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.	No. 19-17213
STATE OF CALIFORNIA, et al., Plaintiffs-Appellees, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al., Defendants-Appellants.	No. 19-17214

REPLY IN SUPPORT OF EMERGENCY MOTION
FOR A STAY PENDING APPEAL

JOSEPH H. HUNT
Assistant Attorney General

DAVID L. ANDERSON
United States Attorney

DANIEL TENNY
GERARD SINZDAK
JOSHUA DOS SANTOS
Attorneys, Appellate Staff
Civil Division, Room 7243
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-0213
joshua.y.dos.santos@usdoj.gov

This Court should stay the district court's injunction pending appeal. 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 likely irreversible 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 because they will lose federal Medicaid reimbursements for services they would have provided to aliens. But they urge the Court to disregard their own reduced expenditures. Plaintiffs simultaneously assert that the federal government's reduced Medicaid spending on aliens is "predictable," California Opp. (Cal.) 5, while the States' reduced Medicaid spending on the same aliens is "speculat[ive]," *id.* at 7. Plaintiffs' Medicaid savings are no more speculative than their predicted lost

reimbursements, and plaintiffs have not demonstrated that the net effect on their budget will be negative.

Even if plaintiffs could establish Article III standing based on lost public-benefit payments, their interest in those funds is "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." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). San Francisco's observation that public-benefit programs "are integral to the public charge assessment," San Francisco Opp. (SF) 8, is relevant only insofar as it acknowledges that the public-charge inadmissibility provision is designed to *reduce* public-benefit expenditures on aliens. By seeking to *increase* spending on public benefits, plaintiffs impermissibly advance "the very . . . interest" that "Congress sought to restrain" in enacting the statute. *National Fed'n of Fed. Employees v. Cheney*, 883 F.2d 1038, 1051 (D.C. Cir. 1989).

As to administrative costs, plaintiffs provide no limiting principle for their assertion that states and localities have standing any time they adjust their own practices in response to a federal policy change. Instead, they rely on inapposite cases that, even on their own terms, do not support that broad proposition, but rather involve direct consequences tied to the challenged action. *See, e.g.*, *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (loss of funding due to undercount in decennial Census); *California v. Azar*, 911 F.3d 558, 571 (9th Cir. 2018) (increased

expenditures under state-based programs when women lost coverage for contraceptives).

B. Merits

1. Plaintiffs' responses to the government's statutory analysis are unpersuasive.

To start, 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. SF 15; Cal. 11-12. But 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 the district court properly recognized as "integral" to the INA's public-charge provision, Op. 69, in the Welfare Reform Act, *see* Pub. L. 104-193, § 423(a)—clear evidence of the statutes' close connection.

Plaintiffs next try to discount the affidavit-of-support provision and the battered-immigrant provision because Congress did "not define or list the means-tested benefits to which" the provisions refer. Cal. 15. But these provisions apply to "*any* means-tested public benefit" the alien receives. 8 U.S.C. § 1183a(a)(1)(B) (emphasis added); *see also id.* § 1182(s). Plaintiffs cannot seriously suggest that the phrase "any means-tested public benefit" excludes nutrition assistance, public housing, and Medicaid.

Plaintiffs fare no better in noting that Congress has provided for support for 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), even if it might in some circumstances assist distressed aliens who are already here. And in the 1882 statute on which plaintiffs rely, Congress raised the funds used to support aliens in distress 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.

Lacking any textual support for their position, plaintiffs place substantial weight on failed legislative proposals. SF 13; Cal. 13. The principle that failed legislative proposals are a dubious means of interpreting a statute is particularly applicable here. Congress did not reject "the very interpretation" of "public charge" that the Rule adopts, Cal. 13; *see also* SF 13; both the 1996 and 2013 proposed definitions were significantly broader than the Rule. The 1996 proposal covered a similar amount of benefits usage within a period of seven years rather than three, *see* H.R. Rep. 104-828, at 138, 240-41, and the 2013 proposal included receipt of *any* amount of public benefits, S. Rep. No. 113-40, at 42, 63.

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).

Plaintiffs likewise err in relying on the purported "longstanding meaning of 'public charge' established and preserved by Congress." SF 9; Cal. 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 in light of the varied circumstances Executive Branch officials confront and the evolving nature of public aid. *See* Mot. 11-12.

Plaintiffs' historical analysis is flawed even on its own terms. Plaintiffs assert that certain 19th Century sources defined "public charge" to mean "a person unable to care for themselves" and who relies on the public "to survive." SF 10. Even if plaintiffs' definition is accepted, it is unclear why aliens who depend on public resources for food, shelter, or health care for months at a time cannot be described as "unable to care for themselves." But in any event, other dictionaries and legal sources contradict plaintiffs' position. Both the 1933 and 1951 editions of Black's Law 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); *see also* 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"). And the cases on which plaintiffs rely do not define the amount or types of aid to be considered, nor could they have taken into account the modern welfare state. *See, e.g.*, *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922) (suggesting, without further qualification, that an alien would clearly be a public charge if "the burden of supporting the appellant is likely to be cast upon the public").

Plaintiffs similarly misunderstand the decision in *Matter of B*, 3 I. & N. Dec. 323 (BIA 1948; AG 1948), as applying only to institutionalization. That decision's "test" for "whether an alien has become a public charge" did not turn on the nature of the public service provided. *Id.* at 326. Rather, the decision held that 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." *Id.* Indeed, *Matter of B* suggests that the alien involved would have been deportable if her relatives had failed to repay Illinois for providing the alien with "clothing, transportation, and other incidental expenses," because Illinois law permitted the State to recover those incidentals—even though there was no dispute that the State had no claim to reimbursement of the core costs of institutionalization. *Id.* at 327. The district court and the 1999 Guidance recognized this straightforward reading of *Matter of B*. *See* Op. 47; 64 Fed. Reg. at 28,690.

Like the district court, 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. SF 11; Cal. 11. But, as the government explained, Mot. 13, *Gegiow* stands simply 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* Mot. 13. Instead, the determination must be based on an alien's personal characteristics, 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 in an effort to circumvent *Gegiow*, Mot. 13, further undermining any suggestion that subsequent Congresses embraced the broad interpretation of *Gegiow* that plaintiffs assert.

Finally, plaintiffs wrongly contend that 8 U.S.C. § 1103 deprives the Rule of deference. SF 13; Cal. 17. They rely on subsection (a)(1), which provides that, in regard to the INA, a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." Plaintiffs do not suggest that the Attorney General has made a determination and ruling that conflicts with the Rule here. Rather, they read the provision as eliminating all deference to the Secretary of Homeland Security in the exercise of authority that Congress expressly delegated to him in subsection (a)(3), which grants him authority to "establish such regulations . . . as he deems necessary for carrying out his authority" to enforce the INA. Plaintiffs

provide no support for this remarkable assertion, and it is plainly incorrect. DHS is entitled to deference in its implementation of the INA, which no one disputes must include the application of the public-charge inadmissibility provision, *see, e.g.*, 84 Fed. Reg. at 41295-96. Indeed, even absent the express delegation in subsection (a)(3), DHS would possess the authority to interpret the public-charge provision which it must implement. *See Barnhart v. Walton*, 535 U.S. 212, 225 (2002) (in "complex[]" statute implicating a "vast number of claims" with a "consequent need for agency expertise," it is appropriate to "read the statute as delegating to the Agency considerable authority to fill in, through interpretation, matters of detail related to its administration").

2. Plaintiffs are likewise mistaken to assert that the Rule fails arbitrary-and-capricious review. SF 15-17; Cal. 17-20.

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. at 51,122. And, to the extent the 1999 Guidance justified its more limited definition of public charge on public-health grounds, *see* SF 16-17; Cal. 17, 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.

As plaintiffs concede, Cal. 18, 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 impacts 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 "justif[ied] the Rule on public health grounds." Cal. 16. Plaintiffs seize on a single sentence from the agency's lengthy 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 consume public benefits. 8 U.S.C. 1182(a)(4)(A). Rather, plaintiffs mistakenly assert that DHS "conceded below" that the injunction would cause no harm, citing the district court's statement that the defendants "conceded" that "they would not 'suffer any hardship.'" SF 3 (quoting Op. 86); Cal. 20 (same). But in context, the district court was merely stating that the government would be able to continue to administer the public-charge provision under the interpretation that the Rule superseded. That conclusion is accurate, but it misses the fundamental point that the injunction causes the precise harm that Congress sought to avoid—allowing aliens to obtain lawful-permanent-resident status even though the Executive Branch

would conclude that they are likely to become public charges. And it also ignores the undisputed point that this harm cannot be redressed by a favorable decision at the end of the litigation.

Moreover, although plaintiffs assert that they will experience long-term harm to their budgets and public health, those harms are speculative and fail to account for countervailing factors. In addition to the problems previously noted, *see* Mot. 6-7, *supra* pp. 1-2, plaintiffs allege that the Rule will lower vaccination rates, SF 7; Cal. 23, without accounting for programs providing free or low-cost vaccinations that are not covered by the Rule. *See* 84 Fed. Reg. at 41,384-85. Plaintiffs' speculative assertions do not outweigh the clear harm to the federal government and the public.

CONCLUSION

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

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

DAVID L. ANDERSON
United States Attorney

DANIEL TENNY
GERARD SINZDAK
s/ Joshua Dos Santos
JOSHUA DOS SANTOS
Attorneys, Appellate Staff
Civil Division, Room 7243
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-0213
joshua.y.dos.santos@usdoj.gov

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Circuit Rules 27-1(d) and 32-3 because it contains 2697 words.

/s/ *Joshua Dos Santos*
Joshua Dos Santos
Counsel for the United States
joshua.y.dos.santos@usdoj.gov

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.

s/ *Joshua Dos Santos*

Joshua Dos Santos
Counsel for the United States
joshua.y.dos.santos@usdoj.gov