No. 19-17213

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO,
and COUNTY OF SANTA CLARA,
Plaintiffs-Appellees

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al.,
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION OF PUBLIC HEALTH, HEALTH POLICY, MEDICINE, AND NURSING DEANS, CHAIRS, AND SCHOLARS; THE AMERICAN PUBLIC HEALTH ASSOCIATION; AND THE AMERICAN ACADEMY OF NURSING FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL AND FOR AFFIRMANCE

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL AND FOR AFFIRMANCE

PLEASE TAKE NOTICE that certain deans of schools of public health, public policy, and nursing, as well as academic chairs and faculty researchers (the "Deans, Chairs, and Scholars"); (ii) the American Public Health Association ("APHA"); and (iii), the American Academy of Nursing (the "Academy") (collectively "*Amici*") request leave to file the accompanying *amicus* brief in support of Plaintiffs. A full list of the Deans, Chairs, and Scholars is attached as Exhibit 1. In support of their motion, *amici* state as follows:

The Deans, Chairs, and Scholars are individuals who are recognized among the nation's leading figures in the field of health policy and public health. *Amici* possess particular expertise on health determinants, methods for lowering barriers to effective health care services, and the broader public health consequences of governmental policies.

The APHA, an organization of nearly 25,000 public health professionals, supports policies and programs that increase and improve access to health, nutrition, and housing services for the nation's most vulnerable populations, and shares the latest research and information, promotes best practices, and advocates for evidence-based public health policies.

The Academy serves the public and the nursing profession by advancing health policy, practice, and science through organizational excellence and effective nursing leadership. The Academy's more than 2,600 Fellows are nursing's most accomplished leaders in education, management, practice, research, and policy. They have been recognized for their extraordinary contributions to nursing and healthcare.

INTEREST OF *AMICI* AND REASONS WHY THE MOTION SHOULD BE GRANTED

Amici seek to inform the Court about the public health impact of the "Public Charge" Rule and believe this case provides an appropriate vehicle for the Court to find that Defendants' approval of the Rule and their intention to implement the Rule are contrary to federal law and detrimental to public health.

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Circuit Rule 29-3, an amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing. Plaintiffs and defendants have indicated that they consent to filing of this brief. For the foregoing reasons, *amici* request that the Court grant leave to file the attached *amicus* brief.

CONCLUSION

For the foregoing reasons, *amici's* motion for leave to file the attached *amicus* brief should be granted.

DATED: November 22, 2019

Respectfully submitted,

/s/ Edward T. Waters

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EXHIBIT 1

The Deans, Chairs, and Scholars consist of the following individuals:

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2. Barbara K. Rimer, DrPH, MPH, Dean and Alumni Distinguished Professor, UNC Gillings School of Global Public Health
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40. William B. Borden, MD, FACC, FAHA, Chief Quality and Population Officer, Associate Professor of Medicine and Health Policy, George Washington University Medical Faculty Associates.

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2019, I caused the foregoing document to be served on the parties' counsel of record electronically by means of the Court's CM/ECF system.

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CORPORATE DISCLOSURE STATEMENT[1]

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* submit the following corporate disclosure statement:

Amici deans, chairs and scholars are individuals and, as such, do not have a parent company and no publicly held company has a ten percent or greater ownership interest in any said *amici*. *Amici* American Public Health Association and American Academy of Nursing do not have a parent company and no publicly held company has a ten percent or greater ownership interest in them.

STATEMENT OF CONSENT AND SEPARATE BRIEFING

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure and Circuit Rule 29-3, counsel for all parties have consented on the parties' behalf to the filing of this *amici curiae* brief.

The Deans, Chairs, Scholars, the American Public Health Association ("APHA"), and the American Academy of Nursing certify that a separate brief is necessary to provide appropriate insight into how a stay of the preliminary

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *amici* certify that no party or counsel for a party authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. Preparation of this brief was supported under an award from the Robert Wood Johnson Foundation to the George Washington University Milken Institute School of Public Health. The views expressed by *amici* do not necessarily reflect the position of the Foundation.

injunction pending appeal would have an immediate chilling effect on immigrant participation in essential health programs, negatively impact their overall health outcomes, result in significant disenrollment from health care programs, and create serious public health risks for individuals and communities across the nation.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE AUTHORITY

The Deans, Chairs, and Scholars are individuals who are recognized among the nation's leading figures in the field of health policy and public health. *Amici* possess particular expertise on health determinants, methods for lowering barriers to effective health care services, and the broader public health consequences of governmental policies. A full list of the Deans, Chairs, and Scholars is included below.

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They have been recognized for their extraordinary contributions to nursing and health care.

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TABLE OF CONTENTS

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

On October 11, 2019, the District Court granted plaintiffs' request for a preliminary injunction prohibiting defendants from implementing a rule that bars admission and lawful permanent residence to people determined "likely to become a public charge." *See City and County of San Francisco, et al. v. U.S. Citizenship and Immigration Services, et al.*, 19-cv-04717-PJH (N.D. Cal., Oct.11, 2019) (Doc. 120) and *State of California, et al. v. U.S. Department of Homeland Security, et al.*, 19-cv-04975-PJH (N.D. Cal., Oct.11, 2019) (Doc. 120). Defendants seek a stay of the preliminary injunction pending appeal. *See* Appellants' Emergency Motion Under Circuit Rule 27-3 for a Stay Pending Appeal, No. 19-17213 (9th Cir. Nov. 15, 2019) (Dkt. Entry 13) *and* Appellants' Emergency Motion Under Circuit Rule 27-3 for a Stay Pending Appeal, No. 19-17214 (9th Cir. Nov. 15, 2019) (Dkt. Entry 20). The preliminary injunction has held at bay, pending appeal, the dire consequences for public health nationwide that would ensue if defendants are permitted to implement this Rule. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248) (the "Rule").

The Rule's consequences are not limited to immigrants and their families. Almost two-thirds of the nation's 44.4 million immigrants live in the twenty most densely populated metropolitan regions, with the largest populations in New York,

Los Angeles and Miami. *See* Jynnah Radford, *Key Findings about U.S. Immigrants*, Pew Research Center (June 17, 2019). Clearly, this Rule amounts to a public health threat on a national scale.

The District Court correctly enjoined implementation of the Rule. In fact, in approving the Rule, Defendants ignored or dismissed the majority of more than 266,000 comments which warned that the Rule was a threat to immigrants' health, access to health care, and broader public health concerns. Defendants acted unreasonably and with absolute disregard for public health in promulgating the Rule. Given the harms that would ensue from immediate implementation of the Rule, the nationwide preliminary injunction should remain in effect until final disposition of this appeal.

ARGUMENT

I. The Rule Threatens Public Health on a National Scale.

A. The Rule will have a chilling effect on immigrant participation in critical health programs, with major negative health consequences.

Prior to the entry of the preliminary injunction, the Rule already was having a measurable chilling effect as immigrants and their families opted to forgo critical services and benefits to which they are entitled for fear of being deemed a "public charge." The Rule's low income, age, and medical condition tests mean that, for instance, low-income children with asthma and pregnant women who use Medicaid

services for which they are eligible run a risk that receipt of such care will threaten their ability to become permanent U.S. residents. Similarly, qualifying Medicaid beneficiaries who learn through preventive health services that they have serious health conditions that may be effectively managed medically and who diligently manage their treatment through Medicaid, risk denial of permanent residency status pursuant to the Rule.

No use of Medicaid is safe, even where the Rule ostensibly permits it, since evidence of care for health conditions would be weighed negatively. Not surprisingly, the Urban Institute reported that "about one in seven adults in immigrant families (13.7 percent) reported 'chilling effects,' in which the respondent or a family member did not participate in a non-cash government benefit program in 2018 for fear of risking their respective future green card statuses. This figure was even higher, 20.7 percent, among adults in low-income immigrant families." Hamutal Bernstein et al., *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018*, Urban Institute (May 2019). Likewise, the Migration Policy Institute ("MPI") estimated the chilling effect could claim 47 percent of the U.S. noncitizen population. Notably, these individuals live in mixed citizen/noncitizen families that include 12 million U.S.-citizen members, two-thirds of whom are children. *See* Jeanne Batalova et

al., *Millions Will Feel Chilling Effect of U.S. Public-Charge Rule That is Also Likely to Reshape Legal Immigration*, Migration Policy Institute (Aug. 2019).

The two largest racial/ethnic immigrant groups, Latinos and Asian American/Pacific Islanders (AAPI), face the greatest risks. Approximately 16.4 million people live in benefit-receiving families with at least one Latino noncitizen, while three million live in such families with at least one AAPI noncitizen. *Id.* According to the MPI, "[i]f program disenrollment follows the patterns observed in the 1990s, as many as 20 percent to 60 percent of immigrants could withdraw from benefit programs. If significant numbers of immigrants and their family members withdraw from public benefit programs because of real or perceived fears that they will not be able to sponsor a family member, be refused a permanent or temporary visa, or be deported, the impacts of the rule on their health and wellbeing could be deep and long-lasting." *Id.*; *see also* Hamutal Bernstein et al., *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018*, Urban Institute (May 2019) (observing "chilling effects in families with various mixes of immigration and citizenship statuses, including 14.7 percent of adults in families where all noncitizen members had green cards and 9.3 percent of those in families where all foreign-born members were naturalized citizens").

The Rule's chilling effects even extend to everyday matters. Researchers for the Urban Institute found that many immigrant families are increasingly avoiding routine activities, such as interacting with teachers or school officials, health care providers, and the police, which poses risks for their well-being and the communities in which they live. *Id.*; *see also* The Children's Partnership, *California Children in Immigrant Families: The Health Provider Perspective. Infographic* (2018) (noting a 42 percent increase in missed scheduled health care appointments for children with at least one immigrant parent since the inception of this Administration's anti-immigrant rhetoric).

Defendants are keenly aware of the chilling effect this Rule will have on immigrants seeking health care. Defendants estimate that the implementation of the Rule will lead to a reduction in Federal and State government payments to individuals under public benefits programs of "approximately $2.47 billion annually due to disenrollment and forgone enrollment . . . ." 84 Fed. Reg. at 41, 485. After ten years, Defendants estimate that the reduction will total approximately $21 billion. *Id.* However, Defendants' own analysis recognizes that their reduction estimates are artificially low. When using disenrollment/forgone enrollment percentages, attributed to the implementation of the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193, 110 Stat. 2105 (1996) ("PRWORA," known as "welfare

reform"), actual estimates of the public benefits program and Rule-driven reductions range from approximately $12.2 billion to $31.4 billion annually. *See* U.S. Dep't of Homeland Security, *Regulatory Impact Analysis, Inadmissibility on Public Charge Grounds, Final Rule*, DHS Docket No.: USCIS-2010-0012, RIN: 1615-AA22, Table 20 (Aug. 2019).

B. The Rule will result in significant disenrollment from health care programs.

The Rule's chilling effect will cause a substantial drop in enrollment in the Supplemental Nutrition Assistance Program ("SNAP," formerly "Food Stamps"), Medicaid, and other essential health care programs. This, in turn, will impede access to both preventive care as well as care to address health conditions that are eminently treatable and manageable, and inevitably will result in worsening health outcomes and a spike in premature deaths. Community health centers across the country are reporting increasing concerns among parents about enrolling their children in Medicaid and food programs. *See* Jennifer Tolbert et al., *Impact of Shifting Immigration Policy on Medicaid Enrollment and Utilization of Care among Health Center Patients*, Kaiser Family Foundation (Oct. 2019). The same effect has been observed in the Special Supplemental Nutrition Program for Women, Infants and Children ("WIC"): WIC agencies in certain states attribute decreasing enrollment largely to fears about the Rule. *Id.* Despite Defendants' protest that WIC is exempt, a drop is not surprising; WIC not only provides food,

but it is a proven, effective means of finding children and families who need health care, thereby potentially pulling back the curtain on health problems.

Furthermore, disenrollment from WIC, SNAP or other critical social welfare programs such as Section 8 housing assistance places the children of immigrants at risk of food insecurity, malnutrition, poverty, and homelessness, likely resulting in increased health care costs over time, particularly for children with special needs. Leah Zallman et al., *Implications of Changing Public Charge Immigration Rules for Children Who Need Medical Care*, JAMA Pediatrics (July 1, 2019); *see also* California Health Care Foundation, *Changing Public Charge Immigration Rules: The Potential Impact on Children Who Need Care* (Oct. 2018) ("Parents choosing to disenroll from SNAP or housing assistance is likely to increase poverty and homelessness rates — two principal determinants of health…While harmful to all children, the loss of such support for families could take a particularly hard toll on children in need of medical attention.").

The risks to Medicaid coverage carry particular import. Medicaid is associated with increased access to the full array of health care services, including comprehensive preventive care and health care to treat and manage health conditions in children and adults. Moreover, Medicaid plays an essential role in promoting financial security among low-income families and improving health outcomes, beginning with the health of mothers and infants and continuing

throughout life. Larisa Antonisse et al., *The Effects of Medicaid Expansion under the ACA: Updated Findings from a Literature Review*, Kaiser Family Foundation (Mar. 2018); *see also* Benjamin Sommers et al., *Health Insurance Coverage and Health — What the Recent Evidence Tells Us*, New England Journal of Medicine (Aug. 10, 2017). But families may avoid Medicaid, even those whom the Rule exempts, such as children and pregnant women, out of fear that Medicaid telegraphs long-term health care needs. *See* Samantha Artiga et al., *Estimated Impacts of Final Public Charge Inadmissibility Rule on Immigrants and Medicaid Coverage*, Kaiser Family Foundation (Sept. 2019) (disenrollment estimated at 2 million to 4.7 million participants in Medicaid and CHIP). The risk of health care avoidance by pregnant women comes at a time of steadily rising U.S. maternal mortality rates, even as international trends move in the opposite direction. Marian F. MacDorman et al., *Is the United States Maternal Mortality Rate Increasing? Disentangling trends from measurement issues*, Obstet Gynecol. (Sept. 2016) at 447-455.

This reduction in enrollment will in turn reduce access to care, contributing to worse health outcomes. *See* Kaiser Family Foundation, *Changes to "Public Charge" Inadmissibility Rule: Implications for Health and Health Coverage* (Aug. 12, 2019). As more immigrants and their children avoid health care, the risks to the broader public health also grow. Jeanne Batalova et al., *Chilling Effects: The*

Expected Public Charge Rule and Its Impact on Legal Immigrants Families' Public Benefits Use, Migration Policy Institute (June 2019); *see also* K. Perreira, et al., *A New Threat to Immigrants' Health - The Public-Charge Rule*, The New England Journal of Medicine (2018) (noting the Rule will lead to reductions in prenatal and postnatal care, which will cause higher rates of low birth weight, infant mortality, and maternal morbidity, as well as forgone routine checkups, immunizations and cancer screenings); Wendy E. Parmet, *The Health Impact of The Proposed Public Charge Rules*, Health Affairs Blog (Sept. 27, 2018) (the Rule will make immigrants avoid medical testing and examinations, leading to more undiagnosed and untreated medical conditions); Letter from HIV Medicine Association (HIVMA), Infectious Diseases Society of America (IDS), Pediatric Infectious Diseases Society (PIDS), and the Ryan White Medical Providers Coalition (RWMPC) to Samantha Deshommes, Chief Regulatory Coordination Division, USCIS (Dec. 10, 2018) (stating that the Rule will make more people avoid preventive services or abandon treatment for HIV-AIDS, tuberculosis and other infectious diseases, and will depress vaccination rates, increasing the likelihood of outbreaks of vaccine-preventable diseases, such as measles, mumps and varicella, threatening public health for all); Camilo Montoya-Galvez, *Immigrants already dropping benefits ahead of new Trump rule, California counties say*, CBS News (2019); Mitchell Katz & Dave Chokshi, *The "Public*

Charge" Proposal and Public Health: Implications for Patients and Clinicians, JAMA (Nov. 27, 2018) (stating that the Rule will lead to increased prevalence of obesity and malnutrition, reduced prescription adherence, and increased risks of outbreaks of transmissible disease).

Disenrollment and altogether avoiding enrollment in health care programs will further disproportionately affect health care safety net providers, such as public hospitals and community health centers. Community health centers anchor primary health care in medically underserved communities that often are home to large numbers of immigrants. Community health centers are designed to encourage early entry and use of highly-effective primary care and are required by law to provide primary medical care to all residents regardless of ability to pay, with fees waived entirely for patients with incomes below the federal poverty level and reduced fees for patients with incomes between poverty and twice poverty. *See* 42 U.S. §§ 254b(k)(3)(E) & G(i)-(iii); 42 C.F.R. § 51c.303(f). Medicaid is the principal form of health insurance among health center patients and Medicaid payments represent 44 percent of total health center revenue. Sara Rosenbaum et al., *Community Health Center Financing: The Role of Medicaid and Section 330 Grant Funding Explained*, Kaiser Family Foundation (Mar. 2019). Should the Rule go into effect, thousands of medically underserved communities in which health centers operate will be affected. As noted previously, health centers are

already experiencing the impact of the Rule on their patients with widespread evidence that patients may be avoiding Medicaid enrollment or forgoing care altogether, especially among pregnant patients and patients with health conditions that could be well managed through primary health care. *See* Tolbert et al., *Impact of Shifting Immigration Policy on Medicaid Enrollment and Utilization of Care Among Health Center Patients*, *supra* (half of health centers reported utilization drop by immigrant patients, especially pregnant women). As noted, declining Medicaid coverage, in turn, can be expected to result in growing financial strain on health centers.

Researchers from the George Washington University Milken Institute School of Public Health estimate conservatively that, under the Rule, health centers nationally could lose between 165,000 and 495,000 Medicaid patients annually. As Medicaid revenue falls, health centers will lose overall patient care capacity, with the total number of patients served declining between 136,000 and 407,000 nationally; California alone could lose service capacity for as many as 142,000 patients and New York health centers could see total patient care capacity drop by over 77,000. Other States in which health centers show high losses in overall patient care capacity include Arizona, Colorado, Florida, Illinois, Massachusetts, New Jersey, Texas and Washington. The estimated Medicaid revenue losses driving this decline in care capacity are substantial, ranging from $164 million to

$493 million nationally. Peter Shin et al., *How will the Public Charge Rule Affect Community Health Centers and the Communities they Serve?* George Washington Health Policy & Management Matters (Sept. 5, 2019).[2] Likewise, other researchers have found Rule-driven funding losses will impact hospital and emergency room services. *See* Cindy Mann et al., *Medicaid Payments at Risk for Hospitals Under the Public Charge Proposed Rule*, Manatt (Nov. 2018) (discussing the impact of reduced Medicaid coverage on delivery of hospital services); Mitchell Katz & Dave Chokshi, *The "Public Charge" Proposal and Public Health: Implications for Patients and Clinicians*, JAMA (Nov. 27, 2018) ("At the system level, increased visits would further strain emergency departments with nonurgent patients. Greater numbers of uninsured patients will further shift costs of care to safety-net health systems, for which financial viability is already in peril.").

Moreover, the Rule's impact on the Medicaid program can be expected to lead to higher mortality rates. Research shows expanding Medicaid eligibility

[2] The losses estimated by Shin et al. are based on final Medicaid coverage loss estimates prepared by Dr. Leighton Ku, *infra*. Dr. Shin's final estimate is somewhat lower than the earlier estimate he prepared regarding the impact of the proposed rule. Because the Final Rule contains Medicaid exemptions for children and pregnant women, which were taken into account by the Ku estimate, the health center impact estimate was revised in turn. Dr. Ku's assessment of health center impact is entirely correct, since his statement reports on the earlier Shin estimates, not the new one.

correlates with significantly lower mortality, particularly disease-related deaths (e.g., as opposed to accidents) with the effect increasing over time. *See* Sarah Miller et al., *Medicaid and Mortality: New Evidence from Linked Survey and Administrative Data,* National Bureau of Economic Research (Working Paper No. 26081, July 2019). Rule-driven coverage reductions will change this figure over time. In fact, public health expert Dr. Leighton Ku estimates that between 1 million and 3.1 million members of immigrant families will forgo Medicaid or disenroll following the Rule's implementation annually. This includes between 600,000 and 1.8 million adults who are 21 or older who will not receive Medicaid and between otherwise eligible 400,000 to 1.2 million children, 21 or younger, who will not receive Medicaid because they are members of immigrant families. *See* Leighton Ku, *New Evidence Demonstrates that the Public Charge Rule Will Harm Immigrant Families and Others*, Health Affairs Blog (Oct. 9. 2019). Dr. Ku goes on to state that the Rule may "eventually increase the number of premature deaths by between 1,300 and 4,000." *Id*.

II. Defendants Unlawfully Ignored or Otherwise Dismissed the Majority of Over 266,000 Public Comments that Warned the Rule Would Create Serious Public Health Risks for Individuals and Communities.

It is settled that "[f]ederal administrative agencies are required to engage in 'reasoned decision-making . . .. Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that

result must be logical and rational. It follows that agency action is lawful only if it rests on a consideration of the relevant factors." *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (internal citation and quotation marks omitted).

Such relevant factors for consideration include public comments made during the rulemaking process. *See Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000). While not all comments carry the same weight, federal agencies must respond to comments that "would require a change in the agency's proposed rule." *City of Portland, Oregon v. E.P.A.*, 507 F.3d 706, 715 (D.C. Cir. 2007). Where, as here, the agency addresses public comments in a "conclusory manner," the agency has failed to provide a "reasoned explanation" for its decision. *Int'l Union, United Mine Workers of America v. Mine Safety & Health Admin.*, 626 F.3d 84, 94-95 (D.C. Cir. 2010); *Lilliputian Systems, Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014).

It is clear, moreover, that agencies must evaluate the fuller meaning of their rules, including the indirect effects that these rules have on the broader population in addition to those directly regulated. Agencies have a duty to reasonably consider the human and health costs of their rules; "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Michigan v. EPA*, 135 S. Ct. at 2707. It follows that final agency actions such as the Rule are arbitrary and

capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2), if the agency failed to "examine the relevant data," "consider an important aspect of the problem," or "articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted); *Ass'n of Civilian Technicians N.Y. Council v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985), *cert. denied*, 474 U.S. 846 (1985) (agency must provide "reasoned explanation of why the new rule effectuates the statute as well or better than the old rule"); *Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994) (record must show agency addressed significant objections and court must remand where "agency [] relied on factors which Congress has not intended it to consider").

There could be no more powerful example of a rule that simply fails on all counts than this Rule. Not only is it contrary to Congressional intent, but the Rule was adopted in blatant disregard of warnings expressed in the majority of the 266,000 comments filed. These comments documented the Rule's direct impact on the health, housing and nutritional status of individuals subject to its terms. In particular, Defendants ignored the perverse incentives the Rule creates for immigrants and their families to avoid services for health conditions that could require "extensive" treatment – an astounding invitation for people with serious

health needs to turn away from sources of health care, health supports, shelter, and nutrition – not just services that are designated "public benefits," but all services. Enrollment and use of public services become Exhibit A of their undesirability under the Rule, triggering an immense "chilling effect." Yet Defendants downplayed the Rule's impact, using a 2.5 percent disenrollment estimate wholly inconsistent with their own studies. *See* Defendants' *Regulatory Impact Analysis, Inadmissibility on Public Charge Grounds, Final Rule*, DHS Docket No.: USCIS-2010-0012, RIN: 1615-AA22, Table 19 *and accompanying text* (Aug. 2019). Defendants themselves acknowledge that previous public benefits limitations in PRWORA (welfare reform) led to dramatic enrollment reductions that ranged from twenty-one to fifty-four percent across population categories and types of benefits. *Id*.

Despite these clear impacts, Defendants believe their sole responsibility is to assure that immigrants will live up to their idea of "self-sufficiency," even if it means acting contrary to law and threatening public health. Although they admit the massive harms the Rule is likely to trigger, *see* 84 Fed. Reg. at 41, 306-16, Defendants essentially shrug them off with what boils down to a "not our problem" stance: "[we] acknowledge[] that individuals subject to this rule may decline to enroll in, or may choose to disenroll from, public benefits for which they may be eligible under PRWORA, in order to avoid negative consequences as a result of

this final rule….But regardless, [we] decline[] to limit the effect of the rulemaking to avoid the possibility that individuals subject to this rule may disenroll or choose not to enroll, as self-sufficiency is the rule's ultimate aim." *Id.* at 41, 312-13.

The record, even as described by Defendants, makes abundantly clear the public health consequences that the Rule can be expected to produce: (i) a general withdrawal from public services, including community-wide services offering health, nutrition, public housing, child care and other critical benefits; (ii) an undermining of efforts to protect health and safety with lasting community-wide impact; (iii) increased hunger, food insecurity, homelessness, and needless hardship from the effect of poverty; (iv) increased uncompensated health care costs; and (v) increased threats to public health as people forgo services as basic as immunizations, fearing they will be caught using a public health service or perhaps worse, be found to have a medical condition requiring ongoing treatment – as noted, a "highly negative factor" in Defendants' proposed scheme.

In spite of these multiple warnings, Defendants do "not believe that it is sound policy to ignore the longstanding self-sufficiency goals set forth by Congress or to admit or grant adjustment of status applications of aliens who are likely to receive public benefits designated in this rule to meet their basic living needs in an [sic] the hope that doing so might alleviate food and housing insecurity, improve public health, decrease costs to states and localities, or better

guarantee health care provider reimbursements." 84 Fed. Reg at 41, 314. In fact, Defendants believe, without evidence, that they "will strengthen public safety, health, and nutrition through this rule by denying admission or adjustment of status to aliens who are not likely to be self-sufficient." *Id*. This hardly qualifies as "reasoned decision making" sufficient for the Rule to survive judicial review – we cannot ignore the disconnect between the decision made and the explanation given. Review is deferential, but courts are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Department of Commerce v. New York*, 588 U.S. ___, 139 S.Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)). The ample evidence of harm that the Rule will cause to public health requires maintaining the nationwide preliminary injunction in effect pending final resolution of this appeal and affirming the District Court's order enjoining Defendants from implementing the Rule.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, substantially similar issues appear in these cases pending before this Court: *City and County of San Francisco, and County of Santa Clara v. United States Citizenship and Immigration Services, et al.*, No. 19-17213, *State of California, et al. v. United States Department of Homeland*

Security, et al., No. 19-17214, and *State of Washington, et al., v. United States Department of Homeland Security, et al.*, No. 19-35914.

CONCLUSION

For the foregoing reasons, Defendants-Appellants' Emergency Motion Under Circuit Rule 27-3 for a Stay Pending Appeal should be denied and the District Court's ruling granting Plaintiffs' motion for issuance of a preliminary injunction should be affirmed.

November 22, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of November, 2019, the foregoing Brief of *Amici Curiae* Deans, Chairs, Scholars, the American Public Health Association and the American Academy of Nursing in Support of Plaintiffs-Appellees' Opposition to Defendants-Appellants' Emergency Motion Under Circuit Rule 27-3 for a Stay Pending Appeal has been served by this Court's Electronic Case Filing System ("ECF").

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(a)(5) and 32(g)(1) of the Federal Rules of Appellate Procedure and Circuit Rule 32-1, I hereby certify that the foregoing Brief of *Amici Curiae* Deans, Chairs, Scholars, the American Public Health Association and the American Academy of Nursing in Support of Plaintiffs-Appellees' Opposition to Defendants-Appellants' Emergency Motion Under Circuit Rule 27-3 for a Stay Pending Appeal which consists of 4155 words, complies with the type-volume limitation.

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