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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STATE OF WASHINGTON, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.	NO. 4:19-cv-05210-RMP REPLY IN SUPPORT OF PLAINTIFF STATES' MOTION FOR § 705 STAY PENDING JUDICIAL REVIEW OR FOR PRELIMINARY INJUNCTION NOTED FOR: October 3, 2019 With Oral Argument at 10:00 a.m. USDC Spokane: Courtroom 901

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I. INTRODUCTION

Unable to enact their agenda through the legislative process, Defendants (DHS) now seek to overhaul our nation's immigration system by dramatically redefining the term "public charge" through an unlawful Rule. DHS disputes neither that the Rule will harm the Plaintiff States financially and injure the health of their residents, nor that the States themselves operate and help fund the federal benefits programs included in the expanded definition of public charge. Instead, DHS trots out the argument this administration has made repeatedly without success—that an injury is too "attenuated" if the administration's rules target State residents, not the States themselves. But that argument has already been rejected, including just this year by the Supreme Court in the census case.

In attempting to defend the merits of its novel statutory interpretation, DHS similarly offers as the plain and unambiguous meaning of "public charge" a definition that Congress has twice explicitly rejected. DHS claims that the sources considered under *Chevron* demonstrate that Congress intended for *any* government support to qualify an immigrant as a public charge. It does so only by picking out ambiguous sentences from authorities whose overall meaning is demonstrably to the contrary and which support Plaintiff States' interpretation—that a public charge is someone primarily dependent on the government for subsistence. Not only is DHS's new Rule contrary to law, but in the face of thoroughly documented harms to public health and vulnerable populations, the

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Rule is arbitrary and capricious based on the agency's failure to provide a reasonable explanation for abandoning the longstanding usage of "public charge" and the statutory interpretation it has applied for decades.

DHS's unlawful refashioning of immigration policy through regulation should not take effect while the Plaintiff States' legal challenge is pending.

A. The Plaintiff States Have Standing

1. The Rule's harm to third parties does not prevent state standing

DHS asserts the Plaintiff States "have not met, or even tried to meet" the burden to establish standing. ECF No. 155 at 9 (Defs.' Opp'n to Mot. for § 705 Stay Pending Judicial Review or for Prelim. Inj.). Not so.[1] The Plaintiff States made a "clear showing of each element of standing" *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013), and demonstrated the Rule will invade concrete and particularized legally protected interests, causing harm that is actual or imminent, *Spokeo, Inc., v. Robins*, 136 S. Ct. 1540, 1548 (2016), and which is "fairly traceable to the challenged action of the defendant" and "likely will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (ellipses, brackets, and internal quotations omitted).

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[1] *See* ECF No. 31 (Am. Compl.) ¶¶ 36, 171–395; ECF No. 34 at 10–17 (Pls.' Mot. for § 705 Stay Pending Review or for Prelim. Inj.) (citing 51 declarations demonstrating injury).

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Specifically, Plaintiff States have shown the Rule will lead to a cascade of costs to states as immigrants disenroll from federal and state benefits programs, *see* ECF No. 34 at 10–17, 51–55, thereby frustrating the States' missions in creating such programs and harming state residents. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601–02 (1982) ("As a proprietor, [a state] is likely to have the same interests as other similarly situated proprietors . . . , [a]nd like other such proprietors it may at times need to pursue those interests in court."); *id.* at 607 ("[A] state has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general."); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("[I]f the health and comfort of the inhabitants of a state are threatened, the state is a proper party to represent and defend them"); *California v. Azar*, 911 F.3d 558, 573 (9th Cir. 2018) (states established standing by showing "that the threat to their economic interest is reasonably probable").

Importantly, DHS does not dispute that the Rule will cause disenrollment, *see* 84 Fed. Reg. 41,292, 41,463 (Aug. 14, 2019), but rather argues that the "potential future harms" that follow therefrom are "spurred by decisions of third parties not before the court." *See* ECF No. 155 at 9. The Supreme Court recently rejected this argument in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). In that case, the government raised the same standing arguments, namely that the alleged harms were not traceable to the Department's actions but to the

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independent actions of third parties. *Id.* at 2565–66. The Supreme Court rejected the contention, holding the plaintiffs had "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." *Id.* at 2566 (emphasis added). As a result, the plaintiffs' theory of standing "d[id] not rest on mere speculation about the decisions of third parties" but "instead on the predictable effect of Government action on the decisions of third parties." *Id.*; *see also Mayor & City Council of Baltimore v. Trump*, No. ELH-18-3636, 2019 WL 4598011, at *17–18 (D. Md. Sept. 20, 2019) (applying the *Department of Commerce* decision to plaintiff's claims that the Trump administration had violated the APA in amending the Foreign Affairs Manual's section on public charge determinations, and concluding the plaintiffs had established standing).

Where, as here, the Plaintiff States have alleged and corroborated with supporting declarations that immigrants will react in a *predictable* way to the Rule, a way that DHS *concedes* they will react, and which causes significant financial harm to the Plaintiff States and the health of their residents, standing is established.[2] *See Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (concluding

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[2] The Plaintiff States' contentions supporting the negative health and financial outcomes resulting from the Rule are corroborated by amici curiae in this case. *See, e.g.*, ECF No. 152 at 17 (Br. of Amici Curiae Am. Academy of

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that states receive "special solicitude in our standing analysis"); *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").

2. The Rule is ripe for review because it causes immediate injury to the Plaintiff States

The Plaintiff States have likewise established their claims are ripe for decision by this Court. The question of ripeness is a corollary of standing, and a party that has proven an "actual or imminent" injury in fact has established its claims are ripe. *Clark v. City of Seattle*, 899 F.3d 802, 809 (9th Cir. 2018).

The issues before this Court also are prudentially ripe under *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075, 1083 (9th Cir. 2015). First, delayed review would cause hardship to Plaintiff States because "[p]ostponing review will only exacerbate [the alleged] harms." *Mayor & City Council of Baltimore*, 2019 WL 4598011, at *21. Second, the Rule is the agency's final action, so judicial intervention does not inappropriately interfere with further administrative action. Third, DHS does not identify any factual development necessary for the Court to review the legal issues. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891 (1990) ("[A] substantive rule which as a

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Pediatrics) ("Disincentivizing the use of SNAP or other public food security benefits by immigrant families will result in enduring damage to the collective health and proper development of all children in such families.").

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practical matter requires the plaintiff to adjust his conduct immediately . . . is 'ripe' for review at once . . . .").

3. The Plaintiff States are within the zone of interest of the INA

The Plaintiff States have established they have "prudential standing" under the APA, because their interests are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (citing 5 U.S.C. § 702). Because this test is "not meant to be especially demanding," *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 & n.16 (1987), agency action is "presumptively reviewable" and "the benefit of any doubt goes to the plaintiff," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). A party has prudential standing 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 intended to permit the suit." *Id*.

The purpose of the public charge exclusion is to prevent immigrants from becoming primarily dependent on state governments for subsistence—and thus to protect state fiscs.[3] By imposing significant uncompensated costs on the

[3] Congress enacted the original 1882 public charge exclusion in response to the U.S. Supreme Court's invalidation of materially identical public charge exclusions in state laws—at the behest of state governments. *See* Immigration Act of 1882, ch. 376, 22 Stat. 214; Hidetaka Hirota, *Expelling the Poor* 185

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Plaintiff States and undermining their comprehensive public assistance programs, the Rule undermines the very interests advanced by the statutes on which DHS relies. The States are thus well within the zone of interests. *See 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).

B. The Rule Is Contrary to Law

The Rule fails under *Chevron*, as DHS's unprecedented interpretation of "public charge" is inconsistent with the term's plain meaning and unlawful. *See Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

1. Congress has rejected the Rule's expansive definition of "public charge"

To accomplish its fundamental overhaul of the public charge doctrine, DHS necessarily disregards Congress's express and repeated rejection of the

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(2017) ("Immediately after the *Henderson* decision, immigration officials in Atlantic seaboard states campaigned to secure national immigration legislation as a substitute for state passenger laws."). The 1882 statute also relied on state officials to enforce its provisions, such as inspecting the condition of arriving passengers, excluding "any convict, lunatic, idiot, or . . . public charge," and collecting the head tax used to "provide for the support and relief of such immigrants" who "may fall into distress or need public aid." 22 Stat. 214, ch. 376 § 2.

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same legislative framework DHS now seeks to implement. ECF No. 155 at 33 (dismissing repeated Congressional refusals to adopt a similar legal framework as inconclusive and "lack[ing] persuasive significance"). But Congress's rejection of DHS's current interpretation is not, as DHS asserts, subject to "several equally tenable inferences," especially where the last Congress to reenact the public charge provision rejected the very interpretation DHS now claims is plain and unambiguous. *Id.*; *see also Competitive Enter. Inst. v. U.S. Dep't of Transp.*, 863 F.3d 911, 917 (D.C. Cir. 2017).

In 1996, Congress rejected proposals that would have expanded the public charge doctrine to encompass immigrants receiving non-cash benefits such as Medicaid or SNAP in the context of the Illegal Immigration Reform and Immigrant Responsibility Act, *see* ECF No. 34 at 29–30. At the time, members made explicit their reasons for rejecting such proposals. *See* S. Rep. No. 104-249, at 64 (1996) (Senator Leahy explaining the proposed framework went "too far in including a vast array of programs none of us think of as welfare"); *see also* ECF No. 34 at 39 (noting the same Congress also enacted the Welfare Reform Act expressly *authorizing* qualified immigrants to access the very benefits it had declined to include in an expanded public charge analysis). In 2013, Congress again refused to enact similar restrictions in amendments to the Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013). *See* ECF No. 34 at 30.

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DHS may not simply dismiss Congress's deliberate legislative judgments and then unilaterally enact the same rejected policies through rulemaking. *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"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01 (1983) ("In view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress" expressed a preference for the prevailing agency interpretation); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987).

The one case DHS cites is inapplicable. *See* ECF No. 155 at 33. In *Competitive Enterprise Institute*, the statutory term at issue was sufficiently ambiguous to leave open "the inference that the existing legislation already incorporated the offered change." 863 F.3d at 917. In contrast, here there is no ambiguity that Congress rejected the very policy DHS now proposes to make law.

DHS also fails to address the fact that when Congress repeatedly rejected these proposals, it did so against a backdrop of the agency's long-term interpretation at the time—namely, that supplemental, non-cash benefits were not considered in the public charge analysis. *Cardoza-Fonseca*, 480 U.S. at 442–43 ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language

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that it has earlier discarded in favor of other language."). In 2013, when Congress for a second time refused to adopt a framework similar to the Rule, it acted with knowledge of the prevailing 1999 Field Guidance, which expressly directed that temporary, non-cash benefits such as SNAP were supplemental in nature and would not render an immigrant likely to become a public charge. *Id.* at 442; *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.").

Equally unavailing is DHS's argument that Congress intended to delegate to the agency broad authority to interpret the term, whether implicitly or explicitly. ECF No. 155 at 31–32. The cases DHS cites directly contradict its argument, as they make clear the only deference appropriately afforded to the agency in this context is based on the agency's fact-finding function in individual cases. *See id.* at 32–33; *see also United States ex rel. Freeman v. Williams*, 175 F.274, 275 (S.D.N.Y. 1910) (deferring to the agency's factual findings regarding whether an individual was a public charge, but exercising the court's authority to "construe the act"); *Ex parte Mitchell*, 256 F. 229, 232 (N.D.N.Y. 1919) (deferring to agency's factual findings, but reversing based on court's construction of the public charge doctrine).

Finally, DHS's fundamental premise—that the Rule is intended to promote Congress's stated goal of "self-sufficiency"—is without merit. First, DHS has no

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basis for attempting to construe 8 U.S.C. § 1601, since Congress did not delegate it authority to interpret a statute designed to address U.S. social welfare policy. *See E.E.O.C. v Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991). Second, DHS has no expertise in welfare reform and whether public benefits programs lead to self-sufficiency, and the Rule contradicts its earlier position, so its interpretation is not entitled to even minimal deference. *Id.* Third, DHS may not use a statement of policy in a different statute to interpret the Immigration and Nationality Act (INA), because that "would virtually free [DHS] from its congressional tether." *Comcast Corp. v. FCC*, 300 F.3d 642, 655 (D.C. Cir. 2010); *see also id.* at 654 ("Policy statements are just that—statements of policy. They are not delegations of regulatory authority"). Lastly, even section 1601 clearly sets forth Congress's judgment that offering certain limited, non-cash, supplemental benefits to qualifying immigrants constitutes "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).

2. Precedent does not support the Rule's expansive definition of public charge

DHS misstates and omits widespread judicial authority showing the term "public charge" has been understood for over a century to refer to individuals who are primarily dependent on the government for survival. *See, e.g.*, *Gegiow v. Uhl*, 239 U.S. 3, 10 (1915); *Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917) (public charge category only "exclude[s] persons who were

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likely to become occupants of almshouses"); *Ex parte Mitchell*, 256 F. at 233 (interpreting "public charge" as "generically similar to 'paupers,' . . . 'professional beggars,' [and] . . . 'occupants of almshouses' "); *United States v. Williams*, 175 F. 274, 275 (S.D.N.Y. 1910) (L. Hand, J.) (noting that "the primary meaning of the words, ['likely to become a public charge']" was probably "likelihood of . . . becoming a pauper").[4]

DHS's counter-arguments are unavailing. For example, DHS claims Congress amended the public charge grounds for exclusion in 1917 in response to a Supreme Court decision holding the phrase should be read in parallel with its surrounding terms, such as "paupers and professional beggars." *See* ECF No. 155 at 21–22. According to DHS, this shows Congress's intent that "public charge" refers to more than just paupers. DHS overstates the import of the 1917 amendment, however, by failing to recognize that courts—including the Ninth Circuit—afterward declined to apply any modified definition to the term. *See Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922) ("Although in the act

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[4] DHS misleadingly uses dictionary definitions of "charge" as a financial term (*e.g.*, a "burden, incumbrance, or lien") to muddy the plain meaning of "public charge" as a legal category of persons. ECF No. 155 at 19. Even DHS's own definitions, however, reveal the original meaning of public charge, when referring to a person, was closely related to a "pauper . . . chargeable to the parish or town." *Id.* (quoting Stewart Rapalje et al., Dict. of Am. & English Law (1888)).

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of February 5, 1917 . . . the location of the words 'persons likely to become a public charge' is changed . . . this change of location of the words does not change the meaning that should be given them . . ."); *Ex parte Mitchell*, 256 F. at 232 (explaining the court is "unable to see that this change of location of these words in the act changes the meaning that is to be given them").

Further, the cases on which DHS relies do not support the agency's unprecedented expansion of the doctrine. *See* ECF No. 155 at 22 (citing *Ex parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923) (affirming public charge finding where immigrant was imprisoned and thus "committed to the custody of a department of the government")); *In re Feinkopf*, 47 F. 447, 447–48 (E.D.N.Y. 1891) (holding that immigration inspector wrongly determined person a public charge without a scintilla of evidence); *United States v. Lipkis*, 56 F. 427, 428 (S.D.N.Y. 1893) (public charge finding due to 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).

Instead, the widespread understanding among courts that the public charge doctrine requires primary dependence on the government for subsistence has continued from colonial times through the present day. ECF No. 34 at 24–26 (discussing colonial and early state cases). Indeed, when amendments were introduced in 1996 to expand the doctrine in the fashion DHS now seeks to enact, it was with the express intent of overturning the settled understanding in case law.

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Yet these amendments were rejected. *Id.* at 30. Thus, just as with evidence of Congressional intent, judicial decisions interpreting the term undermine DHS's attempt to enact its unlawful policy changes through rulemaking.

3. DHS's definition is directly at odds with agency precedent

In addition to contravening Congressional and judicial precedent, the Rule is irreconcilable with the agency's own pronouncements and interpretations of the public charge doctrine, which provide context for determining the meaning of the term. ECF No. 34 at 30–34. Specifically, DHS falsely characterizes its 1999 Field Guidance as "novel and anomalous." *See* ECF No. 155 at 25–27. It is incorrect that the 1999 Field Guidance marked the "introduction" of the common understanding of public charge as involving primary dependence on public assistance, as evidenced by the long line of precedent demonstrating the term's established meaning. *See* cases cited *supra* at 11–12.

Tellingly, the agency's predecessor regulations are consistent with the 1999 Field Guidance. After Congress passed the Immigration Control and Reform Act of 1986, INS promulgated regulations making clear that the public charge analysis would not take into account in-kind assistance. Adjustment of Status for Certain Aliens, 52 Fed. Reg. 16,205 (May 1, 1987) (public charge analysis would not extend to the receipt of "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,

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emergency treatment . . .")). When INS issued the 1999 Field Guidance, it confirmed what had already been made plain—that it had "never been [INS] policy that *any* receipt of services or benefits paid for in whole or in part from public funds renders an alien a public charge, or indicates that the alien is likely to become a public charge." 64 Fed. Reg. 28,689, 28,692 (Mar. 26, 1999) (explaining that "non-cash benefits . . . are by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or a family" and are "not evidence of poverty or dependence").

The sources DHS identifies do not support its position that the 1999 Field Guidance introduced a novel standard. It mischaracterizes a brief excerpt from *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421–22 (A.G. 1962). *See id.* ("the [INA] requires more than a showing of a possibility that the alien will require public support"); *see generally* ECF No. 35-3 at 59 (*Make the Road New York* Compl., Bays Decl., Ex. DDD) ¶ 70. To dispute the State Department's own data showing negligible exclusions based on public charge (*see* ECF No. 34 at 5 n.5), DHS also cites a report by a panel appointed by President Herbert Hoover in 1929, the main purpose of which was to address organized crime and resolve the debate over continuing Prohibition. *See* https://law.jrank.org/pages/11309/Wickersham-Commission.html (last visited Sept. 26, 2019); ECF No. 155 at 27. DHS's own data, however, show that between 1892 and 1980 less than one percent of immigrants were deemed inadmissible as likely to become public

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charges. *See* Dep't of Homeland Security, Table 1. Persons Obtaining Lawful Permanent Resident Status: Fiscal Years 1820 to 2016, (Dec. 18, 2017), https://www.dhs.gov/immigration-statistics/yearbook/2016/table1 (last visited Sept. 27, 2019); Immigration and Naturalization Service, 2001 Statistical Yearbook of the Immigration and Naturalization Service 258 (2003), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2001.pdf (last visited Sept. 27, 2019); ECF No. 35-3 at 57, ¶ 65.

As evidenced by over a century of public charge enforcement and legislation, what is novel and anomalous is *not* the 1999 Field Guidance but the Rule itself. *Compare* 64 Fed. Reg. at 28,692 (noting that as a result of the 1999 Field Guidance, INS did "not expect to substantially change the number of aliens who will be found deportable or inadmissible as public charges") *with* ECF No. 35-1 at 489 of 661 (Ex. T) (reporting results of study showing that a staggering "40 percent of U.S.-born individuals . . . [had] participated in one of the five [proposed public charge benefits] programs over the 1998-2014 period") *and* ECF No. 35-1 at 366 of 661 (Ex. S) ("When recent green card recipients are compared to the new criteria, over two-thirds would have at least one negative factor and more than 40% had two or more.").

4. The Rule violates Section 504 of the Rehabilitation Act by discriminating against individuals with disabilities

The Rule is also unlawful because it violates Section 504's prohibition against disability-based discrimination. *See* 29 U.S.C. § 705. In contravention of

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Section 504, DHS concedes that (1) an individual's disability will be expressly considered in the public charge analysis, and (2) such consideration might have a "potentially outsized impact" on individuals with disabilities. 84 Fed. Reg. at 41,368. DHS argues these disparate and discriminatory effects are justified, however, by Congress's direction in the INA that the relevant public charge factors include an individual's "health." ECF No. 155 at 50. Without offering any citation to governing authority, DHS theorizes that by including "health" as a factor, the statute "certainly includes an alien's disability." *Id.* Thus, according to DHS, the INA takes precedence over Section 504 because "[a] specific, later statutory command, such as that contained in the INA, supersedes section 504's general proscription to the extent the two are in conflict." *Id.* at 61.

The reality is actually the inverse. As between the two statutes, Section 504's narrow prohibition against disability-based discrimination is far more specific and targeted than the INA's generalized direction to consider "health" as a factor in the public charge analysis. For example, Section 504 contains express definitions for what constitutes a disability, *see* 29 U.S.C. § 705(20)(A); what does *not* constitute a disability, *see* 29 U.S.C. § 705(20)(D), (F)(i-iii); and what constitutes a "significant disability," *see* 29 U.S.C. § 705(21)(A)(i-iii). By contrast, even DHS concedes that in the context of the INA, Congress "le[ft] the meaning of 'health' undefined." *See* ECF No. 155 at 36 n.11; *see also id.* at 36.

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For the proposition that DHS should be able to consider disabilities in making public charge determinations, it relies on a case addressing a rule that was upheld in large part because it did *not* consider disabilities. *See* ECF No. 155 at 51–52. In *Sandison v. Michigan High School Athletic Association*, the Sixth Circuit overturned the preliminary injunction of a statute barring 19-year-olds from playing high school sports. 64 F.3d 1026, 1030 (6th Cir. 1995) (reasoning that although the statute had the effect of disadvantaging students with learning disabilities, it did not violate Section 504, in large part because it focused solely on the students' ages and did not consider their disabilities in the analysis).

Here, in contrast to *Sandison*, DHS not only seeks to consider an individual's disability in the public charge analysis, but even intends to double- and triple-count factors frequently related to and overlapping with disabilities, such as an individual's use of Medicaid or lack of private insurance. *See* ECF No. 35-1 at 222 of 661 (Ex. L) (Comment by ACLU) ("In our nation's complex system of disability and health care, receipt of Medicaid is inseparable from the status of being disabled."). Thus, despite DHS's head-in-the-sand argument that an individual's disability will be just one factor "among many," *see* ECF No. 155 at 51, the Rule ensures individuals with disabilities will suffer a cascade of negative and heavily-weighted negative factors, all because of their disability. The Rule discriminates against persons with disabilities and violates the Rehabilitation Act.

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C. The Rule Is Arbitrary and Capricious

DHS's response makes clear it lacks any reasonable justification for the dramatic harms the Rule will inflict on vulnerable populations, as well as the unfettered discretion its arbitrary and unreliable factors will afford to immigration officials enforcing the Rule. An agency's action will be deemed arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co. (State Farm)*, 463 U.S. 29, 43 (1983). Here, DHS has failed to address significant parts of the problem and has not offered reasoned explanations to justify the choices it made based on the facts it found. *Id.* Further, where an agency departs from prior policy that has engendered serious reliance interests, it must provide an even more "detailed justification" for its actions. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). DHS's response falls far short of the mark.

1. DHS has failed to justify the Rule's potentially devastating effect on public health

Despite being presented with overwhelming evidence the Rule would lead to severe public health crises, including reduced vaccinations and the increased spread of communicable diseases such as tuberculosis, DHS largely shrugged off these concerns and proceeded to finalize the Rule. For example, instead of attempting to substantively address the potential harms to public health, DHS

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contends it cannot "measure the immeasurable" or "respond to every single example cited in every single comment." *See* ECF No. 155 at 39–40. The issue is not, however, the lack of precise measurement, but that, given the dire public health risks, DHS is required to demonstrate a reasonable attempt to grasp the magnitude of the problem along with a cogent justification of the harms. *See State Farm*, 463 U.S. at 43; *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) (the "mere fact" that a rule's effect is "*uncertain* is no justification for *disregarding* the effect entirely" (emphasis in original)). DHS essentially concedes it has done neither, instead falling back on its token refrain that the goal of self-sufficiency justifies whatever unknown harms the Rule might inflict. *See McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (explaining that courts will not defer to [an] agency's conclusory or unsupported suppositions").

DHS also responds that it exempted children and pregnant women's receipt of Medicaid benefits from the analysis, which it contends "should eliminate much of the concern that children will forgo vaccinations as a result of the Rule." ECF No. 155 at 39. This response, however, fails to address many of the public health crises warned about in the comments, *see* ECF No. 34 at 42–43, and it does nothing to remedy the concern that *adults* who do not obtain vaccinations may give rise to an outbreak. Without adequate supporting information, evidence, or context, DHS speculates there might be sufficient state

or local government providers that will administer affordable vaccinations absent Medicaid coverage. ECF No. 155 at 39–40. But given the overwhelming evidence of public health consequences that are likely to result from implementation of the Rule—and are in fact *already* resulting from it, *see, e.g.*, ECF No. 35-1 at 97–107 of 661 (Ex. F) (describing disenrollment resulting from chilling effect of the proposed rule); ECF No. 60 (Batayola Decl.) at 9–10 (describing patients and clients who have already requested disenrollment from benefits programs)—DHS's lack of any reasonable effort to consider the magnitude of the problem is facially deficient.

2. DHS has failed to justify severe and irreparable harm to children

DHS also has failed to offer any meaningful justification in response to overwhelming evidence showing the Rule will have devastating effects for children who benefit from food and housing assistance. As commenters explained, the Rule will lead to increased childhood hunger, malnutrition, and homelessness, which are associated with a litany of related effects and lifelong traumas, including depression, poor performance in school, mental illness, substance abuse disorder, and chronic health conditions such as asthma. *See, e.g.*, ECF No. 35-1 at 607–12 of 661 (Ex. V) (Comment by Childhood Asthma Leadership Coalition).

DHS argues that any potential harms the Rule might inflict on such children are justified by the need to promote the purported goal of "self-

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sufficiency." ECF No. 155 at 41–42. There is no logical basis, however, for penalizing a young child for her receipt of food or housing assistance in the hopes that doing so will prompt her to someday become "self-sufficient." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017) (vacating agency action that failed "to consider or to adequately analyze [the] consequences" of agency decision).

DHS similarly fails to offer a coherent justification for its decision to exempt children's Medicaid benefits from the public charge analysis but count their receipt of SNAP or housing assistance against them. Instead, DHS largely relies on irrelevant facts that have nothing to do with the problem. ECF No. 155 at 42–43 (arguing that the distinction is justified in part because unlike Medicaid, SNAP contains only a limited waiver of the waiting period). DHS's reasoning reflects the arbitrariness of a Rule that would promote so absurd a goal as childhood "self-sufficiency" at so great a cost.

3. DHS has failed to justify harms to individuals with disabilities

In response to evidence that the Rule will be devastating for individuals living with disabilities, DHS contends that "[o]nly if an alien, disabled or not, is likely to use one or more covered federal benefits for the specific period of time will that individual be found inadmissible as a public charge." ECF No. 155 at 50–52. In other words, presented with overwhelming evidence that individuals with disabilities rely on Medicaid for services that are not covered by private

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insurance and which allow them to work and be self-sufficient, DHS crafted a Rule aimed at "self-sufficiency" but accomplished the inverse. *See State Farm*, 463 U.S. at 43. The most the agency does is acknowledge the Rule might have a "potentially outsized impact" on such individuals. 84 Fed. Reg. at 41,368. For the reasons set forth above, this is deficient. *See supra* at 17–19 (arguing the Rule violates Section 504 of the Rehabilitation Act).

4. DHS relies on vague, arbitrary factors that prevent meaningful or even-handed enforcement of the Rule

DHS attempts to justify its consideration of factors such as English proficiency and credit scores even despite evidence showing the factors are vague, unreliable, and have no reasonable relation to the Rule's purported goal. *Compare, e.g.*, ECF No. 35-1 at 655–57 of 661 (Ex. Y) (Comment from Consumer Reports) ("Credit scores are designed to measure the likelihood that a borrower will become 90 days late on a credit obligation [and] do not contain information about an individual's earnings or other income.") *and id.* at 659–61 of 661 (Ex. Z) (Comment from Credit Builders Alliance) (noting that credit scores are "a poor indicator of one's ability to provide for themselves and their family" and that "25 percent of credit reports have 'potentially material errors' that could affect a consumer's score") *with* ECF No. 155 at 49–50 (arguing that, "notwithstanding occasional flaws, credit reports are probative of an individual's financial condition, as evidenced by their widespread use throughout the American economy"). Similarly, the Rule's use of vague and undefined

benchmarks such as "English proficiency" demonstrates the Rule is arbitrary and capricious. *See Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229 (9th Cir. 2001) (holding rule was arbitrary and capricious because the question of "whether there has been compliance with [its] vague directive [was] within the unfettered discretion of the [agency], leaving no method by which the applicant . . . can gauge their performance").

In response, DHS argues that factors such as "English proficiency" are not vague, as DHS has "specif[ied] this and other factors to be considered," "explain[ed] which factors are to be afforded greater weight," and "specifically explained how it will implement" the Rule. *See* ECF No. 155 at 48. But this argument is conclusory and fails to address the issue. Moreover, DHS ignored that by incorporating such vague and undefined factors into the public charge analysis, the Rule gives immigration officers unfettered discretion when conducting public charge assessments, making each applicant's assessment a "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).

D. The Plaintiff States Will Suffer Irreparable Harm Absent a Stay or Injunction

Through 51 declarations from state officials who administer Medicaid and other public health programs, food and cash assistance programs, and housing programs, along with non-profit organizations on the front lines helping immigrants to thrive, the Plaintiff States have made a powerful showing of the

irreparable injury that the Rule will cause. These harms are certain to occur, and, in fact are already occurring, even though the Rule has not yet gone into effect. *See* ECF No. 60 (Batayola Decl.) at 9–10 (patients and clients have already requested disenrollment from programs such as the Special Supplemental Nutrition Program for Women, Infants, and Children, even where benefits are not actually enumerated in Rule); ECF No. 152 (Br. of Amici Curiae Am. Academy of Pediatrics) at 13 (explaining significant 2018 disenrollment rates upon announcement of the proposed rule, and stating this demonstrated "chilling effect is real, measurable, and exacerbated by the final Regulation.").

Immigrants have already withdrawn from federal and state programs, thereby endangering their health and wellbeing and frustrating the missions of the state programs meant to ensure healthy communities. *See, e.g.*, ECF No. 35-1 at 97–107 of 661 (Ex. F) (describing chilling effect of the proposed rule); *see also* 1999 Field Guidance, 64 Fed. Reg. at 28,692 (explaining INS's conclusion that "reluctance to access benefits" on the part of "eligible aliens and their families, including [their] U.S. citizen children," "has an adverse impact not just on the potential recipients, but on public health and the general welfare"). This *predictable* reaction in turn imposes *predictable* and specific costs on the Plaintiff States. *See supra* at 2–5.

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The greatest defect in DHS's argument is its confusion of *whether* these harms will occur with the *extent* of the harm that will occur.[5] But there can be no dispute that harm will occur. Indeed, DHS concedes disenrollment will occur, 84 Fed. Reg. at 41,463, medical care will shift to the emergency room, 84 Fed. Reg. at 41,384, and the prevalence of disease will increase, 84 Fed. Reg. at 41,384 and 51,270. It is well-established that if the Plaintiff States are able to prove that these harms are fairly traceable to the defendants, as they have amply done, the magnitude of the harm is irrelevant to the Court's analysis. *See Simula, Inc.*, 175 F.3d at 725 (preliminary injunction may be granted "irrespective of the magnitude of the injury").

Furthermore, the declarations submitted by the States provide more than the requisite amount of certainty, imminence, and irreparability regarding the Rule's resulting harms. For example, the public health injuries to residents are obvious and are described through numerous declarations. *See, e.g.*, ECF No. 71 (Oliver Decl.) at 11 (". . . People will die."); ECF No. 37 (Linke Decl.) at 11 ("Families will not seek preventative care services. . ."); ECF No. 38 (Sharfstein Decl.) at 5

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[5] It is notable that at the same time DHS criticizes the Plaintiff States for not providing exact measurements of the precise harms the Rule will inflict, it excuses its own *de minimus* response to the over 266,000 comments largely in opposition to the Rule, asserting it could not "obtain the unobtainable" or "measure the immeasurable." ECF No. 155 at 50.

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("[F]amilies will not sign up for the Medicaid program, even for their children who are entitled to care. . . [and] the result will be unnecessary illness").[6]

The Plaintiff States have made the same overwhelming showing of harm to their missions, *see, e.g.*, ECF No. 37 (Linke Decl.) at 14 (The Rule would "unwind[] all the progress that has been achieved to ensure that all Washingtonians have access to affordable care."); ECF No. 43 (MacEwan Decl.) at 7 (describing how the reduction of "lawfully present enrollees will result in a sicker risk pool and increase premium costs for all remaining residents enrolled in commercial insurance coverage through Washington Healthplanfinder"), and harm to their fiscs, *see, e.g.*, ECF No. 66 (Peterson Decl.) at 19 (explaining that changes to food and cash assistance programs alone would result in a reduction of up to $97.5 million annually in total economic output in Washington).

While DHS portrays the issue as one of speculative harm to individuals, the Court should instead find that immigrants, when confronted with the threat of

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[6] The submissions by amici curiae likewise paint a vivid picture of the harms to vulnerable groups. *See, e.g.*, ECF No. 110 (Br. of Amici Curiae ACLU) (harms to disabled individuals); ECF No. 111 (Br. of Amici Curiae Nonprofit Anti-Domestic Violence & Sexual Assault Organizations) (harms to domestic violence victims); ECF Nos. 149 (Amici Curiae Br. of AHA), 152 (Br. of Amici Curiae Am. Academy of Pediatrics) (harms to children and pregnant women); ECF No. 150 (Br. of Amici Curiae Justice in Aging) (harms to elderly).

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deportation, will react predictably in forgoing benefits to which they are otherwise legally entitled. ECF No. 153 (Br. of Amici Curiae Fiscal Policy Inst.) at 10–11 (projecting economic losses of up to $24 billion for the United States as a whole). Accordingly, the Plaintiff States have met their burden of establishing irreparable injury.

In a last ditch effort to show the remaining equitable interests weigh in its favor, DHS asserts "there can be no doubt that Defendants have a substantial interest in administering the national immigration system, a *solely federal* prerogative." ECF No. 155 at 57. But a stay would not prevent DHS from "administering the national immigration system"—it would only require DHS to maintain the status quo. DHS's argument also presumes its rulemaking was lawful. If DHS were correct that such a vague assertion were sufficient to balance the equities in its favor, the analysis would be rendered meaningless, as the government could always allege an overriding interest in enforcing its own decisions. Here, the balance of equities weighs heavily in the Plaintiff States' favor. *See* ECF No. 34 at 55–56; *see also E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778–79 (9th Cir. 2018) (affirming grant of TRO in immigration case and explaining the stay did not harm the government but instead "temporarily restored the law to what it had been for many years prior").

E. Nationwide Relief Is Necessary to Afford Complete Relief

Nationwide relief, whether in the form of a stay pursuant to APA § 705 or

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a preliminary injunction, is appropriate in this case. "The scope of an injunction is 'dependent as much on the equities of a given case as the substance of the legal issues it presents,' and courts must tailor the scope 'to meet the exigencies of the particular case.'" *Azar*, 911 F.3d at 584 (quoting *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017)). Here, a stay or injunction applied to only the fourteen Plaintiff States would not afford complete relief, and, to the contrary, would compound the harms on the state fiscs.

The Court should not credit DHS's about-face on the necessity of "uniformity in immigration policy." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018). DHS's assertion that any relief should be limited to the Plaintiff States is undermined by its consistent previous arguments in other immigration cases advocating a uniform nationwide immigration system. *See, e.g.*, Br. for Appellant at 30, *United States of America v. State of California*, 2018 WL 4641711 (9th Cir., filed Sept. 18, 2018) (No. 18-16196) (arguing for release of information regarding federal immigration detainees under a uniform federal scheme rather than the varying laws of fifty states); Br. for the United States at 24, *Arizona v. United States of America*, 2012 WL 939048 (U.S., filed Mar. 19, 2012) ("scheme that depends on national uniformity cannot coexist with a patchwork of different state regimes").

Furthermore, beyond the need to avoid a disjointed and unworkable nationwide immigration system, nationwide relief is necessary to afford the

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Plaintiff States effective relief. *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987). Here, the harm alleged by the Plaintiff States is not only financial. *See Azar*, 911 F.3d at 584 (holding that a nationwide injunction was not proper where a localized injunction would sufficiently remedy the alleged financial harm). The disenrollment and resulting harms to health caused by the Rule's chilling effect can only be sufficiently addressed with a nationwide remedy.

This is true, first, because any immigrant residing in one of the Plaintiff States who may in the future wish to move to another state not among them would be deterred from accessing public benefits if relief were limited in geographic scope. Second, a geographically limited injunction could spur immigrants now living elsewhere to move to one of the Plaintiff States, compounding their economic injuries. Third, a public health crisis or outbreak resulting from the Rule's implementation in another state may quickly spread to the Plaintiff States. Fourth, and finally, 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 would be subject to DHS's new Rule at a point of entry. Therefore, the scope of the injunction must be universal to afford the Plaintiff States the meaningful and effective relief to which they are entitled.

II. CONCLUSION

For the foregoing reasons, the Plaintiff States' motion for § 705 relief pending judicial review or for preliminary injunction should be granted.

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RESPECTFULLY SUBMITTED this 27th day of September, 2019.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 27th day of September, 2019, at Seattle, Washington.

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