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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO and COUNTY OF SANTA CLARA,

Plaintiffs,

vs.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES; DEPARTMENT OF HOMELAND SECURITY; KEVIN McALEENEN, Acting Secretary of Homeland Security; and KENNETH T. CUCCINELLI, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services,

Defendants.

Case No. 4:19-cv-04717-PJH

CITY AND COUNTY OF SAN FRANCISCO AND COUNTY OF SANTA CLARA'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: October 2, 2019
Time: 9:00 am
Judge: Hon. Phyllis J. Hamilton
Place: Oakland Courthouse
Courtroom 3 - 3rd Floor

Trial Date: Not set

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INTRODUCTION

If allowed to go into effect, DHS's Final Rule would upend the meaning of "public charge" in Section 212(a)(4) of the Immigration and Nationality Act (INA) that has remained consistent since Congress first used the term more than a century ago, and it would do so in violation of the basic tenets of reasoned rulemaking. And the Final Rule would inflict harms on the Counties that are irreparable and significant, as documented in the more than twenty declarations the Counties submitted in support of their motion.

In response, Defendants offer only a surface-level treatment of the Counties' claims, distorting the Counties' positions, side-stepping relevant authorities, ignoring DHS's own statements and concessions, and dismissing facts the Counties have documented. They do not—and cannot—undercut the Counties' strong case for swift injunctive relief. DHS is not permitted to bend more than 140 years of precedent to its political whims, and certainly not without the reasoned analysis required by law. To prevent immediate, irreparable harm, the Counties are entitled to a preliminary injunction.

ARGUMENT

I. The Counties Have Standing and Their Claims Are Ripe.

A. Standing. To establish standing, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). A local government has standing that extends to matters "as varied as a municipality's responsibilities, powers, and assets." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004). Contrary to Defendants' assertions, the Counties will suffer several distinct injuries: loss of federal funds and increased health and safety-net expenditures (Compl. ¶¶ 46-52; Mot. 20-21), operational burdens and costs (Compl. ¶¶ 53-56; Mot. 21-22), public health harms (Compl. ¶¶ 57-62; Mot. 22-24), and broader economic harms (Compl. ¶ 63; Mot. 24). Each is sufficient to establish standing.

1. Injury-in-Fact. Defendants contend that the Counties cannot establish injury in fact because the injuries they assert are speculative. Not so. DHS itself projects that 2.5% of "individuals who are members of households with foreign-born noncitizens" will disenroll from programs expressly covered by the Final Rule, including Medicaid. 84 Fed. Reg. 41, 292, 41,463 (Aug 14, 2019); RJN

Exh. I at 91-93, 97-100. And the Counties have demonstrated that disenrollment has already begun because of this rulemaking. Mot. 19. The Counties' injuries are *the direct and inevitable result* of such disenrollment. *See, e.g.*, Shing Decl. ¶¶ 8, 11-12, 32; Smith Decl. ¶ 9; Wagner Decl. ¶ 5. Courts have held similar injuries to be sufficiently concrete to meet the injury-in-fact requirement. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) ("loss of federal funds" stemming from anticipated census undercount is a sufficient injury for standing); *Cal. v. Azar*, 911 F.3d 558, 571 (9th Cir. 2018) (state's economic harm is sufficient when challenged rule will prompt women to seek reproductive care "through state-run programs or programs that the states are responsible for reimbursing").

Defendants also argue that the Counties have not established that the loss of federal funds "totals any noticeable impact on the overall state of their economies." Opp. 7. This is a red herring; the Counties need not make such a showing. "For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017); *see also, e.g.*, *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 932 (9th Cir. 2008) (noting that Supreme Court has found injury-in-fact even where magnitude of harm was only a few dollars). Here, among other injuries, the Counties have set forth unrebutted evidence that they will lose *millions of dollars* in Medicaid reimbursement funds. Wagner Decl. ¶ 5; Shing Decl. ¶ 32. This single injury alone is more than sufficient to establish injury-in-fact.

Defendants next argue that the Counties' administrative costs—such as processing requests for disenrollment and addressing confusion, distrust, and harm caused by the Final Rule—do not matter because they are manufactured and a mere bureaucratic inconvenience. They are neither. In fact, DHS itself "agrees" that the Final Rule will cause "State and local governments . . . [to] incur costs," including increased administrative burdens, so these are not mere self-inflicted injuries. 84 Fed. Reg. at 41,389, 41,469. And governmental administrative costs caused by changes in federal policy are cognizable Article III injuries. *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). The case out-of-circuit Defendants cite on this point addressed *individuals'* claims that they might have to change their job practices because of administrative policy changes, *see*

Crane v. Johnson, 783 F.3d 244, 253-54 (5th Cir. 2015), and is therefore inapposite.

2. Traceability. Defendants' contend that the Counties' injuries here are too weak to support standing because the causal chain includes third parties not before the Court. Defendants misunderstand the requisite showing. "Causation may be found even if there are multiple links in the chain connecting the defendant's unlawful conduct to the plaintiff's injury." *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014). The Supreme Court's recent decision in *Department of Commerce* is instructive. As here, the theory of standing in that census case relied "on the predictable effect of Government action on the decisions of third parties"—there, that people would not participate in the census due to fear of potential immigration consequences. 139 S. Ct. at 2556. The Court found the plaintiffs had standing—even though the causal chain included the actions of third parties. *Id.*; *see also Bennett v. Spear*, 520 U.S. 154, 169-70 (1997) (a plaintiff has standing if their injury is due to the "determinative or coercive effect" of the defendant's action); *Cal. v. Azar*, 911 F.3d at 571 ("The states show, with reasonable probability, that the [rules] will first lead to women losing employer-sponsored contraceptive coverage, which will then result in economic harm to the states.").[1] Here, too, people "will likely react in predictable ways" to the Final Rule—*i.e.*, by disenrolling from benefits. *Dep't of Commerce*, 139 S. Ct. at 2566. And, here too, the resulting harm to plaintiffs is sufficient to establish standing. Indeed, the case for standing is stronger here than in the census case because Defendants *concede* the Final Rule will cause people to disenroll from benefits, 84 Fed. Reg. at 41,463, and evidence establishes that residents of the Counties have already started to do so. Weisberg Decl. ¶¶ 12-14; Shing Decl. ¶¶ 23-24; Newstrom Decl. ¶ 43.

3. Redressability. Finally, there is no dispute that a favorable decision would redress the Counties' injuries. Indeed, Defendants have not advanced any argument to the contrary.

B. Ripeness. Defendants' constitutional ripeness argument fails for all the reasons discussed above. *See* Opp. 8 (equating standing and ripeness). Prudential ripeness, which concerns the fitness of the issues for judicial decision and the hardship to the parties of withholding court

[1] Defendants' reliance upon *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012), is inapt. The chain of causation there—which occurred over "hundreds of years" and involved the actions of "a vast multitude of emitters worldwide," *id.* at 868—bears no resemblance to the single, direct link here where the Final Rule predictably will cause noncitizens to disenroll from programs, causing various harm to the Counties.

consideration, is similarly satisfied. *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1124 (9th Cir. 2009). Defendants have not identified any additional factual development that would assist the court. This is not surprising since the Counties' claims are purely legal in nature, and DHS has projected the Final Rule's disenrollment impact. Further, as discussed below, the Counties will suffer hardship—in fact, irreparable harm—absent injunctive relief. *See infra* Part III(A).

C. Zone of Interests. A plaintiff falls within the zone of interests of the APA's "generous review provisions" unless its "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Lexmark Int'l, Inc. v. Static Control Comp., Inc.*, 572 U.S. 118, 130 (2014) (internal quotation marks and citations omitted). The test reflects a "lenient approach" and is "not especially demanding." *Id*. (same). Thus, the "benefit of any doubt goes to the plaintiff." *Id.* (same).

The Counties' interests are directly "related to" INA Section 212(a)(4) because the Counties administer public benefit programs that are integral to the public charge assessment. *See* Shing Decl. ¶¶ 4-8; Márquez Decl. ¶¶ 6-7; Rhorer Decl. ¶¶ 3-4; *see generally infra* Part II(A). Moreover, INA Section 212(a)(4) calls for consideration of affidavits of support, which are intended to allow the Counties and other governments to recover the costs of benefits they have paid to noncitizens. *See* 8 U.S.C. §§ 1182(a)(4)(B)(ii), 1183a(a), (b), (e)(2). Thus, the Counties' interests in administering public benefit programs—and the costs involved in doing so—are more than "marginally related" to Section 212(a)(4)'s purpose and satisfy the modest zone-of-interests test. *See Cal. v. Health & Human Servs.*, 351 F. Supp. 3d 1267 (N.D. Cal. 2019) (California's increased costs from providing contraceptives and from the consequences of unintended pregnancies are within zone of interests in suit challenging rules creating exemptions to the Affordable Care Act's contraceptive mandate); *Regents of Univ. of Cal. v. DHS*, 279 F. Supp. 3d 1011, 1036 (N.D. Cal.), *aff'd*, 908 F.3d 476 (9th Cir. 2018). Defendants' sole authority, Opp. 9-10, is not to the contrary. It merely applies the uncontroversial proposition that the zone of interest is specific to the statutory provision at issue. *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 903-04 (D.C. Cir. 1996).[2]

[2] Defendants also rely on *INS v. Legalization Assistance Project of Los Angeles Cty. Fed'n of Labor*, 510 U.S. 1301 (1993). Opp. 9-10. That decision expressed the views of a single justice and involved an organization whose interests there was "no indication" the statute addressed. *Id.* at 1305.

II. The Counties are Likely to Succeed on The Merits.

A. The Final Rule is Contrary to Law.

The Final Rule is at odds with the longstanding meaning of public charge established and preserved by Congress: primary dependence on the government for subsistence. Every tool of statutory interpretation—from textual analysis, context, and structure to ordinary usage, legislative history, and case-law—belies Defendants' contention that the Final Rule's definition of public charge "is consistent with the plain meaning of the statutory text." Opp. 10. Defendants distort the Counties' positions, ignore relevant authority, and misrepresent many of the sources on which they rely.

The term "public charge" has always connoted primary reliance on the government, not merely *any* receipt of publicly funded benefits. Contrary to Defendants' suggestion, Opp. 11-12, many sources from the 19th and 20th Centuries define public charge in these terms. In addition to the 19th Century dictionaries cited in the Counties' motion, Mot. 7,[3] several contemporaneous cases distinguish between persons receiving *some* public support and those primarily dependent on or committed to the custody of the government. *See Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917) (public charge inadmissibility ground "exclude[s] persons who were 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) ("agree[ing] with [*Savitsky*'s] construction[]"), *aff'd in part and rev'd in part on other grounds*, 259 U.S. 276 (1922).[4]

[3] Defendants offer alternate dictionary definitions of "charge," but neither contradicts the plain meaning of "public charge" as a person primarily dependent on the public for support. One, Rapalje, does not identify the extent of the "obligation or liability" at issue, and in any case notes that the term is "[m]ore frequently . . . applied to property." *See* Opp. 10. The other, Stimson, offers a definition that applies to property rather than persons. *Id.* Neither undermines the point that the *ordinary* meaning of the term "charge" applicable to persons is a person committed to the trust or care of another. Mot. 7; *accord Charge*, Merriam-Webster Online, https://perma.cc/7VZA-BT7X ("a person or thing committed into the care of another"); *Charge*, Collins Dictionary, https://perma.cc/7JZB-PLFH ("If you describe someone as your charge, they have been given to you to be taken care of and you are responsible for them."); *see Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 568 (2012).

[4] Courts construing state public-charge laws on which the federal provision was modeled long recognized the same distinction between primary dependence, which renders a person a public charge, and receipt of some aid, which does not. *See, e.g.*, *Yeatman v. King*, 51 N.W. 721, 723 (N.D. 1892) ("affording [poor persons] temporary relief," could *prevent* them "from becoming a public charge"); *Township of Cicero v. Falconberry*, 42 N.E. 42, 44 (Ind. 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."); *Clay Cty. v. Adams Cty.*, 95 N.W. 58, 59 (Neb. 1903) (under state public-charge law,

As those cases demonstrate, this interpretation of "public charge" persisted uninterrupted even after Congress reorganized inadmissibility grounds in 1917 in response to *Gegiow v. Uhl*, 239 U.S. 3 (1915). Defendants argue this reorganization superseded the prior interpretation. Opp. 13 & n.7. But even afterward, courts continued to give public charge the same meaning. *Ex parte Mitchell*, 256 F. 229, 230 (N.D.N.Y. 1919) (applying *Gegiow* to 1917 Immigration Act and concluding: "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"); *accord Ex parte Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922). The cases Defendants cite do not establish otherwise. In fact, *Ex parte Horn* explained that a "public charge" is "a person committed to the custody of a department of a government" and held that the petitioner "was not likely to become a public charge, in the sense that he would be a 'pauper' or an *occupant of an almshouse* for want of means of support, or likely to be sent to an almshouse for support at public expense." 292 F. 455, 457 (W.D. Wash. 1923) (citation omitted) (emphasis added).

The same meaning—primary dependence on public support—applies today. Congress's repeated reenactment of the public charge provision from 1882 through the present reflects its agreement with this longstanding meaning. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983). Likewise, Congress's rejections of specific definitions proposed in 1996 and 2003 reflect an intent that the term in question *not* carry the rejected meaning. Contrary to Defendants' argument, Opp. 15, that conclusion is required by Supreme Court doctrine, not "Plaintiffs' theory." Mot. 10-11; *see also Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972). Defendants' argument in this regard that IIRIRA "'expand[ed] the public charge ground of inadmissibility,'" Opp. 1 (quoting H.R. Rep. No. 104-828 at 240-41), is particularly misleading because it relies on a congressional conference report describing *a provision that Congress rejected*. *See* Mot. 10. Defendants also rely on a congressional policy pronouncement focused on preventing noncitizens from "*depend[ing]* on public resources," 8 U.S.C. § 1601(2)(A) (emphasis added)—not, as Defendants suggest, merely *using* them.

Defendants' sources do not show the contrary. *See* Opp. 11-12. One text simply distinguishes between aid "rendered from public funds" (which can support a public charge finding) and "help of

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poor person may obtain "*temporary support or relief* from a place other than that of his settlement," but his "settlement is the political subdivision *primarily liable for his support*" (emphases added)).

any individual or organization . . . secured by voluntary contribution" (which cannot). Cook, *Immigration Laws of the United States* § 285 (1929). The text cites only *Ex parte Kichmiriantz*, 283 F. 697 (N.D. Cal. 1922), which even DHS acknowledges "did not specifically identify how much public support renders a person a public charge," NPRM, 83 Fed. Reg. 51,114, 51,158 (Oct. 10, 2018). *In re Feinknopf*, 47 F. 447, 447, 451 (E.D.N.Y. 1891), held that an immigration officer had acted "without competent evidence" when excluding a noncitizen on public charge grounds because the noncitizen had presented evidence that he was skilled, could and wished to find employment, had no family, and "ha[d] not been an inmate of an almshouse, and ha[d] not received public aid or support." It did not conclude that mere receipt of some aid or support would have made him a public charge or likely to become one. And *United States v. Lipkis*, 56 F. 427 (S.D.N.Y. 1893), offers no definition of "public charge" at all. Indeed, that case concluded that a woman "became a public charge" when "she became insane, and was sent to the public insane asylum . . . where only poor persons unable to pay for treatment are received." *Id.* at 427-28.

Contrary to Defendants' suggestion, Opp. 10-11, the Counties do not contend that "public charge" and "pauper" are *synonymous*—only that "public charge" must be construed by reference to what it and other enumerated classes have in common. Mot. 7-8; *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (Congress is presumed not to use words superfluously); *Platt v. Union Pac. R. Co.*, 99 U.S. 48, 58-59 (1878) (same). For nearly 140 years, Congress has associated "public charge" with several other classes of individuals whose common characteristic was their inability to care for themselves, such that the state was obliged to act as their general guardian or primarily provide for their subsistence. Mot. 7-8. When Congress made "paupers" inadmissible noncitizens alongside "idiots," the "insane," and those likely to become a "public charge" in the 1891 Immigration Act, Pub. L. 51-551, § 1, 26 Stat. 1084 (Mar. 3. 1891), these terms continued to collectively describe people unable to care for themselves. *See* Mot. 8.

Defendants do not contest that the Final Rule will undermine the INA's family-reunification policy by making it far more difficult for noncitizens to obtain green cards through family ties, or that the Final Rule furthers the current administration's efforts to replace family-reunification as a goal of immigration policy. Mot. 11-13. Echoing the Final Rule, Defendants argue only that immigration law

also values self-sufficiency. Opp. 14 (citing 8 U.S.C. § 1601). Immigration law does indeed have multiple policy aims, but Congress, not DHS, decides how to balance them. In fact, DHS correctly recognizes that self-sufficiency is not "the primary purpose of U.S. immigration laws." 84 Fed. Reg. at 41,306. But its overbroad application of that principle, *see id.* at 41,312, undermines the INA's implementation of Congress's family-reunification policy. Mot. 11-13. What's more, the Final Rule misunderstands "self-sufficiency." It construes that term to mean *no* receipt of public benefits, *e.g.*, 84 Fed. Reg. at 41,482, even though the 1996 welfare reform law made plain Congress's view that *granting* public benefits to some noncitizens is "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(7) (emphasis added).

Congress did not delegate authority to interpret the term "public charge" to the Secretary of Homeland Security, who promulgated the Final Rule. And Defendants do not contend otherwise. *See* Opp. 2-3, 10, 13-15. Moreover, the longstanding meaning of public charge is unambiguous. Defendants confuse DHS's discretion in *applying* the public charge standard in a given case with the *de novo* review courts have always applied to the Executive's *interpretation* of that standard. Courts have consistently recognized this distinction. The Court in *Gegiow* explained that "[t]he conclusiveness of the decisions of immigration officers [as to exclusion on public charge grounds] is conclusiveness *upon matters of fact*," but, at the same time, "[t]he courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the *requirements of the act*." 239 U.S. at 9 (emphases added). Decisions before and after *Gegiow* likewise recognize this distinction. *See, e.g.*, *United States ex rel. Freeman v. Williams*, 175 F. 274, 275-76 (S.D.N.Y. 1910) (Learned Hand, J.) (exercising authority "to construe the act" while deferring to immigration officer's determination of "the sufficiency of the evidence"); *Savitsky*, 247 F. at 294 (rejecting immigration officer's statutory interpretation of term "public charge"); *Mitchell*, 256 F. at 232-33 (deferring to immigration officer's factual conclusions but reversing based on court's construction of term "public charge"); *Ng Fung Ho*, 266 F. at 768-69 (same). The cases Defendants cite, Opp. 15, similarly refuse to second-guess *factual* conclusions. Contrary to Defendants' assertions, *id.* at 12, 15, but consistent with Section 212(a)(4) itself, the 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."

It remains true today that DHS can promulgate rational regulations governing application of the statutory standard but cannot demand deference to its views on "questions of law." 8 U.S.C. § 1103(a)(1), (3). When it created DHS, Congress declined to transfer the authority to resolve "questions of law" to the Secretary of Homeland Security. *Compare id.*, *with* 8 U.S.C. § 1103(a)(1), (3) (2000), https://perma.cc/JX6J-3U2N; *see also Gonzales v. Oregon*, 546 U.S. 243, 258-59, 264-65 (2006) (judiciary should not defer to administrative interpretations when agency is given enforcement authority but not authority to carry out overall statutory scheme). Indeed, DHS implicitly recognizes that its definition of "public charge" is owed no deference, as the Final Rule disavows authority to construe the very same statutory term for purposes of the State Department's public charge assessments. *See* 84 Fed. Reg. at 41,315, 41,324, 41,461, 41,478; *see also id.* at 41,462-63 (disavowing authority to construe "public charge" in INA Section 237(a)(5), 8 U.S.C. § 1227(a)(5)). The Final Rule's enormous legal, political, and economic impacts, *e.g.*, Mot. 6, 10-13; 84 Fed. Reg. at 41,300-01 (estimating $3.48 billion annual fiscal effect), further suggest that Congress never meant courts to defer to DHS's interpretation of the statutory term "public charge." *See King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

B. The Final Rule Is Arbitrary, Capricious, and an Abuse of Discretion.

Even on its own terms, the Final Rule is arbitrary and capricious, and in several important ways it fails to offer a "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). In opposition, Defendants are unable to identify explanations or justifications in the Final Rule for several of DHS's key choices and fail to respond directly to the Counties' arguments, instead improperly attempting to supplement and contort the limited justifications DHS did provide.

1. DHS Failed to Conduct Reasoned Analysis of the Relevant Issues.

The Counties laid out several ways DHS failed to meaningfully address harms the Final Rule will cause or adequately support the benefits they claim the Final Rule will generate. Mot. 13-16.

Defendants' response to these arguments fall flat. For example, DHS justified the Final Rule in part on the ground that it would be a net benefit to public health. 84 Fed. Reg. at 41,314. But this assertion is based solely on speculation. DHS agreed that the Final Rule could harm public health. *See id.* at 41,312-14, 41,489; *see also* Opp. 18. But in response, DHS simply asserted—without explanation or analysis—that it "believes" the Final Rule will also produce public health benefits, and that those benefits would outweigh the harms. *See* 84 Fed. Reg. at 41,314.[5] Defendants now argue that DHS "noted" the public health harms, and criticize the Counties for demanding that DHS quantify the benefits, Opp. 17-18, but this mischaracterizes Plaintiffs' position and is beside the point. DHS's obligation was not to quantify the benefits, but to explain why they outweigh the harms and therefore justify the policy choice made. Without such an explanation, the Final Rule rests on speculation and cannot stand. *McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (courts "do not defer to the agency's conclusory or unsupported suppositions") (citing *State Farm*, 463 U.S. at 43); *see also Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039-40 (D.C. Cir. 2012) (serious error in agency's cost-benefit analysis renders rule invalid).

Moreover, Defendants' assertion that the Final Rule is consistent with the 1999 Field Guidance, Opp. 18, is inaccurate. There, INS determined public health was enhanced by noncitizens accessing benefits like SNAP and Medicaid and sought to dispel noncitizens' fear of using those benefits. 64 Fed. Reg. at 28,689. By contrast, the Final Rule *penalizes* noncitizens for accessing those same benefits and asserts public health will improve as a result. DHS's failure to offer a "reasoned explanation" for this change renders the Final Rule invalid. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016). Similarly, DHS ignored that Congress considers use of public benefits to help generate self-sufficiency and failed to grapple with the inconsistency between Congress's view and the Final Rule's negative weighting of prior benefit use. *See* Mot. 15-16; 7 U.S.C. § 2015(d), 42 U.S.C. § 602(a)(1)(A)(i). Defendants do not and could not supply a rationale now. *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) ("a court may uphold agency action only on the grounds that the agency invoked").

[5] Moreover, DHS is not well placed to assess the health impacts of the Final Rule, as the benefits programs and public health are outside its area of expertise. That is why INS consulted with the benefits-granting agencies when establishing its Field Guidance. 64 Fed. Reg. at 28,692.

Defendants are also incorrect that DHS "carefully" considered harms to local and state governments. Opp. 16. The Final Rule does catalogue the detailed comments describing the harms that would befall local and state governments, 84 Fed. Reg. at 41,310-12, and DHS broadly agreed those harms would occur, *see id.* at 41,469-70. But DHS failed to address these concerns, concluding instead that these harms are an acceptable price to pay for furthering the ability of immigration officials to exclude immigrants. *See id.* at 41,312-14. Defendants also seek to minimize these concerns on the basis that "the extent to which disenrollment might impact state and local governments is unknown because data limitations make it difficult to predict the disenrollment impact." Opp. 16 (citing 84 Fed. Reg. at 41,313). But "[t]he mere fact that the . . . effect[ ] [of a rule] is *uncertain* is no justification for *disregarding* the effect entirely." *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) (emphases in original).

This failure is particularly egregious given that DHS cited federal costs savings as a reason to issue the Final Rule. 84 Fed. Reg. at 41,296. But these costs are transferred to local and state governments. Creating federal costs savings is not a purpose of the INA—let alone doing so at the expense of local and state governments. DHS's failure to acknowledge or consider this cost shift renders the rulemaking arbitrary and capricious. *See generally State Farm*, 463 U.S. at 43.

2. The Final Rule Is Irrational.

The Final Rule is irrational in several respects, and Defendants' arguments to the contrary are unavailing. **First**, Defendants are wrong that the Counties misread the Final Rule in arriving at the conclusion that a minimal amount of benefits usage could render someone a public charge. Opp. 19. The Final Rule defines a public charge as a noncitizen "who receives one or more [enumerated] public benefits . . . for more than 12 months in the aggregate within any 36-month period." 84 Fed. Reg. at 41,501 (promulgating 8 C.F.R § 212.21(a)). Defendants focus on the durational threshold to argue that the definition does not capture minimal use. Opp. 19. But as explained in the Counties' motion and accompanying declarations, under the Final Rule, DHS deems a person a "public charge" if she receives just $180 in SNAP benefits in 36 months—or an average of less than 17 cents a day. *See* Mot. 17; Shing Decl. ¶ 17. DHS and Defendants did not and cannot offer a rational justification for why a person who uses a health-promoting benefit in such a minimal amount should be deemed a

public charge.

Second, contrary to Defendants' contention, Opp. 19-20, while Congress directed "family status" be considered, it did not direct "family size" be considered. Nor should family size be considered in a way that runs counter to the evidence about that factor's bearing on a person's likely future financial status. *See* Mot. 17. DHS and Defendants' efforts to cherry-pick the statistics that support their conclusion, while dismissing those that do not, *see* 84 Fed. Reg. at 41,395, are unpersuasive. At bottom, there is no meaningful evidence that the factors the Final Rule added—family size, receipt of an immigration fee waiver, and mere application for benefits—bear any correlation to the likelihood that a noncitizen will become a public charge, under any definition of that term. This absence of a connection between the new factors and the considered outcome is irrational.

Third, contrary to Defendants' contention, Opp. 20, the Final Rule could and should have explained how its multitude of specific factors could be weighed together to actually predict whether a person is likely to become a public charge.[6] DHS never explains how the Final Rule's weighing scheme combines the factors to reasonably predict whether someone will become a public charge. *See* 84 Fed. Reg. at 41397 (under the Final Rule "the determination of the likelihood at any time in the future to become a public charge is not governed by clear data"). DHS's failure to articulate a rational connection between its factor-weighing framework and the prediction required by the statute renders the rule invalid. *State Farm*, 463 U.S. at 43. The framework instead gives individual immigration officers effectively unguided discretion to exclude far more people under Section 212(a)(4) when conducting public charge assessments, and thus makes each noncitizen's assessment precisely the sort of "sport of chance" that "the APA's 'arbitrary and capricious' standard is designed to thwart." *Judulang v. Holder*, 565 U.S. 42, 58-59 (2011).

III. The Remaining Requirements for a Preliminary Injunction Are Satisfied.

A. Absent an Injunction, the Counties Will Suffer Irreparable Harm.

In their motion, the Counties set forth a detailed description of the harms they will suffer if the Final Rule goes into effect. Mot. 18-24. More than twenty individuals submitted declarations in

[6] And this interaction is far from self-evident, as demonstrated by the fact that one can have a positive income factor and remain eligible for benefits that are considered a negative factor. Mot. 17.

support of the Counties' motion attesting to these irreversible and severe consequences. In their opposition, Defendants do not engage with the specifics of the Counties' evidence—offering only two high-level arguments about the sufficiency of the Counties' allegations. Both fail.

First, Defendants argue that the alleged harms are speculative. Opp. 21-22. Not so. DHS itself estimates that if the Final Rule goes into effect, at least 2.5% of individuals who live in households with foreign-born noncitizens will disenroll from Medicaid and SNAP[7]—and Defendants do not dispute this projection in their opposition. 84 Fed. Reg. at 41,463; RJN Exh. I at 91-93, 97-100. Indeed, the Counties have provided significant evidence 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. And the Counties have submitted undisputed evidence that myriad further harms *will* necessarily flow from this disenrollment. Mot. 20-24. For example:

- The Counties will lose millions of dollars in Medicaid reimbursement funds as a result of people disenrolling from Medicaid. Wagner Decl. ¶ 5; Shing Decl. ¶ 32. This direct consequence is indisputable and, even standing alone, constitutes irreparable harm. *See, e.g.*, *United States v. Oregon*, 675 F. Supp. 1249, 1253 (D. Or. 1987) (state's loss of Medicaid funds constituted irreparable harm).
- The Counties' uncompensated care costs will go up as newly uninsured individuals present at the Counties' emergency departments requiring urgent care. The CEOs of hospitals owned and operated by the Counties explained this in detail in declarations filed in support of the Counties' motion. Ehrlich Decl. ¶¶ 5-7; Lorenz Decl. ¶¶ 14-16. Defendants conclusorily state this harm is speculative, but offer no contrary evidence or reason to doubt the informed testimony of the CEOs.
- Public health in the Counties will suffer. The Public Health Officers of both Counties provided sworn testimony to this effect. Aragon Decl. ¶ 7; Cody Decl. ¶¶ 6-8; *see Cal. v. Bur. of Land Mgmt.*, 286 F. Supp. 3d 1054, 1074 (N.D. Cal. 2018) (finding irreparable harm from agency rule that "will have irreparable consequences for public health"). Again, Defendants offer no contrary evidence or reason to doubt the testimony of the Counties' experienced public health officers.
- The Counties will incur significant administrative burdens—e.g., answering patient and

[7] Evidence indicates that the rate of disenrollment will actually be much higher. Mot. 19-20. But the Counties do not need to prove this, as they have shown that even the disenrollment rate projected by Defendants will cause them irreparable harm.

client questions, processing requests for disenrollment, and preparing and distributing materials to train staff and educate the public. Márquez Decl. ¶¶ 9-11; Smith Decl. ¶¶ 4-9; Pon Decl. ¶¶ 13-16. Defendants do not even attempt to argue that this harm is speculative. Nor could they given that significant resources have already been expended in this effort. Shing Decl. ¶¶ 8, 11-12; Márquez Decl. ¶ 10, Lorenz Decl. ¶ 19; Smith Decl. ¶ 9.

Second, Defendants are incorrect that the Counties' harms are not sufficiently immediate to warrant preliminary relief. While some of the harms will surely mount over time, they will become inevitable the moment the Final Rule goes into effect. "[G]etting people to enroll in benefits programs . . . has always been hard." Sandoval Decl. ¶ 6. And it has become even harder now that the community's "trust has been severely compromised by the Rule." *Id.* ¶ 8; *see also* Kanungo Decl. ¶ 9. Thus, once individuals disenroll from benefits and forego critical treatment and preventive care, it will be extremely difficult—if not impossible—to reenroll them and protect public health if and when the Final Rule is declared invalid. It only takes one or two individuals with infectious TB not getting the treatment they need to significantly increase the risk to the Counties' public health. Cody Decl. ¶ 8. And other harms to the Counties will necessarily follow. Put simply, the train will have left the station, and there will be no turning it back. Only by maintaining the status quo during the pendency of this case can these significant harms be avoided. This is precisely what preliminary injunctions are designed to do. *See, e.g., Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023-24 (9th Cir. 2016).

Moreover, Defendants concede that some harm to the Counties—specifically, the increased administrative costs discussed above—*is* immediate. Opp. 23 n.11. They claim this harm should not be considered because it is "self-inflicted" (*id.*), but this argument also falls flat. This reallocation of resources is not the Counties' "avoidable choice," but the only reasonable way to attempt to minimize the extent of the injury wrought by the Final Rule and to address the upheaval caused by the Final Rule. Defendants have acknowledged this impact. 84 Fed. Reg. at 41,389, 41,469. Such injuries are not "self-inflicted" for purposes of evaluating harm. *See, e.g., Cal. v. Azar*, 911 F.3d at 573-74 (rejecting argument that the "states' economic injuries, if any, will be self-inflicted because the states

voluntarily chose to provide money for contraceptive care to its residents through state programs").[8] This harm alone is sufficiently concrete and imminent to warrant preliminary relief.[9]

B. A Nationwide Injunction Is Legally Warranted and Practically Necessary.

As the Ninth Circuit has repeatedly recognized, nationwide injunctions are appropriate when "necessary to give the prevailing parties the relief to which they are entitled." *Cal. v. Azar*, 911 F.3d at 582. Here, there is ample evidence that a nationwide injunction is necessary to give the Counties complete relief. The complexity, confusion, and fear generated by the Final Rule has already caused the Counties to suffer irreparable harm. *See* Newstrom Decl. ¶ 43; Wong Decl. ¶¶ 18-45; Lorenz Decl. ¶¶ 11-13; Weisberg Decl. ¶¶ 12-13. And evidence in the record demonstrates that this rampant confusion and uncertainty will exponentially increase if "public charge" determinations become regional. *See* Newstrom Decl. ¶ 37. Specifically, if "[b]enefits that might not have counted against the immigrant for public charge purposes when they received them in one jurisdiction could be interpreted to count against them if they later move to another," it will "drive immigrants away from programs that are supposedly 'safe' from the public charge rule." *Id.*

Moreover, a geographically limited injunction—requiring differing public charge assessments in different locations—would be administratively unworkable. How would federal enforcement officers know which public charge definition to use when immigrants have moved between jurisdictions with different public charge definitions? Further, lack of uniformity would exacerbate ongoing confusion and chill benefit use by individuals in the Counties. Newstrom Decl. ¶ 37. These facts underscore why nationwide relief is so important in immigration policy cases and "commonplace in APA cases." *See Regents of Univ. of Cal.*, 908 F.3d at 511-512; *see also* 5 U.S.C. § 706(2) (courts must "set aside" unlawful agency action).

CONCLUSION

The Counties respectfully request that the Court grant their motion for preliminary relief.

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[8] *See also* Defs' Opp. to Pltf's Mot. for Prelim. Inj. at 15, *CCSF v. Trump*, No. 3:17-cv-00485-WHO (N.D. Cal.), ECF No. 35 (arguing that plaintiff's harm was "self-inflicted"); *CCSF v. Trump*, 250 F. Supp. 3d 497, 536-37 (N.D. Cal. 2017) (finding irreparable harm over Defendants' objection).

[9] Defendants' argument that the remaining equitable factors require denial of preliminary relief is inextricably intertwined with their argument that the Counties harm is speculative. *See* Opp. 24. Accordingly, it fails for the same reasons discussed above.

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Respectfully submitted,

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