19-17213

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO, and COUNTY OF SANTA CLARA,

Plaintiffs-Appellees,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency, U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency, KEVIN K. MCALEENAN, in his official capacity as Acting Secretary of the United States Department of Homeland Security, KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services,

Defendants-Appellants.

On Appeal from the U.S. District Court for the Northern District of California
No. 4:19-cv-04717-PJH
Hon. Phyllis J. Hamilton, Chief District Judge

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF PLAINTIFFS-APPELLEES

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The Institute for Policy Integrity at New York University School of Law ("Policy Integrity") submits this brief as *amicus curiae* in support of Appellees' challenge to the Department of Homeland Security's ("DHS" or "Department") final rule, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("Rule").[1]

INTEREST OF AMICUS CURIAE

Policy Integrity is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Our legal and economic experts have produced extensive scholarship on the best practices for regulatory impact analysis and the proper valuation of regulatory costs and benefits. Our director, Richard L. Revesz, has published more than 80 articles and books on environmental and administrative law, including works on the legal and economic principles that inform rational regulatory decisions.

In furtherance of our mission to promote rational decisionmaking, Policy Integrity has filed *amicus curiae* briefs in many recent cases addressing administrative agencies' economic analyses. *See, e.g.*, Brief of Institute for Policy Integrity, *California v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153 (N.D. Cal. 2019) (arguing that repeal of reforms for mineral valuation was unreasonable due to

[1] All parties have consented to this filing.

inaccurate economic assessment); Brief of Institute for Policy Integrity as Amicus Curiae, *State of New York v. U.S. Dep't of Health & Human Servs.*, ___F. Supp.3d___, 2019 WL 5781789 (S.D.N.Y. Nov. 6, 2019) (arguing that agency's incomplete assessment of costs and reliance on speculative benefits rendered conscience-protections rule unlawful). In many of those cases, courts have agreed that the economic analyses—and, in turn, the rules issued in reliance on those analyses—were arbitrary and capricious. *See California*, 381 F. Supp. 3d at 1170 (finding repeal arbitrary due in part to agency's flawed economic impact assessment); *New York*, 2019 WL 5781789, at *44–51 (finding rule arbitrary after agency failed to adequately consider indirect policy impacts).

Appellants challenge the district court's finding that the Department did not adequately consider the varied and extensive harms that would result from the Rule or appropriately weigh them against the action's purported benefits. *See* Brief of Appellants at 38–46. Policy Integrity's expertise in cost-benefit analysis gives us a unique perspective on this claim.

SUMMARY OF ARGUMENT

An agency's reliance on a "flawed … cost benefit analysis" can render its action arbitrary and capricious. *California v. FCC*, 39 F.3d 919, 930 (9th Cir. 1994). The Rule is arbitrary and capricious for this reason.

Although the Department projects that the Rule's principal impact will be

large-scale disenrollment from public assistance programs like Medicaid and the Supplemental Nutrition Assistance Program ("SNAP")—programs that, research finds, vastly benefit both beneficiaries and the country as a whole—the Department disregards nearly all of the real-world impacts of this disenrollment, and even claims, in violation of longstanding regulatory guidance and practice, that the disenrollment itself is a benefit of the Rule. Its perfunctory analysis is riddled with serious errors and omissions and cannot lawfully justify the Rule.

For one, the Department fails to meaningfully assess—or, sometimes, even acknowledge—many of the substantial social costs that will result from large-scale disenrollment from public assistance. This includes not only massive costs to disenrollees and their families, including health impacts, hunger, and housing insecurity—all of which are established by considerable evidence emphasized by public commenters during this rulemaking—but also broader national costs, such as declines in state and local government services and access to emergency healthcare. The Department's lack of meaningful consideration of these substantial harms plainly violates its obligation to "pay[] attention to the advantages *and* the disadvantages of [its] decisions," *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015)—a requirement that, contrary to this Court's analysis in its preliminary ruling, applies to the Department just as it applies to other agencies.

The Department's treatment of the Rule's "primary benefit"—ensuring that

noncitizens will be "self-sufficient" by "not us[ing] or receiv[ing] … public benefits," DHS, Regulatory Impact Analysis: Inadmissibility on Public Charge Grounds 13 (Aug. 2019) ("RIA")[2]—is equally cursory and unsound. For one, longstanding executive guidance directs administrative agencies not to treat a reduction in public-assistance payments as a regulatory benefit, as this is simply a monetary "transfer" from enrollees to the government that does not capture impacts on societal welfare. Furthermore, the Department disregards evidence that discouraging noncitizens from participating in public assistance programs for which they are otherwise eligible will worsen their long-term economic prospects, thus rendering them, their families, and their communities more likely to require government aid in the future. By simply assuming, without evidence, that the Rule will promote self-sufficiency, the Department impermissibly relies on "sheer speculation." *Sorenson v. F.C.C.*, 755 F.3d 702, 708 (D.C. Cir. 2014) (internal quotation marks omitted).

By emphasizing speculative benefits while minimizing or ignoring likely costs, the Department arbitrarily puts a "thumb on the scale" in favor of the Rule. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008). Notably absent from the Department's analysis is any attempt

[2] *Available at* https://www.regulations.gov/document?D=USCIS-2010-0012-63741.

to weigh the Rule's impacts and "explain why the [benefits] were worth the [costs]." *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 58 (2d Cir. 2003).

Because the Department relies on this lopsided and cursory analysis to justify the Rule, the Rule is arbitrary and capricious.

ARGUMENT

Final agency actions are arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2), if the agency fails to "examine the relevant data," "consider an important aspect of the problem," or "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). Under this standard, a "serious flaw undermining" an agency's cost-benefit analysis "can render the [resulting] rule unreasonable," *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012), even if that analysis was not legally required, *id.* at 1039–40.

Here, as previewed above, the Department fails to meaningfully consider many of the Rule's substantial social costs, identify any significant benefits resulting from the Rule, and rationally weigh the Rule's costs against its purported benefits. Each of these analytic insufficiencies—detailed in turn below—provides an independent basis to vacate the Rule.

I. DHS Fails to Adequately Evaluate the Rule's Widespread Economic and Social Costs

The Department's regulatory impact analysis for the Rule gives practically no consideration to the Rule's biggest costs, barely acknowledging and entirely failing to analyze its likely impacts on, for example, public health, food insecurity, and housing insecurity—despite receiving many comments describing these effects.

"[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages" of rulemaking. *Michigan*, 135 S. Ct. at 2707. Accordingly, agencies typically treat costs as a "centrally relevant factor when deciding whether to regulate." *Id*. Such costs include far more than just compliance-related financial expenditures: Instead, the Supreme Court has recognized that the concept of regulatory "cost" encompasses "any disadvantage" resulting from a rule. *Id*. Similarly, the primary executive order governing regulatory cost-benefit analysis instructs agencies that their cost assessments should include harms to "health, safety, and the natural environment" in addition to "adverse effects on the efficient functioning of the economy." Exec. Order No. 12,866 § 6(a)(3)(C)(ii), 58 Fed. Reg. 51,735 (Oct. 4, 1993).

As the Department acknowledges, the Rule will cause disenrollment—affecting both citizens and noncitizens—from federal public assistance programs that help low-income individuals access necessities such as healthcare (Medicaid), housing (federal rental assistance), and food (SNAP). RIA at 4–5, 93. The Rule is

also likely to increase the number of noncitizens found ineligible for permanent residency, RIA at 13, and thus cause some of these noncitizens—including many with U.S. citizen children and other relatives—to exit the country. But the Department fails to rigorously assess the many harms that will flow from these disenrollments and ineligibility determinations, instead devoting the bulk of its analysis to the Rule's paperwork costs. *Compare* RIA at 35–81 (calculating cost of completing new forms) *with id.* at 82–109 (discussing enrollment impacts). And while the Department offers excuses for its failure to closely evaluate the Rule's broader effects, none is persuasive.

A. DHS Does Not Adequately Consider the Rule's Costs to Targeted Noncitizens Who Forgo Public Assistance

As noted above, the Rule is expected to cause extensive disenrollment from public assistance programs, as it effectively requires noncitizens to choose between receipt of permanent residency and public benefits. As many organizations advised the Department in comments to this rulemaking, low-income populations are likely to face profound negative effects from the loss of public assistance, as many will no longer be able to afford necessities like healthcare, nutritious food, and safe housing. Despite this deluge of comments, the Department barely discusses and fails to seriously grapple with these costs.

To take one example, many commenters advised the Department that disenrollment from federal healthcare programs, *see* RIA at 93 (projecting over

76,000 fewer participants in Medicaid), will harm the "health" and "financial stability" of disenrollees, Samantha Artiga et al., Potential Effects of Public Charge Changes on Health Coverage for Citizen Children 1 (Kaiser Family Found. 2018) (cited in 121 comments to this rulemaking).[3] Specifically, enrollment in Medicaid causes patients to obtain more preventative care, reducing the need for expensive treatment "after conditions have worsened" and patients have suffered considerable pain. Ctr. on Budget & Policy Priorities, Comment Letter on Inadmissibility on Public Charge Grounds 66 (Dec. 7, 2018) ("CBPP Comments").[4] Studies also show that Medicaid has quantifiable effects on mortality, college enrollment, and future tax contributions for younger individuals, meaning that the Rule, by reducing enrollment, will produce social costs in the form of reduced health, educational attainment, and economic productivity. *See* Ctr. for Law & Soc. Policy, Comments in Response to Proposed Rulemaking 33–34 (Dec. 7, 2018) ("CLASP Comments").[5]

Reductions in SNAP participation from the Rule, RIA at 93 (projecting over 129,000 SNAP enrollment reductions), to provide another example, can also be

[3] *Available at* https://www.kff.org/disparities-policy/issue-brief/potential-effects-of-public-charge-changes-on-health-coverage-for-citizen-children/. All citation figures were compiled by searching the online docket for this rulemaking, *available at* https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=USCIS-2010-0012.
[4] *Available at* https://www.regulations.gov/document?D=USCIS-2010-0012-37272.
[5] *Available at* https://www.regulations.gov/document?D=USCIS-2010-0012-42444.

expected to produce substantial costs to disenrollees. Numerous commenters advised the Department that SNAP increases food security, reduces poverty, and improves physical and mental health. *See, e.g.*, Inst. for Policy Integrity, Comment Letter on Inadmissibility on Public Charge Grounds 10 (Dec. 10, 2018) ("Policy Integrity Comments").[6] One commenter, for instance, cited research explaining that SNAP benefits incentivize the purchase of healthier foods (which are often more expensive than less nutritious food) and reduce the need for individuals to forgo medication in order to purchase food; as a result, SNAP participation is associated with better long-term health outcomes, as food-insecure households spend roughly 45% more on medical costs—an additional $1,900 annually per person—than food-secure households. CBPP Comments at 62 & n. 104. Reductions in SNAP participation also increase homelessness, commenters further advised, as families receiving housing assistance are 72% more likely to be housing secure when they also receive SNAP. Policy Integrity Comments at 10.

None of this data on the social costs of disenrollment from public assistance, however, is in the Department's analysis. Instead the Department simply lists some of the consequences of disenrollment—such as "[a]dverse health effects" and "[a]dditional medical expenses due to delayed health care treatment," RIA at 13–14—without making any effort to quantify them or otherwise assess "how important

[6] *Available at* https://www.regulations.gov/document?D=USCIS-2010-0012-53531.

[they] may be in the context of the overall analysis," Office of Mgmt. & Budget, Circular A-4 on Regulatory Analysis 2 (2003) ("Circular A-4").

The Department's minimal evaluation of the Rule's substantial health and welfare impacts on disenrollees is a far cry from the "central[] relevan[ce]" that costs are normally given in agency decisionmaking, *Michigan*, 135 S. Ct. at 2707, and presents a textbook example of arbitrary-and-capricious rulemaking.

B. DHS Does Not Adequately Consider the Rule's Costs to Citizens and Non-Targeted Immigrants

In addition to disregarding health and welfare costs to noncitizens who forgo or disenroll from public assistance out of justified concern that doing so will prevent them from obtaining permanent residency, the Department also fails to adequately consider similar costs to other populations—both citizens and noncitizens—whom the Rule does not directly target.

These costs are two-fold. First, many of the negative consequences of public-assistance disenrollment, such as homelessness and food insecurity, harm not just the disenrollees, but also their relatives—including U.S. citizen children. Second, it is expected that many individuals not subject to the Rule, such as refugees, asylees, and individuals residing with noncitizen immigrants, will nonetheless disenroll from or forgo public assistance due to confusion about the scope of the Rule and fear of adverse immigration consequences, causing a widespread "chilling effect." Fiscal Policy Inst., Only Wealthy Immigrants Need Apply: How a Trump Rule's Chilling

Effect Will Harm the U.S. (Oct. 10, 2018) ("FPI Study") (cited in 107 comments).[7] As a result, the Rule will likely affect far more individuals than the Department contemplates—up to 24 million people just by the chilling effect, according to one highly-cited estimate, including 9 million children (most of whom are U.S. citizens). *Id.*

The Rule's spillover and chilling-effect costs will be particularly severe for "U.S. citizen children, who would likely decrease participation in support programs, despite remaining eligible." CLASP Comments at 5 (estimating that "up to 4.9 million individuals, including U.S. citizen children, could lose health insurance"). For instance, research provided to the Department shows that Medicaid participation in early childhood improves short-term and long-term health, and, conversely, that uninsured children face a greater mortality risk. *Id.* at 33–34. Costs on children from a parent's SNAP disenrollment—expected to affect many U.S. citizen children under the Rule—are also severe, commenters highlighted, with one study projecting the loss of just one year of benefits to increase health expenses by $140 per child. CBPP Comments at 60–61.

Provided this information, however, the Department impermissibly disregards these substantial impacts. The Department's primary estimate of decreased

[7] *Available at* http://fiscalpolicy.org/wp-content/uploads/2018/10/US-Impact-of-Public-Charge.pdf.

enrollment in public assistance considers only targeted noncitizens, effectively ignoring the chilling effect. RIA at 92 (calculating decreased enrollment based on "individuals intending to adjust status"). And although the Department acknowledges the possibility of a chilling effect, it concludes that such costs cannot serve as a basis to "alter this rule" because they represent "unwarranted choices" by non-targeted populations. Rule, 84 Fed. Reg. at 41,313.

DHS thereby confuses a normative judgment that individuals not directly affected by the Rule *should not* disenroll with an unreasonable assumption that they *will not* disenroll, further minimizing the Rule's substantial health and welfare costs. And by failing to consider the Rule's costs on non-targeted individuals, which are indirect costs of the Rule, the Department violates the requirement that it assess "any disadvantage" of its regulation. *Michigan*, 135 S. Ct. at 2707.

C. DHS Fails to Meaningfully Assess the Rule's Substantial Impacts on Businesses and Local Governments

Disenrollment from public assistance will harm not only disenrollees and their families, but also healthcare systems, retailers, and state and local governments, among others. By reducing consumption among disenrollees, the Rule will lead to lower spending at hospitals and retailers, which, as some commenters emphasized, will impose social costs such as worse health outcomes and potential reductions in government services. Yet once more, the Department fails to evaluate or meaningfully consider these indirect costs.

One of the most significant indirect effects of the Rule will be its health-related social costs. This is because Medicaid is an "indispensable funding source" for many health systems, especially financially vulnerable hospitals and clinics that provide healthcare to uninsured patients, CLASP Comments at 64–65, and so disenrollment from Medicaid resulting from the Rule will "reduce[] revenues for [such] healthcare providers," RIA at 96. The impact is likely to be substantial: Some commenters estimated that as many as 13 million individuals may disenroll from health insurance, producing revenue potential losses as high as $17 billion. *See* Fed'n of Am. Hosps., Comments on Inadmissibility on Public Charge Grounds 5 (Dec. 10, 2018) ("Fed'n of Am. Hosps. Comments").[8] While these revenue reductions are not themselves social costs, they will limit the services that hospitals are able to provide and likely cause some hospitals to close. *See* CLASP Comments at 65 (reporting that hospitals in states with expanded Medicaid enrollment are "84% less likely to close than those in non-expansion states"). Those closures, in turn, will impose substantial health-related costs on local communities: Research finds that premature mortality increases 10% in areas after an emergency department closes, one commenter highlighted, with health impacts particularly pronounced in rural communities. *Id.*

[8] *Available at* https://www.regulations.gov/document?D=USCIS-2010-0012-44367.

The Rule will also have ripple effects throughout the economy by "significantly reduc[ing] the money [disenrollees] are able to spend at places like retailers [and] supermarkets." S. Poverty Law Ctr., Comments in Response to Proposed Rulemaking 13 (Dec. 10, 2018).[9] This reduction in economic activity will lead to lower tax revenues for state and local governments: The Fiscal Policy Institute, for instance, projected $14.5–33.8 billion in reduced economic activity. Fiscal Policy Inst., Comment Letter on Inadmissibility on Public Charge Grounds 8 (Dec. 10, 2018)[10]; *see also* CLASP Comments at 62 (same). Such declines in local government revenues could result in significant costs for communities and individuals, including possible declines in social services and negative impacts on physical and psychological health.

Yet again, however, the Department evaluates none of these widespread social costs. With regard to hospitals, the Department tersely acknowledges that "medical providers … could have a reduced number of patients and customers, … thereby reducing revenues," RIA at 107, yet makes no attempt to analyze the scope of this impact and fails to recognize its likely consequences in the form of hospital closures

[9] *Available at* https://www.regulations.gov/document?D=USCIS-2010-0012-54089.
[10] *Available at* https://www.regulations.gov/document?D=USCIS-2010-0012-49631.

and worsening health outcomes.[11] The Department's treatment of the Rule's rippling economic impacts is similar: While mentioning the possibility of "reduced economic activity for small businesses … [and] grocery stores," RIA at 104, and projecting declines in economic activity resulting from SNAP disenrollment alone, *id.* at 105, the Department does not estimate the size or evaluate the significance of the Rule's economic impact, *see* Circular A-4 at 2 (agencies should "evaluate the[] significance" of non-quantified impacts), or even qualitatively describe the health and welfare costs that might flow from reduced economic activity and decreased state and local government revenues.

This treatment is inadequate. The Department must consider the Rule's indirect social costs, and by giving these impacts minimal consideration, impermissibly "fail[s] to consider an important aspect" of its rulemaking. *State Farm*, 463 U.S. at 43.

D. DHS Does Not Adequately Consider the Costs of Inadmissibility Determinations Resulting from the Rule

In addition to disregarding numerous costs from disenrollment, the Department also fails to consider the impacts that the Rule will have when noncitizens retain public assistance and are deemed ineligible for permanent

[11] While the Department estimates regulatory compliance costs for healthcare providers such as familiarization costs, RIA at 103, this impact is separate from, and does not encapsulate, the decline in Medicaid revenues and the resulting health-related costs for patients.

residency as a result. *See* RIA at 9 (recognizing that the Rule will "likely increase … denials for adjustment of status applicants"). Such denials of permanent residency will impose widespread social costs associated with a decreased workforce, disrupted communities, and separated families.

The costs of family separation, as highlighted by numerous commenters, fall particularly on children, including many U.S. citizens. In fact, citizen children separated from noncitizen parents experience a "pervasive sense of insecurity and … anxiety," leading to worse educational performance and persistent "mental health issues such as depression." CBPP Comments at 89 (internal quotation marks omitted). Doctors have also reported that the fear of being separated from a parent often causes "behavioral issues, psychosomatic symptoms, and mental health issues" in children, *id.* at 87–88 (internal quotation marks omitted), which can be expected to increase under the Department's assumption that the Rule will increase inadmissibility determinations.

Yet even after being presented with these costs of the Rule, the Department entirely disregards them when analyzing the Rule's impacts. While the preamble to the Rule makes passing reference to the "value" of noncitizens to their communities including "strong family bonds and support across generations," Rule, 84 Fed. Reg. at 41,403, the Department's regulatory impact analysis—despite projecting an increase in inadmissibility determinations, *see* RIA at 9—does not identify the

impacts of family separation on U.S. children as a cost of the Rule, much less attempt to assess the magnitude of this cost.

E. DHS Cannot Excuse Its Failure to Consider Costs by Citing Data Limitations

The Department attempts to excuse its failure to assess the Rule's substantial social costs by citing "data limitations," invoking this as the basis for its failure to "estimate the effect" both of more individuals "being deemed inadmissible," Rule, 84 Fed. Reg. at 41,474, and of the Rule's "downstream impacts on state and local economies, large and small businesses, and individuals," *id.* at 41,477. But the Department overstates the limitations in the data, and, in any event, cannot cite a lack of perfect information as a basis for entirely disregarding the harmful consequences of its action.

To start, available data to project the Rule's impacts is not as limited as the Department indicates. As detailed throughout this section, the administrative record contains many quantitative estimates of the Rule's myriad effects, such as reductions in public-assistance enrollment among individuals not targeted by the Rule, increases in healthcare expenditures among disenrollees, and reductions in economic activity more generally, with numerous commenters supplying comprehensive projections of these impacts. *See, e.g.*, FPI Study at 3–4 (projecting 24 million individuals would experience a chilling effect, and that 15–35% of those individuals would disenroll from public benefits); CBPP Comments at 62 (finding 45% increase

in healthcare expenditures for food-insecure households); Fed'n of Am. Hosps. Comments at 5 (estimating up to $17 billion in forgone healthcare revenues). The Department should have "present[ed] all available quantitative information," and rather than disregard the data, should have used it to assess the "importan[ce]" and "magnitude" of these impacts. Circular A-4 at 27.

The Department, of course, does virtually none of this. Despite recognizing that the Rule will lead to large-scale disenrollment from public assistance, *see* RIA at 93, the Department does not "examine the relevant data," *State Farm*, 463 U.S. at 43, on the consequences of these disenrollments for public health and welfare such as increased hunger and health costs. Such an analysis is certainly possible, as the Department itself uses a statistical model from the Department of Agriculture to estimate employment and economic effects from a reduction in SNAP participation, illustrating that statistical modeling can also be used to project the Rule's many other significant impacts. RIA at 105. But the Department fails to conduct any such analysis.

The fact that the Rule's "precise consequences" may not be "certain" does not absolve the Department. The Department should still have "analyze[d] uncertainty," "discuss[ed] the quality of the available data," and used "plausible assumptions … to inform decision makers and the public about the effects" of the Rule. Circular A-4 at 38–39. Based on such an analysis, the Department should then have assessed "how

important the non-quantified … costs may be in the context of the overall analysis," using all available information to compare these costs to any identified regulatory benefits. *Id.* at 2, 27.

The Department's approach—citing the "uncertainty and availability of data" to justify forgoing any detailed analysis or in-depth consideration, Rule, 84 Fed. Reg. at 41,477—falls well short of this standard. While there may be "a range of [plausible] values" for the Rule's myriad harms, the Department's blanket assertion that these effects are "too uncertain … [for] valuation and inclusion" effectively and impermissibly assigns the effects "zero" value. *Ctr. for Biological Diversity*, 538 F.3d at 1200 (internal quotation marks omitted). Yet "non-quantified … costs" are "important" in regulatory analysis and "justify consideration in the regulatory decision" when, like here, they represent such significant and widespread health and public-welfare harms. *See* Circular A-4 at 10.

In short, "[r]egulators by nature work under conditions of serious uncertainty," and "[t]he mere fact that the magnitude of [a regulatory cost] is uncertain is no justification for disregarding the effect entirely." *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219, 1221 (D.C. Cir. 2004) (emphasis omitted). The Department's failure to assess so many of the Rule's significant costs thus renders the Rule arbitrary and capricious.

F. DHS Cannot Excuse Its Failure to Consider Costs by Claiming That They Are "Beyond the Scope" of the Rule

In addition to claiming that numerous regulatory costs are too difficult to analyze, the Department at times disclaims the need to assess large classes of costs—including the impacts of disenrollment on targeted populations, Rule, 84 Fed. Reg. at 41,480, and the broader economy, *id.* at 41,472—by claiming that they are "beyond the scope" of the Rule. This excuse, too, falls flat.

While DHS appears to claim that it does not need to consider the Rule's indirect or unintended impacts, the opposite is true. In fact, the Supreme Court has recognized that regulatory costs extend to "any disadvantage" from a rule, *Michigan*, 135 S. Ct. at 2707, as have other appellate courts, *see, e.g.*, *Am. Dental Ass'n v. Martin*, 984 F.2d 823, 826 (7th Cir. 1993) (critiquing agency's "consideration of … indirect costs"); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1225 (5th Cir. 1991) (vacating rule for failing to consider indirect costs). Echoing this judicial precedent, executive guidance instructs agencies to "consider any important ancillary benefits and countervailing risks" applying "[t]he same standards of information and analysis quality that apply to direct benefits and costs." Circular A-4 at 26; *see also* Exec. Order No. 12,866 § 1(a) (agencies "should assess *all* costs and benefits" (emphasis added)).

The Department is thus wrong that the Rule's large and well-documented impacts on disenrollees, their families, and the national economy and healthcare

system fall "beyond the scope" of its consideration. In adopting the Department's position in its preliminary ruling, this Court relied on two faulty arguments. First, the Court observed that the costs to "states, localities, and various entities (such as healthcare providers)" are "indirect." *City & Cty. of San Francisco v. United States Citizenship & Immigration Servs.*, 944 F.3d 773, 803 (9th Cir. 2019). But indirect costs merit the same consideration as direct costs, as explained in the prior paragraph, and in any event, many of the Rule's costs—such as its severe costs on targeted noncitizens—are direct.

Second, this Court found that the Department lacks a "broad mandate[] to regulate directly entire industries or practices," and so it need not assess regulatory costs to the same extent as other agencies. *Id.* But this has no basis in the case law: The Supreme Court made no reference to the scope of an agency's mandate when it explained in *Michigan* that regulatory costs should typically be treated as a "centrally relevant factor" in rulemaking and that such costs encompass "any disadvantage" resulting from a rule. 135 S. Ct. at 2707. Thus, the fact that the Department's "mandate is to regulate immigration and naturalization," *San Francisco*, 944 F.3d at 804, does not abrogate its obligation to consider the Rule's harmful impacts. Moreover, *Michigan* also involved EPA's definition of a statutory term, belying the Court's attempt to distinguish this case on that basis. *Compare id.* at 803–04 *with*

Michigan, 135 S. Ct. at 2707 (assessing agency's interpretation of "appropriate and necessary").

For these reasons, and because the Department fails to meaningfully recognize or consider these costs throughout its rulemaking, the Rule is arbitrary and capricious.

II. DHS Does Not Identify Any Significant Benefits Resulting from the Rule

While the Department's poor assessment of costs alone renders the Rule arbitrary and capricious, its analysis of the Rule's supposed benefits supplies an additional, independent ground to vacate the Rule.

The Department provides virtually no analysis of the Rule's purported benefits. While estimating some minor administrative cost savings that pale in comparison to the Rule's new filing-related costs, *see* RIA at 8–14 (monetizing costs and benefits of revised filings), the Department identifies the Rule's "primary qualitative benefit … [as] to better ensure that [noncitizens] will not receive one or more public benefits … and instead[] will rely on their financial resources, and those of family members, sponsors, and private organizations." *Id.* at 119; *see also id.* at 7 (identifying the same as the Rule's "primary benefit").

The Department's perfunctory treatment of this supposed "benefit" is deficient in two fundamental respects. First, longstanding executive guidance and practice counsels the Department to treat the loss of public assistance as a "transfer"

of money from noncitizens to the federal government, not a regulatory "benefit" that can justify the Rule's costs. In any event, the Department also impermissibly assumes that the Rule will increase "self-sufficien[cy]," RIA at 7, despite numerous comments showing that the loss of public assistance frequently diminishes people's long-term economic prospects and thereby makes them more reliant on government assistance, not less. The Department's assertion that the Rule will increase self-sufficiency is thus based on "speculation … not supported by the record," providing another reason to deem the Rule arbitrary and capricious. *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1244 (9th Cir. 2001).

A. DHS Implicitly—and Improperly—Treats Transfer Payments as Benefits

The Department's identification of the Rule's "primary benefit" as limiting public assistance to noncitizens, RIA at 7, violates longstanding principles of regulatory cost-benefit analysis distinguishing between benefits and transfers. Accordingly, the Department fails to identify any significant benefits of the Rule.

On this point, some economic background is instructive. The purpose of regulatory cost-benefit analysis is to determine whether a regulation will increase societal welfare. *See* Exec. Order No. 12,866 § 1(a) (instructing agencies to regulate in manner "that maximize[s] net benefits … unless a statute requires another regulatory approach"). The ultimate question for the Department in its cost-benefit

analysis, therefore, is not who will "receive … public benefits," RIA at 119, but whether society will be better off as a result. And from the perspective of society, reductions in public-assistance payments are neither a cost nor a benefit, but rather a transfer from disenrollees to the federal government. Office of Info. & Regulatory Affairs, Regulatory Impact Analysis: A Primer 8 (2011)[12] ("Transfer payments are monetary payments from one group to another that do not affect total resources available to society," such as "[p]ayment by the Federal government for goods or services provided by the private sector[.]"). In other words, any savings to the federal government from reductions in public assistance are fully offset by the loss of assistance payments to disenrollees.

Although the Department sometimes recognizes that the cost savings to the federal government from decreases in public assistance are "the estimated transfer payments of the rule," Rule, 84 Fed. Reg. at 41,478, it nevertheless improperly treats this transfer as a regulatory benefit when it defines the Rule's principal benefit as "better ensur[ing] that [noncitizens] will not receive … public [assistance]," RIA at 119. But agencies are directed "not [to] include transfers in the[ir] estimates of the benefits and costs of a regulation," Circular A-4 at 38, and by sidestepping this guidance, the Department causes two related problems. First, agencies should "adopt

[12] *Available at* https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

a regulation only upon a reasoned determination that the *benefits* of the intended regulation justify its costs." Exec. Order No. 12,866 § 1(b)(6) (emphasis added). Because it fails to identify any substantial regulatory benefits, the Department cannot justify even those components of the Rule's costs that it acknowledges, such as those associated with filing additional paperwork. *See Michigan*, 135 S. Ct. at 2707 ("No regulation is 'appropriate' if it does significantly more harm than good.").

Second, the Department's treatment of forgone transfers as a regulatory benefit is inherently lopsided because it fails to acknowledge that any gain to the government from reduced expenditures on public assistance will be accompanied by a corresponding loss to the disenrollees who no longer receive that assistance. The Administrative Procedure Act prohibits the Department from "inconsistently and opportunistically fram[ing] the costs and benefits of the rule," *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011), which the Department does by characterizing declines in public assistance as the Rule's "primary benefit" without recognizing the countervailing cost to disenrollees.

B. DHS Fails to Support Its Assertions that the Rule Will Increase Self-Sufficiency

Even if self-sufficiency were a cognizable regulatory benefit, the Department's assessment of this benefit would be inadequate because it simply assumes—without analysis—that the Rule will improve self-sufficiency despite extensive record evidence to the contrary.

The Rule is premised on DHS's belief that "an alien who receives the designated public benefits for more than 12 months in the aggregate during a 36-month period is not self-sufficient." Rule, 84 Fed. Reg. at 41,359. The Department does not explain why receipt of only certain "designated" transfers and not others makes an individual not "self-sufficient." A foreign investor who owns significant stock in a U.S. oil company, for instance, is likely to have received far more in U.S. government subsidies than the recipient of Medicaid, yet is still deemed "self-sufficient" and eligible for permanent residency under the Department's definition.

In any event, three years is a very narrow scope for a regulatory impact assessment, *see* Circular A-4 at 34 (recognizing that many cost-benefit analyses look "30 years" ahead), which fails to account for the significant evidence, highlighted by numerous commenters, that public assistance increases recipients' long-term employment prospects and thus reduces the likelihood that they will use government assistance in the future. *See, e.g.*, Hilary Hoynes et al., *Long-Run Impacts of Childhood Access to the Safety Net*, 106 AM. ECON. REV. 903 (2016) (cited in 121 comments). By assessing self-sufficiency through such a narrow timeframe, therefore, the Department incompletely captures the Rule's impacts and arbitrarily ignores the considerable data documenting the positive effects of public assistance on self-sufficiency.

Notably, these effects are especially well-documented among the very programs that the Department projects will see enrollment decline from the Rule, including SNAP and Medicaid. *See id*. With respect to SNAP, for instance, research suggests that children who receive food assistance in early childhood may see "an improvement in later life economic well-being," including "increases in education, earnings, and income and a reduction in poverty and participation in public assistance programs." *Id.* at 921. The long-term effects of Medicaid are similar: As with SNAP, receipt of Medicaid during childhood improves long-term economic outcomes, increasing not only "college attendance" but also lifelong "income and payroll taxes paid." Kristin F. Butcher, Assessing the Long-Run Benefits of Transfers to Low-Income Families 23–24 (Brookings Inst. 2017) (cited in 11 comments).[13] As these two examples demonstrate, research suggests that public assistance tends to increase long-term prosperity and make individuals more able to afford necessities, not less. Because the Department bases its regulation on a conclusion that "runs counter to the evidence before [it]," the Rule is arbitrary and capricious. *State Farm*, 463 U.S. at 43.

While the Department notes that public assistance can "help people to become productive members of society," Rule, 84 Fed. Reg. at 41,314, it fails to appreciate

[13] *Available at* https://www.brookings.edu/wp-content/uploads/2017/01/wp26_butcher_transfers_final.pdf.

that this empirical effect—which, again, many commenters pointed out to the agency—undermines the Department's assertion that the Rule will boost self-sufficiency. Indeed, the Department makes no attempt to evaluate the Rule's impacts on the self-sufficiency of disenrollees and their families, nor to grapple with the record evidence indicating that a reduction in public assistance may decrease rather than increase self-sufficiency. The Department's failure to "grapple with contrary evidence" in the record renders the Rule arbitrary and capricious. *Sierra Club v. Dep't of the Interior*, 899 F.3d 260, 293 (4th Cir. 2018) (internal quotation marks omitted).

III. DHS Fails to Support Its Conclusion that the Purported Benefits of the Rule Outweigh Its Costs

The Department's ultimate comparison of the Rule's regulatory impacts is also fatally flawed. Indeed, the Department does not weigh the Rule's costs and benefits, but instead, without analysis, concludes that its purported "benefit"—the promotion of self-sufficiency, as narrowly defined by DHS—justifies the Rule's costs. This one-sided analysis violates basic tenets of regulatory decisionmaking and is not a reasonable exercise of agency discretion.

While agencies should "adopt a regulation only upon a reasoned determination that the benefits … justify its costs," Exec. Order No. 12,866 § 1(b)(6), the Department simply lists the Rule's various regulatory impacts without assessing which side of the ledger is greater, *see* RIA at 8–14 (summarizing costs

and benefits). Instead, the Department decides that the Rule is justified no matter its cost, because it supposedly promotes the Rule's "ultimate aim" of self-sufficiency. Rule, 84 Fed. Reg. at 41,313 ("DHS declines to limit the effect of the rulemaking to avoid the possibility that individuals subject to this rule may disenroll or choose not to enroll, as self-sufficiency is the rule's ultimate aim.").

The Department's failure to "explain why the [benefits] were worth the [costs]" by itself violates the Administrative Procedure Act. *Mineta*, 340 F.3d at 58. In addition, the Department's one-sided decisionmaking process—regulating without a detailed cost assessment to promote what is at best a speculative benefit—impermissibly "put[s] a thumb on the scale" by "overvaluing" an unsupported benefit while "undervaluing" and disregarding substantial public health and welfare costs. *See Ctr. for Biological Diversity*, 538 F.3d at 1198. As discussed above, this type of "inconsistent[]" treatment of costs and benefits is impermissible. *Bus. Roundtable*, 647 F.3d at 1148.

Because the Department fails to conduct any meaningful weighing of the Rule's cost and benefits, its conclusory finding that the Rule is justified "adds nothing to the agency's defense of its thesis except perhaps the implication that it was committed to its position regardless of any facts to the contrary." *Chemical Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1266 (D.C. Cir. 1994). For this reason, as well, the Rule is arbitrary and capricious.

CONCLUSION

This Court should affirm the district court's issuance of a preliminary injunction.

Dated: January 23, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7), the foregoing Brief contains 6,397 words, as counted by counsel's word processing system, and this complies with the applicable word limit established by the Court.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January 2020, a true and correct copy of the foregoing motion was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED: January 23, 2020

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