No. 19-35914

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.

On Appeal from the United States District Court
for the Eastern District of Washington

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF JURISDICTION 3

STATEMENT OF THE ISSUES 4

PERTINENT STATUTES AND REGULATIONS 4

STATEMENT OF THE CASE 4

A. Statutory and Regulatory Background 4

B. Prior Proceedings 8

SUMMARY OF ARGUMENT 12

STANDARD OF REVIEW 16

ARGUMENT 16

I. Plaintiffs Lack A Cognizable Injury Sufficient To Support This Suit 17

II. Plaintiffs Are Not Likely To Succeed On The Merits 22

A. The Rule Adopts A Permissible Construction Of "Public Charge" 22

B. The Rule Is Not Arbitrary Or Capricious 38

C. The Rule Does Not Violate The Rehabilitation Act 46

III. The Remaining Factors Weigh Against A Preliminary Injunction 47

IV. The District Court Abused Its Discretion In Granting A Nationwide Injunction 49

CONCLUSION 55

STATEMENT OF RELATED CASES

ADDENDUM

TABLE OF AUTHORITIES

Cases: **Page(s)**

Alaska Oil & Gas Ass'n v. Jewell,
815 F.3d 544 (9th Cir. 2016) 38

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,
458 U.S. 592 (1982) 18

Allen v. Wright,
468 U.S. 737 (1984) 17

Association of Private Sector Colls. & Univs. v. Duncan,
681 F.3d 427 (D.C. Cir. 2012) 44

Baltimore Gas & Elec. Co. v. NRDC,
462 U.S. 87 (1983) 38

Barnhart v. Walton,
535 U.S. 212 (2002) 34

Bresgal v. Brock,
843 F.2d 1163 (9th Cir. 1987) 49

C.O. v. Portland Public Sch.,
679 F.3d 1162 (9th Cir. 2012) 46

Califano v. Yamasaki,
442 U.S. 682 (1979) 49

California v. Azar,
911 F.3d 558 (9th Cir. 2018) 51, 52

Caribbean Marine Servs. Co. v. Baldrige,
844 F.2d 668 (9th Cir. 1988) 47, 48

Chevron U.S.A., Inc. v. NRDC,
467 U.S. 837 (1984) 27, 33

City & Cty. of San Francisco v. Trump,
897 F.3d 1225 (9th Cir. 2018) 49, 51

City & Cty. of San Francisco v. USCIS, No. 19-cv-04717-PJH,
2019 WL 5100718 (N.D. Cal. Oct. 11, 2019) 46, 49

City of Los Angeles v. County of Kern,
581 F.3d 841 (9th Cir. 2009) 22

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 17, 19

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 50

Department of Commerce v. New York,
139 S. Ct. 2551 (2019) 44

East Bay Sanctuary Covenant v. Barr,
934 F.3d 1026 (9th Cir. 2019) 49, 51

Environmental Def. Fund v. EPA,
922 F.3d 446 (D.C. Cir. 2019) 44

FCC v. Fox Television Stations,
556 U.S. 502 (2009) 39

Federal Trade Comm'n v. Enforma Nat. Prods., Inc.,
362 F.3d 1204 (9th Cir. 2004) 16

Gill v. Whitford,
138 S. Ct. 1916 (2018) 50

Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.,
527 U.S. 308 (1999) 50

Husted v. A. Philip Randolph Inst.,
138 S. Ct. 1833 (2018) 23

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 29

Linda R.S. v. Richard D.,
410 U.S. 614 (1973) 21

Los Angeles Haven Hospice, Inc. v. Sebelius,
638 F.3d 644 (9th Cir. 2011) 49, 51

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 17

Lujan v. Nat'l Wildlife Fed'n,
497 U.S. 871 (1990) 21

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,
567 U.S. 209 (2012) 17, 21, 22

Matter of B-,
3 I. & N. Dec. 323 (BIA and AG 1948) 24, 25, 36

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 38

National Fed'n of Fed. Emps. v. Cheney,
883 F.2d 1038 (D.C. Cir. 1989) 21

Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.,
636 F.3d 1150 (9th Cir. 2011) 47

Pension Benefit Guar. Corp. v. LTV Corp.,
496 U.S. 633 (1990) 29

Public Citizen, Inc. v. FAA,
988 F.2d 186 (D.C. Cir. 1993) 44

Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1976) 47

Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs,
531 U.S. 159 (2001) 29

Southeastern Cmty. Coll. v. Davis,
442 U.S. 397 (1979) 46

Thor Power Tool Co. v. Commissioner,
439 U.S. 522 (1979) 35

Trump v. Hawaii,
138 S. Ct. 2392 (2018) 50

United States v. Mendoza,
464 U.S. 154 (1984) 51, 52

Virginia ex rel. Cuccinelli v. Sebelius,
656 F.3d 253 (4th Cir. 2011) 20

Virginia Soc'y for Human Life Inc. v. Federal Election Comm'n,
263 F.3d 379 (4th Cir. 2001) 51

Warth v. Seldin,
422 U.S. 490 (1975) 50

Winter v. Natural Res. Def. Council, Inc.,
555 U.S. 7 (2008) 16, 47, 52, 54

Zepeda v. U.S. Immigration & Naturalization Serv.,
753 F.2d 719 (9th Cir. 1983) 50

Statutes:

Administrative Procedure Act:
5 U.S.C. §§ 701-706 3
5 U.S.C. § 705 ..... 1, 8, 16, 54, 55
5 U.S.C. § 706(2)(A) 38

Immigration and Nationality Act (INA):
8 U.S.C. § 1103 5
8 U.S.C. § 1103(a)(1) 33
8 U.S.C. § 1103(a)(3) 33, 35
8 U.S.C. § 1182(a)(4) 5, 23, 34
8 U.S.C. § 1182(a)(4)(A) 1, 4, 5, 22, 48
8 U.S.C. § 1182(a)(4)(B) 5, 22, 41, 47
8 U.S.C. § 1182(a)(4)(C) 23
8 U.S.C. § 1182(s) 23
8 U.S.C. § 1183a 23, 24, 28

8 U.S.C. § 1227(a)(5) 5, 24, 25
8 U.S.C. § 1255a 32

6 U.S.C. § 211(c)(8) 5

6 U.S.C. § 557 5

8 U.S.C. § 1601(2) 26, 28

8 U.S.C. § 1601(3) 26

8 U.S.C. § 1601(5) 2, 27

8 U.S.C. §§ 1611 ..... 23, 26

8 U.S.C. § 1612(b) 31

8 U.S.C. § 1631(a) 25

28 U.S.C. § 1292(a)(1) 4

28 U.S.C. § 1331 3

29 U.S.C. § 794(a) 14, 46

Regulation:

8 C.F.R. § 212.22(d) 45

Legislative Materials:

Concurrent Resolution on the Budget for Fiscal Year 1997: Hearings Before the Committee on the Budget, 104th Cong. (1996) 25

142 Cong. Rec. S11872 (daily ed. Sept. 30, 1996) 30

H.R. Rep. No. 104-828 (Sept. 24, 1996) (Conf. Rep.) 26, 30

S. Rep. No 81-1515 (1950) 34

S. Rep. No. 104-249 (1996) 35

S. Rep. No. 113-40 (2013) 30

Other Authorities:

Arthur Cook et al., *Immigration Laws of the United States* § 285 (1929) 37

11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, p. 139 (2d ed. 1995) 54

64 Fed. Reg. 28,676 (May 26, 1999) 6, 25

64 Fed. Reg. 28,689 (May 26, 1999) 6, 31

83 Fed. Reg. 51,114 (Oct. 10, 2018) 6, 19, 26, 39, 40, 41

84 Fed. Reg. 41,292 (Aug. 14, 2019) 5-8, 19, 27, 33, 39, 41-43, 45

Public Charge:
Black's Law Dictionary (3d ed. 1933) 37
Black's Law Dictionary (4th ed. 1951) 37

The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 50

INTRODUCTION

The Immigration and Nationality Act (INA) provides that an alien is inadmissible if the alien is, in the Executive Branch's opinion, "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). On August 14, 2019, the Department of Homeland Security (DHS) published a final rule implementing the public-charge inadmissibility provision. The Rule defines "public charge" to mean an alien who receives one or more specified public benefits, including certain noncash benefits, for more than twelve months in the aggregate within any thirty-six month period. The Rule also sets forth a framework DHS will use to determine whether an alien is likely at any time to become a public charge. On October 11, 2019, the district court entered a nationwide preliminary injunction and stay under 5 U.S.C. § 705 barring DHS from enforcing the Rule. This Court stayed the injunction pending appeal on December 5, 2019.

The district court's order should be set aside, as none of the traditional factors supports the entry of an injunction here. As a threshold matter, plaintiffs—fourteen States—have not established standing to sue under Article III and zone-of-interest principles. Plaintiffs allege that the Rule will burden their budgets because some of their residents will respond to the Rule by disenrolling from public-benefit programs. Their allegations are based on a speculative chain of inferences and fail to account for factors that would mitigate costs or generate savings. Moreover, plaintiffs seek to

further an interest—greater use of public benefits by aliens—diametrically opposed to the interests Congress sought to further through the public-charge statute.

Nor are plaintiffs likely to succeed on the merits of their claim that the Rule's definition of "public charge" is inconsistent with the INA. Numerous statutory provisions demonstrate that Congress intended to require aliens to rely on their own resources, rather than taxpayer-supported benefits, to meet their basic needs. For example, Congress required many aliens to obtain sponsors who must promise to reimburse the government for public benefits the alien receives, and declared any alien who fails to obtain a required sponsor automatically likely to become a public charge. Congress also made it difficult for most aliens to obtain most public benefits after they enter the country, underscoring its stated goal of "assur[ing] that aliens [are] self-reliant in accordance with [national] immigration policy," 8 U.S.C. § 1601(5).

The Rule—which renders inadmissible aliens who are likely to rely on government support for a significant period to meet basic needs—fully accords with Congress's intent. Congress has not required DHS to adopt a narrow definition of "public charge," but rather has repeatedly and intentionally left the definition and application of the term to the discretion of the Executive Branch.

Plaintiffs are also unlikely to succeed in showing that the Rule is arbitrary and capricious. The agency more than adequately explained its reasons for adopting the Rule, analyzed the costs and benefits associated with the Rule, and reasonably concluded that the Rule's benefits justified its costs. Nor are plaintiffs likely to

succeed in establishing that the Rule violates the Rehabilitation Act. Congress required DHS to take an alien's health into account in evaluating whether the alien is likely at any time to become a public charge, and an alien's health (including any relevant disability) is but one factor among many that DHS considers in making such a determination.

The remaining preliminary-injunction factors likewise weigh against a preliminary injunction. So long as the Rule cannot take effect, the government will grant lawful-permanent-resident status to aliens who DHS believes are inadmissible as likely to become public charges under the Rule. Any harm plaintiffs might experience does not constitute irreparable injury, let alone irreparable injury sufficient to outweigh that harm to the federal government and taxpayers. At a minimum, the district court's injunction should be limited to the plaintiff States, as a broader injunction is not necessary to redress plaintiffs' alleged injuries.[1]

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331, raising claims under the Administrative Procedure Act, 5 U.S.C. §§ 701-706,

[1] Four other district courts have issued preliminary injunctions, all of which the government has appealed. *See City and County of San Francisco v. USCIS*, No. 19-cv-4717 (N.D. Cal.) (Plaintiff Counties); *California v. USDHS*, No. 19-cv-4975 (N.D. Cal.) (Plaintiff States and the District of Columbia); *New York v. DHS*, 19-cv-7777 (S.D.N.Y), and *Make the Road New York v. Cuccinelli*, 19-cv-7993 (S.D.N.Y.) (nationwide); *Casa de Maryland, Inc. v. Trump*, 19-cv-2715 (D. Md.) (nationwide); *Cook County, Illinois v. McAleenan*, 19-cv-6334 (N.D. Ill.) (Illinois).

and the Fifth Amendment. Excerpts of Record (ER) 80, 233-43. Plaintiffs' standing is contested. *See infra* Part I. The district court entered a preliminary injunction on October 11, 2019. ER 1-59. The government filed a timely notice of appeal on October 30, 2019. ER 60-61. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether plaintiffs—fourteen states—are appropriate parties to challenge the Rule.

2. Whether the Rule's definition of "public charge" is based on a permissible construction of the INA.

3. Whether the Rule is arbitrary and capricious.

4. Whether the Rule violates the Rehabilitation Act.

5. Whether the district court erred in failing to limit its injunction to the fourteen plaintiff States before the court.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The INA provides that "[a]ny alien who, . . . in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C.

§ 1182(a)(4)(A).[2] That assessment "shall at a minimum consider the alien's (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." *Id.* § 1182(a)(4)(B). A separate INA provision provides that an alien is deportable if, within five years of entry, the alien "has become a public charge from causes not affirmatively shown to have arisen" since entry. *Id.* § 1227(a)(5).

Three agencies make public-charge inadmissibility determinations under § 1182(a)(4). DHS makes such determinations with respect to aliens seeking admission at the border and aliens within the country who apply to adjust their status to that of a lawful permanent resident. *See* 84 Fed. Reg. 41,292, 41,294 n.3 (Aug. 14, 2019). The Department of State's consular offices apply the public-charge ground of inadmissibility when evaluating visa applications filed by aliens abroad. *See id.* The Department of Justice enforces the statute when the question whether an alien is inadmissible on public-charge grounds arises during removal proceedings. *See id.* The Rule at issue governs DHS's public-charge inadmissibility determinations. *See id.* The Rule's preamble indicated that the State Department and Department of Justice were expected to promulgate rules and guidance consistent with the Rule. *See id.*

[2] The statute refers to the Attorney General, but in 2002, Congress transferred the Attorney General's authority to make inadmissibility determinations in the relevant circumstances to the Secretary of Homeland Security. *See* 8 U.S.C. § 1103; 6 U.S.C. § 557; *see also* 6 U.S.C. § 211(c)(8).

2. Although the public-charge ground of inadmissibility dates back to the first immigration statutes, Congress has never defined the term "public charge," instead leaving the term's definition and application to the Executive Branch's discretion. In 1999, the Immigration and Naturalization Service (INS), a DHS predecessor, proposed a rule to "for the first time define 'public charge,'" 64 Fed. Reg. 28,689 (May 26, 1999) (1999 Guidance), a term that the INS noted was "ambiguous" and had "never been defined in statute or regulation," 64 Fed. Reg. 28,676, 28,676-77 (May 26, 1999) (proposed rule). The proposed rule would have defined "public charge" to mean an alien "who is likely to become primarily dependent on the Government for subsistence as demonstrated by either: (i) [t]he receipt of public cash assistance for income maintenance purposes, or (ii) [i]nstitutionalization for long-term care at Government expense." *Id.* at 28,681. When it announced the proposed rule, INS also issued "field guidance" adopting the proposed rule's definition of "public charge." 64 Fed. Reg. at 28,689. The proposed rule was never finalized, leaving the 1999 Guidance as the default definition of "public charge" since its issuance. 84 Fed. Reg. at 41,348 n.295.

In October 2018, DHS announced a proposed new approach to public-charge inadmissibility determinations. It did so through a proposed rule subject to notice and comment. *See* 83 Fed. Reg. 51,114 (Oct. 10, 2018) (NPRM). After responding to the numerous comments it received during the notice-and-comment period, DHS promulgated the final Rule at issue here in August 2019. *See* 84 Fed. Reg. at 41,501.

The Rule is the first time the Executive Branch has defined the term "public charge" and established a framework for evaluating whether an alien is likely to become a public charge in a final rule following notice and comment.

The Rule defines "public charge" to mean "an alien who receives one or more [specified] public benefits . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." 84 Fed. Reg. at 41,501. The specified public benefits include cash assistance for income maintenance and certain noncash benefits, including most Medicaid benefits, Supplemental Nutrition Assistance Program benefits, and federal housing assistance. *Id.* As the agency explained, the Rule's definition of "public charge" differs from the 1999 Guidance in that: (1) it incorporates certain noncash benefits; and (2) it replaces the "primarily dependent" standard with the 12-month/36-month measure of dependence. *Id.* at 41,294-95.

The Rule also sets forth a framework the agency will use to evaluate whether, considering the "totality of an alien's individual circumstances," the alien is "likely at any time in the future to become a public charge." 84 Fed. Reg. at 41,369, 41,501-04. Among other things, the framework identifies a number of factors an adjudicator must consider in making a public-charge inadmissibility determination, such as the alien's age, financial resources, employment history, education, and health. *Id.* at 41,501-04. The Rule was set to take effect on October 15, 2019, and would have

applied prospectively to applications and petitions postmarked (or, if applicable, submitted electronically) on or after that date. *Id.* at 41,292.

B. Prior Proceedings

Plaintiffs—Washington, Virginia, Colorado, Delaware, Hawai'i, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, and Rhode Island—challenged the Rule. As relevant here, these fourteen States allege that the Rule's definition of "public charge" is not a permissible construction of the INA. Plaintiffs urge that the term unambiguously includes only persons "permanently and primarily dependent on the government for subsistence." ER 74. Plaintiffs further allege that the Rule is *ultra vires* and arbitrary and capricious, and that it violates the Rehabilitation Act.

On October 11, 2019, the district court granted plaintiffs' request for a nationwide preliminary injunction and stay under 5 U.S.C. § 705 barring DHS from implementing the Rule. ER 58-59. The court concluded that plaintiffs had standing because they anticipate experiencing economic, administrative, and public-health costs when aliens disenroll from public benefits in response to the Rule. ER 23-26. Specifically, the court determined that plaintiffs would be harmed because benefit disenrollment by aliens and others within these States would lead to "poorer long-term [health] outcomes" for plaintiffs' populations, which will, in turn, impose economic costs on plaintiffs. *See* ER 22 (plaintiffs will "face increased costs to address the predictable effects of [] adverse childhood experiences" and will "further

face likely pecuniary harm from contagion due to unvaccinated residents"). The court also concluded that plaintiffs "will incur additional administrative costs as a result of the Public Charge Rule, including training staff, responding to client inquiries related to the Final Rule, and modifying existing communications and forms." ER 23.

The court also concluded that plaintiffs had asserted injuries within the zone of interests protected by the public-charge provision, reasoning that Congress enacted the public-charge statute "to protect state fiscs." ER 29. The court noted, in particular, that the statute was designed "to protect states from having to spend money to provide for immigrants who could not provide for themselves." *Id.*

On the merits, the court concluded that plaintiffs were likely to prevail on their claim that the Rule's definition of "public charge" is not a reasonable interpretation of the statute. ER 34-48. The court concluded that Congress did not intend the term "public charge" to "include consideration of non-cash benefits," as evidenced by "two recent rejections by Congress" of proposals that would have defined "public charge" to include receipt of such benefits. ER 47. The court also determined that DHS had "overstepped its authority," because nothing in "any statute, legislative history, or other resource" indicated that Congress had delegated to DHS the authority to "expand the definition of who is inadmissible as a public charge or to define what benefits undermine, rather than promote, the stated goal of achieving self-sufficiency." ER 43-44.

The court also concluded that plaintiffs were likely to succeed in demonstrating that the Rule is arbitrary and capricious. ER 48-50. According to the court, DHS failed to provide reasoned explanations for departing from the 1999 Guidance's definition of "public charge" and for adopting its chosen framework. ER 48-50.

The court also determined that plaintiffs were likely to prevail on their claim that the Rule violated the Rehabilitation Act, because the Rule requires DHS to consider an alien's disability as a negative factor in some circumstances. ER 46.

Regarding the other preliminary-injunction factors, the court concluded that the injuries plaintiffs anticipated experiencing as a result of the Rule—*i.e.*, harms to the health and well-being of their residents and to plaintiffs' "financial security"—were irreparable. ER 51-53. The court also found that the balance of equities weighed in favor of a preliminary injunction. ER 53-55. In the court's view, whereas plaintiffs would experience irreparable harm if the Rule were to go into effect, barring DHS from implementing the Rule would cause the government no "hardship, injury to themselves, or damage to the public interest." ER 54. The court similarly concluded that an injunction was in the public interest because "of the numerous detrimental effects that the Public Charge Rule may cause." ER 55.

Finally, the court concluded that a nationwide injunction was appropriate, rejecting the government's argument that enjoining the Rule in the fourteen plaintiff States was all that was necessary to remedy their injuries. ER 55-57. The court concluded that limiting the scope of the injunction to those States would not protect

plaintiffs from the harms caused by the Rule because "immigrant[s] residing in one of the Plaintiff States may in the future need to move to a non-plaintiff state," "a geographically limited injunction could spur immigrants now living in non-plaintiff states to move to one of the Plaintiff States," and aliens who are lawful permanent residents of plaintiff States could be subject to the Rule at a port of entry outside of plaintiff States upon their return to the United States after a lengthy trip abroad. ER 56-57.

On December 5, 2019, this Court granted the federal government's motion for a stay pending appeal. *See* Order, Dec. 5, 2019 (Stay Order). The Court rejected the government's Article III standing argument, *id.* at 21-25, and assumed without deciding that plaintiffs' injuries fell within the statute's zone of interests, *id.* at 20 n.8. The Court concluded that the government had demonstrated a "strong" likelihood of success on the merits, *id.* at 29-67, that the government will suffer irreparable harm, *id.* at 68-70, and that the balance of equities favors the government, *id.* at 70-73. Dissenting from all but the majority's jurisdictional analysis, Judge Owens would have "den[ied] the government's motion to stay and let these cases proceed in the normal course." *Id.* at 79.

SUMMARY OF ARGUMENT

The district court erred in entering a preliminary injunction barring enforcement of the Rule.

I. As a threshold matter, plaintiffs have neither established standing to sue under Article III nor asserted injuries that fall within the public-charge provision's zone of interests. Plaintiffs allege that the Rule will cause them harm because some of their residents will respond to the Rule by disenrolling from public-benefit programs, which will, in turn, purportedly lead to worse health outcomes for plaintiffs' residents and increased long-term costs for plaintiffs who must deal with a less healthy population. Plaintiffs' allegations rest on a speculative chain of inferences about the long-term impacts of the Rule on public health and fail to account for factors that would mitigate costs or generate savings, such as the savings on Medicaid and other services plaintiffs will no longer have to provide to those rendered inadmissible under the Rule. Plaintiffs' claim that the Rule will be a net drain on their fiscal resources is thus speculative and insufficient to support their standing.

Plaintiffs also have not identified any injury that falls within the public-charge statute's zone of interests because their purported interest in this litigation is fundamentally at odds with the goal of that statute. As the district court recognized, the clear purpose of the public-charge statute is to protect federal and state governments from having to expend taxpayer resources to support aliens admitted to the country or allowed to adjust to lawful-permanent-resident status. The interest

plaintiffs seek to further through this lawsuit—more widespread use of taxpayer-funded benefits by aliens—is thus diametrically opposed to the interests Congress sought to further through the public-charge inadmissibility provision.

II.A. Even if plaintiffs had standing, they are not likely to prevail on the merits of their claims. Numerous statutory provisions demonstrate that Congress intended to require aliens to rely on their own resources, rather than taxpayer-supported benefits, to meet their basic needs. For example, Congress required many aliens to obtain sponsors who must promise to reimburse the government for any means-tested public benefits the alien receives, and declared any alien who fails to obtain a required sponsor automatically likely to become a public charge, no matter the alien's individual circumstances. Congress also restricted the ability of many aliens within the United States to obtain public benefits, and allowed certain aliens who receive such benefits and fail to reimburse the government to be subject to removal from the country.

The Rule—which renders inadmissible aliens who are likely to rely on public benefits for several months to meet basic needs—fully accords with Congress's intent and adopts a permissible construction of the public-charge inadmissibility provision.

In concluding otherwise, the district court determined that Congress did not delegate to DHS the authority to define the term "public charge" and that the Rule's definition of the term is contrary to congressional intent because it includes consideration of noncash benefits. Contrary to the district court's conclusion,

Congress has repeatedly and intentionally left the definition and application of the term to the discretion of the Executive Branch. Indeed, the 1999 Guidance, upon which plaintiffs and the district court rely, represents just such an exercise of the Executive Branch's delegated authority to define the term. And the district court's restricted view of "public charge" as excluding receipt of noncash benefits cannot be squared with Congress's 1996 immigration and welfare-reform legislation, which made clear that Congress did not adopt the court's cramped view of the term "public charge."

B. The district court likewise erred in concluding that plaintiffs were likely to succeed in showing that the Rule is arbitrary and capricious. In adopting the Rule, DHS acknowledged that it was departing from previous guidance and explained its reasons for doing so. The agency also analyzed the benefits and costs of the Rule and responded at length to the extensive comments it received before rationally concluding that the Rule's benefits from promoting self-sufficiency among aliens outweighed its possible costs. In light of Congress's clear emphasis on ensuring that aliens admitted to the country rely on private resources and not public benefits, the agency's decision to prioritize self-reliance among aliens was plainly reasonable.

C. The Rule is also consistent with the Rehabilitation Act, which bars the federal government from denying an individual a government benefit "solely by reason of her or his disability." 29 U.S.C. § 794(a). The Rule requires adjudicators to consider an alien's disability as one factor among many. It does not permit an

adjudicator to find an otherwise-qualified alien to be a public charge based solely on that person's disability. Moreover, Congress itself required DHS to consider an alien's "health" in deciding whether a particular alien is inadmissible on the public-charge ground, and thus mandated consideration of any relevant disabilities.

III. The remaining preliminary-injunction factors also weigh against the issuance of an injunction. Plaintiffs' predictions about the possible future harms to their fiscal interests that the Rule will allegedly cause do not establish the type of immediate, irreparable harm that justifies preliminary injunctive relief. And even if plaintiffs could establish the necessary injury, that injury would be outweighed by the harm to the government and the public that the Rule's injunction creates. So long as the Rule cannot take effect, the government will grant lawful-permanent-resident status to aliens whom DHS would consider likely to become public charges under the Rule. Because the government has no viable means of revisiting these adjustments of status once made, those decisions cannot later be reversed.

IV. At a minimum, the district court abused its discretion in entering a nationwide injunction. Plaintiffs' alleged budgetary harms would be fully redressed by an injunction limited to the geographical area of the plaintiff States. Yet the district court granted nationwide relief based on hypothetical scenarios in which plaintiffs could possibly suffer harm. Those conjectures were not supported by the record, are dubious on their own terms, and are entirely insufficient to demonstrate that relief outside the plaintiff States is necessary to provide complete relief to the parties. The

district court thus failed to heed the longstanding principle that an injunction should be no more burdensome to the defendant than is necessary. And for the same reason, the court erroneously granted a stay of the Rule's effective date nationwide, in contravention of 5 U.S.C. § 705's mandate that such stays be granted only "to the extent necessary to prevent irreparable injury."

STANDARD OF REVIEW

"[T]he legal premises underlying a preliminary injunction" are reviewed de novo. *Federal Trade Comm'n v. Enforma Nat. Prods., Inc.*, 362 F.3d 1204, 1211 (9th Cir. 2004). Otherwise, the district court's entry of the preliminary injunction is reviewed for abuse of discretion. *Id.*

ARGUMENT

The district court erred in entering a preliminary injunction barring enforcement of the Rule. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). None of these factors is satisfied here.

I. Plaintiffs Lack A Cognizable Injury Sufficient To Support This Suit

As a threshold matter, plaintiffs lack standing to pursue injunctive relief because they have not adequately alleged a cognizable injury within the zone of interests protected by the public-charge statute.[3]

To establish Article III standing, plaintiffs must demonstrate an injury that is "concrete, particularized, and actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). "[A]llegations of *possible* future injury are not sufficient." *Id.* Where, as here, "the plaintiff is not himself the object of the government action or inaction he challenges, standing . . . is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)).

To bring suit under the Administrative Procedure Act (APA), a plaintiff "must satisfy not only Article III's standing requirements, but an additional test: The interest he asserts must be arguably within the zone of interests to be protected or regulated by the statute that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). A plaintiff fails that test where its asserted interests are only "marginally related to" or "inconsistent" with the purposes of the relevant statute. *Id.* at 225.

[3] This Court's order granting a stay rejected the government's Article III argument and declined to address the zone-of-interests argument. Stay Order 20-25 & n.8.

Plaintiffs' alleged injuries do not meet these requirements. The district court held that the States alleged a concrete and imminent injury because it was "predictable" that the Rule would "negatively impact" the "health and wellbeing of [the states'] residents," as well as "the Plaintiff States' missions" to "ensure the health, well-being, and economic self-sufficiency" of their residents. ER 13, 16-21, 26. But it is black-letter law that States do not have the "duty or power" to assert the interests of their residents against the federal government. *See, e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

The district court similarly erred in holding that plaintiffs had alleged financial harms sufficient to support their standing. ER 22-26. Plaintiffs allege that the Rule will decrease enrollment in benefits programs, causing "both immigrant and U.S. citizen children of immigrants" to "experience poorer long-term outcomes, including impaired growth, compromised cognitive development, and obesity." ER 22. Plaintiffs also postulate that benefit disenrollment might cause "contagion due to unvaccinated residents, resulting in outbreaks of influenza, measles, and a higher incidence of preventable diseases." *Id.* Plaintiffs further allege that they will have to spend additional resources to deal with these adverse public health consequences over the long term. *Id.* It was that asserted financial harm that the district court deemed sufficiently imminent to demonstrate plaintiffs' standing. *Id.*; *see also id.* (concluding that "Plaintiff States face increased costs to address the predictable effects of the

adverse childhood experiences over the course of these U.S. citizen children's lifetimes").

Plaintiffs' speculative allegations of future financial harm at best establish a "*possible* future injury," not one that is "certainly impending." *Clapper*, 568 U.S. at 409. Plaintiffs' alleged injuries assume, for example, that those who disenroll from public-benefit programs will forgo medical care, thus reducing plaintiffs' receipt of federal Medicaid funds and leading to poorer long-term health outcomes. But any funds plaintiffs lose will be offset by a reduction in the costs they would have incurred to provide public benefits, medical care, and other services to aliens who will be rendered inadmissible under the Rule or who decline to take advantage of benefits funded by plaintiffs in whole or in part. Indeed, although DHS predicted that state and local governments would incur *some* costs, it also estimated that the Rule would *decrease* public benefit outlays by several billion dollars. *See* 83 Fed. Reg. at 51,228.

Plaintiffs' assertion that any benefit disenrollment will be sufficiently widespread and long-lasting to cause "contagion due to unvaccinated residents," ER 22, is similarly speculative. Among other things, as DHS explained, the Rule does not, in fact, impair aliens from obtaining vaccinations. *See* 84 Fed. Reg. at 41,384-85. In short, whether the Rule will have an adverse impact on plaintiffs' budgets is far from "certain[]." *Clapper*, 568 U.S. at 409. Plaintiffs' alleged financial harms thus fail to establish their standing.

The district court also concluded that plaintiffs were harmed by the Rule because they would have to spend time and resources "training staff, responding to client inquires related to the Final Rule, and modifying existing communications and forms." ER 23. But if such administrative costs were sufficient to establish a state government's standing to challenge a federal regulation, States could challenge *any* change in federal policy having any effect on their residents, as all such changes are likely to require States to answer questions about the new policy, to analyze the policy's impact on its residents, and to educate the public and staff about the policy. Under plaintiffs' theory, there would be no limits on a State's ability to challenge any federal policy. No court has recognized such sweeping state or local government authority to bring suit against the federal government. *Cf. Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 272 (4th Cir. 2011) (rejecting standing theory that would have permitted "each state [to] become a roving constitutional watchdog" of the federal government).

In any event, plaintiffs' putative injuries are outside the zone of interests the public-charge inadmissibility ground is designed to protect. The public-charge inadmissibility provision is designed to ensure that aliens who are admitted to the country or become lawful permanent residents do not rely on public benefits. *See infra* Part II. The district court recognized as much, acknowledging that Congress enacted the public-charge provision to protect federal and state governments from having to "spend state money to provide for immigrants." ER 29. The provision does not

create judicially cognizable interests for anyone outside the federal government, except for an alien in the United States who otherwise has a right to challenge a determination of inadmissibility, for Congress has not given any third party a judicially enforceable interest in the admission or removal of an alien. *Cf. Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

In direct contravention to that clear purpose, plaintiffs here seek to further an alleged interest in *greater* use of public benefits by aliens and those residing in households containing foreign-born individuals. *See, e.g.,* ER 162 (asserting that the Rule harms plaintiffs because it will cause residents of their States to "disenroll or forbear enrollment" in federal benefit programs). The public-charge statute's objective is to reduce public-benefit use by aliens, not to safeguard state and local government resources by requiring the federal government to expend more money on public benefits. Plaintiffs cannot bring a lawsuit to promote "the very . . . interest" that "Congress sought to restrain." *National Fed'n of Fed. Emps. v. Cheney*, 883 F.2d 1038, 1051 (D.C. Cir. 1989); *see also Patchak*, 567 U.S. at 209 (litigant's interests must not be "inconsistent with the purposes implicit in the statute"). To the extent plaintiffs assert an interest in avoiding the administrative costs they may incur to update their own internal procedures, that alleged injury is a mere incidental consequence of a change in federal law that does not furnish a basis to challenge the substance of the Rule itself. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990).

It is not even "marginally related" to the interests protected by the statute. *See Patchak*, 567 U.S. at 225; *City of Los Angeles v. County of Kern*, 581 F.3d 841, 848 (9th Cir. 2009) (dismissing plaintiffs' constitutional claim on zone-of-interest grounds because the court could not "conclude that the [plaintiffs'] alleged injury [was] tied to the purposes animating the dormant Commerce Clause").

II. Plaintiffs Are Not Likely To Succeed On The Merits

Even assuming plaintiffs could pursue their claims, as this Court recognized in granting a stay pending appeal, the district court erred in concluding that plaintiffs are likely to succeed on the merits. The Rule is a reasonable construction of the undefined term "public charge," and the agency both acknowledged that it was changing its approach and adequately explained its reasons for doing so. The Rule, which considers any disability an alien may have as one factor among many in making a public-charge inadmissibility determination, also fully accords with the Rehabilitation Act. The district court's conclusions to the contrary lack merit.

A. The Rule Adopts A Permissible Construction of "Public Charge"

1. The INA renders inadmissible "[a]ny alien who . . . in the opinion of the [Secretary] . . . is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). In determining whether an alien is likely at any time to become a public charge, DHS must review the alien's individual circumstances, which must include consideration of the alien's "age"; "health"; "family status"; "assets, resources, and financial status"; and "education and skills." *Id.* § 1182(a)(4)(B)(i).

Related provisions of the INA illustrate that the receipt of public benefits, including noncash benefits, is relevant to the determination whether an alien is likely to become a public charge. Congress expressly instructed that, when making a public-charge inadmissibility determination, DHS "shall not consider any benefits the alien may have received," 8 U.S.C. § 1182(s), including various noncash benefits, if the alien "has been battered or subjected to extreme cruelty in the United States by [specified persons]," *id.* § 1641(c); *see also id.* §§ 1611-1613 (specifying the public benefits for which battered aliens and other qualified aliens are eligible). The inclusion of that provision prohibiting the consideration of a battered alien's receipt of public benefits presupposes that DHS will ordinarily consider the past receipt of benefits in making public-charge inadmissibility determinations. *Cf. Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1844 (2018) ("There is no reason to create an exception to a prohibition unless the prohibition would otherwise forbid what the exception allows.").

In addition, Congress mandated that many aliens seeking admission or adjustment of status obtain affidavits of support from sponsors to avoid a public-charge inadmissibility determination. *See* 8 U.S.C. § 1182(a)(4)(C) (requiring most family-sponsored immigrants to submit enforceable affidavits of support); *id.* § 1182(a)(4)(D) (same for certain employment-based immigrants); *id.* § 1183a (affidavit-of-support requirements). Aliens who fail to obtain a required affidavit of support qualify by operation of law as likely to become public charges, regardless of their individual circumstances. *Id.* § 1182(a)(4). Congress further specified that the

sponsor must agree "to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line," *id.* § 1183a(a)(1)(A), and it granted federal and state governments the right to seek reimbursement from the sponsor for "any means-tested public benefit" that the government provides to the alien, *id.* § 1183a(b)(1)(A); *see also id.* § 1183a(a) (affidavits of support are legally binding and enforceable contracts "against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit").

The import of the affidavit-of-support provision is clear: To avoid being found inadmissible as likely to become a public charge, an alien governed by the provision must find a sponsor who is willing to reimburse the government for *any* means-tested public benefits the alien receives while the sponsorship obligation is in effect (even if the alien receives those benefits only briefly and only in minimal amounts). Congress thus provided that the mere *possibility* that an alien might obtain unreimbursed, means-tested public benefits in the future was sufficient to render that alien inadmissible as a public charge, regardless of the alien's other circumstances.

Moreover, Congress enacted the affidavit-of-support provision in 1996—the same year that it enacted the current version of the public-charge provision—against the backdrop of a longstanding interpretation of the term "public charge" for purposes of deportability under 8 U.S.C. § 1227(a)(5). Under that longstanding interpretation, as set forth in *Matter of B-*, 3 I. & N. Dec. 323 (BIA and AG 1948), an

alien is deportable if he receives a public benefit that the alien or designated friends and relatives are legally obligated to repay, the relevant government agency demands repayment, and "[t]he alien and other persons legally responsible for the debt fail to repay after a demand has been made." 64 Fed. Reg. 28,676, 28,691 (May 26, 1999) (citing *Matter of B-*, 3 I. & N. Dec. at 323); *Concurrent Resolution on the Budget for Fiscal Year 1997: Hearings Before the Committee on the Budget*, 104th Cong. 81 (1996) (noting that interpretation). Thus, when it made sponsors legally responsible for repayment of any means-tested public benefits received by an alien and provided government agencies with a legally enforceable right to demand repayment, Congress understood that a failure to repay the benefit by the alien or sponsor could render the alien deportable as a "public charge" under 8 U.S.C. § 1227(a)(5). In other words, Congress implemented a system in 1996 under which an alien's receipt of an unreimbursed, means-tested public benefit could render the alien a "public charge" subject to deportation (provided a demand for repayment was made).

Congress also took steps to limit aliens' ability to obtain public benefits. Congress provided that, for purposes of eligibility for means-tested public benefits, an alien's income is generally "deemed to include" the "income and resources" of the sponsor. 8 U.S.C. § 1631(a). This deeming provision reduces the likelihood that aliens subject to § 1182's public-charge provision will qualify for means-tested public benefits, providing further evidence of Congress's intent that such aliens not receive taxpayer-funded benefits once they are admitted to the United States. *See also* H.R.

Rep. No. 104-828, at 242 (Sept. 24, 1996) (Conf. Rep.) (explaining that the deeming provision was designed to further "the national immigration policy that aliens be self-reliant"). Congress's apparent concern about the receipt of public benefits, including noncash benefits, by aliens is further underscored by provisions barring most aliens from obtaining many federal public benefits, either at all or until they have been in the country for at least five years. *See* 8 U.S.C. §§ 1611-1613, 1641; 83 Fed. Reg. at 51,126-33.

As Congress explained, these and other provisions were driven by its concern about the "increasing" use by aliens of "public benefits [provided by] Federal, State, and local governments." 8 U.S.C. § 1601(3). Congress emphasized that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," *id.* § 1601(1), and that it "continues to be the immigration policy of the United States that . . . (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (B) the availability of public benefits not constitute an incentive for immigration to the United States," *id.* § 1601(2). Congress expressly equated a lack of "self-sufficiency" with the receipt of "public benefits" by aliens, *id.* § 1601(3), which it defined broadly to include any "welfare, health, disability, public or assisted housing . . . or any other similar benefit," *id.* § 1611(c) (defining "federal public benefit"). And it stressed the government's "compelling" interest in enacting "new

rules for eligibility [for public benefits] and sponsorship agreements [for individuals subject to the public-charge provision] in order to assure that aliens be self-reliant in accordance with national immigration policy." *Id.* § 1601(5). *See* Stay Order 53-54 (noting that statements of purpose "lend[] support to DHS's interpretation of the INA").

Consistent with that statutory text, context, and history, the Rule defines a "public charge" as an "alien who receives one or more [enumerated] public benefits" over a specified period of time. 84 Fed. Reg. at 41,501. That definition respects Congress's understanding that the term "public charge" would encompass individuals who rely on taxpayer-funded benefits to meet their basic needs. At a minimum, the Rule is "a permissible construction of the statute." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

2. The district court nevertheless concluded that plaintiffs were likely to succeed in showing that the Rule's definition of "public charge" is not a permissible construction of the INA. ER 34-48. The court believed that the INA does not permit DHS to consider noncash benefits in the public charge determination, as evidenced by "two recent rejections by Congress of arguments in favor of expanding the rule to include consideration of non-cash benefits." ER 47. And it further concluded that DHS had exceeded its authority because no "statute, legislative history, or other resource" indicated that (1) "the purpose of the public charge inadmissibility provision is to ensure the economic self-sufficiency of aliens" or that

(2) "Congress has delegated to DHS the authority" to define the term "public charge." ER 43-47. The court's conclusions are flawed.

As discussed, Congress's 1996 INA amendments and its contemporaneous welfare-reform legislation demonstrate that it did not understand "public charge" to exclude consideration of an alien's receipt of noncash benefits. To the contrary, stemming the expanding use of means-tested, noncash public benefits by aliens was a motivating force behind Congress's enactment of the 1996 legislation, as evidenced by Congress's explication of the policies underlying the 1996 legislation and by the statutory provisions it enacted. *See supra* pp. 23-27. For example, the newly enacted mandatory affidavit-of-support provision requires sponsors to repay *any* means-tested benefit an alien receives (regardless of the amount or length of time the alien receives the benefit) and grants government agencies the right to seek repayment. *See* 8 U.S.C. § 1183a; *supra* p. 24. That provision is not limited to cash benefits. Moreover, a large number of aliens will automatically be deemed inadmissible as likely to become "public charges" if they fail to obtain affidavits of support. *See supra* pp. 23-24. Thus, as noted, Congress concluded that the possibility that an alien might receive *any* mean-tested public benefit, not just cash benefits, that the alien was unable to repay was enough to render the alien inadmissible as likely to become a public charge. And, of course, Congress expressly stated its legislative goal was to ensure that aliens not rely "on public resources to meet their needs." 8 U.S.C. § 1601(2)(A). That stated goal was in no way limited to cash benefits.

The district court also erroneously found it significant that, in 1996 and 2013, Congress declined to adopt legislation that would have expressly defined the term "public charge" to include receipt of certain noncash benefits. *See* ER 38-39, 41, 47. "Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute," because "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001). As a result, "several equally tenable inferences may be drawn from such inaction." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

The district court's reliance on the failed 1996 and 2013 proposals to define the term "public charge" is particularly flawed here. There is no indication that Congress believed the proposed definitions were fundamentally inconsistent with the statutory term "public charge." Congress did not "discard[]" the proposed definitions of public charge "in favor of other language" eventually enacted. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987). It did not adopt an alternate definition in the 1996 legislation, which left the term undefined, and it enacted no legislation on the subject in 2013. *See* Stay Op. 49 ("[T]he failure of Congress to *compel* DHS to adopt a particular rule is not the logical equivalent of *forbidding* DHS from adopting that rule."). In addition, the legislative history of the 1996 proposal indicates that the proposal was dropped at the last minute because the President objected to the proposal's rigid definition of "public charge," as well as other provisions, and threatened to veto the bill unless changes

were made. *See* H.R. Rep. No. 104-828, at 241; 142 Cong. Rec. S11872, S11881-82 (Sept. 30, 1996). Far from suggesting that Congress attributed an unambiguous meaning to the still-undefined term "public charge," these circumstances suggest that Congress acceded to the President's demands that the Executive Branch retain the discretion to define the term. *See* Stay Order 49 n.15 ("If anything, this legislative history proves only that Congress decided not to constrain the discretion of agencies in determining who is a public charge.").

The circumstances surrounding the 2013 proposal's failure similarly fail to support the inference that Congress would have viewed the Rule as an impermissible construction of the public-charge provision. The 2013 proposal was rejected by a Senate committee. S. Rep. No. 113-40, at 42 (2013). But Congress then failed to enact the bill the committee agreed on. The question of what significance to assign to a rejected committee proposal that formed a part of a bill subsequently rejected by the full Congress underscores the problems inherent in relying on unenacted legislation.

In addition, both the 1996 and 2013 proposals 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. No. 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. Even if Congress's failure to codify those stricter standards were evidence of its understanding of the term "public charge" (which they are not), they

would not support the conclusion that Congress rejected the Rule's narrower definition.

The district court likewise erred in relying on the fact that Congress authorized some "qualified aliens" to receive noncash public benefits. ER 37-38. Congress's expressed intent to exclude aliens who might rely on public assistance is not inconsistent with its decision to assist certain aliens who have already been admitted—especially since immigration officials cannot with perfect accuracy predict which aliens will become public charges. Thus, that Congress made benefits available to certain aliens in some circumstances does not indicate that Congress sought to promote the admission or adjustment of aliens who were expected to obtain such benefits. To the contrary, Congress made clear that it expected aliens admitted to the country to rely on their own resources and not those of the public. *See supra* pp. 26-27.

The district court's reliance on the availability of some noncash benefits as evidence that Congress did not authorize DHS to consider such benefits in the public-charge calculus is flawed for an additional reason. In addition to making certain noncash benefits available to aliens in limited circumstances, Congress has also authorized qualified aliens to receive certain cash-based benefits, such as Temporary Assistance for Needy Families benefits. *See* 8 U.S.C. § 1612(b). Yet, since 1999, DHS has considered an alien's likely receipt of such benefits in determining whether the alien is inadmissible on public-charge grounds. *See* 64 Fed. Reg. at 28,692. Thus, the

mere fact that a particular public benefit may be available to an alien following the alien's entry cannot be plausibly viewed as evidence that DHS may not consider an alien's likely receipt of that benefit in making a public-charge inadmissibility determination.

The "special rule" that Congress created as part of a 1986 amnesty program likewise does not establish that the term "public charge" unambiguously excludes consideration of noncash benefits. *See* ER 36 (citing 8 U.S.C. § 1255a(d)(2)(B)(iii)). If anything, it supports the opposite conclusion. Under the 1986 program, Congress required the Attorney General to adjust the status of certain aliens who had entered the country unlawfully on or before January 1, 1982. *See* 8 U.S.C. § 1255a. In so doing, Congress waived certain grounds of inadmissibility. *See id.* § 1255a(d). As relevant here, Congress created a "special rule for determination of public charge" under which an alien meeting the program's qualifications would not be deemed a public charge if he or she "demonstrate[d] a history of employment in the United States evidencing self-support without receipt of public cash assistance." *Id.* The fact that, as part of its amnesty program, Congress crafted a "special rule" to narrow the Executive's application of the public-charge ground to only those who receive cash assistance indicates that Congress understood the ordinary definition of public charge to be broader.

The district court's other critiques of the Rule's definition of public charge likewise do not withstand scrutiny. The court plainly erred in rejecting as

"unsupported" the government's assertion "that the purpose of the public charge inadmissibility provision is to ensure the economic self-sufficiency of aliens." ER 43. Indeed, by the court's own account, the purpose of the public-charge provision is to protect the government "from having to spend state money to provide for immigrants who could not provide for themselves." ER 29. In other words, the obvious point of the statute is to ensure that aliens admitted to the country are "economic[ally] self-sufficien[t]" and do not rely on the public for support.

The district court likewise erred in concluding that nothing in "any statute, legislative history, or other resource" demonstrates that Congress delegated to DHS the authority to define the term "public charge" under § 1182(a). *See* Stay Order 35 ("By granting regulatory authority to DHS, Congress intended that DHS would resolve any ambiguities in the INA." (citing 8 U.S.C. § 1103(a)(1), (3)). To the contrary, Congress has repeatedly and intentionally left the term's definition and application to the discretion of the Executive Branch. Although provisions barring entry to those likely to become a "public charge" have appeared in immigration statutes dating back to the late 19th century, Congress has never defined the term. 84 Fed. Reg. at 41,308. That is not because Congress assumed the term had a settled meaning the Executive Branch was bound to follow. *See* Stay Order 34 ("In a word, the phrase [public charge] is 'ambiguous' under *Chevron*; it is capable of a range of meanings.").

Rather, in an extensive report that served as a foundation for the enactment of the INA, the Senate Judiciary Committee emphasized that because "the elements constituting likelihood of becoming a public charge are varied, there should be no attempt to define the term in the law." S. Rep. No. 81-1515, at 349 (1950); *see also id.* at 803 (reproducing Senate resolution directing Committee to make "full and complete investigation of our entire immigration system" and provide recommendations). The report also recognized that "[d]ecisions of the courts have given varied definitions of the phrase 'likely to become a public charge,'" *id.* at 347, and that "different consuls, even in close proximity with one another, have enforced [public-charge] standards highly inconsistent with one another," *id.* at 349. Far from mandating plaintiffs' definition of public charge, the report concluded that the public-charge inadmissibility determination properly "rests within the discretion of" Executive Branch officials. *Id.*; *cf. Barnhart v. Walton*, 535 U.S. 212, 225 (2002) (Where Congress enacts a "complex[]" statute implicating a "vast number of claims" with a "consequent need for agency expertise and administrative experience," 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.").

Indeed, the statute itself reflects Congress's broad delegation of authority to the Executive Branch, as it expressly provides that public-charge inadmissibility determinations are made "in the opinion of the [Secretary of Homeland Security]." 8 U.S.C. § 1182(a)(4); *supra* p. 5 n.2. *See* Stay Order 33 ("That is the language of

discretion, and the officials are given broad leeway."); *see also Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 540 (1979) (Where a statute specifies that a determination is to be made "in the opinion of" an agency decisionmaker, the statute confers "broad discretion" on the decisionmaker to make that determination.); *see also* 8 U.S.C. § 1103(a)(3) (granting the Secretary of Homeland Security the authority to "establish such regulations . . . as he deems necessary for carrying out his authority" to enforce the INA).

By leaving the definition of "public charge" to the discretion of the Executive Branch, Congress recognized not only the need for flexibility in the Executive Branch's application of the public-charge provision to varied individual circumstances, but also the need for the term "public charge" to evolve over time to reflect changes in the scope and nature of public benefits. In enacting immigration and welfare-reform legislation in 1996, Congress expressly recognized the need for public-charge laws to have the flexibility to reflect current conditions. As one Senate report explained:

> It is even more important in this era that there be such a [public-charge] law, since the welfare state has changed the pattern of immigration and emigration that existed earlier in our history. Before the welfare state, if an immigrant could not succeed in the U.S., he or she often returned to "the old country." This happens less often today, because of the welfare "safety net." . . . It should be made clear to immigrants that the taxpayers of this country expect them to be able to make it in this country on their own and with the help of their sponsors.

S. Rep. No. 104-249, at 5-9 (1996).

The 1999 Guidance—which, for the first time, defined the term "public charge" by reference to cash assistance—represents an exercise of the Executive Branch's longstanding discretion to define the term "public charge" and further negates the district court's conclusion that the Executive Branch lacks the authority to define "public charge" or to decide what "benefits programs" should be considered, ER 43-45.

Administrative interpretations of the term likewise undermine the court's conclusion that "public charge" has been uniformly understood not to apply to aliens who receive noncash benefits. Since at least 1948, the Executive Branch has taken the authoritative position that an alien qualifies as a "public charge" for deportability purposes if the alien or the alien's sponsor or relative fails to repay a public benefit upon a demand for repayment by a government agency entitled to repayment. *See Matter of B-*, 3 I. & N. Dec. at 326. Under that rubric, a failure to repay a qualifying benefit upon demand renders an alien a "public charge" for deportability purposes regardless of the nature of the benefit. *See id.* Indeed, although the Board of Immigration Appeals concluded that the alien in *Matter of B-* was not deportable as a public charge because Illinois law did not allow the State to demand repayment for the care she received during her stay in a state mental hospital, the opinion suggests that the alien would have been deportable as a public charge if her relatives had failed to pay the cost of the alien's "clothing, transportation, and other incidental expenses,"

because Illinois law made the alien "legally liable" for those incidental, noncash expenses. *Id.* at 327.

Other historical sources likewise belie the district court's suggestion that the term "public charge" had a fixed meaning that excludes consideration of noncash benefits. For example, both the 1933 and 1951 editions of Black's Law Dictionary defined the term "public charge," "[a]s used in" the 1917 Immigration Act, to mean simply "one who produces a money charge upon, or an expense to, the public for support and care"—without reference to the type of expense. *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").

In short, "the history of the use of 'public charge' in federal immigration law demonstrates that 'public charge' does not have a fixed, unambiguous meaning. Rather, the phrase is subject to multiple interpretations, it in fact has been interpreted differently, and the Executive Branch has been afforded the discretion to interpret it." Stay Order 46.

The district court also suggested that DHS lacked the authority to consider the cost to the federal government of providing noncash benefits such as Medicaid to aliens. ER 45-46. But the defining purpose of the public-charge provision is to bar admission of aliens who will drain taxpayer resources. There should thus be no

serious dispute that Congress delegated authority to DHS to consider the costs to federal and state governments that the admission or adjustment of particular aliens is expected to generate. *See* Stay Order 50-51.

B. The Rule Is Not Arbitrary Or Capricious

The district court likewise erred in concluding that the Rule is arbitrary and capricious. 5 U.S.C. § 706(2)(A). Review under "the arbitrary and capricious standard [is] deferential and narrow." *Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 554 (9th Cir. 2016). Agency action will be upheld if the agency examined "the relevant data" and articulated "a satisfactory explanation" for its decision, "including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A reviewing court may not itself weigh the evidence or "substitute its judgment for that of the agency." *Alaska Oil & Gas Ass'n*, 815 F.3d at 554. Final agency action satisfies the arbitrary-and-capricious standard provided that it "is within the bounds of reasoned decisionmaking." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983).

The Rule—including its new definition of "public charge" and its framework for evaluating which aliens are, in the opinion of the Executive Branch, likely to become public charges—is well within the bounds of reasoned decisionmaking. As discussed, the Rule differs from the agency's previous interpretation of "public charge" (the validity of which neither plaintiffs nor the district court dispute) in that it requires adjudicators to consider an alien's past and expected future receipt of

specified noncash benefits (not just cash benefits) in determining whether that alien is likely to become a public charge, and in that it defines the term "public charge" to include those who receive such benefits for more than twelve months in the aggregate within any thirty-six month period.

Consistent with the dictates of reasoned decisionmaking, the agency "forthrightly acknowledged" its change in approach and provided "good reasons for the new policy." *FCC v. Fox Television Stations*, 556 U.S. 502, 515, 517 (2009). The agency explained that the Rule is designed "to better ensure that applicants for admission to the United States and applicants for adjustment of status to lawful permanent resident who are subject to the public charge ground of inadmissibility are self-sufficient—*i.e.*, do not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their family, sponsor, and private organizations." 83 Fed. Reg. at 51,122; 84 Fed. Reg. at 41,317-19. Because Congress itself viewed the receipt of any public benefits, including noncash benefits, as indicative of a lack of self-sufficiency, the agency reasoned that the Rule is more consistent with congressional intent than the agency's 1999 approach. 83 Fed. Reg. at 51,123; *see also* 84 Fed. Reg. at 41,319 (explaining that the Rule is designed to address "deficiencies" in the standard adopted by the 1999 Guidance, including "that the guidance assumed an overly permissi[ve] definition of dependence on public benefits by only including consideration of certain cash benefits, rather than a broader set of benefits, whether cash or noncash, that similarly denote reliance on the government").

The agency also stressed that the 1999 Guidance had relied on an "artificial distinction between cash and noncash benefits." 83 Fed. Reg. at 51,123. As the agency explained, "[f]ood, shelter, and necessary medical treatment are basic necessities of life." 83 Fed. Reg. at 51,159. Thus, a "person who needs the public's assistance to provide for these basic necessities is not self-sufficient," even if the person does not receive cash assistance from the government. *Id.*

The agency also emphasized that the cost to the federal government of providing noncash benefits to a recipient often exceeds the cost of cash-based assistance, demonstrating that noncash benefits are in many individual cases a more significant form of public support than is cash-based assistance. *See* 83 Fed. Reg. at 51,160. For example, the agency estimated that the average recipient of Temporary Assistance for Needy Families receives about $1,272.56 in cash assistance per year. *Id.* By contrast, the agency estimated that the average Medicaid recipient receives $7,426.59 in annual benefits and the average household is provided $8,121.16 per year in federal rental assistance. *Id.* The agency thus reasonably concluded that the receipt of noncash benefits was relevant to whether an alien was self-supporting or instead required public support to meet basic needs.

The agency also explained, at length, its reasons for including in the Rule the various factors it identified as weighing on the question whether an alien is likely to become a public charge. *See* 83 Fed. Reg. 51,178-207. The factors implemented Congress's mandate that the agency consider, at a minimum, each alien's "age";

"health"; "family status"; "assets, resources, and financial status"; and "education and skills" in making a "public charge" determination. *See id.* at 51,178; 8 U.S.C. § 1182(a)(4)(B). The agency described in detail how each of the various factors bore positively or negatively on the determination whether an alien is likely to depend on public benefits in the future, while retaining the "totality of the circumstances" approach that allows each adjudicating officer to make a decision appropriate to each alien's particular circumstances.

The agency also rationally weighed the benefits and costs of the Rule. It explained that, by excluding those aliens likely to rely on public benefits from the country and encouraging those within the country to become self-sufficient, the Rule is likely to save federal and state governments billions of dollars annually in benefit payments and associated costs. *See* 83 Fed. Reg. at 51,228. At the same time, the agency recognized that the disenrollment of aliens from public-benefit programs could have certain adverse effects. The agency noted, for example, that a reduction in public-benefit enrollment and payments could negatively affect third parties who receive such payments as revenue, including, for example, health-care providers who participate in Medicaid and local businesses who accept Supplemental Nutrition Assistance Program benefits. 83 Fed. Reg. at 51,118; 84 Fed. Reg. at 41,313. The agency also recognized that disenrollment in public-benefit programs by aliens subject to the Rule or those who incorrectly believe they are subject to the Rule could have

adverse consequences on the health and welfare of those populations, while also potentially imposing some "costs [on] states and localities." 84 Fed. Reg. at 41,313.

Although it recognized these potential costs, the agency explained that there were reasons to believe that the costs would not be as great as some feared. 84 Fed. Reg. at 41,313. Among other things, in response to commentator concerns, the agency took steps to "mitigate . . . disenrollment impacts." *Id.* Those steps included excluding receipt of benefits under the Children's Health Insurance Program (CHIP) from the list of public benefits covered by the Rule, and exempting Medicaid benefits received by aliens under the age of twenty-one and pregnant women from the Rule's definition of public charge. *Id.* at 41,313-14. The agency also noted that the majority of aliens subject to the Rule do not currently receive public benefits, either because they reside outside the United States or because, following the 1996 welfare-reform legislation, they are generally precluded from receiving such benefits. *Id.* at 41,212-13. As a result, the agency concluded that the Rule was unlikely to substantially affect the receipt of public benefits by those subject to the Rule. *Id.* at 41,313.

The agency also explained that those classes of aliens who are eligible for the noncash benefits covered by the Rule, such as lawful permanent residents and refugees, are, except in rare circumstances, not subject to a public-charge inadmissibility determination and are thus not affected by the Rule. 84 Fed. Reg. at 41,313. An agency, of course, is not obliged to abandon an otherwise lawful policy simply because third parties not affected by the policy might wrongly assume that they

are. But in any event, the agency considered and made plans to address disenrollment by those not covered by the Rule. To the extent such individuals disenroll from public benefits out of confusion over the Rule's coverage, the agency reasoned that the effect might be short-lived, as such individuals might re-enroll after realizing their error. 84 Fed. Reg. at 41,463. And, to clear up any confusion as quickly as possible—thus minimizing disenrollment among populations not subject to the Rule—the agency further stated that it planned to "issue clear guidance that identifies the groups of individuals who are not subject to this rule, including, but not limited to, U.S. citizens, [certain] lawful permanent residents, . . . and refugees." *Id.* at 41,313.

Ultimately, the agency rationally concluded that the benefits obtained from promoting self-sufficiency outweighed the Rule's potential costs. *See* 84 Fed. Reg. at 41,314. As the agency explained, the precise costs of the Rule were uncertain, given the impossibility of estimating precisely the number of individuals who would disenroll from public-benefit programs as a result of the Rule, how long they would remain disenrolled, and to what extent such disenrollment would ultimately affect state and local communities and governments. *See, e.g.*, 84 Fed. Reg. at 41,313. At the same time, the Rule provided clear but similarly difficult-to-measure benefits, such as helping to ensure that aliens entering the country or adjusting status are self-reliant and reducing the incentive to immigrate that the availability of public benefits might otherwise provide to aliens abroad. The agency's ultimate decision about whether to move forward with the Rule thus "called for value-laden decisionmaking and the

weighing of incommensurables under conditions of uncertainty." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019). Given Congress's clear focus on ensuring that aliens admitted to the country rely on private resources and not public benefits, the agency's decision to prioritize self-reliance among aliens is plainly reasonable. *See* Stay Order 65 ("[I]t was sufficient—and not arbitrary and capricious—for DHS to consider whether, in the long term, the overall benefits of its policy change will outweigh the costs of retaining the current policy.").

The district court mistakenly concluded that plaintiffs were likely to succeed in establishing that DHS failed to adequately address comments it received in response to its proposed Rule. ER 50. An agency's obligation to respond to comments on a proposed rulemaking is "not 'particularly demanding.'" *Association of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441-42 (D.C. Cir. 2012). Instead, "the agency's response to public comments need only 'enable [courts] to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'" *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993); *see also Environmental Def. Fund v. EPA*, 922 F.3d 446, 458 (D.C. Cir. 2019) ("Nothing in the APA saddles agencies with the crushing task of responding to every single example cited in every single comment."). Here, the agency addressed at length the comments it received, acknowledged that it was changing its approach, addressed the costs and benefits of the Rule, and explained its reasons for concluding that the Rule's benefits outweighed

its costs. *See supra* pp. 39-44. Those actions satisfied the agency's obligations under the APA. *See* Stay Order 58-67.

The district court also missed the mark to the extent it suggested that the agency failed to take account of "reliance interests" that the 1999 Guidance may have engendered. ER 49-50. To the contrary, the Rule expressly bars DHS from considering any benefits newly covered by the Rule that an alien received before the Rule's effective date. 84 Fed. Reg. at 41,504 (8 C.F.R. § 212.22(d)). In addition, DHS explicitly stated that the Rule applies only to applications and petitions postmarked (or if applicable, submitted electronically) on or after the effective date. *Id.* at 41,292. Thus, to the extent an alien obtained benefits in reliance on the 1999 Guidance's definition of public charge, those benefits will not be counted against the alien. *Id.* And, as noted, the agency explained its reasons for departing from the 1999 Guidance, thus satisfying its obligation to acknowledge and justify a policy change that may affect those who relied on the previous policy. *See supra* pp. 39-40; Stay Order 66-67.

The district court also expressed concern that the Rule could sweep in an alien who uses Medicaid "to become or remain self-sufficient." ER 50. But the Rule's definition of "public charge" does not encompass those aliens who rely on Medicaid for short periods of time to become or remain self-reliant. And even assuming an alien who relies on Medicaid for an extended period is capable of supporting himself,

the clear import of Congress's 1996 legislation was to compel aliens to rely on private rather than public resources.

C. The Rule Does Not Violate The Rehabilitation Act

Contrary to the district court's conclusion (ER 46), plaintiffs have not raised even a serious question regarding whether the Rule violates the Rehabilitation Act, let alone demonstrated a likelihood of success. *See* Stay Order 54 ("This argument need not detain us long."); *City & County of San Francisco v. USCIS*, No. 19-cv-04717-PJH, 2019 WL 5100718, at *30 (N.D. Cal. Oct. 11, 2019) (concluding that there are not "even serious questions" that the Rule complies with the Rehabilitation Act). The Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability," be denied the benefits of a federal program. 29 U.S.C. § 794(a). "[B]y its terms," the statute "does not compel [government] institutions to disregard the disabilities of" individuals; instead, it "merely requires them not to exclude a person who is 'otherwise qualified'" solely because of his or her disability. *C.O. v. Portland Public Sch.*, 679 F.3d 1162, 1169 (9th Cir. 2012) (quoting *Southeastern Cmty. Coll. v. Davis,* 442 U.S. 397, 405 (1979)).

Consistent with the Rehabilitation Act, the Rule does not deny any alien admission into the United States, or adjustment of status, "solely by reason of" disability. An alien's medical condition is one factor, not the sole factor, that an adjudicator will consider in evaluating the totality of an alien's circumstances. Nor is there any aspect of the Rule that suggests that an adjudicator may conclude that an

"otherwise qualified" alien (*i.e.*, an alien who is not likely to become a public charge) is inadmissible solely because the individual is disabled. Moreover, in 1996, Congress explicitly added "health" as a factor DHS "shall . . . consider" in evaluating whether the alien is likely to become a public charge, 8 U.S.C. § 1182(a)(4)(B)(i), thus requiring DHS to take an alien's medical condition, including a disability, into account. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (A "specific statute will not be controlled or nullified by a general one.").

III. The Remaining Factors Weigh Against A Preliminary Injunction

The remaining preliminary injunction factors also weigh against an injunction. Contrary to the district court's conclusion, plaintiffs have not established that they will be irreparably harmed absent an injunction. To obtain an injunction, a "plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." *Id.*; *see also Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011) ("An injunction will not issue if the person or entity seeking injunctive relief shows a mere 'possibility of some remote future injury.'") (quoting *Winter*, 555 U.S. at 22).

As discussed above, plaintiffs' alleged harms are speculative, founded on an attenuated chain of inferences, and fail to account for cost savings that the Rule is

likely to generate for plaintiffs. *See supra* Part I. At most, plaintiffs have established a mere possibility of a future harm to their fiscal interests. That mere possibility is not sufficient to establish their standing. But even if it were, it would not demonstrate the immediate, irreparable harm necessary for the award of preliminary injunctive relief. *See Caribbean Marine Servs. Co.*, 844 F.2d at 674.

The balance of equities and the public interest likewise do not support the entry of a preliminary injunction here. Both the federal government and the public will be irreparably harmed if the Rule cannot go into effect. So long as the Rule is enjoined, DHS will be forced to retain an immigration policy in which it grants lawful-permanent-resident status to aliens who "in the opinion of the [Secretary]" are likely to become public charges as the Secretary would define that term. 8 U.S.C. § 1182(a)(4)(A). DHS currently has no viable means of revisiting adjustment-of-status determinations once made, *see* ER 63-64, so those aliens will likely receive lawful-permanent-resident status permanently (assuming they are not ineligible for other reasons), such that the harm is irreparable. *See* Stay Order 68-70.

And as noted, plaintiffs' asserted injuries are at odds with the purposes underlying the public-charge inadmissibility provision. Plaintiffs do not serve the public interest by promoting increased use of public benefits by aliens, contrary to Congress's clear intent. At a minimum, the harms to the federal government and the public preclude enjoining the Rule pending the resolution of this case on the merits.

IV. The District Court Abused Its Discretion In Granting A Nationwide Injunction

Even if the district court did not err in granting a preliminary injunction, the court abused its discretion by issuing a nationwide injunction. An injunction limited to the plaintiff States would fully redress the States' alleged harms. Indeed, in a related challenge to the Rule brought by several other States, the district court correctly recognized that an injunction limited to the plaintiffs' jurisdictions was all that was necessary. *See City & County of San Francisco*, 2019 WL 5100718, at *53.

1. Under this Court's precedents, courts may issue nationwide injunctions only in "exceptional cases" in which "such breadth [is] necessary to remedy a plaintiff's harm." *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (quoting *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018)). That is because, as this Court and the Supreme Court have recognized, "'injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs' before the Court." *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). And therefore relief "must be narrowly tailored to remedy the specific harm shown," and may only extend "protection to persons other than prevailing parties in the lawsuit" if "such breadth is necessary to give prevailing parties the relief to which they are entitled." *City & Cty. of San Francisco*, 897 F.3d at 1244 (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987)).

That principle has deep roots. It is well established that the scope of a court's statutory authority to enter injunctive relief is circumscribed by the type of relief that was "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). And the tradition of equity inherited from English law was premised on "providing equitable relief only to parties" because the fundamental role of a court was to "adjudicate the rights of 'individual[s].'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2427-28 (2018) (Thomas, J., concurring) (quoting *The Federalist No. 78*, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). As a result, "a plaintiff could not sue to vindicate the private rights of someone else." *Id.* at 2428.

Long-settled principles of Article III standing reflect that history. As this Court has recognized, "our legal system does not automatically grant individual plaintiffs standing to act on behalf of all citizens similarly situated." *Zepeda v. U.S. Immigration & Naturalization Serv.*, 753 F.2d 719, 730 n.1 (9th Cir. 1983). Indeed, it is an "elementary principle" that in the absence of class certification, plaintiffs are "not entitled to relief for people whom they do not represent." *Id.* For that reason, the Supreme Court has repeatedly "caution[ed]" that "'standing is not dispensed in gross': A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("The Art. III judicial

power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally.").

Nationwide injunctions conflict with those principles. By protecting non-parties, such an injunction provides relief on the basis of rights which the plaintiffs lack standing to assert. Such injunctions necessarily "deprive[]" other parties of "the right to litigate in other forums." *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018). And absent "exceptional" circumstances, they impose burdens on a defendant without a sufficient "connection to a plaintiff's particular harm." *East Bay Sanctuary Covenant*, 934 F.3d at 1029.

The harm of a nationwide injunction also extends to the judicial system as a whole, causing a "detrimental effect" on the law's development "'by foreclosing adjudication by a number of different courts and judges.'" *Los Angeles Haven Hospice*, 638 F.3d at 664 (quoting *Yamasaki*, 442 U.S. at 702). By its sweeping nature, a nationwide injunction "stymie[s] . . . robust debate arising in different judicial districts," *East Bay Sanctuary Covenant*, 934 F.3d at 1029 (quoting *San Francisco*, 897 F.3d at 1244), and thus "deprives the Supreme Court of the benefit it receives from permitting multiple courts of appeals to explore a difficult question before it grants certiorari." *Los Angeles Haven Hospice*, 638 F.3d at 664 (citing *United States v. Mendoza*, 464 U.S. 154, 160 (1984)); *see also Virginia Soc'y for Human Life Inc. v. Federal Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001) (permitting nationwide injunction "would 'substantially thwart the development of important questions of law by freezing the

first final decision rendered on a particular legal issue.'" (quoting *Mendoza*, 464 U.S. at 160)).

2. The district court's injunction here cannot be reconciled with these principles. The district court extended its injunction beyond the plaintiff States based on the mere possibility that a narrower injunction would be insufficient to redress plaintiffs' alleged injuries. But "plaintiffs must demonstrate a likelihood of irreparable injury—not just a possibility—in order to obtain preliminary relief" of any kind, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008)—much less nationwide relief. Moreover, the speculative theories on which the district court relied are not supported "in the record," *California*, 911 F.3d at 584, and are too insubstantial to justify a remedy that will burden the government on a national scale.

The district court first relied on the possibility that some aliens residing in the plaintiff States "*may* in the future need to move to a non-plaintiff state but would be deterred from accessing public benefits if relief were limited in geographic scope." ER 57 (emphasis added). Yet nothing in the record shows that aliens are likely to forgo benefits based on the mere chance that they will move. Nor is there evidence that the plaintiff States are likely to suffer the long-term harms they allege even if a small pool of aliens does temporarily forgo benefits because they will soon move elsewhere. Indeed, aliens who leave the plaintiff States are particularly unlikely to cause the future harms that plaintiffs predict.

Similarly speculative was the district court's assertion that "a geographically limited injunction *could* spur immigrants now living in non-plaintiff states to move to one of the Plaintiff States, compounding the Plaintiff States' economic injuries to accommodate a surge in social services enrollees." ER 57 (emphasis added). Again, no evidence shows that a significant number of aliens are likely to uproot their lives and move to the plaintiff States only to take advantage of a preliminary injunction set in place for the duration of this litigation. The district court cited a mere possibility, not a likely harm that could only be remedied by a nationwide injunction.

The last theory on which the district court relied does not seem to relate to the plaintiff States at all. The district court observed that "if the injunction applied only in the fourteen Plaintiff States, a lawful permanent resident returning to the United States from a trip abroad of more than 180 days may be subject to the Public Charge Rule at a point of entry." ER 57. The Rule's mere *application* to a lawful permanent resident who *used* to reside in the plaintiff States would not harm the plaintiffs, except insofar as they seek to advance an abstract policy interest in their preferred interpretation of federal law. Nor would plaintiffs suffer any injury even if an alien were denied entry. To the extent that the district court was suggesting that aliens with plans to travel might temporarily forgo benefits for fear of being denied reentry, there is once more no record evidence regarding either such aliens' likelihood to do so, or the likelihood that such temporary abstinence from benefits would harm the plaintiff States.

Those mere possibilities do not justify the district court's assertion that "the injunction must be universal to afford the Plaintiff States the relief to which they are entitled." ER 57. *See Winter*, 555 U.S. at 22 ("[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, p. 139 (2d ed. 1995)). It was an abuse of discretion to premise a nationwide injunction on such poor evidence that the Rule's application in other states will harm Plaintiffs, given the significant and undisputed harm to the federal government from a nationwide injunction.

3. The district court provided virtually no justification for its grant of a stay postponing the Rule's effective date under 5 U.S.C. § 705, which permits courts to "issue all necessary and appropriate process to postpone the effective date of an agency action," but only "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury." The district court asserted that "postponing the effective date of the Public Charge Rule, in its entirety, provides the Plaintiff States" with "the necessary relief to 'prevent irreparable injury.'" ER 56. For the reasons stated above, a preliminary injunction or stay limited to the plaintiff States would remedy the harms alleged. Thus, the district court's nationwide postponement of the Rule was not "necessary to prevent irreparable injury." 5 U.S.C. § 705.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the court's preliminary injunction and stay under 5 U.S.C. § 705 vacated.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellants state that they know of two related cases pending in this Court:

City and County of San Francisco v. USCIS, No. 19-17213

California v. USDHS, No. 19-17214

s/ Gerard Sinzdak
Gerard Sinzdak

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,724 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
Gerard Sinzdak

ADDENDUM

TABLE OF CONTENTS

8 U.S.C. § 1182 ..... A1

8 U.S.C. § 1183a A3

8 U.S.C. § 1227 ..... A10

8 U.S.C. § 1601 ..... A11

29 U.S.C. § 794(a) A12

Final Rule (*Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. at 41,500-08) A14

8 U.S.C. § 1182

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(4) Public charge

(A) In general

Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

(B) Factors to be taken into account

(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's--

(I) age;

(II) health;

(III) family status;

(IV) assets, resources, and financial status; and

(V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 1183a of this title for purposes of exclusion under this paragraph.

(C) Family-sponsored immigrants

Any alien who seeks admission or adjustment of status under a visa number issued under section 1151(b)(2) or 1153(a) of this title is inadmissible under this paragraph unless--

(i) the alien has obtained--

(I) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 1154(a)(1)(A) of this title;

(II) classification pursuant to clause (ii) or (iii) of section 1154(a)(1)(B) of this title; or

(III) classification or status as a VAWA self-petitioner; or

(ii) the person petitioning for the alien's admission (and any additional sponsor required under section 1183a(f) of this title or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(D) Certain employment-based immigrants

Any alien who seeks admission or adjustment of status under a visa number issued under section 1153(b) of this title by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is inadmissible under this paragraph unless such relative has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(E) Special rule for qualified alien victims

Subparagraphs (A), (B), and (C) shall not apply to an alien who--

(i) is a VAWA self-petitioner;

(ii) is an applicant for, or is granted, nonimmigrant status under section 1101(a)(15)(U) of this title; or

(iii) is a qualified alien described in section 1641(c) of this title.

* * *

(s) Consideration of benefits received as battered alien in determination of inadmissibility as likely to become public charge

In determining whether an alien described in subsection (a)(4)(C)(i) is inadmissible under subsection (a)(4) or ineligible to receive an immigrant visa or otherwise to adjust to the status of permanent resident by reason of subsection (a)(4), the consular officer or the Attorney General shall not consider any benefits the alien may have received that were authorized under section 1641(c) of this title.

8 U.S.C. § 1183a

§ 1183a. Requirements for sponsor's affidavit of support

(a) Enforceability

(1) Terms of affidavit

No affidavit of support may be accepted by the Attorney General or by any consular officer to establish that an alien is not excludable as a public charge under section 1182(a)(4) of this title unless such affidavit is executed by a sponsor of the alien as a contract--

(A) in which the sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable;

(B) that is legally enforceable against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit (as defined in subsection (e)1), consistent with the provisions of this section; and

(C) in which the sponsor agrees to submit to the jurisdiction of any Federal or State court for the purpose of actions brought under subsection (b)(2).

(2) Period of enforceability

An affidavit of support shall be enforceable with respect to benefits provided for an alien before the date the alien is naturalized as a citizen of the United States, or, if earlier, the termination date provided under paragraph (3).

(3) Termination of period of enforceability upon completion of required period of employment, etc.

(A) In general

An affidavit of support is not enforceable after such time as the alien (i) has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act [42 U.S.C.A § 401 et seq.] or can be credited with such qualifying quarters as provided under subparagraph (B), and (ii) in the case of any such qualifying quarter creditable for any period beginning after December 31, 1996, did not receive any Federal means-tested public benefit (as provided under section 1613 of this title) during any such period.

(B) Qualifying quarters

For purposes of this section, in determining the number of qualifying quarters of coverage under title II of the Social Security Act [42 U.S.C.A. § 401 et seq.] an alien shall be credited with--

(i) all of the qualifying quarters of coverage as defined under title II of the Social Security Act worked by a parent of such alien while the alien was under age 18, and

(ii) all of the qualifying quarters worked by a spouse of such alien during their marriage and the alien remains married to such spouse or such spouse is deceased.

No such qualifying quarter of coverage that is creditable under title II of the Social Security Act for any period beginning after December 31, 1996, may be credited to an alien under clause (i) or (ii) if the parent or spouse (as the case may be) of such alien received any Federal means-tested public benefit (as provided under section 1613 of this title) during the period for which such qualifying quarter of coverage is so credited.

(C) Provision of information to save system

The Attorney General shall ensure that appropriate information regarding the application of this paragraph is provided to the system for alien verification of eligibility (SAVE) described in section 1137(d)(3) of the Social Security Act [42 U.S.C.A. § 1320b-7(d)(3)].

(b) Reimbursement of government expenses

(1) Request for reimbursement

(A) Requirement

Upon notification that a sponsored alien has received any means-tested public benefit, the appropriate nongovernmental entity which provided such benefit or the appropriate entity of the Federal Government, a State, or any political subdivision of a State shall request reimbursement by the sponsor in an amount which is equal to the unreimbursed costs of such benefit.

(B) Regulations

The Attorney General, in consultation with the heads of other appropriate Federal agencies, shall prescribe such regulations as may be necessary to carry out subparagraph (A).

(2) Actions to compel reimbursement

(A) In case of nonresponse

If within 45 days after a request for reimbursement under paragraph (1)(A), the appropriate entity has not received a response from the sponsor indicating a willingness to commence payment an action may be brought against the sponsor pursuant to the affidavit of support.

(B) In case of failure to pay

If the sponsor fails to abide by the repayment terms established by the appropriate entity, the entity may bring an action against the sponsor pursuant to the affidavit of support.

(C) Limitation on actions

No cause of action may be brought under this paragraph later than 10 years after the date on which the sponsored alien last received any means-tested public benefit to which the affidavit of support applies.

(3) Use of collection agencies

If the appropriate entity under paragraph (1)(A) requests reimbursement from the sponsor or brings an action against the sponsor pursuant to the affidavit of support, the appropriate entity may appoint or hire an individual or other person to act on behalf of such entity acting under the authority of law for purposes of collecting any amounts owed.

(c) Remedies

Remedies available to enforce an affidavit of support under this section include any or all of the remedies described in section 3201, 3203, 3204, or 3205 of Title 28, as well as an order for specific performance and payment of legal fees and other costs of collection, and include corresponding remedies available under State law. A Federal agency may seek to collect amounts owed under this section in accordance with the provisions of subchapter II of chapter 37 of Title 31.

(d) Notification of change of address

(1) General requirement

The sponsor shall notify the Attorney General and the State in which the sponsored alien is currently a resident within 30 days of any change of address of the sponsor during the period in which an affidavit of support is enforceable.

(2) Penalty

Any person subject to the requirement of paragraph (1) who fails to satisfy such requirement shall, after notice and opportunity to be heard, be subject to a civil penalty of--

(A) not less than $250 or more than $2,000, or

(B) if such failure occurs with knowledge that the sponsored alien has received any means-tested public benefits (other than benefits described in section 1611(b), 1613(c)(2), or 1621(b) of this title) not less than $2,000 or more than $5,000.

The Attorney General shall enforce this paragraph under appropriate regulations.

(e) Jurisdiction

An action to enforce an affidavit of support executed under subsection (a) may be brought against the sponsor in any appropriate court--

(1) by a sponsored alien, with respect to financial support; or

(2) by the appropriate entity of the Federal Government, a State or any political subdivision of a State, or by any other nongovernmental entity under subsection (b)(2), with respect to reimbursement.

(f) "Sponsor" defined

(1) In general

For purposes of this section the term "sponsor" in relation to a sponsored alien means an individual who executes an affidavit of support with respect to the sponsored alien and who--

(A) is a citizen or national of the United States or an alien who is lawfully admitted to the United States for permanent residence;

(B) is at least 18 years of age;

(C) is domiciled in any of the several States of the United States, the District of Columbia, or any territory or possession of the United States;

(D) is petitioning for the admission of the alien under section 1154 of this title; and

(E) demonstrates (as provided in paragraph (6)) the means to maintain an annual income equal to at least 125 percent of the Federal poverty line.

(2) Income requirement case

Such term also includes an individual who does not meet the requirement of paragraph (1)(E) but accepts joint and several liability together with an individual under paragraph (5)(A).

(3) Active duty armed services case

Such term also includes an individual who does not meet the requirement of paragraph (1)(E) but is on active duty (other than active duty for training) in the Armed Forces of the United States, is petitioning for the admission of the alien under section 1154 of this title as the spouse or child of the individual, and demonstrates (as provided in paragraph (6)) the means to maintain an annual income equal to at least 100 percent of the Federal poverty line.

(4) Certain employment-based immigrants case

Such term also includes an individual--

(A) who does not meet the requirement of paragraph (1)(D), but is the relative of the sponsored alien who filed a classification petition for the sponsored alien as an employment-based immigrant under section 1153(b) of this title or who has a significant ownership interest in the entity that filed such a petition; and

(B)(i) who demonstrates (as provided under paragraph (6)) the means to maintain an annual income equal to at least 125 percent of the Federal poverty line, or

(ii) does not meet the requirement of paragraph (1)(E) but accepts joint and several liability together with an individual under paragraph (5)(A).

(5) Non-petitioning cases

Such term also includes an individual who does not meet the requirement of paragraph (1)(D) but who--

(A) accepts joint and several liability with a petitioning sponsor under paragraph (2) or relative of an employment-based immigrant under paragraph (4) and who demonstrates (as provided under paragraph (6)) the means to maintain an annual income equal to at least 125 percent of the Federal poverty line; or

(B) is a spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, or grandchild of a sponsored alien or a legal guardian of a sponsored alien, meets the requirements of paragraph (1) (other than subparagraph (D)), and executes an affidavit of support with respect to such alien in a case in which--

(i) the individual petitioning under section 1154 of this title for the classification of such alien died after the approval of such petition, and the Secretary of Homeland Security has determined for humanitarian reasons that revocation of such petition under section 1155 of this title would be inappropriate; or

(ii) the alien's petition is being adjudicated pursuant to section 1154(l) of this title (surviving relative consideration).

(6) Demonstration of means to maintain income

(A) In general

(i) Method of demonstration

For purposes of this section, a demonstration of the means to maintain income shall include provision of a certified copy of the individual's Federal income tax return for the individual's 3 most recent taxable years and a written statement, executed under oath or as permitted under penalty of perjury under section 1746 of Title 28, that the copies are certified copies of such returns.

(ii) Flexibility

For purposes of this section, aliens may demonstrate the means to maintain income through demonstration of significant assets of the sponsored alien or of the sponsor, if such assets are available for the support of the sponsored alien.

(iii) Percent of poverty

For purposes of this section, a reference to an annual income equal to at least a particular percentage of the Federal poverty line means an annual income equal to at least such percentage of the Federal poverty line for a family unit of a size equal to the number of members of the sponsor's household (including family and non-family dependents) plus the total number of other dependents and aliens sponsored by that sponsor.

(B) Limitation

The Secretary of State, or the Attorney General in the case of adjustment of status, may provide that the demonstration under subparagraph (A) applies only to the most recent taxable year.

(h) "Federal poverty line" defined

For purposes of this section, the term "Federal poverty line" means the level of income equal to the official poverty line (as defined by the Director of the Office of Management and Budget, as revised annually by the Secretary of Health and Human Services, in accordance with section 9902(2) of Title 42) that is applicable to a family of the size involved.

(i) Sponsor's social security account number required to be provided

(1) An affidavit of support shall include the social security account number of each sponsor.

(2) The Attorney General shall develop an automated system to maintain the social security account number data provided under paragraph (1).

(3) The Attorney General shall submit an annual report to the Committees on the Judiciary of the House of Representatives and the Senate setting forth--

(A) for the most recent fiscal year for which data are available the number of sponsors under this section and the number of sponsors in compliance with the financial obligations of this section; and

(B) a comparison of such numbers with the numbers of such sponsors for the preceding fiscal year.

8 U.S.C. § 1227

§ 1227. Deportable aliens

(a) Classes of deportable aliens.

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(5) Public charge

Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

8 U.S.C. § 1601

§ 1601. Statements of national policy concerning welfare and immigration

The Congress makes the following statements concerning national policy with respect to welfare and immigration:

(1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.

(2) It continues to be the immigration policy of the United States that--

(A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and

(B) the availability of public benefits not constitute an incentive for immigration to the United States.

(3) Despite the principle of self-sufficiency, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.

(4) Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.

(5) It is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy.

(6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.

(7) With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.

29 U.S.C. § 794

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of career and technical education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

respond: The estimated total number of respondents for the information collection Form I–539 paper filers is 174,289 and the estimated hour burden per response is two hours. The estimated total number of respondents for the information collection Form I–539 e-filers is 74,696 and the estimated hour burden per response is 1.08 hours. The estimated total number of respondents for the information collection I–539A is 54,375 and the estimated hour burden per response is 0.5 hour. The estimated total number of respondents for the information collection of Biometrics is 248,985 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 747,974 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $56,121,219.

USCIS Form I–912

Under the PRA DHS is required to submit to OMB, for review and approval, covered reporting requirements inherent in a rule. This rule will require non-substantive edits to USCIS Form I–912, Request for Fee Waiver. These edits make clear to those who request fee waivers that an approved fee waiver can negatively impact eligibility for an immigration benefit that is subject to the public charge inadmissibility determination. Accordingly, USCIS has submitted a PRA Change Worksheet, Form OMB 83–C, and amended information collection instrument to OMB for review and approval in accordance with the PRA.

USCIS Form I–407

Under the PRA, DHS is required to submit to OMB, for review and approval, covered reporting requirements inherent in a rule. This rule requires the use of USCIS Form I–407 but does not require any changes to the form or instructions and does not impact the number of respondents, time or cost burden. This form is currently approved by OMB under the PRA. The OMB control number for this information collection is 1615–0130.

USCIS Form I–693

Under the PRA, DHS is required to submit to OMB, for review and approval, covered reporting requirements inherent in a rule. This rule requires the use of USCIS Form I–693 but does not require any changes to the form or instructions and does not impact the number of respondents, time or cost burden. This form is currently approved by OMB under the PRA. The OMB control number for this information collection is 1615–0033.

V. List of Subjects and Regulatory Amendments

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Immigration, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 213

Immigration, Surety bonds.

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 248

Aliens, Reporting and recordkeeping requirements.

Accordingly, DHS amends chapter I of title 8 of the Code of Federal Regulations as follows:

PART 103—IMMIGRATION BENEFITS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1365b; 31 U.S.C. 9701; Public Law 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p.166; 8 CFR part 2; Pub. L. 112–54.

■ 2. Section 103.6 is amended by:

a. Revising paragraphs (a)(1), (a)(2)(i), and (c)(1);

■ b. Adding paragraph (d)(3); and

■ c. Revising paragraph (e) The revisions and additions read as follows:

§ 103.6 Surety bonds.

(a) * * *

(1) *Extension agreements; consent of surety; collateral security.* All surety bonds posted in immigration cases must be executed on the forms designated by DHS, a copy of which, and any rider attached thereto, must be furnished to the obligor. DHS is authorized to approve a bond, a formal agreement for the extension of liability of surety, a request for delivery of collateral security to a duly appointed and undischarged administrator or executor of the estate of a deceased depositor, and a power of attorney executed on the form designated by DHS, if any. All other matters relating to bonds, including a power of attorney not executed on the form designated by DHS and a request for delivery of collateral security to other than the depositor or his or her approved attorney in fact, will be forwarded to the appropriate office for approval.

(2) *Bond riders*—(i) *General.* A bond rider must be prepared on the form(s) designated by DHS, and attached to the bond. If a condition to be included in a bond is not on the original bond, a rider containing the condition must be executed.

* * * * *

(c) * * *

(1) Public charge bonds. Special rules for the cancellation of public charge bonds are described in 8 CFR 213.1.

* * * * *

(d) * * *

(3) *Public charge bonds.* The threshold bond amount for public charge bonds is set forth in 8 CFR 213.1.

(e) *Breach of bond.* Breach of public charge bonds is governed by 8 CFR 213.1. For other immigration bonds, a bond is breached when there has been a substantial violation of the stipulated conditions. A final determination that a bond has been breached creates a claim in favor of the United States which may not be released by the officer. DHS will determine whether a bond has been breached. If DHS determines that a bond has been breached, it will notify the obligor of the decision, the reasons therefor, and inform the obligor of the right to appeal the decision in accordance with the provisions of this part.

■ 3. Section 103.7 is amended by adding paragraphs (b)(1)(i)(LLL) and (MMM) to read as follows:

§ 103.7 Fees.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(LLL) Public Charge Bond, Form I–945. $25.

(MMM) Request for Cancellation of Public Charge Bond, Form I–356. $25.

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 4. The authority citation for part 212 continues to read as follows:

Authority: 6 U.S.C. 111, 202(4) and 271; 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1185 note (section 7209 of Pub. L. 108–458), 1187, 1223, 1225, 1226, 1227, 1255, 1359; 8 CFR part 2.

■ 5. Amend § 212.18 by revising paragraph (b)(2) and (3) to read as follows:

§ 212.18 Application for Waivers of inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders

* * * * *

(b) * * *

(2) If an applicant is inadmissible under section 212(a)(1) of the Act, USCIS may waive such inadmissibility if it determines that granting a waiver is in the national interest.

(3) If any other applicable provision of section 212(a) renders the applicant inadmissible, USCIS may grant a waiver of inadmissibility if the activities rendering the alien inadmissible were caused by or were incident to the victimization and USCIS determines that it is in the national interest to waive the applicable ground or grounds of inadmissibility.

■ 6. Add §§ 212.20 through 212.23 to read as follows:

Sec.

* * * * *

212.20 Applicability of public charge inadmissibility.
212.21 Definitions.
212.22 Public charge inadmissibility determination.
212.23 Exemptions and waivers for public charge ground of inadmissibility.

§ 212.20 Applicability of public charge inadmissibility.

8 CFR 212.20 through 212.23 address the public charge ground of inadmissibility under section 212(a)(4) of the Act. Unless the alien requesting the immigration benefit or classification has been exempted from section 212(a)(4) of the Act as listed in 8 CFR 212.23(a), the provisions of §§ 212.20 through 212.23 of this part apply to an applicant for admission or adjustment of status to lawful permanent resident, if the application is postmarked (or, if applicable, submitted electronically) on or after October 15, 2019.

§ 212.21 Definitions.

For the purposes of 8 CFR 212.20 through 212.23, the following definitions apply:

(a) *Public Charge.* Public charge means an alien who receives one or more public benefits, as defined in paragraph (b) of this section, for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).

(b) *Public benefit.* Public benefit means:

(1) Any Federal, State, local, or tribal cash assistance for income maintenance (other than tax credits), including:

(i) Supplemental Security Income (SSI), 42 U.S.C. 1381 *et seq.;*

(ii) Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601 *et seq.;* or

(iii) Federal, State or local cash benefit programs for income maintenance (often called ''General Assistance'' in the State context, but which also exist under other names); and

(2) Supplemental Nutrition Assistance Program (SNAP), 7 U.S.C. 2011 to 2036c;

(3) Section 8 Housing Assistance under the Housing Choice Voucher Program, as administered by HUD under 42 U.S.C. 1437f;

(4) Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation) under Section 8 of the U.S. Housing Act of 1937 (42 U.S.C. 1437f); and

(5) Medicaid under 42 U.S.C. 1396 *et seq.,* except for:

(i) Benefits received for an emergency medical condition as described in 42 U.S.C. 1396b(v)(2)–(3), 42 CFR 440.255(c);

(ii) Services or benefits funded by Medicaid but provided under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1400 *et seq.;*

(iii) School-based services or benefits provided to individuals who are at or below the oldest age eligible for secondary education as determined under State or local law;

(iv) Benefits received by an alien under 21 years of age, or a woman during pregnancy (and during the 60-day period beginning on the last day of the pregnancy).

(6) Public Housing under section 9 of the U.S. Housing Act of 1937.

(7) Public benefits, as defined in paragraphs (b)(1) through (b)(6) of this section, do not include any public benefits received by an alien who at the time of receipt of the public benefit, or at the time of filing or adjudication of the application for admission or adjustment of status, or application or request for extension of stay or change of status is—

(i) Enlisted in the U.S. Armed Forces under the authority of 10 U.S.C. 504(b)(1)(B) or 10 U.S.C. 504(b)(2), or

(ii) Serving in active duty or in the Ready Reserve component of the U.S. Armed Forces, or

(iii) Is the spouse or child, as defined in section 101(b) of the Act, of an alien described in paragraphs (b)(7)(i) or (ii) of this section.

(8) In a subsequent adjudication for a benefit for which the public charge ground of inadmissibility applies, public benefits, as defined in this section, do not include any public benefits received by an alien during periods in which the alien was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility, as set forth in 8 CFR 212.23(a), or for which the alien received a waiver of public charge inadmissibility, as set forth in 8 CFR 212.23(b).

(9) Public benefits, as defined in this section, do not include any public benefits that were or will be received by—

(i) Children of U.S. citizens whose lawful admission for permanent residence and subsequent residence in the legal and physical custody of their U.S. citizen parent will result automatically in the child's acquisition of citizenship, upon meeting the eligibility criteria of section 320(a)–(b) of the Act, in accordance with 8 CFR part 320; or

(ii) Children of U.S. citizens whose lawful admission for permanent residence will result automatically in the child's acquisition of citizenship upon finalization of adoption (if the child satisfies the requirements applicable to adopted children under INA 101(b)(1)), in the United States by the U.S. citizen parent(s), upon meeting the eligibility criteria of section 320(a)–(b) of the Act, in accordance with 8 CFR part 320; or

(iii) Children of U.S. citizens who are entering the United States for the purpose of attending an interview under section 322 of the Act in accordance with 8 CFR part 322.

(c) *Likely at any time to become a public charge.* Likely at any time to become a public charge means more likely than not at any time in the future to become a public charge, as defined in 212.21(a), based on the totality of the alien's circumstances.

(d) *Alien's household.* For purposes of public charge inadmissibility determinations under section 212(a)(4) of the Act:

(1) If the alien is 21 years of age or older, or under the age of 21 and married, the alien's household includes:

(i) The alien;
(ii) The alien's spouse, if physically residing with the alien;
(iii) The alien's children, as defined in 101(b)(1) of the Act, physically residing with the alien;
(iv) The alien's other children, as defined in section 101(b)(1) of the Act, not physically residing with the alien for whom the alien provides or is required to provide at least 50 percent of the children's financial support, as evidenced by a child support order or agreement a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;
(v) Any other individuals (including a spouse not physically residing with the alien) to whom the alien provides, or is required to provide, at least 50 percent of the individual's financial support or who are listed as dependents on the alien's federal income tax return; and
(vi) Any individual who provides to the alien at least 50 percent of the alien's financial support, or who lists the alien as a dependent on his or her federal income tax return.
(2) If the alien is a child as defined in section 101(b)(1) of the Act, the alien's household includes the following individuals:
(i) The alien;
(ii) The alien's children as defined in section 101(b)(1) of the Act physically residing with the alien;
(iii) The alien's other children as defined in section 101(b)(1) of the Act not physically residing with the alien for whom the alien provides or is required to provide at least 50 percent of the children's financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;
(iv) The alien's parents, legal guardians, or any other individual providing or required to provide at least 50 percent of the alien's financial support to the alien as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided to the alien;
(v) The parents' or legal guardians' other children as defined in section 101(b)(1) of the Act physically residing with the alien;
(vi) The alien's parents' or legal guardians' other children as defined in section 101(b)(1) of the Act, not physically residing with the alien for whom the parent or legal guardian provides or is required to provide at least 50 percent of the other children's financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the parents or legal guardians; and
(vii) Any other individual(s) to whom the alien's parents or legal guardians provide, or are required to provide at least 50 percent of such individual's financial support or who is listed as a dependent on the parent's or legal guardian's federal income tax return.
(e) *Receipt of public benefits.* Receipt of public benefits occurs when a public benefit-granting agency provides a public benefit, as defined in paragraph (b) of this section, to an alien as a beneficiary, whether in the form of cash, voucher, services, or insurance coverage. Applying for a public benefit does not constitute receipt of public benefits although it may suggest a likelihood of future receipt. Certification for future receipt of a public benefit does not constitute receipt of public benefits, although it may suggest a likelihood of future receipt. An alien's receipt of, application for, or certification for public benefits solely on behalf of another individual does not constitute receipt of, application for, or certification for such alien.
(f) Primary caregiver means an alien who is 18 years of age or older and has significant responsibility for actively caring for and managing the well-being of a child or an elderly, ill, or disabled person in the alien's household.

§ 212.22 Public charge inadmissibility determination.

This section relates to the public charge ground of inadmissibility under section 212(a)(4) of the Act.
(a) *Prospective determination based on the totality of circumstances.* The determination of an alien's likelihood of becoming a public charge at any time in the future must be based on the totality of the alien's circumstances by weighing all factors that are relevant to whether the alien is more likely than not at any time in the future to receive one or more public benefits, as defined in 8 CFR 212.21(b), for more than 12 months in the aggregate within any 36-month period. Except as necessary to fully evaluate evidence provided in paragraph (b)(4)(ii)(E)(*3*) of this section, DHS will not specifically assess whether an alien qualifies or would qualify for any public benefit, as defined in 8 CFR 212.21(b).
(b) *Minimum factors to consider.* A public charge inadmissibility determination must at least entail consideration of the alien's age; health; family status; education and skills; and assets, resources, and financial status, as follows:
(1) *The alien's age*—(i) *Standard.* When considering an alien's age, DHS will consider whether the alien's age makes the alien more likely than not to become a public charge at any time in the future, such as by impacting the alien's ability to work, including whether the alien is between the age of 18 and the minimum ''early retirement age'' for Social Security set forth in 42 U.S.C. 416(*l*)(2).
(ii) [Reserved]
(2) *The alien's health*—(i) *Standard.* DHS will consider whether the alien's health makes the alien more likely than not to become a public charge at any time in the future, including whether the alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide and care for himself or herself, to attend school, or to work upon admission or adjustment of status.
(ii) *Evidence.* USCIS' consideration includes but is not limited to the following:
(A) A report of an immigration medical examination performed by a civil surgeon or panel physician where such examination is required (to which USCIS will generally defer absent evidence that such report is incomplete); or
(B) Evidence of a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide and care for himself or herself, to attend school, or to work upon admission or adjustment of status.
(3) *The alien's family status*—(i) *Standard.* When considering an alien's family status, DHS will consider the alien's household size, as defined in 8 CFR 212.21(d), and whether the alien's household size makes the alien more likely than not to become a public charge at any time in the future.
(ii) [Reserved]
(4) *The alien's assets, resources, and financial status*—(i) *Standard.* When considering an alien's assets, resources, and financial status, DHS will consider whether such assets, resources, and financial status excluding any income from illegal activities or sources (*e.g.,* proceeds from illegal gambling or drug sales, and income from public benefits listed in 8 CFR 212.21(b)), make the alien more likely than not to become a public charge at any time in the future, including whether:

(A) The alien's household's annual gross income is at least 125 percent of the most recent Federal Poverty Guideline (100 percent for an alien on active duty, other than training, in the U.S. Armed Forces) based on the alien's household size as defined by section 212.21(d);

(B) If the alien's household's annual gross income is less than 125 percent of the most recent Federal Poverty Guideline (100 percent for an alien on active duty, other than training, in the U.S. Armed Forces), the alien may submit evidence of ownership of significant assets. For purposes of this paragraph, an alien may establish ownership of significant assets, such as savings accounts, stocks, bonds, certificates of deposit, real estate or other assets, in which the combined cash value of all the assets (the total value of the assets less any offsetting liabilities) exceeds:

(*1*) If the intending immigrant is the spouse or child of a United States citizen (and the child has reached his or her 18th birthday), three times the difference between the alien's household income and 125 percent of the FPG (100 percent for those on active duty, other than training, in the U.S. Armed Forces) for the alien's household size;

(*2*) If the intending immigrant is an orphan who will be adopted in the United States after the alien orphan acquires permanent residence (or in whose case the parents will need to seek a formal recognition of a foreign adoption under the law of the State of the intending immigrant's proposed residence because at least one of the parents did not see the child before or during the adoption), and who will, as a result of the adoption or formal recognition of the foreign adoption, acquire citizenship under section 320 of the Act, the difference between the alien's household income and 125 percent of the FPG (100 percent for those on active duty, other than training, in the U.S. Armed Forces) for the alien's household size; or

(*3*) In all other cases, five times the difference between the alien's household income and 125 percent of the FPG (100 percent for those on active duty, other than training, in the U.S. Armed Forces) for the alien's household size.

(C) The alien has sufficient household assets and resources to cover any reasonably foreseeable medical costs, including as related to a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide care for himself or herself, to attend school, or to work;

(D) The alien has any financial liabilities; and whether

(E) The alien has applied for, been certified to receive, or received public benefits, as defined in 8 CFR 212.21(b), on or after October 15, 2019.

(ii) *Evidence.* USCIS' consideration includes, but is not limited to the following:

(A) The alien's annual gross household income including, but not limited to:

(*1*) For each member of the household whose income will be considered, the most recent tax-year transcript from the U.S. Internal Revenue Service (IRS) of such household member's IRS Form 1040, U.S. Individual Income Tax Return; or

(*2*) If the evidence in paragraph (b)(4)(ii)(A)(*1*) of this section is unavailable for a household member, other credible and probative evidence of such household member's income, including an explanation of why such transcript is not available, such as if the household member is not subject to taxation in the United States.

(B) Any additional income from individuals not included in the alien's household provided to the alien's household on a continuing monthly or yearly basis for the most recent calendar year and on which the alien relies or will rely to meet the standard at 8 CFR 212.22(b)(4)(i);

(C) The household's cash assets and resources. Evidence of such cash assets and resources may include checking and savings account statements covering 12 months prior to filing the application;

(D) The household's non-cash assets and resources, that can be converted into cash within 12 months, such as net cash value of real estate holdings minus the sum of all loans secured by a mortgage, trust deed, or other lien on the home; annuities; securities; retirement and educational accounts; and any other assets that can easily be converted into cash;

(E) Evidence that the alien has:

(*1*) Applied for or received any public benefit, as defined in 8 CFR 212.21(b), on or after October 15, 2019 or disenrolled or requested to be disenrolled from such benefit(s); or

(*2*) Been certified or approved to receive any public benefit, as defined in 8 CFR 212.21(b), on or after October 15, 2019 or withdrew his or her application or disenrolled or requested to be to disenrolled from such benefit(s);

(*3*) Submitted evidence from a Federal, State, local, or tribal agency administering a public benefit, as defined in 212.21(b), that the alien has specifically identified as showing that the alien does not qualify or would not qualify for such public benefit by virtue of, for instance, the alien's annual gross household income or prospective immigration status or length of stay;

(F) Whether the alien has applied for or has received a USCIS fee waiver for an immigration benefit request on or after October 15, 2019, unless the fee waiver was applied for or granted as part of an application for which a public charge inadmissibility determination under section 212(a)(4) of the Act was not required.

(G) The alien's credit history and credit score in the United States, and other evidence of the alien's liabilities not reflected in the credit history and credit score (*e.g.,* any mortgages, car loans, unpaid child or spousal support, unpaid taxes, and credit card debt); and

(H) Whether the alien has sufficient household assets and resources (including, for instance, health insurance not designated as a public benefit under 8 CFR 212.21(b)) to pay for reasonably foreseeable medical costs, such as costs related to a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide care for himself or herself, to attend school, or to work;

(5) *The alien's education and skills.* (i) *Standard.* When considering an alien's education and skills, DHS will consider whether the alien has adequate education and skills to either obtain or maintain lawful employment with an income sufficient to avoid being more likely than not to become a public charge.

(ii) *Evidence.* USCIS' consideration includes but is not limited to the following: (A) The alien's history of employment, excluding employment involving illegal activities, *e.g.,* illegal gambling or drug sales. The alien must provide the following:

(*1*) The last 3 years of the alien's tax transcripts from the U.S. Internal Revenue Service (IRS) of the alien's IRS Form 1040, U.S. Individual Income Tax Return; or

(*2*) If the evidence in paragraph (b)(5)(ii)(A)(*1*) of this section is unavailable, other credible and probative evidence of the alien's history of employment for the last 3 years, including an explanation of why such transcripts are not available, such as if the alien is not subject to taxation in the United States;

(B) Whether the alien has a high school diploma (or its equivalent) or has a higher education degree;

(C) Whether the alien has any occupational skills, certifications, or licenses; and

(D) Whether the alien is proficient in English or proficient in other languages in addition to English.

(E) Whether the alien is a primary caregiver as defined in 8 CFR 212.21(f), such that the alien lacks an employment history, is not currently employed, or is not employed full time. Only one alien within a household can be considered a primary caregiver of the same individual within the household. USCIS' consideration with respect this paragraph includes but is not limited to evidence that an individual the alien is caring for resides in the alien's household, evidence of the individual's age, and evidence of the individual's medical condition, including disability, if any.

(6) *The alien's prospective immigration status and expected period of admission.*

(i) *Standard.* DHS will consider the immigration status that the alien seeks and the expected period of admission as it relates to the alien's ability to financially support for himself or herself during the duration of the alien's stay, including:

(A) Whether the alien is applying for adjustment of status or admission in a nonimmigrant or immigrant classification; and

(B) If the alien is seeking admission as a nonimmigrant, the nonimmigrant classification and the anticipated period of temporary stay.

(ii) [Reserved]

(7) *An affidavit of support under section 213A of the Act, when required under section 212(a)(4) of the Act, that meets the requirements of section 213A of the Act and 8 CFR 213a*—(i) *Standard.* If the alien is required under sections 212(a)(4)(C) or (D) to submit an affidavit of support under section 213A of the Act and 8 CFR part 213a, and submits such a sufficient affidavit of support, DHS will consider the likelihood that the sponsor would actually provide the statutorily-required amount of financial support to the alien, and any other related considerations.

(A) *Evidence.* USCIS consideration includes but is not limited to the following:

(*1*) The sponsor's annual income, assets, and resources;

(*2*) The sponsor's relationship to the applicant, including but not limited to whether the sponsor lives with the alien; and

(*3*) Whether the sponsor has submitted an affidavit of support with respect to other individuals.

(c) *Heavily weighted factors.* The factors below will weigh heavily in a public charge inadmissibility determination. The mere presence of any one heavily weighted factor does not, alone, make the alien more or less likely than not to become a public charge.

(1) *Heavily weighted negative factors.* The following factors will weigh heavily in favor of a finding that an alien is likely at any time in the future to become a public charge:

(i) The alien is not a full-time student and is authorized to work, but is unable to demonstrate current employment, recent employment history, or a reasonable prospect of future employment;

(ii) The alien has received or has been certified or approved to receive one or more public benefits, as defined in § 212.21(b), for more than 12 months in the aggregate within any 36-month period, beginning no earlier than 36 months prior to the alien's application for admission or adjustment of status on or after October 15, 2019;

(iii)(A) The alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide for himself or herself, attend school, or work; and

(B) The alien is uninsured and has neither the prospect of obtaining private health insurance, nor the financial resources to pay for reasonably foreseeable medical costs related to such medical condition; or

(iv) The alien was previously found inadmissible or deportable on public charge grounds by an Immigration Judge or the Board of Immigration Appeals.

(2) *Heavily weighted positive factors.* The following factors will weigh heavily in favor of a finding that an alien is not likely to become a public charge:

(i) The alien's household has income, assets, or resources, and support (excluding any income from illegal activities, *e.g.,* proceeds from illegal gambling or drug sales, and any income from public benefits as defined in § 212.21(b)) of at least 250 percent of the Federal Poverty Guidelines for the alien's household size;

(ii) The alien is authorized to work and is currently employed in a legal industry with an annual income, excluding any income from illegal activities such as proceeds from illegal gambling or drug sales, of at least 250 percent of the Federal Poverty Guidelines for the alien's household size; or

(iii) The alien has private health insurance, except that for purposes of this paragraph (c)(2)(iii), private health insurance must be appropriate for the expected period of admission, and does not include health insurance for which the alien receives subsidies in the form of premium tax credits under the Patient Protection and Affordable Care Act, as amended.

(d) *Treatment of benefits received before* October 15, 2019. For purposes of this regulation, DHS will consider, as a negative factor, but not as a heavily weighted negative factor as described in paragraph (c)(1) of this section, any amount of cash assistance for income maintenance, including Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), State and local cash assistance programs that provide benefits for income maintenance (often called ''General Assistance'' programs), and programs (including Medicaid) supporting aliens who are institutionalized for long-term care, received, or certified for receipt, before October 15, 2019, as provided under the 1999 Interim Field Guidance, also known as the 1999 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds. DHS will not consider as a negative factor any other public benefits received, or certified for receipt, before October 15, 2019.

§ 212.23 Exemptions and waivers for public charge ground of inadmissibility.

(a) *Exemptions.* The public charge ground of inadmissibility under section 212(a)(4) of the Act does not apply, based on statutory or regulatory authority, to the following categories of aliens:

(1) Refugees at the time of admission under section 207 of the Act and at the time of adjustment of status to lawful permanent resident under section 209 of the Act;

(2) Asylees at the time of grant under section 208 of the Act and at the time of adjustment of status to lawful permanent resident under section 209 of the Act;

(3) Amerasian immigrants at the time of application for admission as described in sections 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Public Law 100–202, 101 Stat. 1329–183, section 101(e) (Dec. 22, 1987), as amended, 8 U.S.C. 1101 note;

(4) Afghan and Iraqi Interpreter, or Afghan or Iraqi national employed by or on behalf of the U.S. Government as described in section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006 Public Law 109–163 (Jan. 6, 2006), as amended, and section 602(b) of the Afghan Allies Protection Act of 2009, Public Law 111–8, title VI

(Mar. 11, 2009), as amended, 8 U.S.C. 1101 note, and section 1244(g) of the National Defense Authorization Act for Fiscal Year 2008, as amended Public Law 110–181 (Jan. 28, 2008);

(5) Cuban and Haitian entrants applying for adjustment of status under section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99–603, 100 Stat. 3359 (Nov. 6, 1986), as amended, 8 U.S.C. 1255a note;

(6) Aliens applying for adjustment of status under the Cuban Adjustment Act, Public Law 89–732 (Nov. 2, 1966), as amended, 8 U.S.C. 1255 note;

(7) Nicaraguans and other Central Americans applying for adjustment of status under sections 202(a) and section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105–100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255 note;

(8) Haitians applying for adjustment of status under section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Public Law 105–277, 112 Stat. 2681 (Oct. 21, 1998), as amended, 8 U.S.C. 1255 note;

(9) Lautenberg parolees as described in section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Public Law 101–167, 103 Stat. 1195, title V (Nov. 21, 1989), as amended, 8 U.S.C. 1255 note;

(10) Special immigrant juveniles as described in section 245(h) of the Act;

(11) Aliens who entered the United States prior to January 1, 1972, and who meet the other conditions for being granted lawful permanent residence under section 249 of the Act and 8 CFR part 249 (Registry);

(12) Aliens applying for or re-registering for Temporary Protected Status as described in section 244 of the Act in accordance with section 244(c)(2)(A)(ii) of the Act and 8 CFR 244.3(a);

(13) A nonimmigrant described in section 101(a)(15)(A)(i) and (A)(ii) of the Act (Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family or Other Foreign Government Official or Employee, or Immediate Family), in accordance with section 102 of the Act and 22 CFR 41.21(d);

(14) A nonimmigrant classifiable as C–2 (alien in transit to U.N. Headquarters) or C–3 (foreign government official), 22 CFR 41.21(d);

(15) A nonimmigrant described in section 101(a)(15)(G)(i), (G)(ii), (G)(iii), and (G)(iv), of the Act (Principal Resident Representative of Recognized Foreign Government to International Organization, and related categories), in accordance with section 102 of the Act and 22 CFR 41.21(d);

(16) A nonimmigrant classifiable as NATO–1, NATO–2, NATO–3, NATO–4 (NATO representatives), and NATO–6 in accordance with 22 CFR 41.21(d);

(17) An applicant for nonimmigrant status under section 101(a)(15)(T) of the Act, in accordance with 8 CFR 212.16(b);

(18) Except as provided in section 212.23(b), an individual who is seeking an immigration benefit for which admissibility is required, including but not limited to adjustment of status under section 245(a) of the Act and section 245(l) of the Act and who:

(i) Has a pending application that sets forth a prima facie case for eligibility for nonimmigrant status under section 101(a)(15)(T) of the Act, or

(ii) Has been granted nonimmigrant status under section 101(a)(15)(T) of the Act, provided that the individual is in valid T nonimmigrant status at the time the benefit request is properly filed with USCIS and at the time the benefit request is adjudicated;

(19) Except as provided in § 212.23(b),

(i) A petitioner for nonimmigrant status under section 101(a)(15)(U) of the Act, in accordance with section 212(a)(4)(E)(ii) of the Act; or

(ii) An individual who is granted nonimmigrant status under section 101(a)(15)(U) of the Act in accordance with section 212(a)(4)(E)(ii) of the Act, who is seeking an immigration benefit for which admissibility is required, including, but not limited to, adjustment of status under section 245(a) of the Act, provided that the individual is in valid U nonimmigrant status at the time the benefit request is properly filed with USCIS and at the time the benefit request is adjudicated.

(20) Except as provided in section 212.23(b), any alien who is a VAWA self-petitioner under section 212(a)(4)(E)(i) of the Act;

(21) Except as provided in section 212.23(b), a qualified alien described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1641(c), under section 212(a)(4)(E)(iii) of the Act;

(22) Applicants adjusting status who qualify for a benefit under section 1703 of the National Defense Authorization Act, Public Law 108–136, 117 Stat. 1392 (Nov. 24, 2003), 8 U.S.C. 1151 note (posthumous benefits to surviving spouses, children, and parents);

(23) American Indians born in Canada determined to fall under section 289 of the Act;

(24) Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Public Law 97–429 (Jan. 8, 1983);

(25) Nationals of Vietnam, Cambodia, and Laos applying for adjustment of status under section 586 of Public Law 106–429 under 8 CFR 245.21;

(26) Polish and Hungarian Parolees who were paroled into the United States from November 1, 1989 to December 31, 1991 under section 646(b) of the IIRIRA, Public Law 104–208, Div. C, Title VI, Subtitle D (Sept. 30, 1996), 8 U.S.C. 1255 note; and

(27) Any other categories of aliens exempt under any other law from the public charge ground of inadmissibility provisions under section 212(a)(4) of the Act.

(b) *Limited Exemption.* Aliens described in §§ 212.23(a)(18) through (21) must submit an affidavit of support as described in section 213A of the Act if they are applying for adjustment of status based on an employment-based petition that requires such an affidavit of support as described in section 212(a)(4)(D) of the Act.

(c) *Waivers.* A waiver for the public charge ground of inadmissibility may be authorized based on statutory or regulatory authority, for the following categories of aliens:

(1) Applicants for admission as nonimmigrants under 101(a)(15)(S) of the Act;

(2) Nonimmigrants admitted under section 101(a)(15)(S) of the Act applying for adjustment of status under section 245(j) of the Act (witnesses or informants); and

(3) Any other waiver of the public charge ground of inadmissibility that is authorized by law or regulation.

PART 213—PUBLIC CHARGE BONDS

■ 7. The authority citation for part 213 is revised to read as follows:

Authority: 8 U.S.C. 1103; 1183; 8 CFR part 2.

■ 8. Revise the part heading to read as set forth above.

■ 9. Revise § 213.1 to read as follows:

§ 213.1 Adjustment of status of aliens on submission of a public charge bond.

(a) *Inadmissible aliens.* In accordance with section 213 of the Act, after an alien seeking adjustment of status has been found inadmissible as likely at any time in the future to become a public charge under section 212(a)(4) of the Act, DHS may allow the alien to submit a public charge bond, if the alien is otherwise admissible, in accordance with the requirements of 8 CFR 103.6 and this section. The public charge

bond must meet the conditions set forth in 8 CFR 103.6 and this section.

(b) *Discretion.* The decision to allow an alien inadmissible under section 212(a)(4) of the Act to submit a public charge bond is in DHS's discretion. If an alien has one or more heavily weighted negative factors as defined in 8 CFR 212.22 in his or her case, DHS generally will not favorably exercise discretion to allow submission of a public charge bond.

(c) *Public Charge Bonds.* (1) *Types.* DHS may require an alien to submit a surety bond, as listed in 8 CFR 103.6, or cash or any cash equivalents specified by DHS. DHS will notify the alien of the type of bond that may be submitted. All surety, cash, or cash equivalent bonds must be executed on a form designated by DHS and in accordance with form instructions. When a surety bond is accepted, the bond must comply with requirements applicable to surety bonds in 8 CFR 103.6 and this section. If cash or a cash equivalent, is being provided to secure a bond, DHS must issue a receipt on a form designated by DHS.

(2) *Amount.* Any public charge bond must be in an amount decided by DHS, not less than $8,100, annually adjusted for inflation based on the Consumer Price Index for All Urban Consumers (CPI–U), and rounded up to the nearest dollar. The bond amount decided by DHS may not be appealed by the alien or the bond obligor.

(d) *Conditions of the bond.* A public charge bond must remain in effect until USCIS grants a request to cancel the bond in accordance with paragraph (g) of this section, whereby the alien naturalizes or otherwise obtains U.S. citizenship, permanently departs the United States, dies, the alien has reached his or her 5-year anniversary since becoming a lawful permanent resident, or the alien changes immigration status to one not subject to public charge ground of inadmissibility. An alien on whose behalf a public charge bond has been submitted may not receive any public benefits, as defined in 8 CFR 212.21(b), for more than 12 months in the aggregate within any 364month period (such that, for instance, receipt of two benefits in one month counts as two months, after the alien's adjustment of status to that of a lawful permanent resident, until the bond is cancelled in accordance with paragraph (g) of this section. An alien must also comply with any other conditions imposed as part of the bond.

(e) *Submission.* A public charge bond may be submitted on the alien's behalf only after DHS notifies the alien and the alien's representative, if any, that a bond may be submitted. The bond must be submitted to DHS in accordance with the instructions of the form designated by DHS for this purpose, with the fee prescribed in 8 CFR 103.7(b), and any procedures contained in the DHS notification to the alien. DHS will specify the bond amount and any other conditions, as appropriate for the alien and the immigration benefit being sought. USCIS will notify the alien and the alien's representative, if any, that the bond has been accepted, and will provide a copy to the alien and the alien's representative, if any, of any communication between the obligor and the U.S. government. An obligor must notify DHS within 30 days of any change in the obligor's or the alien's physical and mailing address.

(f) *Substitution.* (1) *Substitution Process.* Either the obligor of the bond previously submitted to DHS or a new obligor may submit a substitute bond on the alien's behalf. The substitute bond must specify an effective date. The substitute bond must meet all of the requirements applicable to the initial bond as required by this section and 8 CFR 103.6, and if the obligor is different from the original obligor, the new obligor must assume all liabilities of the initial obligor. The substitute bond must also cover any breach of the bond conditions which occurred before DHS accepted the substitute bond, in the event DHS did not learn of the breach until after DHS accepted the substitute bond.

(2) *Acceptance.* Upon submission of the substitute bond, DHS will review the substitute bond for sufficiency as set forth in this section. If the substitute bond is sufficient DHS will cancel the bond previously submitted to DHS, and replace it with the substitute bond. If the substitute bond is insufficient, DHS will notify the obligor of the substitute bond to correct the deficiency within the timeframe specified in the notice. If the deficiency is not corrected within the timeframe specified, the previously submitted bond will remain in effect.

(g) *Cancellation of the Public Charge Bond.* (1) An alien or obligor may request that DHS cancel a public charge bond if the alien:

(i) Naturalized or otherwise obtained United States citizenship;

(ii) Permanently departed the United States;

(iii) Died;

(iv) Reached his or her 5-year anniversary since becoming a lawful permanent resident; or

(v) Obtained a different immigration status not subject to public charge inadmissibility, as listed in 8 CFR 212.23, following the grant of lawful permanent resident status associated with the public charge bond.

(2) *Permanent Departure Defined.* For purposes of this section, permanent departure means that the alien lost or abandoned his or her lawful permanent resident status, whether by operation of law or voluntarily, and physically departed the United States. An alien is only deemed to have voluntarily lost lawful permanent resident status when the alien has submitted a record of abandonment of lawful permanent resident status, on the form prescribed by DHS, from outside the United States, and in accordance with the form's instructions.

(3) *Cancellation Request.* A request to cancel a public charge bond must be made by submitting a form designated by DHS, in accordance with that form's instructions and the fee prescribed in 8 CFR 103.7(b). If a request for cancellation of a public charge bond is not filed, the bond shall remain in effect until the form is filed, reviewed, and a decision is rendered. DHS may in its discretion cancel a public charge bond if it determines that an alien otherwise meets the eligibility requirements of paragraphs (g)(1) of this section.

(4) *Adjudication and Burden of Proof.* The alien and the obligor have the burden to establish, by a preponderance of the evidence, that one of the conditions for cancellation of the public charge bond listed in paragraph (g)(1) of this section has been met. If DHS determines that the information included in the cancellation request is insufficient to determine whether cancellation is appropriate, DHS may request additional information as outlined in 8 CFR 103.2(b)(8). DHS must cancel a public charge bond if DHS determines that the conditions of the bond have been met, and that the bond was not breached, in accordance with paragraph (h) of this section. For cancellations under paragraph (g)(1)(iv) of this section, the alien or the obligor must establish that the public charge bond has not been breached during the 5-year period preceding the alien's fifth anniversary of becoming a lawful permanent resident.

(5) *Decision.* DHS will notify the obligor, the alien, and the alien's representative, if any, of its decision regarding the request to cancel the public charge bond. When the public charge bond is cancelled, the obligor is released from liability. If the public charge bond has been secured by a cash deposit or a cash equivalent, DHS will refund the cash deposit and any interest earned to the obligor consistent with 8 U.S.C. 1363 and 8 CFR 293.1. If DHS denies the request to cancel the bond,

DHS will notify the obligor and the alien, and the alien's representative, if any, of the reasons why, and of the right of the obligor to appeal in accordance with the requirements of 8 CFR part 103, subpart A. An obligor may file a motion pursuant to 8 CFR 103.5 after an unfavorable decision on appeal.

(h) *Breach.* (1) *Breach and Claim in Favor of the United States.* An administratively final determination that a bond has been breached creates a claim in favor of the United States. Such claim may not be released or discharged by an immigration officer. A breach determination is administratively final when the time to file an appeal with the Administrative Appeals Office (AAO) pursuant to 8 CFR part 103, subpart A, has expired or when the appeal is dismissed or rejected.

(2) *Breach of Bond Conditions.* (i) The conditions of the bond are breached if the alien has received public benefits, as defined in 8 CFR 212.21(b), for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months), after the alien's adjustment of status to that of a lawful permanent resident and before the bond is cancelled under paragraph (g) of this section. DHS will not consider any public benefits, as defined in 8 CFR 212.21(b), received by the alien during periods while an alien was present in the United States in a category that is exempt from the public charge ground of inadmissibility or for which the alien received a waiver of public charge inadmissibility, as set forth in 8 CFR 212.21(b) and 8 CFR 212.23, and public benefits received after the alien obtained U.S. citizenship, when determining whether the conditions of the bond have been breached. DHS will not consider any public benefits, as defined in 8 CFR 212.21 (b)(1) through (b)(3), received by an alien who, at the time of receipt filing, adjudication or bond breach or cancellation determination, is enlisted in the U.S. Armed Forces under the authority of 10 U.S.C. 504(b)(1)(B) or 10 U.S.C. 504(b)(2), serving in active duty or in the Ready Reserve component of the U.S. Armed Forces, or if received by such an individual's spouse or child as defined in section 101(b) of the Act; or

(ii) The conditions of the bond otherwise imposed by DHS as part of the public charge bond are breached.

(3) *Adjudication.* DHS will determine whether the conditions of the bond have been breached. If DHS determines that it has insufficient information from the benefit-granting agency to determine whether a breach occurred, DHS may request additional information from the benefit-granting agency. If DHS determines that it has insufficient information from the alien or the obligor, it may request additional information as outlined in 8 CFR part 103 before making a breach determination. If DHS intends to declare a bond breached based on information that is not otherwise protected from disclosure to the obligor, DHS will disclose such information to the obligor to the extent permitted by law, and provide the obligor with an opportunity to respond and submit rebuttal evidence, including specifying a deadline for a response. DHS will send a copy of this notification to the alien and the alien's representative, if any. After the obligor's response, or after the specified deadline has passed, DHS will make a breach determination.

(4) *Decision.* DHS will notify the obligor and the alien, and the alien's representative, if any, of the breach determination. If DHS determines that a bond has been breached, DHS will inform the obligor of the right to appeal in accordance with the requirements of 8 CFR part 103, subpart A. With respect to a breach determination for a surety bond, the alien or the alien's representative, if any, may not appeal the breach determination or file a motion.

(5) *Demand for Payment.* Demands for amounts due under the terms of the bond will be sent to the obligor and any agent/co-obligor after a declaration of breach becomes administratively final.

(6) *Amount of Bond Breach and Effect on Bond.* The bond must be considered breached in the full amount of the bond.

(i) *Exhaustion of administrative remedies.* Unless an administrative appeal is precluded by regulation, a party has not exhausted the administrative remedies available with respect to a public charge bond under this section until the party has obtained a final decision in an administrative appeal under 8 CFR part 103, subpart A.

(ii) [Reserved]

PART 214—NONIMMIGRANT CLASSES

■ 10. The authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305 and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Public Law 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

■ 11. Section 214.1 is amended by:

■ a. Adding paragraph (a)(3)(iv),

■ b. Removing the term, ''and'' in paragraph (c)(4)(iii);

The additions read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

(a) * * *

(3) * * *

(iv) Except where the nonimmigrant classification for which the alien seeks to extend is exempt from section 212(a)(4) of the Act or that section has been waived, as a condition for approval of extension of status, the alien must demonstrate that he or she has not received since obtaining the nonimmigrant status he or she seeks to extend one or more public benefits as defined in 8 CFR 212.21(b), for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months). For the purposes of this determination, DHS will only consider public benefits received on or after October 15, 2019 for petitions or applications postmarked (or, if applicable, submitted electronically) on or after that date.

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PART 245—ADJUSTMENT OF STATUS TO THAT OF A PERSON ADMITTED FOR PERMANENT RESIDENCE

■ 12. The authority citation for part 245 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1255; Pub. L. 105–100, section 202, 111 Stat. 2160, 2193; Pub. L. 105–277, section 902, 112 Stat. 2681; Pub. L. 110–229, tit. VII, 122 Stat. 754; 8 CFR part 2.

■ 13. Amend § 245.4 by redesignating the undesignated text as paragraph (a) and adding paragraph (b) to read as follows:

§ 245.4 Documentary requirements.

* * * * *

(b) For purposes of public charge determinations under section 212(a)(4) of the Act and 8 CFR 212.22, an alien who is seeking adjustment of status under this part must submit a declaration of self-sufficiency on a form designated by DHS, in accordance with form instructions.

■ 14. In § 245.23, revise paragraph (c)(3) to read as follows:

§ 245.23 Adjustment of aliens in T nonimmigrant classification.

* * * * *

(c) * * *

(3) The alien is inadmissible under any applicable provisions of section 212(a) of the Act and has not obtained a waiver of inadmissibility in accordance with 8 CFR 212.18 or

214.11(j). Where the alien establishes that the victimization was a central reason for the applicant's unlawful presence in the United States, section 212(a)(9)(B)(iii) of the Act is not applicable, and the applicant need not obtain a waiver of that ground of inadmissibility. The alien, however, must submit with the Form I–485 evidence sufficient to demonstrate that the victimization suffered was a central reason for the unlawful presence in the United States. To qualify for this exception, the victimization need not be the sole reason for the unlawful presence but the nexus between the victimization and the unlawful presence must be more than tangential, incidental, or superficial.

PART 248—CHANGE OF NONIMMIGRANT CLASSIFICATION

■ 15. The authority citation for part 248 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1184, 1258; 8 CFR part 2.

■ 16. Section 248.1 is amended by:

■ a. Revising paragraph (a);

■ b. Redesignating paragraphs (b) through (e) as paragraphs (c) through (f), respectively; and

■ c. Adding a new paragraph (b); and

■ d. Revising newly redesignated paragraph (c)(4).

The revisions and additions read as follows:

§ 248.1 Eligibility.

(a) *General.* Except for those classes enumerated in § 248.2 of this part, any alien lawfully admitted to the United States as a nonimmigrant, including an alien who acquired such status in accordance with section 247 of the Act who is continuing to maintain his or her nonimmigrant status, may apply to have his or her nonimmigrant classification changed to any nonimmigrant classification other than that of a spouse or fiance(e), or the child of such alien, under section 101(a)(15)(K) of the Act or as an alien in transit under section 101(a)(15)(C) of the Act. Except where the nonimmigrant classification to which the alien seeks to change is exempted by law or regulation from section 212(a)(4) of the Act, as a condition for approval of a change of nonimmigrant status, the alien must demonstrate that he or she has not received since obtaining the nonimmigrant status from which he or she seeks to change, public benefits, as described in 8 CFR 212.21(b), for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months). DHS will only consider public benefits received on or after October 15, 2019 for petitions or applications postmarked (or, if applicable, submitted electronically) on or after that date . An alien defined by section 101(a)(15)(V) or 101(a)(15)(U) of the Act may be accorded nonimmigrant status in the United States by following the procedures set forth in 8 CFR 214.15(f) and 214.14, respectively.

(b) *Decision in change of status proceedings.* Where an applicant or petitioner demonstrates eligibility for a requested change of status, it may be granted at the discretion of DHS. There is no appeal from the denial of an application for change of status.

(c) * * *

(4) As a condition for approval, an alien seeking to change nonimmigrant classification must demonstrate that he or she has not received, since obtaining the nonimmigrant status from which he or she seeks to change, one or more public benefits, as defined in 8 CFR 212.21(b), for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months). For purposes of this determination, DHS will only consider public benefits received on or after October 15, 2019 for petitions or applications postmarked (or, if applicable, submitted electronically) on or after that date. This provision does not apply to classes of nonimmigrants who are explicitly exempt by law or regulation from section 212(a)(4) of the Act.

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Kevin K. McAleenan,

Acting Secretary of Homeland Security.

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