IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants-Appellants.

No. 19-35914

REPLY IN SUPPORT OF DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR A STAY PENDING APPEAL

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This Court should stay the district court's injunction pending appeal. At the outset, plaintiffs' speculative fiscal harms do not establish standing, and, even if they did, plaintiffs fail to explain how the interest they seek to further—*greater* use of public benefits by aliens—aligns with the public-charge statute, which was designed to *reduce* such benefit use. On the merits, plaintiffs identify no provision of the INA with which the Rule is inconsistent, fail to meaningfully address the numerous provisions with which the Rule accords, and ignore Congress's longstanding decision to leave the definition of "public charge" to the discretion of the Executive Branch. Instead, plaintiffs mistakenly rely on failed legislative proposals and ambiguous historical materials. Given the likelihood that the government will prevail on appeal, it should not have to bear the undisputed harm the injunction imposes: the adjustment to lawful-permanent-resident status of individuals DHS believes should be inadmissible.

A. Standing

Although the Rule does not regulate them, plaintiffs claim to have standing based on their view that the Rule will deplete state coffers by causing fewer aliens to use state and federal benefits, by causing "pecuniary harm from contagion," and by causing miscellaneous administrative costs. Response 6. To begin, the theory that the Rule will in fact cause outbreaks of disease and harm State treasuries impermissibly rests on numerous "speculative inferences." *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 (1976). But more importantly, the States fail to acknowledge the obvious problem with their predictions of budgetary harm: that the Rule will *also*

cause States to save billions of dollars by reducing their spending on benefits. *See* 83 Fed. Reg. at 51,228.

That consideration distinguishes this case from *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). There, a state had standing because a new census question would have the "predictable effect" of lowering census response rates, which would almost inevitably result in the state's losing federal funds that are distributed on the basis of state population. *Id.* at 2565-66. But here, even if the Rule's "predictable effect" is decreased enrollment in state and federal benefits, a countervailing benefit to state budgets makes the States' putative harms far from inevitable, or even likely—much less "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013).

The States barely defend the district court's conclusion that they are within the statute's zone of interests, arguing only that the district court was not "plainly wrong." Response 8. That half-hearted response is unsurprising. By seeking to *increase* spending on public benefits, plaintiffs impermissibly advance "the very . . . interest" that "Congress sought to restrain" in enacting the public-charge statute. *National Fed'n of Fed. Employees v. Cheney*, 883 F.2d 1038, 1051 (D.C. Cir. 1989).

B. Merits

1. Plaintiffs' responses to the government's statutory analysis are unpersuasive. Plaintiffs first assert that DHS did not argue in the district court that the Rule is entitled to deference as a permissible construction of the public-charge provision, and

thus waived the argument. Response 8-9. That assertion does not withstand the briefest scrutiny. *See, e.g.*, Dkt. 155 at 31-33 (citing *Chevron* and arguing that the Rule comes within the broad interpretive discretion that Congress granted the Executive Branch).

Plaintiffs attempt to minimize congressional statements of "national policy with respect to welfare and immigration," 8 U.S.C. § 1601, because Congress enacted them in connection with welfare-reform legislation, Pub. L. 104-193 (Aug. 22, 1996), rather than an immigration law. Response 17-18. DHS is not "attempting to construe 8 U.S.C. § 1601," *id.* at 17, but rather is looking to its highly relevant statements of congressional policy in construing the statute that DHS is charged with administering. The same Congress responsible for these statements enacted the relevant amendments to the INA (including the relevant "public charge" provisions) just one month later. *See* Pub. L. 104-208 (Sept. 30, 1996). And Congress enacted the enforceable affidavit-of-support provision, 8 U.S.C. § 1183a, a provision integral to the public-charge statute, in the Welfare Reform Act, *see* Pub. L. 104-193, § 423(a)—clear evidence of the statutes' close connection.

Plaintiffs wrongly assert that the affidavit-of-support provision undermines the government's position because, in requiring sponsors to repay any means-tested benefit the alien receives, it "underscores Congress's intent that aliens *could* receive means-tested benefits without becoming public charges." Response 19 (emphasis in original). But in requiring aliens to reimburse the government for any public benefits

they receive, declaring them inadmissible as likely to become public charges if they cannot find sponsors willing to guarantee repayment, and rendering deportable as a public charge any alien who receives an unreimbursed benefit within a specified period of time, *see* Mot. 9-10, the affidavit-of-support provision clearly does not indicate Congress's support for the receipt of public benefits by aliens. Plaintiffs similarly miss the point of the battered-alien provision. Congress would have had no reason to instruct DHS not to consider a battered aliens' receipt of public benefits in making a public charge determination if, as plaintiffs posit, DHS was already prohibited from doing so.

Plaintiffs fare no better in noting that Congress has provided for support aliens in limited circumstances. Congress has made clear that it did not want "the availability of public benefits" to provide "an incentive for immigration to the United States," 8 U.S.C. § 1601(2), and that policy is in no way inconsistent with assisting distressed aliens once they are already here. As for the 1882 statute upon which plaintiffs rely, Congress raised the funds used to support distressed aliens through a head-tax on "each and every" alien who arrived in U.S. ports, Immigration Act of 1882, ch. 376, §§ 1-2, 22 Stat. 214 (Aug. 3, 1882)—hardly an indication that Congress approved of alien use of public benefits. In any event, the Rule does not define "public charge" to include aliens who receive "*any* increment of public assistance," as plaintiffs repeatedly assert. *See* Response 12 (emphasis added); *see also* Response 11,

14, 17. Rather, it defines the term to include only those who receive more than twelve months of enumerated benefits out of a 36-month period.

Lacking any textual support for their objection, plaintiffs place substantial weight on a failed 1996 legislative proposal. Response 15-16. But failed legislative proposals are always a dubious means of interpreting a statute, and that is particularly true here. Congress did not reject "the very interpretation" of "public charge" that the Rule adopts, Response 16; the 1996 proposed definition was significantly broader than the Rule, *see* H.R. Rep. 104-828, at 138, 240-41 (considering a similar amount of benefits usage within a seven-year period instead of the Rule's three-year period). Moreover, there is no indication that Congress believed that the 1996 proposal's definition of "public charge" was inconsistent with an established meaning of the term; rather, the legislative history suggests that the President objected to a rigid definition of the term, *see* 142 Cong. Rec. at S11881-82. Nor is this a case where Congress deliberately "discarded" the Rule's definition "in favor of other language" eventually enacted. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987). Rather, Congress left the term undefined, thus leaving its interpretation to the Executive Branch.

Plaintiffs likewise err in relying on the purported longstanding meaning of "public charge." *See* Response 9-10. Congress has never defined the term, and therefore has not established its meaning. Rather, the defining feature of Congress's approach to the "public charge" inadmissibility provision over the last 135 years has

been its repeated and intentional decision to leave the term's definition to the Executive Branch's discretion. *See* Mot. 13-14. Congress did so in light of the varied circumstances Executive Branch officials confront and the evolving nature of public aid.

Plaintiffs' historical analysis is flawed even on its own terms. Plaintiffs assert that certain 19th-Century sources defined "public charge" to mean "one who is unable to care of himself or herself." Response 10. Even if plaintiffs' definition is accepted, it is unclear why an alien who depends on public resources for food, shelter, or health care for months at a time cannot properly be described as "unable to care for himself or herself." In any event, other relevant sources contradict plaintiffs' position. For example, both the 1933 and 1951 editions of Black's Law Dictionary defined the term, "[a]s used in" the 1917 version of the public-charge provision, to mean simply "one who produces a money charge upon, or an expense to, the public for support and care." Public Charge, Black's Law Dictionary (3d ed. 1933); Black's Law Dictionary (4th ed. 1951). And a 1929 treatise did the same. *See* Arthur Cook et al., *Immigration Laws of the United States* § 285 (1929) (noting that "public charge" meant a person who required "any maintenance, or financial assistance, rendered from public funds, or funds secured by taxation"). Those sources belie Plaintiffs' claim that "public charge" is a term of art with the meaning they prescribe.

Plaintiffs' reliance on administrative practice is entirely misplaced. Plaintiffs mistakenly suggest that the Rule is inconsistent with general statements made in past

administrative decisions. Response 13. But the Rule does not permit an alien to be deemed inadmissible based on a mere "possibility that the alien will require public support," *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (AG 1962), or on the simple fact that an alien has at some time accepted public benefits, *see Matter of B*, 3 I. & N. Dec. 323, 324 (BIA 1948; AG 1948); *Matter of Perez*, 15 I. & N. Dec. 136, 137 (B.I.A. 1974). Rather, the balance of the many factors in the Rule must show that an alien will likely use designated benefits for more than 12 months in the aggregate within a three-year period.

It is instead Plaintiffs' definition that is inconsistent with prior practice. Under *Matter of B*, an alien is deportable as a public charge if (1) the government provides a "service[]" for which it has a right to repayment; (2) it "make[s] demand for payment"; and (3) there is "a failure to pay." *Matter of B*, 3 I. & N. Dec. at 326. That determination has nothing to do with the type or size of the public benefit an alien receives. Indeed, *Matter of B* suggested that the alien involved would have been deportable as a public charge if her relatives had failed to repay the State's costs in providing the alien with "clothing, transportation, and other incidental expenses," because Illinois law permitted the State to recover those incidentals, even though the law did not permit the State to recover the core costs of institutionalization. *Id.*

Plaintiffs cite *Gegiow v. Uhl*, 239 U.S. 3 (1915), as evidence that the term "public charge" had a settled historical meaning with which the Rule allegedly conflicts. Response 12. But *Gegiow* stands merely for the proposition that an alien cannot be

deemed likely to become a public charge based solely on labor-market conditions in his destination city. *See Gegiow*, 239 U.S. at 9-10. Instead, the determination must be based on an alien's personal characteristics, *id.*, which is precisely the approach the Rule employs, *see* 84 Fed. Reg. at 41,501 (mandating that individual public-charge inadmissibility determinations must be "based on the totality of the alien's [particular] circumstances"). And Congress revised the immigration laws to "overcome" *Gegiow*, further undermining any suggestion that subsequent Congresses embraced the broad interpretation of *Gegiow* that plaintiffs assert. *See* S. Rep. 64-352, at 5 (1916); H.R. Rep. 64-886, at 3-4 (1916).

2. Plaintiffs are likewise mistaken to assert that the Rule fails arbitrary-and-capricious review.

As the government explained, DHS acknowledged its policy change and provided "good reasons" for it, *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). *See* Mot. 15-16; *see also, e.g.*, 84 Fed. Reg. at 41,295, 41,319-20; 83 Fed. Reg. at 51,123, 51,163-64. The agency explained that the 1999 Guidance drew an "artificial distinction between cash and non-cash benefits," 83 Fed. Reg. at 51,123, and was, as a result, "overly permissi[ve]" and inconsistent with congressional intent, 84 Fed. Reg. at 41,319. The Rule's definition of "public charge" corrected these deficiencies and brought the definition into alignment with Congress's goal of ensuring that aliens admitted to the country or permitted to adjust status do not rely on public resources to meet their needs. 83 Fed. Reg. 51,122. And, to the extent the 1999 Guidance

justified its more limited definition of public charge on public-health grounds, *see* Response 20, the agency explained that it was no longer comfortable disregarding the "longstanding self-sufficiency goals set forth by Congress" in "the hope that doing so might" improve public health. 84 Fed. Reg. at 41,314. That is precisely the sort of "value-laden decisionmaking and . . . weighing of incommensurables under conditions of uncertainty" that is entrusted to agencies rather than courts. *Department of Commerce*, 139 S. Ct. at 2571.

The agency also acknowledged the potential costs and other adverse effects of the Rule, including the likely disenrollment in public benefits by some who are subject to the Rule and some who are not. *See, e.g.*, 84 Fed. Reg. at 41,313. While noting the difficulty of estimating the precise impact of its Rule, DHS nonetheless took steps to mitigate the adverse public-health and other potential effects of the Rule, by, for example, excluding certain benefits and recipients from the Rule's coverage. *See* Mot. 17. And it ultimately concluded that furthering Congress's stated goal of alien self-reliance outweighed whatever public-health benefits a more permissive rule might have. 84 Fed. Reg. at 41,313. Given Congress's stated immigration priorities, the agency's decision was not irrational.

Finally, plaintiffs are wrong when they assert that DHS improperly sought to justify the Rule on public-health grounds. Response 22. Plaintiffs seize on a single sentence from the agency's discussion stating that the Rule "will ultimately strengthen public safety, health, and nutrition" by "denying admission or adjustment of status to

aliens who are not likely to be self-sufficient." *Id.* (citing 84 Fed. Reg. at 41,314). The agency's long-term prediction that denying admission or adjustment of status to aliens unlikely to be able to support themselves would be beneficial is unobjectionable and consistent with Congress's findings, but it was not, in any event, the justification for the Rule. Rather, as discussed above, the agency justified the Rule on the ground that it better accords with congressional intent and national immigration policy.

C. Remaining Stay Factors

Plaintiffs do not dispute that, unless the Rule is allowed to take effect, DHS will be forced to continue an immigration policy that will result in the likely irreversible grant of lawful-permanent-resident status to aliens who are "likely to become . . . public charge[s]," as the Secretary would define that term, and who are likely to receive public benefits. 8 U.S.C. 1182(a)(4)(A). As noted, plaintiffs' asserted harms are speculative and fail to account for countervailing factors. *See* Mot. 6-7, *supra* pp. 1-2. In addition, plaintiffs improperly discount as "cursory" DHS's reliance on several facts that undercut their allegations of harm, such as the Rule's exemption of Medicaid receipt by children and pregnant women, and the existence of programs providing free or low-cost vaccinations that are not covered by the Rule. Response 20-21. Plaintiffs' speculative assertions of harm do not outweigh the clear harm to the federal government and the public.

D. Nationwide Injunction

The States impermissibly attempt to justify a nationwide injunction with assertions about the Rule's "impact on other states" that are not "detailed in the record." *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018). Even taking the States' speculations at face value, they have not shown that irreparable harm will result if some aliens temporarily forgo benefits because they will travel abroad, or because they will soon move to another state in which the Rule is applied. Response 25. Indeed, if aliens leave the plaintiff States, there seems little chance that plaintiffs will suffer the future harms that they predict. Similarly baseless is Plaintiffs' theory that, to take advantage of a preliminary injunction, a significant number of aliens in other states will uproot their lives, move to plaintiff States, and burden plaintiffs' public fiscs. *Id.* It was an abuse of discretion to premise a nationwide injunction on such poor evidence that application of the Rule in other states will harm Plaintiffs, given the significant and undisputed harm to the federal government from a nationwide injunction. At a minimum, the court's injunction should be limited to plaintiffs.

CONCLUSION

The preliminary injunction should be stayed pending the federal government's appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Circuit Rule 27-1(d) and 32-3 because it contains 2743 words.

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2019, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

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