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15 **UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF WASHINGTON
17 AT SPOKANE**

18 STATE OF WASHINGTON, et al.,

19 NO. 4:19-cv-05210-RMP

20 Plaintiffs,

21 v.
22 UNITED STATES DEPARTMENT
23 OF HOMELAND SECURITY, a
24 federal agency, et al.

25 PLAINTIFF STATES'
26 OPPOSITION TO DEFENDANTS'
27 MOTION TO STAY SECTION 705
28 STAY AND PRELIMINARY
29 INJUNCTION

30 Defendants.

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I. INTRODUCTION

2 Defendants seek a stay of this Court’s Section 705 stay and preliminary
3 injunction, claiming they will be harmed by not implementing a rule that was
4 never in effect. Defendants’ motion, ECF No. 169 (Mot. to Stay), falls far short
5 of the extraordinary showing necessary to obtain such relief, ignoring critical
6 authority and rehashing the same arguments Defendants already raised
7 unsuccessfully in their earlier briefing. As the Court’s Order made clear, *see* ECF
8 No. 162 (PI Order), Defendants’ recycled arguments fail to establish *any* of the
9 grounds necessary for a stay—much less all of them—as Defendants are unlikely
10 to succeed on the merits; have failed to refute the Plaintiff States’ showing of
11 irreparable harm; cannot demonstrate comparable harms of their own; and
12 identify no equities supporting their request for such extraordinary relief.

13 Defendants add new details in support of some arguments, including that
14 leaving the injunction and stay in place will purportedly cause them irreparable
15 harm in the form of “uncertainty and administrative burdens.” For example,
16 Defendants claim they will be harmed by having to continue to process
17 noncitizens’ applications for adjustment of status under the longstanding
18 framework historically governing such applications. Defendants also claim they
19 will be harmed by possibly having to rehire at a later date some unknown number
20 of contract employees to perform data entry. Defendants, however, have no valid
21 interest in the enforcement of an unlawful rule, and their vague and speculative
22 allegations of harm pale in comparison to the many severe and concrete injuries

1 identified in the briefing and the Court's Order. Moreover, the significant flaws
 2 in Defendants' arguments are underscored by the fact that *every* court to have
 3 considered similar challenges to the Rule—including district courts in New York,
 4 Maryland, Illinois, and California—all independently ruled the plaintiffs were
 5 likely to prevail on the merits and enjoined the Rule's implementation, with two
 6 courts issuing similar nationwide injunctions. The motion should be denied.

7 **II. BACKGROUND**

8 On August 14, DHS published the Rule at issue, *Inadmissibility on Public*
 9 *Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019), which was set to take
 10 effect on October 15. On the same day DHS published the Rule, the Plaintiff
 11 States filed a 176-page complaint opposing its implementation. ECF No. 1. On
 12 September 6, the Plaintiff States filed a 60-page motion seeking a preliminary
 13 injunction and Section 705 stay of the Rule. ECF No. 34 (PI Mot.). Defendants
 14 then filed a 60-page opposition in response, *see* ECF No. 155 (PI Opp'n), and on
 15 September 27, the Plaintiff States filed a 30-page reply. ECF No. 158 (PI Reply).

16 In support of their PI Motion, the Plaintiff States provided declarations
 17 from a broad range of public officials, nonprofit leaders, and subject matter
 18 experts attesting to the many severe harms likely to result from—and in some
 19 cases already resulting from—Defendants' planned implementation of the Rule.
 20 *See* ECF Nos. 36 to 86. The Plaintiff States also submitted over 125 comments
 21 DHS had received during the notice-and-comment period. ECF Nos. 35-1, 35-2,
 22 35-3. Several amici curiae—including leading medical, educational, social

1 welfare, and civil rights organizations—filed briefs in support of the Plaintiff
 2 States. ECF Nos. 109–111, 149–153. In addition to reviewing these voluminous
 3 materials, the Court held nearly two hours of oral argument. ECF No. 161.

4 On October 11, the Court issued a comprehensive 59-page opinion
 5 granting the Plaintiff States’ request for a stay and preliminary injunction. The
 6 Court systematically addressed each of the relevant legal issues and the parties’
 7 arguments. *First*, the Court addressed foundational issues, holding the Plaintiff
 8 States had established standing and ripeness. PI Order at 11–30. *Second*, the
 9 Court addressed the likelihood of success on the merits, holding the Plaintiff
 10 States had shown the Rule likely violated the Administrative Procedure Act and
 11 was both contrary to law and arbitrary and capricious. *Id.* at 34–50 (“[T]he
 12 Plaintiff States have demonstrated a substantial likelihood of success on the
 13 merits of at least two of their causes of action in this matter.”). *Third*, the Court
 14 considered the balance of interests and irreparable harm. *Id.* at 51–55 (Defendants
 15 “made no showing of hardship, injury to themselves, or damage to the public
 16 interest from continuing to enforce the status quo,” whereas the Plaintiff States
 17 “have shown a significant threat of irreparable injury”). *Finally*, the Court held
 18 that staying or enjoining the Rule on anything less than a nationwide basis “would
 19 not prevent [irreparable] harms to the Plaintiff States.” *Id.* at 56–58.

20 Several other district courts across the country considered similar
 21 challenges to the Rule. *See New York v. U.S. Dep’t of Homeland Sec.*, No. 19-
 22 7777, 2019 WL 5100372 (S.D.N.Y. Oct. 11, 2019); *City & County of San*

1 *Francisco v. U.S. Citizenship & Immigration Servs.*, No. 19-4717, 2019 WL
 2 5100718 (N.D. Cal. Oct. 11, 2019); *Casa De Maryland, Inc. v. Trump*, No. PWG-
 3 19-2715, 2019 WL 5190689 (D. Md. Oct. 14, 2019); *Cook County v. McAleenan*,
 4 No. 19-6334, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019). Notably, every court
 5 to consider such a challenge independently enjoined the Rule’s implementation,
 6 holding the plaintiffs in each case were likely to prevail on the merits and would
 7 suffer irreparable harm if the Rule were implemented, with two courts issuing
 8 similar nationwide stays and injunctions. *See New York*, 2019 WL 5100372, at
 9 *12 (“[T]his Court grants a nationwide injunction, as well as a stay postponing
 10 the effective date of the Rule pending a final ruling on the merits, or further order
 11 of the Court.”); *Casa De Maryland*, 2019 WL 5190689, at *1 (“DHS is enjoined
 12 from enforcing the Public Charge Rule and the effective date of the Rule is
 13 postponed on a nationwide basis during the pendency of this case.”); *see also*
 14 *City & County of San Francisco*, 2019 WL 5100718, at *53 (enjoining the Rule
 15 from taking effect in “California, Oregon, the District of Columbia, Maine, [and]
 16 Pennsylvania”); *Cook County v. McAleenan*, 2019 WL 5110267, at *1 (finding
 17 all requirements for preliminary injunction were met and prohibiting Defendants
 18 from implementing the Rule “in the State of Illinois”).

19 On October 25, Defendants filed the instant Motion to Stay. ECF No. 169.
 20 Notwithstanding this Court’s Order finding the Plaintiff States are likely to
 21 succeed on the merits, Defendants now argue they are “likely to succeed on
 22 appeal.” *Id.* at 5. Defendants also contend that delaying implementation of the

1 Rule will impose “significant administrative burdens on Defendants and needless
 2 uncertainty on the aliens Plaintiffs claim to support.” *Id.* at 14. On October 30,
 3 Defendants filed a Notice of Appeal. ECF No. 174.

4 III. ARGUMENT

5 Defendants briefly cite the relevant factors for a stay pending appeal, but
 6 nowhere do they acknowledge the extraordinarily heavy burden they must carry
 7 to obtain such relief. Courts have explained that such a stay is an “intrusion into
 8 the ordinary processes of administration and judicial review” and “is not a matter
 9 of right, even if irreparable injury might otherwise result.” *Nken v. Holder*, 556
 10 U.S. 418, 427 (2009); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 769
 11 (9th Cir. 2018); *see also Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316
 12 (1983) (Blackmun, J., in chambers) (a stay pending appeal is available “only
 13 under extraordinary circumstances”). A stay pending appeal is an “exercise of
 14 judicial discretion,” and the party seeking it must show that the circumstances
 15 justify an exercise of that discretion. *Nken*, 556 U.S. at 433–34. In this context, a
 16 defendant’s burden “is a heavy one,” 11 Wright & Miller, *Federal Practice &*
 17 *Procedure* § 2904 (3d ed. 2019), with courts considering the following factors:

18 (1) whether the stay applicant has made a *strong showing* that he
 19 is likely to succeed on the merits; (2) whether the applicant will
 20 be irreparably injured absent a stay; (3) whether issuance of
 the stay will substantially injure the other parties interested in the
 proceeding; and (4) where the public interest lies.

21 *E. Bay Sanctuary Covenant*, 932 F.3d at 769–70 (quoting *Nken*, 556 U.S. at 433–
 22 34) (emphasis added). The first and second factors are “critical,” and the “mere

1 possibility” of success on the merits or irreparable harm does not satisfy them.
 2 *Id.* Moreover, Defendants’ burden of making a “strong showing” of a likelihood
 3 of success is rendered only more challenging by the “limited and deferential”
 4 abuse-of-discretion standard of review applied to preliminary injunctions. *Cnty.*
 5 *House, Inc. v. City of Boise*, 490 F.3d 1041, 1047 (9th Cir. 2007).

6 **A. This Court Has Already Held that the Plaintiffs States—Not
 7 Defendants—Are Likely to Prevail on the Merits**

8 Defendants take issue with the Court’s well-reasoned decision that the
 9 Plaintiff States are likely to succeed on the merits, but their argument ignores
 10 critical aspects of the Court’s ruling and fails to raise anything not already briefed
 11 and argued at length. For example, Defendants claim they are likely to succeed
 12 on appeal in showing the Plaintiff States lack standing, *see* Mot. to Stay at 6–9,
 13 but their argument depends on a glaring omission: Defendants fail to even cite—
 14 much less address—the Supreme Court’s recent decision in *Dep’t of Commerce*
 15 *v. New York*, 139 S. Ct. 2551 (2019) (Roberts, C.J.). In that case, the Court held
 16 the plaintiffs, including several states, had established standing based on “the
 17 predictable effect of Government action on the decisions of third parties.” *Id.* at
 18 2565. Here, although the Plaintiff States addressed the case extensively in
 19 briefing and at oral argument, *see* PI Reply at 11–12, and the Court carefully
 20 considered and even quoted from the decision in its Order, *see* PI Order at 24–
 21 25, Defendants fail to mention the case at all in their 13-page Motion to Stay.
 22 Defendants’ other arguments overlook similarly negative precedent in an attempt

1 to breathe new life into their already-rejected contentions.

2 It is thus unnecessary to conduct yet another exhaustive refutation of
 3 Defendants' other meritless arguments, as the issues have already been addressed
 4 in the pleadings, declarations, amicus briefs, oral argument, and PI Order. *See* PI
 5 Reply at 10–15, PI Order at 11–30 (jurisdictional issues); PI Reply at 15–22, PI
 6 Order at 30–46 (congressional intent, meaning of the term, and agency authority);
 7 PI Reply at 24–26, PI Order at 45–46 (Rehabilitation Act); PI Mot. at 54–65, PI
 8 Reply at 27–32, PI Order at 48–50 (arbitrary and capricious); PI Mot. at 65–70,
 9 PI Reply at 36–38, PI Order at 55–59 (scope of relief). Defendants' reliance on
 10 these rehashed arguments only underscores the Plaintiffs' likelihood of success.

11 The other courts to consider challenges to the Rule reached similar
 12 conclusions. For example, Judge Feinerman of the Northern District of Illinois
 13 identified the Supreme Court's opinion in *Gegiow v. Uhl*, 239 U.S. 3 (1915) as
 14 critical evidence for interpreting the meaning of the term "public charge." *See*
 15 *Cook County v. DHS*, 2019 WL 5110267, at *8-12 ("Fortunately, the Supreme
 16 Court told us just over a century ago what 'public charge' meant in the relevant
 17 era, and thus what it means today . . . *Gegiow* teaches that 'public charge' does
 18 not, as DHS maintains, encompass persons who receive benefits, whether modest
 19 or substantial, due to being temporarily unable to support themselves entirely on
 20 their own."). As Judge Feinerman explained, Defendants' "attempt to evade
 21 *Gegiow's* interpretation" was unsupported by the very evidence they relied on.
 22 *Id.* For example, Judge Feinerman noted DHS had based its flawed argument in

1 that case—as it did here as well—in part on a 1929 treatise that badly misstated
 2 the relevant precedent. *Id.* at *10 (“The treatise is wrong. It does not address
 3 *Gegiow* in expressing its understanding of ‘public charge.’ And the sole authority
 4 it cites . . . does not support its view.”). The other courts to consider such
 5 challenges reached similar conclusions. *See New York*, 2019 WL 5100372, at *6
 6 (explaining that “one thing is abundantly clear—‘public charge’ has *never* been
 7 understood” to mean the definition set forth in the Rule (emphasis in original)).

8 **B. Defendants Fail to Show Irreparable Harm Pending Appeal**

9 Defendants have failed to identify any cognizable harm they will suffer
 10 from staying the implementation of a Rule that was never in effect. Offering only
 11 minimal harms present in virtually any injunction, Defendants’ argument
 12 depends largely on speculation and a fundamental misinterpretation of precedent.

13 *First*, Defendants argue they are *per se* harmed by any delay preventing
 14 them from implementing any rule. Mot. to Stay at 9. Here, Defendants incorrectly
 15 rely on *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) for
 16 the proposition that the “federal government sustains irreparable injury whenever
 17 it ‘is enjoined by a court from effectuating statutes enacted by representatives of
 18 its people.’” *Id.* The Plaintiff States have addressed this point repeatedly
 19 throughout the instant litigation, but it bears repeating: The Rule is *not* a statute
 20 “enacted by representatives of [the] people”; rather, it is a new agency action
 21 subject to judicial review pursuant to the APA (and in fact was twice *rejected* by
 22 Congress). Further, Defendants have no valid interest in the enforcement of an

1 unlawful rule such as the one at issue here. *League of Women Voters of U.S. v.*
 2 *Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (“There is generally no public interest in
 3 the perpetuation of unlawful agency action. To the contrary, there is a substantial
 4 public interest in having governmental agencies abide by the federal laws that
 5 govern their existence and operations.” (internal citations, quotations omitted)).

6 *Second*, Defendants fail to establish they will be harmed by having to
 7 continue processing noncitizens’ applications for adjustment of status consistent
 8 with the longstanding policy already governing the process for many years. *See,*
 9 *e.g.*, 64 Fed. Reg. 28,689, 28,692 (Mar. 26, 1999) (1999 Field Guidance)
 10 underscoring that the public charge analysis will *not* consider noncitizens’ use
 11 of “important health and nutrition benefits that they are legally entitled to
 12 receive”). According to Defendants, continuing to approve such applications
 13 consistent with their historical practice will irreparably harm them, as “DHS
 14 currently has no practical means of revisiting these determinations made under
 15 the prior guidance . . . if the injunction against the Rule is ultimately vacated.”
 16 Mot. to Stay at 10. Defendants’ superficial claims of harm pale in comparison to
 17 the severe injuries to the Plaintiff States, including in the event noncitizens
 18 wrongly choose to disenroll from benefits because of the Rule’s unlawful effects.
 19 *See* PI Mot. at 56–57 (explaining that even a slight decrease in vaccination rates
 20 resulting from Medicaid disenrollment could give rise to a deadly outbreak); *see*
 21 *also* 1999 Field Guidance (noncitizens’ reluctance to use important health and
 22 nutritional benefits they are legally entitled to receive “has an adverse impact not

1 just on the potential recipients, but on public health and the general welfare”).

2 *Third*, Defendants claim they will suffer irreparable harm because an
 3 unspecified number of contract employees hired to perform data entry tasks
 4 might choose to pursue other employment while this litigation is pending. As an
 5 initial matter, Defendants’ various arguments are internally irreconcilable, as
 6 Defendants now appear to rely on speculation over the independent employment
 7 decisions of third parties to demonstrate harm. *Compare* Mot. to Stay at 7
 8 (arguing Defendants will prevail on appeal because Plaintiff States cannot allege
 9 harm based on the “decisions of independent actors”) *with id.* at 14 (arguing
 10 Defendants will suffer harm because an unknown number of data-entry contract
 11 employees might “seek other employment”). But even apart from Defendants’
 12 apparent failure to make any contingency plan for the potential injunction of a
 13 rule twice rejected by Congress and strongly opposed by the “vast majority” of
 14 over 266,000 public comments, Defendants’ alleged harms are not only common
 15 to any injunction but are frankly trivial compared to the injuries the Plaintiff
 16 States will suffer if the Rule is implemented. *Compare* Decl. of Daniel Renaud,
 17 ECF No. 170, ¶ 5 (alleging potential harm related to Defendants’ “active social
 18 media presence”) *with* PI Mot. at 58–59, PI Reply at 29–30, and PI Order at 16–
 19 18 (detailing the lasting physical, emotional, medical, financial, educational, and
 20 societal costs of childhood hunger and homelessness).

21 **IV. CONCLUSION**

22 For the foregoing reasons, Defendants’ Motion to Stay should be denied.

1 RESPECTFULLY SUBMITTED this 15th day of November 2019.

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DECLARATION OF SERVICE

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

DATED this 15th day of November 2019, at Seattle, Washington.

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