No. 19-3591

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK, CITY OF NEW YORK,
STATE OF CONNECTICUT, and STATE OF VERMONT,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, KENNETH T. CUCCINELLI, in his official capacity as Acting Director of USCIS, and UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

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

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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 inadmissibility statute, which was designed to *reduce* such benefit use. On the merits, plaintiffs identify no INA provision 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 Executive Branch's discretion. As for plaintiffs' arbitrary-and-capricious challenge, the agency carefully explained the basis for its change in position and amply justified the factors that it will take into account in individualized determinations. Plaintiffs' reliance on the Rehabilitation Act only underscores their misunderstanding of the Rule.

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 believe should be inadmissible. At a minimum, the injunction should be stayed insofar as it extends beyond the plaintiff States, who fail to explain why a broader injunction is necessary to redress their asserted injuries.[1]

[1] On December 2, 2019, the district court denied the government's motion for a stay pending appeal. *See* Dkt. 122.

A. Standing

Plaintiffs claim to have standing because the Rule will cause fewer aliens to use state and federal benefits. Response 25. Plaintiffs do not dispute, however, 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. Instead, they assert that their "losses will not be offset by" spending reductions because, plaintiffs predict, "the Rule will simultaneously *increase* plaintiffs' healthcare costs as newly uninsured patients avoid preventative care, use costly emergency services, and suffer worse health outcomes." Response 12-13. Thus, plaintiffs ultimately rely not on harm caused directly by disenrollment, but rather on "speculative inferences" about its downstream effects. *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 (1976).

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. *Id.* at 2565-66. By contrast, even if the Rule's "predictable effect" is decreased enrollment in public benefits, the correlated savings to state budgets makes the States' putative harms far from inevitable, much less "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013).

Plaintiffs also assert that "as administrators of public-benefit programs," they will "incur direct programmatic costs." Response 13. But they 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, nor any case that has adopted this boundless theory of standing.

As to the zone of interests, plaintiffs assert that their budgetary interests are consonant with Congress's efforts "to protect state and city fiscs." Response 26. But the public-charge statute's actual objective is to reduce public-benefit use by aliens, not to "protect" state and local government resources by requiring the federal government to expend more money on public benefits. By seeking to *increase* spending on public benefits, plaintiffs impermissibly advance "the very . . . interest" that "Congress sought to restrain." *National Fed'n of Fed. Employees v. Cheney*, 883 F.2d 1038, 1051 (D.C. Cir. 1989).

B. Merits

1. Plaintiffs make no serious effort to address the numerous statutory provisions that illustrate Congress's intent to ensure that aliens rely on private resources rather than public benefits. *See* Mot. 9-12. Plaintiffs entirely ignore Congress's statements of purpose, which emphasized Congress's focus on self-sufficiency of aliens and specifically addressed aliens' use of public resources. *See* 8 U.S.C. § 1601; Mot. 11. And they seek to dismiss other provisions as "ancillary amendments" unrelated to the public-charge provision. Response 20.

Plaintiffs do not dispute that the statute does not define "public charge." Nor do they explain why congressional actions contemporaneous with the enactment of

the provision at issue here should be ignored when seeking to ascertain what Congress understood that term to mean.

Moreover, the affidavit-of-support provision is hardly "ancillary." Response 20. In a paragraph entitled "Public Charge," Congress provided that an alien who was "likely at any time to become a public charge is inadmissible," 8 U.S.C. § 1182(a)(4), and then further specified that an alien who fails to obtain a required sponsor "is inadmissible under this paragraph," *id.* § 1182(a)(4)(C), (D). The congressional determination that the public-charge ground of inadmissibility will apply to an alien who cannot guarantee that any public benefits received will be repaid is highly probative of Congress's understanding of the term.

The battered-alien provision likewise bears directly on the public-charge provision because it indicates when DHS may not consider the receipt of public benefits in making public-charge inadmissibility determinations. 8 U.S.C. § 1182(s). The government is not using "a shield for some immigrants . . . as a sword against others." Response 19. Rather, the relevant point is that Congress would have had no reason to instruct DHS not to consider a battered alien's receipt of public benefits in making a public-charge inadmissibility determination (*i.e.*, it would have had no reason to create a shield) if, as plaintiffs posit, DHS was already prohibited from doing so.

Rather than grapple with the statute's text, plaintiffs rely primarily on a flawed historical analysis. Plaintiffs assert that "public charge" is a century-old "term of art" that means "an individual who is unlikely to work and is thus extensively dependent

on the government to survive." Response 3. The historical record does not support that assertion. The 1999 Guidance, on which plaintiffs rely, explicitly noted that the term "public charge" was "ambiguous" and had "never been defined in statute or regulation." 64 Fed. Reg. 28676-77. Other historical sources similarly undermine plaintiffs' claim that "public charge" has the settled meaning they assert. Both the 1933 and 1951 editions of Black's Law Dictionary defined "public charge" 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). A 1929 immigration treatise provided a similar definition. Arthur Cook et al., *Immigration Laws of the United States* § 285 (1929) ("public charge" means a person who requires "any maintenance, or financial assistance, rendered from public funds").

Plaintiffs briefly argue that an 1882 statute supports their proposed definition because the statute provided some relief for distressed aliens. Response 4-5. Congress's recognition that some aliens who evaded a public-charge designation would later seek out public support is not evidence that Congress desired that such aliens be admitted. And that statute raised funds 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 aliens' use of public benefits.

Plaintiffs characterize the Senate report that provided a foundation for the INA as "demonstrat[ing] that Congress understood the history of the public-charge provision and the precedents interpreting that provision, and retained the preexisting scope of 'public charge' rather than expand[ing] it." Response 17. But plaintiffs ignore what the report actually said about the history of the provision: that the term had no set definition and that its implementation should be left to the Executive Branch. *See* Mot. 13 (citing S. Rep. No. 81-1515 (1950)).

Plaintiffs also misunderstand *Matter of B-*, which they characterize as holding that "[t]o be deportable, [an alien] must *both* have become a 'public charge'—*i.e.*, substantially reliant on government funds to survive—*and* failed to repay those funds when demanded." Response 18. That decision's "test" for "whether an alien has become a public charge" did not turn on whether the alien had become substantially reliant on government funds to survive. *Matter of B-*, 3 I. & N. Dec. 323, 326 (BIA 1948; A.G. 1948). 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.

2. Plaintiffs arbitrary-and-capricious challenge is likewise meritless. Plaintiffs' suggestion that DHS should have exhaustively "justif[ied] the need to radically alter the well-established public-charge framework," Response 21, cannot be reconciled with the Supreme Court's admonition that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Instead, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Id.*

Plaintiffs mistakenly suggest that the Rule is premised on setting aside factual findings underlying the 1999 Guidance. Response 22. But DHS 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 better 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. 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.

It is not entirely clear what plaintiffs mean when they fault DHS for "considering receipt of *any* amount of supplemental benefits, even temporarily, as

proof that an immigrant will be a public charge." Response 22. The likelihood that an alien will become a public charge at any time in the future is assessed on a case-by-case basis based on the totality of the circumstances, and past receipt of designated public benefits is just one factor among many. And the Rule's definition of "public charge" requires sustained use of public benefits, not mere temporary receipt. Plaintiffs' assertion that DHS should have drawn the line differently, Response 23-24, is a classic case of second-guessing an agency's exercise of discretion.

Plaintiffs are similarly mistaken in suggesting that some of the factors taken into account "do not have a reasonable connection to an immigrant's likely receipt of supplemental benefits *at all*." Response 23. They cannot seriously suggest that an alien's credit score or dependence on health-insurance subsidies is irrelevant to the likelihood that the alien will receive public benefits in the future. Instead, plaintiffs attack a straw man by noting that "the vast majority of people with [certain enumerated] factors do not use *any* public benefits." *Id.* That would be a problem if these factors were dispositive, but plaintiffs cannot plausibly demonstrate that they are irrational considerations in the totality of the circumstances.

3. Plaintiffs similarly err when they assert that "the Rule treats applicants differently based solely on their disabilities because it automatically 'considers disability as a negative factor in the public charge assessment.'" Response 24. Considering an alien's health as one factor among many, as DHS is statutorily required to do, 8 U.S.C. § 1182(a)(4)(b)(i)(II), plainly does not violate the

Rehabilitation Act's prohibition on denying benefits solely by reason of disability. Plaintiffs' assertion that "disability alone" "will automatically render an applicant incapable of supporting himself," Response 25, merely underscores their refusal to acknowledge the Rule's totality-of-the-circumstances approach.

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 irreversible grant of lawful-permanent-resident status to at least some aliens who are likely to become "public charge[s]," as the Secretary would define that term. 8 U.S.C. 1182(a)(4)(A). Plaintiffs' observation that the injunction preserves the status quo, Response 10-11, is beside the point, as the status quo forces the Secretary to make likely permanent determinations in a manner inconsistent with his lawful exercise of delegated discretion.

On the other side of the ledger, plaintiffs' harms are speculative and fail to account for countervailing factors. *See supra* Part A. And there is no basis for plaintiffs' view that the public interest is served by compelling DHS to grant lawful-permanent resident status to aliens who are likely to become public charges as the Secretary would define that term. Response 13-14.

D. Nationwide Injunction

Plaintiffs do not attempt to defend the district court's conclusion that an injunction extending beyond the plaintiff States is necessary to remedy their alleged

injuries. Instead, they assert that a nationwide injunction is appropriate simply because they are challenging a regulation under the Administrative Procedure Act. Response 28. In support of this extreme position, plaintiffs rely on statements in a D.C. Circuit case (involving a permanent nationwide injunction) that reflect the unique fact that D.C. Circuit rulings often curtail the agency's flexibility nationwide as a practical matter because venue rules permit aggrieved parties to seek review in the District of Columbia, where the federal defendant is located. *See National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998); 28 U.S.C. § 1391(e). The D.C. Circuit has not suggested that the APA compels courts to issue nationwide injunctions, let alone to give nationwide effect to *preliminary* injunctions, which are an equitable tool designed merely to "preserve the relative positions of the parties until a trial on the merits can be held." *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). And other courts have narrowed injunctions under the APA to apply only as necessary to provide complete relief to the parties. *See Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011).

Plaintiffs accuse the government, in contesting the scope of the injunction, of "ignor[ing] the separate provision of the district court's order postponing the Rule's effective date under 5 U.S.C. § 705." Response 27. The district court's discussion of that provision, relegated to a footnote, stated that "[t]he standard for a stay under 5 U.S.C. § 705 is the same as the standard for a preliminary injunction," and that the

"Court grants the stay for the same reasons it grants the injunction." Order 24 n.5. The district court thus properly did not endorse plaintiffs' apparent view that relief under § 705 could be justified even if it would not constitute a proper exercise of equitable discretion. That view cannot be reconciled with § 705's text, which provides for interim relief only "[t]o the extent necessary to prevent irreparable injury."

CONCLUSION

The preliminary injunction (and associated stay under 5 U.S.C. § 705) should be stayed pending the federal government's appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,592 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Gerard Sinzdak
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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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