." 139 S. Ct. at 2565. The Supreme Court rejected the Government's argument, concluding:

> But we are satisfied that, in these circumstances, respondents have met their burden of showing that third parties will likely react in predictable ways to the citizenship question, even if they do so unlawfully and despite the requirement that the Government keep individual answers confidential. . . . Respondents' theory of standing . . . does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties.

139 S. Ct. at 2566.

The Plaintiff States have made a strong showing of the predictable effect of the Government action on individual residents who are not parties in this action, and in turn, the predictable effect on the Plaintiff States. The complexities of the multi-factor totality of the circumstances test and the new definition of "public charge" that USCIS officers must administer are not fully captured in this Order. Nevertheless, from the components of the rule that the Court already has closely examined, it is predictable that applying the multi-factor Public Charge Rule would result in disparate results depending on each USCIS officer. Moreover, the general message conveyed to USCIS

officers, immigrants, legal permanent residents, and the general public alike is unmistakable: the Public Charge Rule creates a wider barrier to exclude individuals seeking to alter their immigration status.

Therefore, it is further predictable that individuals who perceive that they or their children may fall within the broadened scope of the public charge inadmissibility ground will seek to reduce that risk by disenrolling from non-cash public benefits. Otherwise stated, the chilling effect of the Public Charge Rule likely will lead individuals to disenroll from benefits, because receipt of those benefits likely would subject them to a public charge determination, and, equally foreseeably, because the Public Charge Rule will create fear and confusion regarding public charge inadmissibility.

Also predictable is that the chilling effect will negatively impact the Plaintiff States' missions, the health and wellbeing of their residents, citizens and non-citizens alike, and the Plaintiff States' budgets and economies. "'A causal chain does not fail simply because it has several 'links,' provided those links are not hypothetical or tenuous.'" *California v. Azar*, 11 F.3d 58, 1–57 72 (9th Cir. 2018) (quoting *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (internal quotation omitted)). While the magnitude of the injuries may remain in dispute, the Plaintiff States have shown that their likely injuries are a predictable result of the Public Charge Rule. *See California*, 911 F.3d at 572 (citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S.

669, 689 n. 14 (1973), for the proposition that injuries of only a few dollars can establish standing).

D. Ripeness

A case is ripe for adjudication only if it presents "issues that are 'definite and concrete, not hypothetical or abstract.'" *Clark v. City of Seattle*, 899 F.3d 802, 809 (9th Cir. 2018) (quoting *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d. 1144, 1153 (9th Cir. 2017)). Just as the Federal Defendants argue that the Plaintiff States' alleged harms are not concrete or imminent, they make the same arguments for purposes of ripeness. The Court applies the same analysis as discussed for standing and concludes that the alleged harms are sufficiently concrete and imminent to support ripeness.

The Federal Defendants also argue that the Court should decline to hear the case on the basis of prudential ripeness. *See* ECF No. 155 at 25. Courts resolve questions of prudential ripeness "in a twofold aspect," evaluating "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Where review of an administrative action is at issue, "[f]itness for resolution depends on the nature of the issue and the finality of the administrative agency's action." *Hotel Emples. & Rest. Emples. Int'l Union v. Nev. Gaming Comm'n*, 984 F.2d 1507, 1513 (9th Cir. 1993). Once a court has found that constitutional ripeness is satisfied, the prudential ripeness bar is minimal, as "'a federal court's obligation to hear and decide' cases within its jurisdiction is 'virtually unflagging.'" *Susan B. Anthony List*, 572 U.S. at 167 (quoting *Lexmark*

Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–26 (2014) (internal quotation omitted)).

The Federal Defendants misconstrue the issues raised by the Amended Complaint and the record on the instant motion. Challenges to the validity of a rule under the judicial review provisions of the APA present issues fit for adjudication by a court. *See Abbott Laboratories*, 387 U.S. at 149–52 (review of a rule before it has been applied and enforced is available where "the regulations are clear-cut," present a legal issue, and constitute the agency's formal and definitive statement of policy). Moreover, the Plaintiff States' harm would only be exacerbated by delaying review. For example, delaying review increases the potential for spread of infectious diseases among the populations of the Plaintiff States, as well as to nearby states, as a result of reduced access to health care and vaccinations. Therefore, the Court finds this matter is ripe for review.

E. Zone of Interests

The Federal Defendants argue that the Plaintiff States do not fall within the "zone of interests" of the INA because: "It is aliens improperly determined inadmissible, not States, who 'fall within the zone of interests protected' by any limitations implicit in § 1182(a)(4)(A) and § 1183 because they are the 'reasonable—indeed, predictable—challengers' to DHS's inadmissibility decisions." ECF No. 155 at 28 (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 227 (2012); 8 U.S.C. § 1252 (providing for appeal by an

individual of a final order of removal based on a public charge determination)).

However, the zone of interests test is "not 'especially demanding.'" *Lexmark Int'l*, 572 U.S. at 130 (quoting *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225). Particularly where a plaintiff pursues relief through the APA, the Supreme Court has directed that the test shall be applied "in keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.'" *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). There is no requirement that a plaintiff show "any 'indication of congressional purpose to benefit the would-be plaintiff.'" *Id.* (quoting *Clarke*, 479 U.S. at 399–400). Moreover, the "benefit of any doubt goes to the plaintiff." *Id.* "The test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* (quoting *Clarke*, 479 U.S. at 399).

The Plaintiff States meet this lenient standard by tracing the origins of the public charge exclusion enacted by Congress in 1882 "to protect state fiscs." ECF No. 158 at 14. The concept of a "public charge" exclusion originally was incorporated into U.S. law by Congress in 1882 to protect states from having to spend state money to provide for immigrants who could not provide for themselves. ECF No. 158 at 14–15 n. 3. The Plaintiff States reasonably extrapolate: "By imposing significant uncompensated costs on the Plaintiff States

and undermining their comprehensive public assistance programs, the Rule undermines the very interests advanced by the statutes on which DHS relies. ECF No. 158 at 14–15 (citing *Texas v. United States*, 809 F.3d 124, 163 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016) for the proposition that it "recogniz[es] states' economic interests in immigration policy"). Thus, states were at the center of the zone of interest for use of the term "public charge" from the beginning of the relevant statutory scheme, and the Plaintiff States continue to have interests that are sufficiently consistent with the purposes implicit in the public charge inadmissibility policy to challenge its application now.

The Court finds that the Plaintiff States have standing to pursue this action, that the issues are ripe for adjudication, and that the Plaintiff States are within the zone of interests of the Public Charge Rule.

IV. LEGAL STANDARDS FOR STAYS AND PRELIMINARY INJUNCTIONS IN CASES CHALLENGING AGENCY ACTION

The Administrative Procedure Act's stay provision states, in relevant part:

> On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to

> preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705.[5]

The Court applies a closely similar standard in deciding whether to stay the effect of a rule under section 705 as it does in deciding whether to issue a preliminary injunction under Fed. R. Civ. P. Rule 65(a). *Nken v. Holder*, 556 U.S. 418, 425–26 (2009); *see also Hill Dermaceuticals, Inc. v. United States FDA*, 524 F. Supp.2d 5, 8 (D.D.C. 2007). For a preliminary injunction, the moving party must demonstrate: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the moving party's favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). For a stay, the traditional test articulates the third factor in slightly different terms: "'whether issuance of the stay will substantially injure the other parties." *Nken*, 556 U.S. at 419 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Provided the Court considers all four parts of the *Winter* test, the Court may supplement its preliminary injunction inquiry by considering whether "the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [the requesting party's] favor.'" *Alliance for the Wild Rockies v. Cottrell*, 632

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[5] Alternatively, Section 705 authorizes an agency itself to temporarily stay the effective date of its rule pending judicial review, when it "finds that justice so requires." 5 U.S.C. § 705.

F.3d 1127, 1132 (9th Cir. 2011) (quoting *Clear Channel Outdoor, Inc. v. City of L.A.*, 340 F.3d 810, 813 (9th Cir. 2003)). The Ninth Circuit's "sliding scale" approach survives *Winter*, "so long as the [movant] also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies*, 632 F.3d at 1135.

Both a stay under section 705 and a preliminary injunction serve the purpose of preserving the status quo until a trial on the merits can be held. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016); *Sierra Club v. Jackson*, 833 F.Supp.2d 11, 28(D.D.C. 2012) ("Such a stay is not designed to do anything other than preserve the status quo.") (citing 5 U.S.C. § 705).

Section 705 and preliminary injunctions under Rule 65, although determined by application of similar standards, offer different forms of relief. *Nken*, 556 U.S. at 428. An injunction "is directed at someone, and governs that party's conduct." *Id.* "By contrast, instead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself. It does so either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." *Id.* "If nothing else, the terms are by no means synonymous." *Id.*

One difference is that Fed. R. Civ. P. 65(c) requires the court to determine the amount that the movant must give in security for "the costs and damages sustained by any party found to have been wrongfully

enjoined or restrained." Section 705 contains no such requirement.

In granting preliminary injunctive relief pursuant to Fed. R. Civ. P. 65, a court must consider whether the defendant shall be enjoined from enforcing the disputed rule against all persons nationwide, or solely against plaintiffs. "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Intern. Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

There is "no bar against . . . nationwide relief in federal district or circuit court when it is appropriate." *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987); *see also Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) ("[T]he District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction."); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 181 n. 12 (2010) (J. Stevens, dissenting) ("Although we have not squarely addressed the issue, in my view there is no requirement that an injunction affect only the parties in the suit. To limit an injunction against a federal agency to the named plaintiffs would only encourage numerous other regulated entities to file additional lawsuits in this and other federal jurisdictions.") (internal quotations omitted). The primary consideration is whether the injunctive relief is sufficiently narrow in scope to "'be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs' before the court." *L.A.*

Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 664 (9th Cir. 2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

The Ninth Circuit has "upheld nationwide injunctions when 'necessary to give Plaintiff a full expression of their rights.'" *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) (quoting *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), *rev'd on other grounds Trump v. Hawaii*, 138 S. Ct. 2392 (2018), and citing *Washington v. Trump*, 847 F.3d 1151,1166–67 (9th Cir. 2017) (per curium)). By contrast, the Ninth Circuit has vacated a nationwide injunction on a finding that the plaintiffs did not make "a sufficient showing of 'nationwide impact' demonstrating that a nationwide injunction is necessary to completely accord relief to them.'" *Id.*

V. ANALYSIS

A. Likelihood of Success on the Merits

For purposes of the Motion for a Stay and Preliminary Injunction, the Plaintiff States highlight the likelihood of success on the merits of their first and third causes of action, both of which are pursuant to the APA. ECF No. 34 at 21–51.

Under the APA, "[a] person suffering legal wrong because of agency action. . . is entitled to judicial review thereof." 5 U.S.C. § 702. The APA further directs courts to "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(2)(A).

1. First Cause of Action: Violation of the Administrative Procedure Act—Action Not in Accordance with Law

An administrative agency "may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000), *superseded by statute on other grounds*, 21 U.S.C. § 387a. When an administrative agency's action involves the construction of a statute that the agency administers, a court's analysis is governed by the two-step framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Id.* at 125–26.

A reviewing court's first inquiry under *Chevron* is whether Congress has expressed its intent clearly and unambiguously in the statutory language at issue. *Brown & Williamson*, 529 U.S. at 132. If Congress has spoken directly to the issue before the reviewing court, the court's inquiry need not proceed further, and the court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. If Congress has not addressed the specific question raised by the administrative agency's construction of a statute, "a reviewing court must respect the agency's construction of the statute so long as it is permissible." *Brown & Williamson*, 529 U.S. at 132 (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *Auer v. Robbins*, 519 U.S. 452, 457 (1997)).

In analyzing the first step of *Chevron,* "whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to

examining a particular statutory provision in isolation." *Brown & Williamson*, 529 U.S. at 133. The reviewing court must read the words of a statute "'in their context and with a view to their place in the overall statutory scheme.'" *Id.* (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). A court must interpret a particular statutory provision both in the context of other parts of the same regulatory scheme and with respect to other statutes that may affect the meaning of the statutory provision at issue. *Id.*

In this case, the issue is whether Congress has expressed its intent regarding barring individuals from obtaining visas or changing their status to legal permanent residents based on a specific definition of public charge. Congress has expressed its intent regarding the public charge statute in a variety of forms. In 1986, Congress included a special rule in a section of the INA addressing waivers of the public charge inadmissibility ground for applicants seeking legal permanent residency status. 8 U.S.C. § 1255a(d)(2)(B)(iii). The "special rule for determination of public charge," excepts an immigrant seeking relief under that section from inadmissibility as a public charge if he or she demonstrates "a history of employment in the United States evidencing self-support without receipt of public cash assistance." *Id.*

Later, as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Welfare Reform Act"), Congress enacted a statutory provision

articulating the following "Statements of national policy concerning welfare and immigration":

> The Congress makes the following statements concerning national policy with respect to welfare and immigration:
>
> (1) Self -sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.
> (2) It continues to be the immigration policy of the United States that—
>
> (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and
>
> (B) the availability of public benefits not constitute an incentive for immigration to the United States.
> (3) Despite the principle of self-sufficiency, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.
> (4) Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.
> (5) It is 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.

> (6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.
> (7) With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this title, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.

8 U.S.C. § 1601.

The Welfare Reform Act further limited eligibility for many "federal means-tested public benefits," such as Medicaid and SNAP, to "qualified" immigrants, and Congress defined "qualified" to include lawful permanent residents and certain other legal statuses. *See* 8 U.S.C. § 1641(b). Most immigrants become "qualified" for benefits eligibility five years after their date of entry. 8 U.S.C. §§ 1612, 1613. States retain a significant degree of authority to determine eligibility for state benefits. *See* U.S.C. §§ 1621–22, 1641.

Thus, in the course of significantly restricting access to public benefits by non-citizens, Congress expressly states that part of its national immigration policy is allowing public benefits to qualified aliens in "the least restrictive means available" in order to achieve the goal that the aliens "be self-reliant." 8 U.S.C. § 1601(7). Congress did not state that there should be no public

benefits provided to qualified aliens, but rather that public benefits be provided in "the least restrictive means available." *See id.* The Public Charge Rule at issue here likely would chill qualified aliens from accessing all public benefits by weighing negatively the use of non-cash public benefits for inadmissibility purposes.

One month after enactment of the Welfare Reform Act, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("Immigration Reform Act") reenacted the existing public charge provision and codified th e five minimum factors approach to public charge determinations that remains in effect today and will continue to be in effect if the Public Charge Rule is not implemented on October 15, 2019. *See* 8 U.S.C. § 1182(a)(4).

In the course of enacting the Immigration Reform Act, members of Congress debated whether to expand the public charge definition to include use of non-cash public benefits. *See* Immigration Control & Financial Responsibility Act of 1996, H.R. 2202, 104th Cong. § 202 (1996) (early House bill that would have defined public charge for purposes of removal to include receipt by a non-citizen of Medicaid, supplemental food assistance, SSI, and other means-tested public benefits). However, in the Senate, at least one senator criticized the effort to include previously unconsidered, non-cash public benefits in the public charge test and to create a bright-line framework of considering whether the immigrant has received public benefits for an aggregate of twelve months as "too quick to label people as public charges for utilizing the same public

assistance that many Americans need to get on their feet." S. Rep. No. 104-249. at *63–64 (1996) (Senator Leay's remarks).

Congress's intent is reflected by the fact that the Immigration Reform Act that was enacted into law did not contain the provisions that would have incorporated into the public charge determination non-cash public benefits. *See* 8 U.S.C. § 1182(a)(4).

After the Welfare Reform Act and the Immigration Reform Act took effect, Congress further demonstrated its intent regarding non-cash public benefits for immigrants by expanding access to SNAP benefits for certain immigrants who resided in the United States at the time that the Welfare Reform Act was enacted and to children and certain immigrants with disabilities regardless of how long they had been in the country. *See* Agricultural Research, Extension, and Education Reform Act of 1998, Pub. L. No. 105-185, 112 Stat. 523; Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134.

In 1999, to "help alleviate public confusion over the meaning of the term 'public charge' in immigration law and its relationship to the receipt of Federal, State, and local public benefits," the INS issued "field guidance" ("the 1999 field guidance") and a proposed rule to guide public charge determinations by INS officers. INS, Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (Mar. 26, 1999). The 1999 field guidance provided that a person may be deemed a public charge under the inadmissibility provision at 8 U.S.C. § 1182(a)(4) if the person is "primarily dependent on the government for

subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." *Id.* at 28,692.

In issuing the field guidance and proposed rule, the INS reasoned as follows:

> The Service is proposing this definition by regulation and adopting it on an interim basis for several reasons. First, confusion about the relationship between the receipt of public benefits and the concept of "public charge" has deterred eligible aliens and their families, including U.S. citizen children, from seeking important health and nutrition benefits that they are legally entitled to receive. This reluctance to access benefits has an adverse impact not just on the potential recipients, but on public health and the general welfare. Second, non-cash benefits (other than institutionalization for long-term care) are by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or family. In addition to receiving non-cash benefits, an alien would have to have either additional income—such as wages, savings, or earned retirement benefits—or public cash assistance. Thus, by focusing on cash assistance for income maintenance, the Service can identify those who are primarily dependent on the government for subsistence without inhibiting access to non-cash benefits that serve important public

> interests. Finally, 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 noncash programs is not evidence of poverty or dependence.

64 Fed. Reg. at 28,692.

In addition, the INS noted: "In adopting this new definition, the Service does not expect to substantially change the number of aliens who will be found deportable or inadmissible as public charges." *Id.*

The proposed rule was never finalized, but the 1999 field guidance has applied to public charge determinations since it was issued twenty years ago. *See* ECF No. 35-1 at 109. During the past twenty-year period, Congress has not expressly altered the working definition of public charge or the field guidance as to how the public charge inadmissibility ground should be applied to applicants for visas or permanent legal residency.

In 2013, Congress again considered and rejected a proposal to broaden the public charge inadmissibility ground to require applicants to show that "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)." S. Rep. No. 113-40 (Jun. 7, 2013).

The Plaintiff States also maintain that the Public Charge Rule "departs from the unambiguously expressed intent of Congress" in statutes other than the Welfare Reform Act and the INA, namely section 504 of the Rehabilitation Act and a statute governing SNAP benefits. ECF No. 31 at 169–71.

With respect to the Rehabilitation Act of 1973, the Plaintiff States assert that the Public Charge Rule is not in accordance with section 504, which provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . under any program or activity conducted by an Executive agency." 29 U.S.C. § 794(a). The SNAP statute provides that "the value of benefits that may be provided under this chapter shall not be considered income or resources for any purpose under any Federal, State, or local laws." 7 U.S.C. § 2017(b).

The Federal Defendants broadly assert: "From the beginning, immigration authorities have recognized that the plain meaning of the public charge ground of inadmissibility encompasses all of those likely to become a financial burden on the public, and that the purpose of the provision is to exclude those who are not self-sufficient." ECF No. 155 at 35–36. The Federal Defendants rely on the statements of the Secretary of Labor to the House Committee on Immigration and Naturalization in 1916 to support that the goal behind the public charge inadmissibility ground is to support self-sufficiency:

> [(1)] a person is 'likely to become a public charge' when 'such applicant may be a charge (an economic burden) upon the community to which he is going.'[; and]
> [(2)] the public charge clause 'for so many years has been the chief measure of protection in the law . . . intended to reach economic rather than sanitary objections to the admission of certain classes of aliens.'

Id. (citing H.R. Doc. No. 64-886, at 3–4 (1916)); *see also* ECF No. 155 at 37 ("As explained above, Congress and the Executive Branch have long recognized the 'public charge' ground as a 'chief measure' for ensuring the economic self-sufficiency of aliens.").

The Federal Defendants' arguments to this Court replicate DHS's assertion in the rulemaking record that "self-sufficiency is the rule's ultimate aim." 84 Fed. Reg. at 41,313. DHS attempts to reconcile the absence of the Welfare Reform Act's "self-sufficiency" language in the public charge inadmissibility provision at 8 U.S.C. § 1182(a)(4) by noting the temporal proximity between the Welfare Reform Act and the Immigration Reform Act:

> Although the INA does not mention self-sufficiency in the context of . . . 8 U.S.C. § 1182(a)(4), DHS believes that there is a strong connection between the self -sufficiency policy statements [in the Welfare Reform Act] (even if not codified in the INA itself) at 8 U.S.C. 1601 and the public charge inadmissibility language

> in . . . 8 U.S.C. 1182(a)(4), which were enacted within a month of each other.

84 Fed. Reg. at 41,355–56.

Notably, DHS cites no basis for interpreting the policy statements at 8 U.S.C. § 1601 beyond a belief in "a strong connection" between those policy statements and the public charge rule inadmissibility ground.

Essentially, at this early stage in the litigation, the Federal Defendants urge the Court to take two unsupported leaps of statutory construction. First, they seek a legal conclusion that the purpose of the public charge inadmissibility provision is to "ensur[e] the economic self-sufficiency of aliens." ECF No. 155 at 37. Second, the Federal Defendants argue that Congress has delegated to DHS the role of determining what benefits programs, income levels, and household sizes or compositions, promote or undermine self-sufficiency. However, the Federal Defendants have not cited any statute, legislative history, or other resource that supports the interpretation that Congress has delegated to DHS the authority to expand the definition of who is inadmissible as a public charge or to define what benefits undermine, rather than promote, the stated goal of achieving self-sufficiency.

By contrast, the Plaintiff States offer extensive support for the conclusion that Congress unambiguously rejected key components of the Public Charge Rule, including the consideration of non-cash public benefits and a rigid twelve-month aggregate approach in determining whether someone would be deemed a public charge. In the pivotal legislative

period of 1996, and again in 2013, Congress rejected the provisions that the Public Charge Rule now incorporates. In 2013, as the Plaintiff States underscore, Congress rejected expansion of the benefits considered for public charge exclusion with full awareness of the 1999 field guidance in effect. *See* ECF No. 158 at 18 (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.")).

Furthermore, the Plaintiff States make a strong showing in the record that DHS has overstepped its authority. The Federal Defendants assert, without any citation to authority, that "an individual who relies on Medicaid benefits for an extended period of time in order 'to get up, get dressed, and go to work,' is not self-sufficient.'" ECF No. 155 at 54 (quoting from Plaintiff's motion at ECF No. 34). Yet, again, the Federal Defendants offer no authority to support that DHS's role, by Congressional authorization, is to define self-sufficiency. *See Comcast Corp. v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010) (rejecting the FCC's interpretation of its authority because "if accepted it would virtually free the Commission from its congressional tether."). The Federal Defendants also have not explained how DHS as an agency has the expertise necessary to make a determination of what promotes self-sufficiency and what amounts to self-sufficiency.

As further illustration of DHS's unmooring from its Congressionally delegated authority, DHS justifies

including receipt of Medicaid in the public charge consideration by reciting that "'the total Federal expenditure for the Medicaid program overall is by far larger than any other program for low-income people.'" ECF No. 109 at 41 (brief from Health Law Advocates and other public health organizations, quoting 84 Fed. Reg. at 41,379). However, "[t]he cost of Medicaid is not DHS's concern[, as] Congress delegated the implementation and administration of Medicaid, including the cost of the program, to HHS and the states." *Id*. (citing 42 U.S.C. §§ 1396, 1396-1, 1315(a)). Congress cannot delegate authority that the Constitution does not allocate to the federal government in the first place, and the states exercise a central role in formulation and administration of health care policy. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 636 ("[T]he facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed."); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (noting the "historic primacy of state regulation of matters of health and safety"). Therefore, the Court finds a likelihood that the Plaintiff States will be successful in proving that DHS acted beyond its Congressionally delegated authority when it promulgated the Public Charge Rule.

Moreover, the Rehabilitation Act prohibits denying a person benefits, excluding a person from participating, or discriminating against a person "solely by reason of her or his disability[.]" 29 U.S.C. § 794(a). Although DHS acknowledges in the Public Charge Rule notice that the Public Charge Rule will have a "potentially outsized impact" on individuals with

disabilities, DHS rationalizes that "Congress did not specifically provide for a public charge exemption for individuals with disabilities and in fact included health as a mandatory factor in the public charge inadmissibility consideration." 84 Fed. Reg. at 41,368. The Federal Defendants argue that the Public Charge Rule is consistent with the Rehabilitation Act because disability is "one factor (among many) that may be considered." ECF No. 155 at 61.

At this early stage in the litigation, the plain language of the Public Charge Rule casts doubt that DHS ultimately will be able to show that the Public Charge Rule is not contrary to the Rehabilitation Act. First, contrary to the Federal Defendants' assertion, the Public Charge Rule does not state that disability is a factor that "may" be considered. Rather, if the "disability" is a "medical condition that is likely to require extensive medical treatment," it is one of the minimum factors that the officer must consider. *See* 8 C.F.R. § 212.22(b). Second, as the *amici* highlighted, an individual with a disability is likely to have the disability counted at least twice as a negative factor in the public charge determination because receipt of Medicaid is "essential" for millions of people in the United States with disabilities, and "a third of Medicaid's adult recipients under the age of 65 are people with disabilities." ECF No. 110 at 19 (emphasis in original removed).

Amici maintain that contrary to being an indicator of becoming a public charge, Medicaid is "positively associated with employment and the integration of individuals with disabilities, in part because Medicaid

covers employment supports that enable peleop with disabilities to work. ECF No. 110 at 19–20; *see also* 42 U.S.C. § 1396-1 (providing that grants to states for medical assistance programs for families with dependent children and aged, blind, or disabled individuals are for the purpose of "help[ing] such families and individuals attain or retain capability for independence or self-care[.]"). Therefore, accessing Medicaid logically would assist immigrants, not hinder them, in becoming self-sufficient, which is DHS's stated goal of the Public Charge Rule.

Given the history of the public charge provision at 8 U.S.C. § 1182(a)(4)(B), particularly the two recent rejections by Congress of arguments in favor of expanding the rule to include consideration of non-cash benefits for exclusion as the Public Charge Rule now does, the Court finds a significant likelihood that the language of the final rule expands beyond the statutory framework of what a USCIS officer previously was to consider in applying the public charge test. *See INS v. Cardoza-Fonseca*, 40 U.S. 421, 442–43 (1987) ("'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.'") (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 392–93 (1980) (Stewart, J. dissenting)).

The U.S. Constitution vests Congress with plenary power to create immigration law, subject only to constitutional limitations. *See* U.S. Const. Art. I, sect. 8, cl. 4; *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). An

administrative agency may not make through rulemaking immigration law that Congress declined to enact. *See Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 533 (2009) (rejecting a federal agency's interpretation of a statute and finding that the agency had "attempted to do what Congress declined to do").

Therefore, the Court finds that the Plaintiff States have demonstrated a strong likelihood of success on the merits of their first cause of action.

2. Count 3: Violation of the Administrative Procedure Act—Arbitrary and Capricious Agency Action

Review of a rulemaking procedure under section 706(2)'s arbitrary and capricious standard is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Nevertheless, an agency has a duty to examine "the relevant data" and to articulate "a satisfactory explanation for its action, 'including a rational connection between the facts found and the choice made.'" *Dep't of Commerce*, 139 S. Ct. at 2569 (quoting *State Farm*, 463 U.S. at 43 (internal quotation omitted)). An agency rule is arbitrary and capricious "if the agency has ruled on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

Further, when an agency's prior policy has engendered "serious reliance interests," an agency would be "arbitrary and capricious to ignore such matters," and the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515–16 (2009). For instance, in *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 29–30 (1996), the Supreme Court examined statutory text elsewhere in the INA establishing minimum requirements to be eligible for a waiver of deportation. Although the Court found that the relevant provision of the INA "imposes no limitations on the factors that the Attorney General (or her delegate, the INS) may consider," the Court determined that the practices of the INS in exercising its discretion nonetheless were germane to whether the agency violated the APA. *Id.* at 31–32 (internal citation omitted). "Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion' within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)." *Id.* at 32.

The record on the instant motion raises concerns that the process that DHS followed in formulating the Public Charge Rule did not adhere to the requirements of the APA. First, based on the statutory and agency history of the public charge inadmissibility ground discussed above, it is likely that the status quo has

engendered "serious reliance interests" and DHS will be held to the higher standard of providing "a more detailed justification." *FCC*, 556 U.S. at 515–16. Although DHS received over 266,000 comments, the agency's responses to those comments appear conclusory. Moreover, the repeated justification of the changes as promoting self-sufficiency of immigrants in the United States appears inconsistent with the new components of the Public Charge Rule, such as the negative weight attributed to disabled people who use Medicaid to become or remain self-sufficient. *See* ECF No. 110; 42 U.S.C. § 1396-1.

Therefore, the Court finds that there are serious questions going to the merits regarding whether DHS has acted in an arbitrary and capricious manner in formulating the Public Charge Rule. Moreover, the Plaintiff States have demonstrated a substantial likelihood of success on the merits of at least two of their causes of action in this matter.

B. Likelihood of Irreparable Harm

The Plaintiff States are likely to incur multiple forms of irreparable harm if the Public Charge Rule takes effect as scheduled on October 15, 2019, before this case can be resolved on the merits.

First, the Plaintiff States provide a strong basis for finding that disenrollment from non-cash benefits programs is predictable, not speculative. *See, e.g.,* ECF No. 35-1 at 98–140 (detailing the chilling effects of the Public Charge Rule in the use of benefits by legal immigrant families including those with U.S. citizen children); *see also Rodde v. Bonta*, 357 F.3d 988, 999

(9th Cir. 2004) (finding irreparable harm caused by denial of Medicaid and resulting lack of necessary treatment, increased pain, and medical complications). Not only that, DHS's predecessor agency noted the harms resulting from a chilling effect twenty years before publication of the Public Charge Rule. 64 Fed. Reg. at 28,692 (" . . . reluctance to access benefits has an adverse impact not just on the potential recipients, but on public health and the general welfare.").

As discussed in terms of standing, the Public Charge Rule threatens a wide variety of predictable harms to the Plaintiff States' interests in promoting the missions of their health care systems, the health and wellbeing of their residents, and the Plaintiff States' financial security. The harms to children, including U.S. citizen children, from reduced access to medical care, food assistance, and housing support particularly threaten the Plaintiff States with a need to re-allocate resources that will only compound over time. Chronic hunger and housing insecurity in childhood is associated with disorders and other negative effects later in life that are likely to impose significant expenses on state funds. *See* ECF No. 149 at 21–22. As a natural consequence, the Plaintiff States are likely to lose tax revenue from affected children growing into adults with a compromised ability to contribute to their families and communities. *See* ECF No. 35-1 at 171, 618.

Second, the Public Charge Rule notice itself acknowledges many of the harms alleged by the Plaintiff States. DHS recognizes that disenrollment or foregone enrollment will occur. 84 Fed. Reg. at 41,463.

DHS also acknowledges that more individuals will visit emergency rooms for emergent and primary care, resulting in "a potential for increases in uncompensated care" and that communities will experience increases in communicable diseases. *Id.* at 41,384.

In the Public Charge Rule notice, DHS attempts to justify the likely harms by invoking the goal of promoting "the self-sufficiency of aliens within the United States." *See, e.g.,* 84 Fed. Reg. 41,309 (as underscored by the Plaintiff States at oral argument, the Public Charge Rule notice uses the word "self-sufficiency" 165 times and the word "self-sufficient" 135 times). Whether DHS can use the stated goal of promoting self-sufficiency to justify this rulemaking remains an open question for a later determination, although, as the Court found above, the Plaintiff States have made a strong showing that DHS overstepped their Congressionally authorized role in interpreting and enforcing the policy statements in 8 U.S.C. § 1601.

The operative question for this prong of both a section 705 stay and preliminary injunction analysis is whether there is a likelihood of irreparable injury. The Court finds this prong satisfied and notes that DHS itself recognizes that irreparable injury will occur. The Federal Defendants contest only the magnitude of the harms claimed by the Plaintiff States and the *amici*. However, the Federal Defendants do not contest the existence of irreparable harm and DHS acknowledged many of the harms in its own rulemaking notice. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir.

1999) (requiring a party moving for a preliminary injunction to demonstrate "a significant threat of irreparable injury, irrespective of the magnitude of the injury").

Therefore, the Court finds that immediate and ongoing harm to the Plaintiff States and their residents, both immigrant and non-immigrant, is predictable, and there is a significant likelihood of irreparable injury if the rule were to take effect as scheduled on October 15, 2019.

C. Balance of the Equities, Substantial Injury to the Opposing Party, and the Public Interest[6]

The third and fourth factors of both a section 705 stay and preliminary injunction analysis also tip in favor of preserving the status quo until this litigation is resolved. The Federal Defendants assert that they have "a substantial interest in administering the national immigration system, a *solely federal* prerogative," and that they "have made the assessment in their expertise that the 'status quo' referred to by Plaintiffs is insufficient or inappropriate to serve the purposes of proper immigration enforcement.'" ECF No. 155 at 67–68 (emphasis in original).

However, the Federal Defendants have made no showing of hardship, injury to themselves, or damage to the public interest from continuing to enforce the

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[6] When the federal government is a party, the balance of the equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073 (9th Cir. 2014) (citing *Nken*, 556 U.S. at 435).

status quo with respect to the public charge ground of inadmissibility until these issues can be resolved on the merits. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1186 (9th Cir. 2011) (reasoning that automatically deferring to federal agencies' expert assessment of the equities of an injunction would result in "nearly unattainable" relief from the federal government's policies, "as government experts will likely attest that the public interest favors the federal government's preferred policy, regardless of procedural failures.").

In contrast, the Plaintiff States have shown a significant threat of irreparable injury as a result of the impending enactment of the Public Charge Rule by numerous individuals disenrolling from benefits for which they or their relatives were qualified, out of fear or confusion, that accepting those non-cash public benefits will deprive them of an opportunity for legal permanent residency. The Plaintiff States have further demonstrated how that chilling effect predictably would cause irreparable injury by creating long-term costs to the Plaintiff States from providing ongoing triage for residents who have missed opportunities for timely diagnoses, vaccinations, or building a strong foundation in childhood that will allow U.S. citizen children and future U.S. citizens to flourish and contribute to their communities as taxpaying adults.

Further, the Court finds a significant threat of immediate and ongoing harm to all states because of the likelihood of residents of the Plaintiff States travelling through or relocating to other states. Consequently, the balance of equities tips sharply in

favor of the Plaintiff States, and the third factor for purposes of a stay, threat of substantial injury to the opposing party, favors the Plaintiff States, as well.

The Court finds that the Plaintiff States and the dozens of *amici* who submitted briefs in support of the stay and injunctive relief have established that "an injunction is in the public interest" because of the numerous detrimental effects that the Public Charge Rule may cause. *See Winter*, 555 U.S. at 20; *see also League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("[T]here is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations.").

VI. FORM AND SCOPE OF RELIEF

The Plaintiff States have shown under the four requisite considerations of the *Winter* test that they are entitled to both a stay under 5 U.S.C. § 705 and a preliminary injunction under Fed. R. Civ. P. 65.

In section 705, Congress expressly created a mechanism for a reviewing court to intervene to suspend an administrative action until a challenge to the legality of that action can be judicially reviewed. 5 U.S.C. § 705.[7] Here, postponing the effective date of the

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[7] *See* Frank Chang, *The Administrative Procedure Act's Stay Provision: Bypassing Scylla and Charybdis of Preliminary Injunctions*, 85 Geo. Wash. L. Rev. 1529, 1552 (2017) ("The nationwide stay is an acceptable and rational policy choice that Congress made: while it delegates certain rulemaking authority to the agencies, it does so on the premise that the judiciary will curb their excesses.").

Public Charge Rule, in its entirety, provides the Plaintiff States' the necessary relief to "prevent irreparable injury," as section 705 instructs. *See Nken*, 556 U.S. at 421 ("A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it.").

Alternatively, if a reviewing court determines that a section 705 stay is not appropriate or timely, the Court also finds that the Plaintiff States offer substantial evidence to support a preliminary injunction from enforcement of the Public Charge Rule, without geographic limitation.

Just as the remedy under section 705 for administrative actions is to preserve the status quo while the merits of a challenge to administrative action is resolved, an injunction must apply universally to workably maintain the status quo and adequately protect the Plaintiff States from irreparable harm. Limiting the scope of the injunction to the fourteen Plaintiff States would not prevent those harms to the Plaintiff States, for several reasons. First, any immigrant residing in one of the Plaintiff States may in the future need to move to a non-plaintiff state but would be deterred from accessing public benefits if relief were limited in geographic scope. Second, a geographically limited injunction could spur immigrants now living in non-plaintiff states to move to one of the Plaintiff States, compounding the Plaintiff States' economic injuries to accommodate a surge in social services enrollees. Third, if the injunction applied only in the fourteen Plaintiff States, a lawful permanent resident returning to the United States

from a trip abroad of more than 180 days may be subject to the Public Charge Rule at a point of entry. Therefore, the scope of the injunction must be universal to afford the Plaintiff States the relief to which they are entitled. *See, e.g.*, *California*, 911 F.3d at 582 ("Although there is no bar against nationwide relief in federal district court . . . such broad relief must be necessary to give prevailing parties the relief to which they are entitled.") (internal quotation marks and citation omitted).

Finally, the Court declines to limit the injunction to apply only in those states within the U.S. Court of Appeals for the Ninth Circuit. In addition to the reasons discussed above, a Ninth Circuit-only injunction would deprive eleven of the fourteen Plaintiff States any relief at all. Colorado, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Rhode Island, and Virginia are located in seven other judicial circuits (the First, Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits) and would derive no protection from irreparable injury from relief limited to jurisdictions within the Ninth Circuit.

Accordingly, **IT IS HEREBY ORDERED**:

1. The Plaintiff States' Motion for a Section 705 Stay Pending Judicial Review and for Preliminary Injunction, **ECF No. 34**, is **GRANTED**.

2. The Court finds that the Plaintiff States have established a likelihood of success on the merits of their claims under the Administrative Procedure Act, that they would suffer irreparable harm absent a stay of the

effective date of the Public Charge Rule or preliminary injunctive relief, that the lack of substantial injury to the opposing party and the public interest favor a stay, and that the balance of equities and the public interest favor an injunction.

3. The Court therefore, pursuant to 5 U.S.C. § 705, **STAYS** the implementation of the U.S. Department of Homeland Security's (DHS) Rule entitled Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245 and 248), **in its entirety**, pending entry of a final judgment on the Plaintiff States' APA claims. The effective date of the Final Rule is **POSTPONED** pending conclusion of these review proceedings.

4. In the alternative, pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, the Court **PRELIMINARILY ENJOINS** the Federal Defendants and their officers, agents, servants, employees, and attorneys, and any person in active concert or participation with them, from implementing or enforcing the Rule entitled Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug.14, 2019), in any manner or in any respect, and shall preserve the status quo pursuant to the regulations promulgated under 8 C.F.R. Parts 103, 212, 213, 214, 245, and 248, in effect as of the date of this Order, until further order of the Court.

5. No bond shall be required pursuant to Federal Rule of Civil Procedure 65(c).

IT IS SO ORDERED. The District Court Clerk is directed to enter this Order and provide copies to counsel.

DATED October 11, 2019.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
United States District Judge

APPENDIX F

1. 8 U.S.C. 1182(a)(4) provides:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(4) Public charge

(A) In general

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.

(B) Factors to be taken into account

(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's—

(I) age;

(II) health;

(III) family status;

(IV) assets, resources, and financial status; and

(V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 1183a of this title for purposes of exclusion under this paragraph.

(C) Family-sponsored immigrants

Any alien who seeks admission or adjustment of status under a visa number issued under section 1151(b)(2) or 1153(a) of this title is inadmissible under this paragraph unless—

(i) the alien has obtained—

(I) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 1154(a)(1)(A) of this title;

(II) classification pursuant to clause (ii) or (iii) of section 1154(a)(1)(B) of this title; or

(III) classification or status as a VAWA self-petitioner; or

(ii) the person petitioning for the alien's admission (and any additional sponsor required under section 1183a(f) of this title or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit

of support described in section 1183a of this title with respect to such alien.

(D) Certain employment-based immigrants

Any alien who seeks admission or adjustment of status under a visa number issued under section 1153(b) of this title by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is inadmissible under this paragraph unless such relative has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(E) Special rule for qualified alien victims

Subparagraphs (A), (B), and (C) shall not apply to an alien who—

(i) is a VAWA self-petitioner;

(ii) is an applicant for, or is granted, nonimmigrant status under section 1101(a)(15)(U) of this title; or

(iii) is a qualified alien described in section 1641(c) of this title.

2. 8 U.S.C. 1183a provides in pertinent part:

Requirements for sponsor's affidavit of support

(a) Enforceability

(1) Terms of affidavit

No affidavit of support may be accepted by the Attorney General or by any consular officer to establish that an alien is not excludable as a public charge under section 1182(a)(4) of this title unless such affidavit is executed by a sponsor of the alien as a contract—

(A) in which the sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable;

(B) that is legally enforceable against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit (as defined in subsection (e)[1]),consistent with the provisions of this section; and

(C) in which the sponsor agrees to submit to the jurisdiction of any Federal or State court for the purpose of actions brought under subsection (b)(2).

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[1] See Reference in Text note below.

(2) Period of enforceability

An affidavit of support shall be enforceable with respect to benefits provided for an alien before the date the alien is naturalized as a citizen of the United States, or, if earlier, the termination date provided under paragraph (3).

* * * * *

(b) Reimbursement of government expenses

(1) Request for reimbursement

(A) Requirement

Upon notification that a sponsored alien has received any means-tested public benefit, the appropriate nongovernmental entity which provided such benefit or the appropriate entity of the Federal Government, a State, or any political subdivision of a State shall request reimbursement by the sponsor in an amount which is equal to the unreimbursed costs of such benefit.

(B) Regulations

The Attorney General, in consultation with the heads of other appropriate Federal agencies, shall prescribe such regulations as may be necessary to carry out subparagraph (A).

(2) Actions to compel reimbursement

(A) In case of nonresponse

If within 45 days after a request for reimbursement under paragraph (1)(A), the appropriate entity has not received a response from the sponsor indicating a willingness to commence payment an action may be brought against the sponsor pursuant to the affidavit of support.

(B) In case of failure to pay

If the sponsor fails to abide by the repayment terms established by the appropriate entity, the entity may bring an action against the sponsor pursuant to the affidavit of support.

(C) Limitation on actions

No cause of action may be brought under this paragraph later than 10 years after the date on which the sponsored alien last received any means-tested public benefit to which the affidavit of support applies.

* * * * *

3. 8 U.S.C. 1227(a)(5) provides:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within

one or more of the following classes of deportable aliens:

(5) Public charge

Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

4. 8 U.S.C. 1601 provides:

Statements of national policy concerning welfare and immigration

The Congress makes the following statements concerning national policy with respect to welfare and immigration:

(1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.

(2) It continues to be the immigration policy of the United States that—

(A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and

(B) the availability of public benefits not constitute an incentive for immigration to the United States.

(3) Despite the principle of self-sufficiency, aliens have been applying for and receiving public

benefits from Federal, State, and local governments at increasing rates.

(4) Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.

(5) It is 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.

(6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.

(7) With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.

5. 8 U.S.C. 1611 provides:

Aliens who are not qualified aliens ineligible for Federal public benefits

(a) In general

Notwithstanding any other provision of law and except as provided in subsection (b), an alien who is not a qualified alien (as defined in section 1641 of this title) is not eligible for any Federal public benefit (as defined in subsection (c)).

(b) Exceptions

(1) Subsection (a) shall not apply with respect to the following Federal public benefits:

> (A) Medical assistance under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] (or any successor program to such title) for care and services that are necessary for the treatment of an emergency medical condition (as defined in section 1903(v)(3) of such Act [42 U.S.C. 1396b(v)(3)]) of the alien involved and are not related to an organ transplant procedure, if the alien involved otherwise meets the eligibility requirements for medical assistance under the State plan approved under such title (other than the requirement of the receipt of aid or assistance under title IV of such Act [42 U.S.C. 601 et seq.], supplemental security income benefits under title XVI of such Act [42 U.S.C. 1381 et seq.], or a State supplementary payment).

(B) Short-term, non-cash, in-kind emergency disaster relief.

(C) Public health assistance (not including any assistance under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.]) for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(D) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (i) deliver in-kind services at the community level, including through public or private nonprofit agencies; (ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (iii) are necessary for the protection of life or safety.

(E) Programs for housing or community development assistance or financial assistance administered by the Secretary of Housing and Urban Development, any program under title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.], or any assistance under section 1926c of title 7, to the extent that the alien is receiving such a benefit on August 22, 1996.

(2) Subsection (a) shall not apply to any benefit payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] to an alien who is lawfully present in the United States as determined by the Attorney General, to any benefit if nonpayment of such benefit would contravene an international agreement described in section 233 of the Social Security Act [42 U.S.C. 433], to any benefit if nonpayment would be contrary to section 202(t) of the Social Security Act [42 U.S.C. 402(t)], or to any benefit payable under title II of the Social Security Act to which entitlement is based on an application filed in or before August 1996.

(3) Subsection (a) shall not apply to any benefit payable under title XVIII of the Social Security Act [42 U.S.C. 1395 et seq.] (relating to the medicare pro-gram) to an alien who is lawfully present in the United States as determined by the Attorney General and, with respect to benefits payable under part A of such title [42 U.S.C. 1395c et seq.], who was authorized to be employed with respect to any wages attributable to employment which are counted for purposes of eligibility for such benefits.

(4) Subsection (a) shall not apply to any benefit payable under the Railroad Retirement Act of 1974 [45 U.S.C. 231 et seq.] or the Railroad Unemployment Insurance Act [45 U.S.C. 351 et seq.] to an alien who is lawfully present in the United States as determined by the Attorney General or to an alien residing outside the United States.

(5) Subsection (a) shall not apply to eligibility for benefits for the program defined in section 1612(a)(3)(A) of this title (relating to the supplemental

security income program), or to eligibility for benefits under any other program that is based on eligibility for benefits under the program so defined, for an alien who was receiving such benefits on August 22, 1996.

(c) "Federal public benefit" defined

(1) Except as provided in paragraph (2), for purposes of this chapter the term "Federal public benefit" means—

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

(2) Such term shall not apply—

(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for en-try is related to such employment in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99-239 or 99-658 (or a successor provision) is in effect;

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien

lawfully admitted for permanent residence under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.] qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as determined by the Attorney General, after consultation with the Secretary of State; or

(C) to the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States.

6. 29 U.S.C. 794 provides:

Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth

day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of title 20), system of career and technical education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care,

housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and

510,[1] of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

[1] See References in Text note below.