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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, DISTRICT OF COLUMBIA, STATE OF MAINE, COMMONWEALTH OF PENNSYLVANIA and **STATE OF OREGON,**

Plaintiffs,

v.

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

Defendants.

Case No. 4:19-cv-04975-PJH

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date:	October 2, 2019
Time:	9:00 a.m.
Dept:	Courtroom 3, 3rd Floor
Judge:	Hon. Phyllis Hamilton
Trial Date:	Not set
Action Filed:	August 16, 2019

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INTRODUCTION

Defendants' new Rule abandons the settled understanding of public charge as primary dependency on the government, in favor of assessing an applicant's potential for supplemental and temporary receipt of federal benefits for which they are eligible. Despite the fact that Congress has expressly rejected this approach, Defendants press on without offering any reasonable justification for this radical change in policy. The Rule directly harms the States as co-funders and administrators of the federal public benefit programs included in the Rule's expanded definition of public charge, and Defendants do not rebut irrefutable evidence that the new Rule will cause the States to suffer serious, irreparable injuries. The Court should grant the States' motion to preserve the status quo pending adjudication of the merits.

ARGUMENT

I. THE STATES HAVE MADE THE REQUISITE FACTUAL SHOWING REGARDING HARM

The States have met their burden to establish standing and to justify preliminary relief by demonstrating that the Rule will invade legally protected interests that are concrete and particularized, and will cause harm that is actual or imminent. *Spokeo, Inc., v. Robins*, 136 S.Ct. 1540, 1548 (2016). Specifically, the Rule will damage the States' fiscs through: (1) loss of federal funds to support important state policies and programs; (2) state-borne costs resulting from delayed or foregone healthcare; and (3) noncitizens' reduced ability to participate in the labor force and as economic consumers. Mot. at 29-34. Defendants do not seriously challenge that the Rule will have these effects, but mostly quibble over their scope and timing.

Harm to the States flowing from noncitizen residents' predictable reactions to the Rule, such as foregoing or disenrolling from federal programs (which Defendants themselves anticipate), does not render those harms excessively speculative or hypothetical. *See California v. Azar*, 911 F.3d 558, 571-73 (9th Cir. 2018) (affirming preliminary injunction against federal rule based on estimated costs of 31,000 to 120,000 individuals nationwide losing coverage); *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (upholding state standing based on predictable effect of federal action on third parties); *Clinton v. New York*, 524 U.S, 417, 430-33 (1998). "Just because a causal chain links the states to the harm does not foreclose

standing." *Azar*, 911 F.3d at 571-72. The Rule's direct effects are easily distinguished from *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 868 (9th Cir. 2012), where plaintiffs lacked standing to sue companies that were some of the "vast multitude" of actors over the course of "hundreds of years" contributing to global warming.

Further, it is not necessary for the States to allege the exact number of immigrants and family members who will disenroll or fail to enroll in direct response to the Rule in order to establish standing because "[t]here is also no requirement that the economic harm be of a certain magnitude." *Azar*, 911 F.3d at 572; *see also Massachusetts v. United States*, 923 F.3d 209, 221-228 (1st Cir. 2019). The Rule's economic impacts are indisputable (and conceded by Defendants), even if the precise dollar amount is unknown at this point.

Defendants attempt to diminish the significance of the Rule's impact by focusing on one expert's use of the word "potentially" when describing the 2.2 million Californians who will be subject to a chilling effect, Opp'n at 8 (citing Lucia Decl. ¶¶ 12-13), but this language accurately encompasses the entire population of immigrants and their families who currently qualify for and receive benefits included in the new Rule. Expert testimony further establishes that a significant percentage of that large base population is likely to disenroll from public benefits. Wong Decl. ¶¶ 28-30; Ponce Decls. ¶¶ 10-11, 25; Lucia Decl. ¶ 9. Anecdotal evidence confirms the likelihood of disenrollment. Buhrig II Decl. ¶¶ 29-30; Hernandez Decl. ¶¶ 25-26; Medina Decl. ¶¶ 19-21, Palmer Decl. ¶ 10; Pakseresht ¶ 20; Ruiz ¶ 10. Even Defendants' estimate of a 2.5 % disenrollment rate, Cisneros Decl. A at 93, would result in 241,089 impacted individuals and households nationwide over the course of a *single year*— more than enough to justify a preliminary injunction. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999) (preliminary injunction may be granted "irrespective of the magnitude of the injury"); *Azar*, 911 F.3d at 572 (states had standing where "some women residing in the plaintiff states will lose coverage"). And even Defendants' lower estimates of the likely economic losses, on top of non-monetary harms to health and wellbeing, are substantial. 83 Fed. Reg. 51,270; 84 Fed. Reg. 41,473; Cisneros Decl. A at 98-99, Table 18 (annual estimates of $1.46 billion to $4.37 billion in reduced payments). *Cf. Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1232-34 (10th Cir.

2012) (state lacked standing where single affidavit offered conclusory prediction of economic harm, and no other evidence of harm existed despite implementation of snow mobile rule). The States have detailed their interest in immigrant residents and their families making use of cost-effective public benefits, such as preventive healthcare, nutrition benefits, and housing subsidies for which they are eligible, and the harm caused to the States by those individuals delaying or foregoing services. Allen Decl. ¶¶ 51, 54; Buhrig I (Medicaid) Decl. ¶¶ 20-21, 23; Buhrig II (SNAP) Decl. ¶¶ 39; Dean Decl. ¶¶ 8; Cantwell Decl. ¶¶ 24, 37-40; Coyle ¶¶ 9, 11; Jimenez ¶ 11; Lucia Decl. ¶ 26; Pakseresht Decl. ¶ 34; Pelotte Decl. ¶ 3; Ponce Decl. ¶ 34; Kergan Decl. ¶ 6.

The States have "standing to seek judicial review of governmental action that affects the performance of [their] duties." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950-51 (9th Cir. 2002). The States have also shown that the Rule will interfere with the administration of programs that promote public health and economic self-sufficiency, including the coordination and integration required by federal and state law to achieve those goals. Allen Decl. ¶¶ 24-25, 55-56; Buhrig I Decl. ¶¶ 40-43; Buhrig II Decl. ¶¶ 17-19; Byrd Decl. ¶¶ 20, 23-24 and Ex. A at 5-6; Cantwell Decl. at ¶ 23-24, 41-43; Kergan (Wisotsky) Decl. ¶¶ 30-33; Kofman Decl. ¶¶ 9-10, Fernandez ¶ 30; McKeever Decl. ¶¶ 11-14; Neville-Morgan Decl. ¶ 22; Probert Decl. ¶ 17; *see also infra* IV.C.1. Impediments such as increased "churn" in Medicaid or having to revise enrollment processes that automatically review health insurance applicants for subsidy eligibility, are not "trifling" or mere "bureaucratic inconvenience." *Cf. Skaff v. Meridien N. Am. Beverly Hills*, 506 F.3d 832, 840 (9th Cir. 2007). The fact that the States voluntarily expend or redirect resources (e.g., Ruiz Decl. ¶¶ 16, 19) necessary to communicate about the Rule and redesign existing programs does not mean that the States are improperly manufacturing harm, *contra* Opp'n at 9-10. *See Azar*, 911 F.3d at 573-74 (rejecting theory that states' injuries were self-inflicted because they voluntarily chose to offer benefits through state programs).

Although Defendants now attempt to distinguish the case, they raised many of the same standing objections when the States challenged rescission of Deferred Action for Childhood Arrivals (DACA). *See Regents of Univ. of California v. United States Dep't of Homeland Security*, 279 F. Supp. 3d 1011, 1033-36 (N.D. Cal. 2018), *aff'd by* 908 F.3d 476 (9th Cir. 2018),

cert. granted sub nom. Dep't of Homeland Sec. v. Regents of Univ. of California, 139 S. Ct. 2779 (2019). Those arguments were rejected by the *Regents* Court and should be rejected again here. There, the court recognized a variety of harm to the States' proprietary interests, as employers and in the public universities, and also as administrators of public health programs, holding that the higher healthcare costs for States were "sufficient to confer Article III standing." *Id*. at 1034. In both cases the States suffer cognizable harm due to loss of tax revenue. *Compare* 279 F. Supp. 3d at 1033 (noting estimated losses of state and local taxes due to rescission of DACA), *with* Lucia Decl. ¶¶ 12-20 (estimating loss of tax revenue between $65 and $151 million); Ex. B at 9; Buhrig II Decl. ¶ 35; Fernández Decl. ¶¶ 6, 9, 37; Pakseresht Decl. ¶ 33; Perlotte Decl. ¶¶ 11-12.

Finally, Defendants argue that the States should wait to see the scope of the Rule's effects before filing suit. But the States have shown the likely effects of the Rule, many predicted by Defendants themselves, and evidence in the administrative record demonstrates harms caused by similar past changes in public benefit eligibility rules.[1] *See, e.g.*, Ponce Decl. ¶¶ 10-11, Exs. C and D; Cisneros Decl. Ex. I at 12; Ex. K at 59-60, 63, 92-93, n. 100, 111, 183-84, Ex. O at 2, n. 12-15, Ex. R at 11. Furthermore, the Rule has already begun to cause harms. Buhrig II Decl. ¶¶ 29-30; Chawla Decl. ¶¶ 10, 12-13; Fanelli Decl. ¶ 38; Gill Decl. ¶ 9; Hernandez Decl. ¶¶ 25-26; Kofman ¶¶ 13-14; Medina Decl. ¶¶ 19-21; Palmer Decl. ¶ 10; Pakseresht ¶ 20; Ruiz Decl. ¶ 10. Requiring the States to wait will only compound harm. Allen Decl. ¶¶ 54, 60-62; Buhrig II Decl. ¶¶ 38-39; Cantwell Decl. ¶¶ 34, 36; Chawla Decl. ¶¶ 15-16; Dean Decl. ¶¶ 6-7; Escudero Decl. ¶¶ 13-14, 16; Fanelli Decl. ¶ 14; Fernández Decl. ¶ 38; Hicks Decl. ¶¶ 27, 30; Jimenez Decl. ¶¶ 10-11; Palmer Decl. ¶ 17; Perlotte Decl. ¶ 3.

II. THE STATES ARE WITHIN THE ZONE OF INTERESTS

The States' claims also satisfy the zone of interests test, which requires plaintiffs in an APA action to show that their injuries "arguably fall within the zone of interests protected or regulated by the statutory provision . . . invoked in the suit." *See Bennett v. Spear*, 520 U.S. 154, 162 (1997). "There need be no indication of congressional purpose to benefit the would-be

[1] Indeed, recognition of chilling effect harms is what caused the federal agency to issue its 1999 clarifying guidance on public charge (which the new Rule now undoes). 64 Fed. Reg. 28,689. Defendants note the need for clarifying guidance, but none has been issued. Opp'n p. 24, n.17.

plaintiff" to satisfy the zone of interests test. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). This test is "not meant to be especially demanding," and 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 be reasonably assumed that Congress intended to permit the suit." *Patchak*, 567 U.S. at 225; *see also Massachusetts*, 549 U.S. at 518, 520 (holding that states have standing to challenge agency interpretation of Clean Air Act and noting special solicitude given to states in standing analysis). That is not the case here.

The States seek to avail themselves of the flexibility to extend public benefits to certain noncitizens, which Congress expressly authorized in the Immigration and Naturalization Act (INA). States have the option to provide Medicaid to certain qualified noncitizens, 8 U.S.C. § 1612(b). The Rule, however, will cause the States to incur increased costs for medical care due to a loss of federal contributions as eligible noncitizens disenroll from or forgo enrollment in Medicaid programs.[2] *See* Mot. at 15-16, 29-30. The INA also grants states the ability to provide benefits to certain noncitizens ineligible for federal benefits, 8 U.S.C. § 1621(d), and authorizes states to provide nutrition assistance to certain noncitizens, *id.* § 1612. *See Korab v. Fink*, 797 F.3d 572, 574 (9th Cir. 2014) (Congress expressly gave states discretion to provide certain state benefits to noncitizens). The States are well within the zone of interests of the INA. *See also Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016) (recognizing states' economic interests in immigration policy); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 768 (9th Cir. 2018) (holding that legal aid interest falls within the zone of interests protected by the INA).[3]

[2] The States also fall within the Rehabilitation Act's zone of interests even though they are not the victim of discrimination. *See Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1303 (2017) (city's economic injury due to discrimination against its residents within Fair Housing Act zone of interests); *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098, 1124 (C.D. Cal. 2015) (teachers could sue under Rehabilitation Act based on discrimination against students because of "any person aggrieved" language).

[3] *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897 (D.C. Cir. 1996), involved a qualitatively different type of plaintiff—a private anti-immigration organization, whose individual members were not intended beneficiaries of the relevant INA provisions, in contrast to the States' significant and proprietary interests at issue here. *See id.* at 901, 903.

III. THE EQUITIES AND PUBLIC INTEREST FAVOR THE STATES

Plaintiffs do not need to show that the balance of equities tips "sharply" in their favor in order to obtain a preliminary injunction, *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (explaining legal standard), but they have done so. The harms faced by the States are serious and have profound implications for the public at large.

In contrast, Defendants neither articulate any concrete harms that the federal government or the public interest will suffer if the Court stays the effective date or preliminarily enjoins the Rule, nor offer any evidence supporting their view of the equities. They assert only, "Defendants have a substantial interest in administering the national immigration system […] according to the expert guidance of the responsible agencies, and […] they will be harmed by an injunction preventing them from applying their expertise." Opp'n at 35. If this analysis were sufficient, then the equities and public interest would virtually always weigh against issuing a preliminary injunction when government rulemaking is challenged. This is not the law. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (affirming preliminary injunction against federal forestry plan); *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 369 (9th Cir. 2016) (en banc) (no irreparable harm to government defendant where injunction "restores the status quo ante" of the state's "long standing … procedures").

IV. THE STATES ARE LIKELY TO SUCCEED ON THE MERITS

A. Defendants' new interpretation of "public charge" is inconsistent with the plain meaning of the statute.

Defendants attempt to stretch the term "public charge" to include someone who is primarily self-sufficient, but receives some assistance from the government. But as demonstrated in the Motion, the plain meaning of "public charge" is someone who is primarily dependent on the government to meet basic needs.

Even Defendants' own dictionary definitions suggest that primary dependence best corresponds to the term's plain meaning: a "charge" is "an obligation or liability," on the public, such as "a pauper being chargeable to the parish or town." Opp'n at 12; *see id.* at 1 (conceding that "public charge" has long been understood to mean a person who cannot provide himself with

the basic *needs of subsistence*") (emphasis added). Individuals who need to be institutionalized at government expense, or who are poor and unable to work due to age or disability and thus qualify for Supplemental Security Income (SSI), present the public with such "an obligation or liability" because they have no other alternative in order to survive. Accordingly, these types of benefits are already included in the prior public charge test. *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,692 (May 26, 1999); *see also Matter of Harutunian*, 14 I. & N. Dec. 583, 589-90 (1974) (holding that a senior with no other means of subsistence could be determined a public charge based on receipt of old age benefits). Government-funded healthcare and supplemental nutritional or housing assistance, however, do not present the same kind of obligation or liability. While the States can and do choose to provide those benefits to their residents for sound public policy reasons, they do not serve as adults' primary means of survival. *Cf. Charge, Public Charge*, Black's Law Dictionary (6th ed. 1990) (defining "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") (emphasis added); *American Sec. & Trust Co. v. Utley*, 382 F.2d 451, 453 (D.C. Cir. 1967) (describing different needs of "infants" and noting that "[w]hat are 'necessaries' will obviously vary with the circumstances, income, and background of the beneficiary"). The federal government set forth this commonsense meaning of public charge in its 1999 Field Guidance and proposed rule.

Defendants' attempts to rely on early caselaw to corroborate their new, expansive definition of the term "public charge" are unavailing. Defendants rely on *In re Feinknopf*, 47 F. 447 (E.D.N.Y. 1891) to suggest that consideration of whether an immigrant "received public aid or support" was distinct evidence in a public charge determination, glossing over the court's point that the immigration inspector wrongly determined someone a public charge without a scintilla of supporting evidence. 47 F. at 448-49. Nor did the *Feinknopf* court hold that receipt of public aid demonstrated that a person was likely to become a public charge. *Id.* at 447-48. Defendants also incorrectly assert that *United States v. Lipkis*, 56 F. 427, 428 (S.D.N.Y. 1893), supports the proposition that an immigrant is a public charge if "although earning a modest living, might need assistance." Opp'n at 14. But the public charge finding in that case was due to the immigrant's

"poverty and inefficiency" and "earning more or less as a peddler" living in "extreme poverty"—*not* earning a modest living, but needing assistance.[4] *See* 56 F. at 427-28.

Defendants reason that public charge does not mean "completely destitute" or "entirely dependent," but the States do not so argue. Even SSI recipients (whom the parties agree may be determined a "public charge") may have their own resources or income, just not enough to avoid dependence for subsistence. Congress intended public charge to mean something beyond being a "pauper" (until 1952 a separate ground for inadmissibility). As the 1933 Black's Law Dictionary explained, the term public charge "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 prisons." Black's Law Dictionary 311 (3rd ed. 1933) (citations omitted). Public charge contrasts with the term "extreme hardship," which plainly is subject to a range of interpretations. *See I.N.S. v. Jong Ha Wang*, 450 U.S. 139, 144 (1981).

Today's modern health and social service systems, in which Medicaid plays a central role in providing healthcare for a large proportion of the U.S. population, were, of course, unknown to the 1882 Congress. It strains credulity too far to suppose that Congress intended "public charge" to describe wide swaths of the U.S. population—40% of all U.S. residents would receive a "heavily weighted" negative factor if they were evaluated under the Rule. Cisneros Decl. Ex. K at 10. Modern interpretations of the term "public charge" preserved a definition inconsistent with its application to individuals using these important and common benefits.

Defendants also overstate the States' argument regarding supplemental in-kind benefits. The 1999 Field Guidance reasonably included those institutionalized at government expense as "public charges," an in-kind benefit that provides all life necessities. The Rule veers afield from the plain meaning of "public charge" because it encompasses receipt of assistance that is both in-kind *and* supplemental in nature—benefits that support, rather than detract from, ability to work

[4] Defendants rely on a district court case, *Ex Parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923), for the proposition that Congress's 1917 amendment of the INA (which relocated the "public charge" term to make it separate from the term "paupers," *see* Immigration Act Feb. 5, 1917 § 3), effectively overruled *Gegiow v. Uhl*, 239 U.S. 3 (1915). But the Ninth Circuit determined that *Gegiow* was still good law even after the 1917 amendments. *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922).

and self-sufficiency—and makes low income a separate, additional negative factor.

Defendants' argument that the plain meaning of "public charge" does not require "permanent" receipt of public benefits is yet another red herring because the States acknowledge that public charge determinations are prospective in nature.[5] Mot. at 16. Indeed, the fact that the statute requires agency officials to make a prospective determination about an immigrant's likelihood "at any time" in the future of becoming a public charge implies that the method for making such determination should be less—rather than more—restrictive, since an immigrant's present circumstances are not sufficiently predictive of their future status. *See* ABSTRACTS OF REPORTS OF THE IMMIGRATION COMM'N, S. Doc. No. 747, Vol. 1, 35-39 (3d Sess. 1911) (1911 investigation showed that immigrants of limited means who used some type of assistance have historically been admitted into the country and "were for the most part self-supporting").

Congress' consideration and rejection of proposed amendments that would have expanded public charge underscore that the Rule is an unreasonable interpretation of the INA. *See* Mot. at 15; S. REP. NO. 104-249, at 64 (1996) (statement of Sen. Leahy opposing proposed legislation on the grounds that "the definition of public charge goes too far in including a vast array of programs none of us think of as welfare"); S. REP. NO. 113-40, at 42 (2013) (failed bill would have rendered immigrants living in the United State inadmissible as public charges if they qualified for programs like Medicaid and SNAP). Defendants mischaracterize these failed attempts to amend the public charge statute as affirming the agency's permission to interpret "public charge," contrary to accepted canons of statutory interpretation. *See Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 533 (2009) (an agency may not do through administrative action "what Congress declined to do"); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987) 442-443 (rejecting agency interpretation of immigration laws that correspond to rejected legislation because "[f]ew principles of statutory construction are more compelling").

Finally, 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

[5] The States apologize for the inadvertent omission of "at any time" from their quotation of § 1182(a)(4)(A), Mot. at 2.

determinations. But the new Rule goes beyond anything that Congress authorized. The statute does not give officials free rein to decide in their "opinion" the meaning of the term public charge. *Gegiow*, 239 U.S. at 10. Despite the federal government's general authority in the area of immigration law, courts do not hesitate to restrain immigration officials when they adopt interpretations that are contrary to law. *See, e.g., Cardoza-Fonseca*, 480 U.S. at 446-450 (rejecting agency's interpretation of asylum standards).

B. The Rule violates the rights of persons with disabilities.

In their opposition, Defendants ignore the evolution in federal immigration and civil rights law over the last half century recognizing that persons with disabilities are no longer assumed to be a burden on society. *See, e.g.*, Immigration Act of 1990, Pub. L. No. 101-649 § 603(a)(15), 104 Stat. 4978, 5083-84 (1990) (deleting language excluding, *inter alia*, "[a]liens who are mentally retarded" or who are "afflicted with . . . . a mental defect"); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 592, 601 (1999) (affirming individuals with disabilities' rights to community-based Medicaid). Instead, citing a non-precedential USCIS decision, Defendants claim that Congress authorized the Rule's impact on persons with disabilities by listing "health" as a factor. Opp'n at 21. But the INA does not excuse Defendants from their obligation to comply with the anti-discrimination mandate of the Rehabilitation Act.

Moreover, Defendants are incorrect that the INA mandates disability discrimination. By subjecting persons with disabilities to multiple, overlapping negatively weighted factors, and excluding them from positively weighted factors, the Rule reverts to a categorical exclusion of people with disabilities that prevailed over a century ago. DHS justifies this aspect of the Rule by relying on early twentieth-century caselaw assuming that noncitizens would become a public charge based solely on their disabilities. *See* 84 Fed. Reg. 41,292; 41,368 n.407 (citing, *inter alia*, *Barlin v. Rodgers*, 191 F. 970, 974-977 (3d Cir. 1911) (sustaining exclusion of three impoverished immigrants, the first because he had a "rudimentary" right hand affecting his ability to earn a living, the second because of poor appearance and "stammering" such that it made the alien scarcely able to make himself understood, and the third because he was very small for his age); *United States ex rel. Canfora v. Williams*, 186 F. 354 (S.D.N.Y. 1911) (ruling that an

amputated leg was sufficient to justify the exclusion of a sixty year old man even though the man had adult children who were able and willing to support him)). In the Rehabilitation Act and the ADA, Congress repudiated Defendants' approach, and they cannot now exercise their statutory authority in a manner that is "incompatible with the expressed or implied will of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Nor can Defendants' facile statements that disability will not be dispositive be reconciled with the rest of the Rule. Immigrants with disabilities would be assigned a negative health factor—and deprived of a positive factor—because the Rule adopts a definition of "health" that strongly overlaps with disability.[6] *Compare* 8 C.F.R. § 212.22(b)(2) (defining "health" factor to include "a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide and care for himself or herself, to attend school, or to work[.]"), *and* 29 U.S.C. § 705(9)(B) (defining "disability" as "a physical or mental impairment that substantially limits one or more life activities of the individual"). The Rule then attributes another heavily weighted negative factor *to that same medical condition* if the applicant lacks private insurance, 8 C.F.R. § 212.22(c)(1)(iii), and a further heavily weighted negative factor if the applicant has received Medicaid for 12 of the last 36 months, 8 C.F.R. §§ 212.22(c)(1)(ii), 212.21(b)(5), even though use of Medicaid is commonplace among individuals with disabilities because it covers services that no other insurer provides. Thus, the Rule is virtually certain to exclude anyone with a significant disability as a public charge by counting their disability against them multiple times. This approach violates Section 504. *See Lovell v. Chandler*, 303 F.3d 1039, 1053 (9th Cir. 2002) (finding a Section 504 violation notwithstanding other factors in a "restrictive income and assets test," because "those disabled persons were denied QUEST coverage by the State solely because of their disabilities").

C. The Rule constitutes arbitrary and capricious agency decision-making.

1. Substantial reliance interests mean the Rule must meet a higher standard.

Defendants fail to satisfy their obligation to offer a more "detailed justification" where, as

[6] Nothing in the legislative history suggests that Congress intended this meaning when it designated "health" as a factor in a public charge determination.

here, "serious reliance interests" are at stake. *F.C.C. v. Fox Television Studios*, 556 U.S. 502, 515 (2009). Defendants suggest the States' interests in protecting their programs from widespread disruptions are "trifling," but the States administer and fund major federal public benefit programs that have developed with the understanding that immigrants' lawful participation in them will not result in public charge determinations. These reliance interests are not speculative or marginal. For example, under the ACA, states have automated Medicaid determinations and enrollment such that some individuals seeking private insurance through the marketplace may be unintentionally enrolled in Medicaid due to federal streamlining requirements. Defendants dismissed this concern, stating a lack of evidence in "how the ACA marketplace works." 84 Fed. Reg. at 41,379. Federal provisions, however, clearly require state marketplaces to transfer eligible applicants to Medicaid. *See* 42 C.F.R. § 435.1200(b), (d)-(f).

2. The Rule is not supported by a reasoned explanation or detailed justification.

Defendants assert that they sufficiently justified the Rule based on their goal of ensuring that immigrants do not rely on public benefits, citing expenditure data for federal nutrition, housing, and health care programs, and immigrant participation in these programs. Opp at 22-23. These data do not provide a "good reason" for a policy change because Congress authorized immigrants' participation in these programs. *See Fox.*, 556 U.S. at 515. The data merely show participation as Congress intended when it enacted an eligibility framework striking a balance between supplemental support and self-reliance. *See* 8 U.S.C. §§ 1611-15, 1601(7) (the 1996 eligibility rules are "the least restrictive means available for achieving the compelling governmental interest of assuring that [noncitizens] be self-reliant in accordance with national immigration policy.").

Defendants offer no justification for using PRWORA and IIRIRA to create new "incentives" regarding immigration, beyond a perfunctory pointing to data and general policy statements. They do not provide even a minimal level of analysis to justify the change at this time. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126-27 (2016) (rejecting a marginal explanation). In adopting the Rule, Defendants failed to weigh significant facts developed since 1999 covered in a 2017 National Academy of Sciences analysis regarding

immigrants' economic impact. *Compare* Cisneros Decl. Ex. S at 1-13 with 84 Fed. Reg. at 41,306, 314, 353 and 402. The Rule does not discuss the number of legal permanent residents who, following a trip abroad, could be subjected to the new public charge test. *Compare* Cisneros Decl. Ex. K at 78 *with* Ex. A at 21-33. Because Defendants do not "examine the relevant data and articulate a satisfactory explanation," the Rule is arbitrary and capricious. *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

3. Defendants refuse to acknowledge change to affidavits of support.

Defendants claim that they are not changing the role of affidavits of support in the public charge process. Opp'n at 26. Defendants fail to acknowledge the policy changes that they impose, indicating they failed to weigh advantages and disadvantages. *Encino*, 136 S. Ct. at 2125-26 (agencies "must at least 'display awareness that it is changing position"); *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707 (2015).

The American Immigration Lawyers Association, a knowledgeable professional organization of 15,000 immigration attorneys and immigration law experts, made clear that the Rule represents a major policy change by decreasing the significance of a sponsor's legally enforceable affidavit of support. Cisneros Decl., Ex. C at 4 and 7 ("[A] properly completed, non-fraudulent [affidavit of support] is generally sufficient to satisfy any public charge concerns."). Defendants fail to acknowledge this fundamental change in the Rule's background discussion, 84 Fed. Reg. at 41,303-04, or elsewhere in the Rule or NPRM, at 51,197-98. *See* 84 Fed. Reg. at 41, 430 ("DHS rejects the assertion that the rule shifts the emphasis away from the affidavit of support, as the statute does not require or even permit DHS to focus . . . solely on the affidavit of support").

4. The Rule is not a logical application of the totality of the circumstances test.

Despite lip service paid to the "totality of circumstances" test, Defendants cannot reasonably deny that the overlap of various bright-line aspects of the Rule will result in the mechanical exclusion of many low-income immigrants, inconsistent with the INA's mandated multi-factor test. The Rule will operate as a bright line test excluding immigrants with limited resources and incomes below 125 percent of the poverty level, who will be determined likely to

receive Medicaid or other covered benefits, and likely have overlapping factors such as low incomes, employment history, and poor credit scores, but be unable to meet the new, punitively high public charge bond. Decl. Ex. K at 32-33, Ex. M at 4, 19, 93, 95-96; *see also supra* Section IVB. *Mary V. Harris Found. v. F.C.C.*, 776 F.3d 21, 22 (D.C. Cir. 2015), in which the appellate court upheld an agency's bright-line rule to deny an application for a license to operate a radio station, is inapposite because it did not involve a statute mandating a totality of the circumstances approach. Defendants concede that their framework's heavily-weighted negative factors will lead to inadmissibility determinations even for applicants presenting positive factors. 84 Fed. Reg. at 41,400. And despite Defendants' assertions that the 125-250 percent income band will be treated as a positive factor, the actual regulation does not direct this treatment. *See* 84 Fed. Reg. at 41,502-03 (§ 212.22). To the extent IIRIRA addressed use of public benefits in the public charge ground of inadmissibility, it only did so by reference to affidavits of support that are required under INA Section 213A. The affidavit simply establishes a repayment mechanism, not a policy preference that benefit receipt is more weighty than other enumerated factors. The new regulation and forms do not assure full consideration of the range of relevant evidence. *See* Mot. at 23, 25.[7]

5. DHS's exemptions and failure to consider impacts are arbitrary and capricious.

Defendants fail to "examine the relevant data and articulate a satisfactory explanation" by declining to adjust factual conclusions to account for likely disenrollment rates based on research and evaluation of past disenrollment rates following the enactment of PRWORA. *See State Farm*, 463 U.S. at 43; 83 Fed. Reg. 51,266. They claim that this was a reasonable choice because PRWORA changed eligibility requirements, whereas the Rule merely changes incentives. However, the consequences of a public charge determination—denial of legal permanent residency—are profound. Research shows that refugees refused needed services at very high rates even though PRWORA did not affect their eligibility. Cisneros Decl. Ex U at 3-4.

[7] The Rule's paperwork requirements are yet another example of arbitrary and capricious decision-making. The Form I-944 is part of the Rule, and Defendants do not disclose methodology for the time estimates associated with it, *cf.* Cisneros Decl. Ex G at 25-26, 79; Ex. C at 9-10, or justification of requirements for irrelevant documents. These concerns impact the States' interests because they will likely have to provide certain information, such as the value of benefits received, though existing systems not equipped to do so. Cisneros Decl. Ex. M at 106.

Defendants justify dismissal of this research on the grounds that choices to disenroll are "unwarranted," but the fact that people may forego benefits due to fear or confusion does not excuse them from considering those foreseeable effects. *See Michigan*, 135 S. Ct. at 2707; *cf. Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) ("[w]hether the public has been irrational in interpreting" the rule is "irrelevant" to harm caused by public perception).

Finally, DHS's failure to exempt SNAP for children over 5 years old is arbitrary and capricious. Congress availed these benefits to immigrant children, and repayment obligations bind the sponsor, not the child. The stated reasons for the policy—removing incentives to immigrate and use benefits—do not apply to children who are not decision makers. Defendants note that they appropriately exempted receipt of Medicaid by immigrant children, but then say of child SNAP recipients only, "Congress explicitly required DHS to consider age in public charge determinations." Opp'n at 27. As noted earlier, DHS did not provide population or age profile data to show the Rule's reach. This is decision is not reasoned, but arbitrary and capricious.

V. THE HARMS CAUSED BY THE RULE WARRANT A NATIONWIDE INJUNCTION

Defendants do not deny that a patchwork injunction in the five States, but not elsewhere, would eschew the need for uniformity in immigration policy and thereby cause confusion and chilling effects for households that span state lines, *see* 8 C.F.R. § 212.21(d)(1)(iv-vi), (2)(iii-iv, vi-vii), and immigrants who move in and out of the States. "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 442 U.S. 682 (1979). A stay or preliminary injunction in only the five States would not provide relief sufficient to alleviate the confusion and fear caused by the Rule. The States' request for nationwide relief here is therefore more similar to *Regents*, 908 F.3d at 511-12, where Defendants likewise failed to offer a workable alternative to a nationwide injunction, than to *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1030 (9th Cir. 2019), where the district court did not initially make a finding necessary to support nationwide relief.

CONCLUSION

For the foregoing reasons, the States request that this Court grant their motion in full.

Dated: September 20, 2019

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CERTIFICATE OF SERVICE

Case Name: State of California et al v. U.S. Department of Homeland Security et al

No. 4:19-cv-04975-PJH

I hereby certify that on September 20, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 20, 2019, at Oakland, California.

Kelinda Crenshaw
Declarant

Signature

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