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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

STATE OF WASHINGTON, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants

No. 4:19-cv-5210-RMP

DEFENDANTS' MOTION FOR STAY OF INJUNCTION PENDING APPEAL AND MEMORANDUM OF LAW

11/25/2019
Without Oral Argument

U.S. DEPARTMENT OF JUSTICE
1100 L St. NW, Washington, DC, 20003
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I. INTRODUCTION

The federal government respectfully moves to stay pending appeal the Court's order granting a nationwide preliminary injunction, and issuing a section 705 stay. At the least, the Court should stay the injunction insofar as it applies beyond redressing the relevant injuries to Plaintiffs in this case. All the factors justifying a stay are met here. The government is likely to succeed on appeal both because the Plaintiffs lack standing and do not fall within the zone of interests of the relevant statute, and because the Department of Homeland Security's rule—Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) ("Rule")—is fully consistent with the Immigration and Nationality Act ("INA") and the Administrative Procedure Act ("APA"). The government will also suffer irreparable harm in the absence of a stay. As things currently stand, the Executive Branch will be forced to grant lawful permanent resident ("LPR") status to aliens likely to become public charges under the Rule, and depend on public resources designated as public benefits for purposes of a public charge inadmissibility determination under the Rule. And it may be compelled to do so even if the aliens have no link to the Plaintiff States. This state of affairs irreparably harms the government (and hence the public), who, as Congress has confirmed, has a "compelling . . . interest" in ensuring that "aliens be self-reliant."[1] 8 U.S.C. § 1601.

[1] For the reasons identified in this brief, Defendants also request that the Court stay its section 705 administrative stay of the Rule. *See Washington v. United States Dep't of Homeland Sec.*, No. 4:19-CV-5210-RMP, 2019 WL 5100717, at *11 (E.D. Wash. Oct. 11, 2019) ("The Court applies a closely similar standard in deciding whether to stay the

Such an ongoing and significant intrusion into the Executive Branch's authority over immigration is particularly unwarranted here, where the only alleged injuries Plaintiffs would face from a stay are speculative downstream effects from the decisions of nonparties in response to the challenged Rule during the pendency of the litigation. Even if these purported injuries could give Plaintiffs standing (they cannot), they certainly would not justify inflicting such substantial harm on the Executive Branch, especially as the government is likely to prevail on appeal. This Court should therefore stay its injunction of the Rule pending the resolution of the government's appeal. At a minimum, it should issue a stay limiting the effect of its injunction to Plaintiff States. Defendants conferred with Plaintiffs, who oppose this motion.

II. ARGUMENT

In considering whether to grant a stay pending appeal, the Court must consider four factors: (1) the applicant's likelihood of success on the merits; (2) whether the applicant will suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). All four factors favor a stay here.

A. The Government Is Likely to Succeed on the Merits

The government respectfully submits that notwithstanding the Court's decision, it is likely to succeed on the merits of its appeal. As Defendants explained in their Opposition to Plaintiffs' Motion for a Preliminary Injunction and at oral argument,

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effect of a rule under section 705 as it does in deciding whether to issue a preliminary injunction").

Plaintiffs are neither the appropriate parties to challenge the Rule nor have presented tenable objections to it. *See generally* ECF No. 155 ("PI Opp."). The Court's conclusions to the contrary are unlikely to withstand appellate review.

1. At the outset, the Court concluded that Plaintiffs have suffered a cognizable injury—and have ripe claims—on the theory that the Rule will have various downstream effects on their fiscs based on the independent decisions of nonparty aliens affected by the Rule. Op. 23-26. But the Supreme Court has repeatedly "decline[d] to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors," and that reluctance should apply with even more force where, as here, such a theory "relies on a highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 414 (2013). And even if Plaintiffs were able to establish that they would incur these speculative costs, they have not and cannot show that these costs would outweigh the ones they would have incurred based on aliens who would have resided within their jurisdictions, and consumed their resources, but for the Rule. *Cf. Henderson v. Stalder*, 287 F.3d 374, 379-80 (5th Cir. 2002) (use of plaintiffs' tax dollars to produce a challenged license plate "is insufficient to confer standing" in part because motorists who choose the license plate pay additional fees that "offset the administrative costs" of the plates). Nor can Plaintiffs rely on "administrative costs as a result of the Public Charge Rule" – such as "training staff, responding to client inquiries related to the Final Rule, and modifying existing communications and forms." Op. 23. Plaintiffs have identified no authority for the remarkable proposition that a state may challenge any federal policy so long as it would require them to make administrative updates. *See Crane v. Johnson*, 783 F.3d 244, 253 (5th Cir. 2015) (rejecting state

officials' claim that they have standing to challenge DACA on the theory that policy would require that them to "alter their current processes to ensure" compliance and agreeing that "a government employee responsible for carrying out an agency policy does not have standing to challenge that policy merely because of work responsibilities related to that policy"). And Plaintiffs cannot rely on alleged harms to "the health and wellbeing of their residents" to establish standing. Op. 26. It is well-settled that States cannot raise a derivative claim on behalf of their residents against the federal government for its administration of the federal laws. *See, e.g.*, *Massachusetts v. Mellon*, 262 U.S. 447, 485-486 (1923) ("[I]t is no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government."); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.16 (1982).

In any event, even if Plaintiffs had Article III standing, they would fall outside the zone of interests governed by 8 U.S.C. § 1182(a)(4). *See* PI Opp. 17-18. It is aliens improperly determined inadmissible, not States, who "fall within the zone of interests protected" by any limitations implicit in § 1182(a)(4)(A) and 1183, because they are the "reasonable—indeed, predictable—challengers" to DHS's inadmissibility decisions. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 227 (2012). And to the extent the public charge provision anticipated that it would implicate States' interests, those interests are the inverse of those Plaintiffs seek to protect here. The public charge rule is constructed to protect government resources by excluding aliens that are likely to rely on them. *See* Grounds for Exclusion of Aliens under the Immigration and Nationality Act, House Committee on the Judiciary, 100th Congress, Doc. No. 95 at

pg. 124-25 (Sept. 1988) (public charge ground of inadmissibility is intended to address issue of aliens "receiv[ing] public assistance").

2. On the merits, this Court held that the Rule is contrary to Congress's intent regarding the public charge statute as "expressed . . . in a variety of forms." Op. 35. In particular, the Court found "extensive support for the conclusion that Congress unambiguously rejected key components of the Public Charge Rule" in two failed legislative proposals in 1996 and 2013. Op. 44. But "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute," because "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170 (2001) (citation omitted). For that reason, "unsuccessful attempts at legislation are not the best of guides to legislative intent" as a general matter, and "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 332 n.24 (1981) (citations omitted). In any event, the Court erred in finding that "Congress rejected the provisions that the Public Charge Rule now incorporates." Op. 44. The proposal in the 1996 bill was materially different from the Rule, sweeping in any alien that had used twelve months of federal, state, or local benefits—consecutive or not—within a five year period. *See Welfare Reform*, Hearings before the House Committee on Ways and Means, Subcommittee on Human Resources, Serial 104-62, (May 22-23, 1996). Likewise, Congress declined to adopt the 2013 proposal in light of "the strict benefit restrictions and requirements already included" in "existing law." S. Rep. 113-40, at 42. Regardless, the 2013 proposal addressed a different issue. It sought to amend the proposed Border

Security, Economic Opportunity, and Immigration Modernization Act, a bill to create a path to citizenship for certain noncitizens who could show they were not "likely to become a public charge." S. 744, 113th Cong. § 2101 (2013); S. Rep. No. 113-40, at 42 (2013).

The Court also inferred Congress's intent from a 1996 law that made "qualified aliens" eligible to receive some federal benefits five years after arriving in the United States. Op. 37. But the Rule does not prohibit anyone from receiving benefits to which they are entitled, but rather appropriately takes such receipt into consideration among many other factors in assessing an individual's likelihood of becoming a public charge. *See* Rule at 41365-66. And Congress implicitly recognized that past receipt of public benefits can be considered in determining the likelihood of someone becoming a public charge when it prohibited consideration of past benefits for certain "battered aliens." 8 U.S.C. § 1182(s). Congress, therefore, understood and accepted DHS's consideration of past receipt of benefits in other circumstances.

The Court also found that "the Federal Defendants have not cited any statute, legislative history, or other resource that supports the interpretation that Congress has delegated to DHS the authority to expand the definition of who is inadmissible as a public charge or to define what benefits undermine, rather than promote, the stated goal of achieving self-sufficiency." Op. 43-44. But Defendants did explain that Congress implicitly delegates interpretive authority to the Executive Branch when it omits definitions of key statutory terms, thereby "commit[ting] their definition in the first instance to" the agency, *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981), to be exercised within the reasonable limits of the plain meaning of the statutory term. *See Chevron*,

U.S.A., Inc. v. NRDC, 467 U.S. 837, 844 (1984). And Defendants cited legislative history and court decisions recognizing the delegation of authority to interpret the meaning of "public charge." PI Opp. at 31-34. Indeed, the 1999 Interim Field Guidance on which the Court relies, Op. 39-41, 44, was a prior exercise of this delegated interpretive authority.

3. Next, the Court incorrectly held that the Rule should be enjoined on the ground that it may violate the Rehabilitation Act on an as-applied basis. Op. 46-47. As another district court concluded, there are not "even serious questions" that the Rule complies with the Rehabilitation Act. *City & Cty. of S.F. v. United States Citizenship & Immigration Servs.*, No. 19-cv-04717-PJH, 2019 U.S. Dist. LEXIS 177379, at *112 (N.D. Cal. Oct. 11, 2019). For one thing, "the Rehabilitation Act requires that a plaintiff show that a disabled person was denied services 'solely' by reason of her disability," and "[t]he Rule does not deny any alien admission into the United States, or adjustment of status, 'solely by reason of' disability." *Id.* at *111-12. For another, "Congress, not the Rule, requires DHS to take this factor into account," as "the INA explicitly lists 'health' as a factor that an officer 'shall consider' in making a public charge determination," and "'[h]ealth' includes an alien's disability and whatever impact the disability may have on the alien's expenses and ability to work." *Id.* at 112 (ellipsis and citation omitted). In all events, this Court's concern that the Rule *may* result in *as-applied* violations of the Rehabilitation Act is no basis for *facially* invalidating the Rule.

4. The Court further erred in holding that the Rule is arbitrary and capricious based on the Court's view that "the status quo has engendered 'serious reliance interests' and DHS will be held to a higher standard of providing 'a more detailed justification.'"

Op. 50. But this case does not involve "serious reliance interests" where the Rule is not retroactive. Rule at 41320-21. Additionally, agencies are not subject to a demanding standard when reliance interests are involved. In *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009), the Supreme Court noted only that agencies must provide certain, additional detail; specifically, it must demonstrate that it took "reliance interests . . . into account." *Id.* at 515. DHS met this standard, and otherwise satisfied the *Fox* requirements for permissibly altering a prior agency rule. *See* 83 Fed. Reg. 51114, 51116, 51123, 51161-63; Rule at 41295, 41297, 41305, 41308-09, 41320-21; 41333; 41347. This is true here, since the interpretation to which Plaintiffs seek to revert is nonbinding guidance that could not possibly foreclose DHS from adopting a different reasonable interpretation through notice-and-comment rulemaking. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

The Court likewise erred in finding that "the agency's responses to" the over 266,000 public comments "appear conclusory." Op. 50. On the contrary, DHS's extremely thorough responses to public comments, filling hundreds of pages in the Rule, easily met the "not particularly demanding" standard governing an agency's obligation to respond to comments on a proposed rulemaking. *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441–42 (D.C. Cir. 2012); *see also Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) ("[T]he agency's response to public comments need only 'enable [courts] to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'").

The Court found that the Rule's stated justification—"promoting self-sufficiency of immigrants in the United States"—is inconsistent with the Rule's treatment of

Medicaid enrollment as a negative factor since "disabled people" use "Medicaid to become self-sufficient." Op. 50. But this amounts to a mere disagreement with the agency's policy judgment. DHS need not "demonstrate to a court's satisfaction that the reasons for [its] new policy are *better* than the reasons or the old one," it must demonstrate that the Rule is "permissible under the [INA], that there are good reasons for it, and that the agency believes it to be better." *Fox*, 556 U.S. at 515.

B. The Remaining Factors Favor a Stay

Both the government and the public will be irreparably harmed if the nationwide injunction is not stayed. The federal government sustains irreparable injury whenever it "is enjoined by a court from effectuating statutes enacted by representatives of its people," *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers). That injury is particularly acute here because the Court's injunction will require DHS, on a nationwide basis, to grant lawful permanent resident status to aliens who are likely at any time to become public charges under the Rule, and who depend on public resources designated as public benefits for purposes of a public charge inadmissibility determination under the Rule to meet their needs. *See* 8 U.S.C. § 1601 ("principle of United States immigration law" of "[s]elf-sufficiency"); *Id.* § 1601(2)(A) ("[T]he immigration policy of the United States [is] that aliens within the Nation's borders not depend on public resources to meet their needs."). DHS estimates that roughly 382,264 people apply for an adjustment of status and are subject to a public charge inquiry each year. *See* Declaration of Daniel Renaud, Exh. 1, ¶ 4; Rule at 41497, 41464. If the Rule remains enjoined, some subset of this population will receive an adjustment of status that otherwise would not under the Rule's more thorough review process. Renaud Decl. ¶ 4.

DHS currently has no practical means of revisiting these determinations made under the prior guidance, and subjecting them to the Rule, if the injunction against the Rule is ultimately vacated. *Id.* And because those persons, by definition, are likely to receive government benefits in the future, the injunctions will inevitably result in the additional expenditure of government resources, precisely the harm that Congress and the rule seek to prevent. Moreover, every day the effective date of the Rule remains stayed, the Rule's future effectiveness is reduced: any public benefits received by aliens submitting status adjustment applications before the Rule takes effect will be counted only if they would have been covered by the 1999 Interim Field Guidance, Rule 41321, which means that even if the government ultimately prevails, the Rule's future operation will be irreparably undermined.

The injunction also imposes significant administrative burdens on Defendants and needless uncertainty on the aliens Plaintiffs claim to support. For instance, USCIS has devoted significant time to preparing implementation of the Rule, including preparing training for the relevant officers at its National Benefit Center as well as across 88 Field Offices. *Id.* ¶ 5. The rollout of such widespread training cannot happen overnight, and USCIS will be forced to start much of the process over again if and when the injunction is vacated. *Id.* USCIS also hired contractors to enter the significant amount of data required on its new forms associated with the Rule. *Id.* ¶ 6. If the injunction is not stayed in the near future, contractors are likely to seek other employment, which will only further impede USCIS's ability to implement the Rule if and when the injunction is vacated. *Id.*

On the other side of the ledger, Plaintiffs will not suffer any irreparable injury. Their alleged harms stemming from downstream effects of the Rule are insufficient to

create standing, *see supra* Section I.A, much less satisfy the more exacting requirements to establish irreparable injury, *see* PI Opp. 52-56. And even if the Court accepts that the Rule will *eventually* cause Plaintiffs irreparable injury, they have provided no evidence that the Rule will irreparably drain their fiscs *during the pendency of an appeal*. *Id*. at 55-56. And even then, if it were clear that a stay would somehow irreparably harm these States, any such injuries would be substantially outweighed by the harms to the government fisc (and the public) associated with the threat of mandating the ongoing admission of aliens likely to become public charges under the Rule.

C. The Court Should At Least Stay the Injunction in Part

At a minimum, the Court should stay its injunction insofar as it sweeps more broadly than necessary to redress Plaintiffs' alleged injuries. *See* PI Opp. 58-60. Indeed, district courts in two related challenges have limited the scope of their injunctions to particular jurisdictions—namely, California, Oregon, Maine, Pennsylvania, Illinois, and the District of Columbia. *See Cook County v. McAleenan*, No. 19 C 6334, 2019 WL 5110267, at *14 (N.D. Ill. Oct. 14, 2019); *City & Cty. of S.F.*, 2019 U.S. Dist. LEXIS 177379, at *177-84. Yet those decisions have been rendered largely academic by the scope of this Court's injunction.

Although the Court sought to justify its injunction's scope on the theory that noncitizens residing in the Plaintiff States may desire to move to a non-plaintiff state and might be deterred from accessing public benefits, or a noncitizen may move to the Plaintiff States, Op. 57, the mere possibility of either scenario does not justify extending an injunction to every alien affected by the Rule. Likewise, the potential that a lawful permanent resident returning to the United States after more than 180 days may be subject

to the Rule at a point of entry does not justify enjoining the Rule throughout the entire nation. *Id*.

Separately, the Court's injunction is especially improper to the extent it requires Defendants to "preserve the status quo pursuant to the regulations promulgated under 8 C.F.R. Parts 103, 212, 213, 214, 245, and 248" (the "status quo provision"). Op. at 58-59. If the Court intended to forbid *any* change to the interpretation or administration of the public charge ground of inadmissibility, even though the Court issued only a preliminary judgment on the lawfulness of the Rule, that relief would be extraordinary and unwarranted. Plaintiffs must demonstrate a likelihood of success on the merits to secure injunctive relief, and have not shown (or made any attempt to show) that they are likely to succeed in demonstrating that *any* change concerning the public charge ground of inadmissibility would be unlawful. Nor has the Court been asked to pass judgment on any other specific, proposed change.

Second, the status quo provision is overbroad. "An injunction must be narrowly tailored to remedy the specific harm shown." *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019). Plaintiffs do not allege any harm associated with any other change to the public charge ground of inadmissibility. Plaintiffs' claims and alleged injuries are limited to the Rule. Separately, the regulations cited in the status quo provision address subjects unrelated to the public charge rule entirely. For example, one regulation covers certification requirements for foreign health workers, *see* 8 CFR § 212.15, and another discusses immigration rights conferred by NAFTA upon citizens of Canada and Mexico, *see id.* § 214.6. Under the Court's injunction, even these provisions must remain wholly unchanged. Third, a court must be "specific in outlining the terms of

the injunctive relief granted." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (quotes omitted). This rule is "designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Id.* The status quo provision not only insulates the enumerated regulations from any modification, but requires Defendants to affirmatively "preserve the status quo pursuant" to those regulations. Yet it is unclear what additional duty this imposes on Defendants.

III. CONCLUSION

The government respectfully requests that the Court stay its preliminary injunction either in whole or in part, and its section 705 stay of the Rule, pending final resolution of the government's appeal.

Dated: October 25, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all users receiving ECF notices for this case.

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UNITED STATES DISTRICT COURT
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No. 4:19-cv-5210-RMP

[PROPOSED] ORDER STAYING PRELIMINARY INJUNCTION

U.S. DEPARTMENT OF JUSTICE
1100 L St. NW, Washington, DC, 20003
(202) 305-7664

The Court, having considered Defendants' Motion for Stay of Injunction Pending Appeal, any opposition thereto, and the entire record, hereby **ORDERS** as follows:

(1) Defendants' Motion is **GRANTED**.

(2) The Court's October 11, 2019 Order Granting Plaintiff States' Motion for Section 705 Stay and Preliminary Injunction is hereby **STAYED** until further Order of the Court.

IT IS SO ORDERED.

Dated: _____

United States District Judge