No. 19-3591

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, SECRETARY CHAD F. WOLF, in his official capacity as Acting Secretary of the United States Department of Homeland Security, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, DIRECTOR KENNETH T. CUCCINELLI II, in his official capacity as Acting Director of United States Citizenship and Immigration Services, and UNITED STATES OF AMERICA,

Defendants-Appellants.

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

REPLY BRIEF

JOSEPH H. HUNT
Assistant Attorney General

GEOFFREY S. BERMAN
United States Attorney

DANIEL TENNY
GERARD SINZDAK
JOSHUA DOS SANTOS
JACK STARCHER
Attorneys, Appellate Staff
Civil Division, Room 7242
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-0718

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INTRODUCTION AND SUMMARY

The preliminary injunctions barring the Department of Homeland Security (DHS) from enforcing the new public-charge Rule should be set aside. The Supreme Court has now granted the government's request for stays of the injunctions. In so ruling, the Court necessarily concluded that the government is likely to prevail on the merits, that the government will suffer irreparable harm so long as the Rule is enjoined, and that the balance of equities and the public interest do not weigh in favor of an injunction. Nothing in plaintiffs' submissions casts doubt on those conclusions.

As a threshold matter, plaintiffs' speculative assertions of harm do not establish standing, and, even if they did, plaintiffs fail to explain how the interest they seek to further—*greater* use of public benefits by aliens—aligns with the public-charge inadmissibility statute, which was designed to *reduce* such benefit use.

On the merits, plaintiffs identify no provision of the Immigration and Nationality Act (INA) with which the Rule is inconsistent, fail to meaningfully address the numerous provisions with which the Rule accords, and ignore Congress's longstanding decision to leave the definition of "public charge" to the Executive Branch's discretion. Plaintiffs instead claim that "public charge" has a uniformly accepted meaning that applies only to a narrow set of aliens and public benefits. Nothing in the statute's text, context, or history requires plaintiffs' narrow reading, or precludes DHS's natural and reasonable conclusion that aliens who rely on public

support to feed, house, or care for themselves over a protracted or intense period are public charges.

The remaining factors likewise weigh against an injunction. Given the likelihood that the government will prevail in this litigation, it should not have to bear the undisputed harm the injunction imposes: the likely irreversible adjustment to lawful-permanent-resident status of individuals DHS believes should be inadmissible.

ARGUMENT

I. Plaintiffs Are Not Likely To Prevail

In granting a stay of the two injunctions at issue here, the Supreme Court has necessarily concluded that the government is likely to prevail against plaintiffs' challenges to the Rule's validity. *See Department of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020). Plaintiffs' arguments to the contrary cast no doubt on that conclusion.

A. Plaintiffs Lack Standing

1. The States and City claim that the Rule will cause them injury in the form of "significant losses in Medicaid revenue." New York Br. (NY) 64-65. But plaintiffs do not contest that the Rule contains an exception that allows aliens to use state and federal public benefits to cover emergency services, and that DHS will not consider any such use in making a public-charge inadmissibility determination. 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019). Nor do plaintiffs dispute that the Rule will result in significant savings in the form of reduced spending on medical care for aliens who are rendered inadmissible or decline to apply for public benefits funded by plaintiffs. It is

thus unclear to what extent the States and City will actually suffer financial harm as a result of the Rule.

That distinguishes this case from *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). There, a State had standing because a new census question would have the "predictable effect" of lowering census response rates, which would inevitably result in the State's losing federal funds allocated on the basis of state population. *Id.* at 2565-66. Here, even if the Rule's "predictable effect" is decreased enrollment in state and federal benefits, it is far from clear that decreased enrollment actually causes the alleged harm to plaintiffs' treasuries—much less that the harm is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013). This is not a question of unrelated "countervailing benefits," NY 65; it is a question of whether the very disenrollment plaintiffs forecast would cause them financial injury *at all*.

Nor can the States and City premise standing on "training and outreach efforts" or incidental "programmatic costs." NY 65-66. If those kinds of administrative and training costs were enough to establish standing, any State or City could challenge any policy that had any effect on its residents. Plaintiffs cite no authority embracing such a broad theory of standing.

Regarding the organizations, even the district court recognized that they could not premise standing on demand for services they were "*already* providing." SA 35; *see* Make The Road Br. (MTR) 51. The organizations also claim that they will "spend additional time and resources on applications for adjustment of status" in order to

account for the Rule. MTR 51-52. But that theory of standing is potentially limitless, *see Kowalski v. Tesmer*, 543 U.S. 125, 134 & n.5 (2004), and does not establish that the Rule will impede the organizations' "ability to carry out" their "core activities," as required under this Court's precedent. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 109-11 (2d Cir. 2017).

2. Even if plaintiffs could establish Article III standing, plaintiffs' arguments confirm that their purported injuries fall outside the public-charge inadmissibility provision's zone of interests. Plaintiffs' alleged harms are entirely premised on the predicted effects of *decreased* benefit use by aliens, NY 63-66, and on resulting burdens on the organizations, MTR 51-52. They thus seek to *increase* spending on public benefits, "the very . . . interest" that "Congress sought to restrain" in the public-charge inadmissibility provision. *National Fed'n of Fed. Emps. v. Cheney*, 883 F.2d 1038, 1051 (D.C. Cir. 1989).

Plaintiffs respond by claiming that the public-charge inadmissibility provision is generally intended to "protect state and city fiscs" or to "ensure that States and their subdivisions continue to receive the economic and other benefits that flow" from immigration. NY 67. But the provision plainly is not intended to do so by encouraging aliens to rely on federal benefits.

The organizations, for their part, do not advance their argument by relying on INA provisions—not at issue here—that give advocacy organizations a role in helping aliens navigate immigration proceedings. MTR 53. Nor do general goals of

"promoting 'family unity, diversity, and humanitarian assistance,'" MTR 54 (quoting 84 Fed. Reg. at 41,306), mean that Congress intended to allow lawsuits to promote interests diametrically opposed to the public-charge inadmissibility provision itself.

B. Plaintiffs Are Not Likely To Succeed On The Merits

1. The Rule Is Consistent With The INA

DHS reasonably interpreted "public charge" to refer to an alien who charges expenses to the public for his support and care for a sustained period; the agency then implemented that interpretation by establishing an administrable threshold level of benefits receipt below which an alien will not be considered a public charge. As the Ninth Circuit held, the Rule "easily" qualifies as a reasonable interpretation of the statute. *City & Cty. of San Francisco v. USCIS*, 944 F.3d 773, 799 (9th Cir. 2019).

Much of plaintiffs' contrary argument turns on their erroneous contention that the term "public charge" has a longstanding, fixed meaning that Congress implicitly adopted. Specifically, plaintiffs assert that the term "public charge" describes a person who is "primarily dependent on the government for long-term subsistence." NY 1; MTR 4. The public-charge inadmissibility provision's text, context, and history negate plaintiffs' contention.

Plaintiffs ask this Court to ignore strong textual indications of Congress's understanding of the term. In enacting welfare and immigration-reform legislation in 1996 (the last time the public-charge inadmissibility provision was amended), Congress made its intentions clear: it sought to ensure that "aliens within the Nation's

borders not depend on public resources to meet their needs" and that "the availability of public benefits not constitute an incentive for immigration to the United States." 8 U.S.C. § 1601(2). The Rule accords with that express intent.

Plaintiffs contend that the statements lack relevance because they appear in a different statute enacted one month before Congress amended the public-charge inadmissibility provision. NY 47-48. But there is no basis to conclude that the 1996 Congress's understanding of "national policy with respect to welfare and immigration," 8 U.S.C. § 1601, changed in the intervening month. And to the extent plaintiffs suggest that DHS erred in considering Congress's statements of policy, MTR 40, that is plainly incorrect. *See, e.g.*, *PDK Labs. Inc. v. DEA*, 438 F.3d 1184, 1192 (D.C. Cir. 2006) ("In exercising delegated authority to resolve statutory ambiguities, agencies can and should consider policy input from a wide variety of sources, including . . . most certainly, Congress.").

In any event, there is a direct statutory connection between the public-charge inadmissibility provision and Congress's statements on immigration policy. Those statements of policy accompanied legislation that altered the public-charge determination by introducing the affidavit-of-support provision, 8 U.S.C. § 1183a. *See* Pub. L. No. 104-193, § 423 (1996); *see also* Appellants' Opening Brief (AOB) 27-28. And, in the statements of policy themselves, Congress expressly identified the "compelling government interest" in enacting stricter "rules" for "sponsorship

agreements [(*i.e.*, public-charge-related affidavits of support)] in order to assure that aliens be self-reliant." 8 U.S.C. § 1601(5).

Plaintiffs are similarly mistaken to suggest (NY 48) that Congress's extensive efforts to prevent aliens from becoming dependent on public benefits show that Congress used other means to keep aliens from using benefits. The more natural inference is that Congress attempted, in a number of ways, to curb aliens' reliance on public benefits for their basic needs—including by prohibiting the admission of aliens who are likely to rely on such benefits.

Plaintiffs likewise err in asserting that, in authorizing some aliens to receive public benefits in some circumstances, "Congress has plainly concluded allowing noncitizens to access those benefits is not inconsistent with the statements of purpose expressed" in § 1601. MTR 39-40; NY 49. But it does not follow that Congress intended the admission of aliens who would require such benefits. Indeed, plaintiffs concede that an alien's expected receipt of cash benefits can render an alien inadmissible on the public-charge ground, even though Congress similarly authorized aliens to receive such benefits. NY 14; MTR 43. The dichotomy simply reflects that immigration officials cannot with perfect accuracy predict which aliens will become public charges.

Plaintiffs similarly err in refusing to acknowledge the significance of the affidavit-of-support provision. As the government explained, AOB 27-28, the affidavit-of-support provision, 8 U.S.C. § 1183a, and the public-charge inadmissibility

provision, 8 U.S.C. § 1182(a)(4), require many aliens to obtain sponsors, mandate that those sponsors agree to repay means-tested benefits the alien receives, and declare inadmissible on public-charge grounds any alien who fails to obtain a required affidavit. Thus, Congress provided that the mere possibility that an alien might receive an unreimbursed, means-tested public benefit—regardless of whether the benefit is cash or in-kind or whether it would provide the alien's primary means of support—was sufficient to render the alien inadmissible on the public-charge ground. *See* AOB 28. Plaintiffs' claim that Congress viewed "public charge" as including only those aliens who are expected to rely primarily on the government for long-term subsistence cannot be squared with that provision.

Plaintiffs attempt to dismiss the significance of the affidavit-of-support provision, noting that not all aliens subject to a public-charge inadmissibility determination must obtain an affidavit of support, and that the affidavit of support is enforceable only for a specified period of time after admission. NY 50; MTR 41-42. But those observations miss the point. In classifying aliens who fail to submit a required affidavit of support as being inadmissible on the public-charge ground, Congress could not have shared plaintiffs' narrow understanding of "public charge" as limited to aliens who are expected to be primarily dependent on the government.

Plaintiffs assert that the 1986 amnesty provision, 8 U.S.C. § 1255a(d), merely "reflects" their position. MTR 43. But if Congress agreed with plaintiffs' understanding of "public charge" as limited to those who receive cash benefits, it

would have had no reason to create a "special rule" for the amnesty program imposing that limitation. *See* 8 U.S.C. § 1255a(d)(2)(B)(iii). And plaintiffs' assertion (NY 36) that the special amnesty provision was targeted at especially destitute aliens who "would normally be deemed 'public charges'" cannot be reconciled with the provision's limitation to those aliens with a "history of employment in the United States evidencing self-support without receipt of public cash assistance," 8 U.S.C. § 1255a(d)(2)(B)(iii). The more natural inference is that Congress thought the covered aliens might be deemed public charges *even though* they had a history of employment in the United States and did not receive cash assistance, presumably because they did not earn enough to provide for their care without public support.

Nor do plaintiffs have an answer to the battered-alien provision, 8 U.S.C. § 1182(s). They assert that, in citing the provision, the government is improperly using "a shield for some immigrants" as "a sword against others." NY 51. But Congress would not have had to create a broad "shield" barring an immigration officer conducting a public-charge assessment from considering "any benefits" a battered alien received, 8 U.S.C. § 1182(s), if Congress did not expect immigration officers to ordinarily consider such benefits.

Plaintiffs misapprehend the government's argument when they contend that the foregoing provisions did not "expand the definition of public charge in 1996." MTR 39; NY 47-51. The government does not contend that they did. These provisions simply underscore that the Rule is a reasonable reflection of Congress's

understanding of "public charge," and that Congress has not adopted the narrow definition that plaintiffs propose. Similarly mistaken are plaintiffs' assertions that DHS claims the authority "to interpret 'public charge' to mean *any* receipt of *any* amount of *any* public benefits." NY 21-22. The Rule does no such thing. It defines "public charge" to mean an alien's receipt of an enumerated list of public benefits for at least a specified period of time. That definition fits comfortably within the public-charge inadmissibility provision.

Plaintiffs also fail to distinguish *Matter of B-*, 3 I. & N. Dec. 323 (BIA and AG 1948), under which an alien can become deportable as a "public charge" if she receives a public benefit which she is obligated to repay, and fails to repay that benefit after the relevant agency demands repayment. Plaintiffs point out that *Matter of B-* involved an alien who was a "resident of a state mental institution," MTR 11, and assert that the *Matter of B-* framework required that the alien be "substantially reliant on government funds," NY 39. But nothing in the relevant portion of *Matter of B-* turned on the alien's institutionalization, and far from establishing a "substantially reliant" test, *Matter of B-* indicated that the alien would have been deportable as a "public charge" if her family had not repaid the government for the "clothing, transportation, and other incidental expenses" it had provided. 3 I. & N. Dec. at 326-27. Thus, *Matter of B-* directly addressed whether the receipt of temporary, noncash benefits can render an alien deportable as a "public charge," and concluded that it can.

Plaintiffs' observation that *Matter of B-* has not subsequently been applied to aliens' receipt of small amounts of benefits, MTR 11, is unsurprising given that, until 1996, agencies generally could not demand repayment for means-tested benefits, a prerequisite to deportation on public-charge grounds under *Matter of B-*. *See* 3 I. & N. Dec. at 326-37; 142 Cong. Rec. S4401, S4408-09 (1996). It is thus significant that, in 1996, Congress provided government agencies with the legal right to seek reimbursement from a sponsor for means-tested public benefits the agencies provide to an alien. *See* 8 U.S.C. § 1183a(b). In so doing, Congress understood that it was subjecting aliens to potential deportation as public charges for failing to repay such benefits.

Disregarding the text and context of the public-charge provision, plaintiffs ask this Court to place significant weight on two failed legislative proposals. NY 48; MTR 17-19, 34-35. Failed legislative proposals are a dubious means of interpreting a statute, and that is particularly true here. Congress did not reject the 1996 and 2013 proposals in favor of alternative language. In both instances, it left the statutory term "public charge" undefined. "If anything, this legislative history proves only that Congress decided not to constrain the discretion of agencies in determining who is a public charge." *San Francisco*, 944 F.3d at 798 n.15.

Nor is there any indication that Congress believed that either the 1996 or 2013 proposed definitions of "public charge" were inconsistent with an established meaning of the term. Rather, the history of the 1996 proposal indicates that the

President objected to a rigid statutory definition of the term. *See* 142 Cong. Rec. S11872, S11881-82 (daily ed. Sept. 30, 1996). And, in 2013, Congress rejected the committee bill that had rejected the proposal. This case thus bears no resemblance to cases in which Congress has adopted alternative proposals or tacitly accepted longstanding interpretations. *See* MTR 34-35.

2. DHS Has Broad Discretion To Define The Term "Public Charge"

As the Ninth Circuit recognized, the common thread running through Congress's enactment of various public-charge provisions has been its repeated and intentional decision to leave the term's definition to the Executive Branch's discretion, so that the Executive may "adapt" the public-charge provision to "change[s] over time" in "the way in which federal, state, and local governments have cared for our most vulnerable populations." *San Francisco*, 944 F.3d at 792. The Rule falls comfortably within that delegated authority.

a. Congress expressly authorized the Secretary of Homeland Security to "establish such regulations . . . as he deems necessary" to carry out "the administration and enforcement of . . . all laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1), (3). And Congress gave the Secretary authority to exercise discretion in the enforcement of the public-charge inadmissibility provision. *See* NY 4 & nn. 1 & 2; AOB 6 & n.2. There is no basis for plaintiffs' assertion that DHS lacks rulemaking authority, nor can this case plausibly be

compared to *King v. Burwell*, 135 S. Ct. 2480 (2015), where the Supreme Court held that, in the absence of an express delegation of authority, it would not presume that Congress had delegated a central question of health-care policy to the Internal Revenue Service.

b. The INA's legislative history also makes clear that Congress both understood that the term "public charge" lacked a fixed meaning and intentionally declined to cabin the Executive Branch's discretion by giving it one. As the government explained, AOB 33-34, in a report on the country's immigration laws that provided the foundation for the INA, the Senate Judiciary Committee acknowledged the absence of any consistent pre-existing standard, and reaffirmed that the Executive Branch should retain discretion to interpret the term. S. Rep. No. 81-1515, at 349 (1950).

Plaintiffs offer no real response. They assert that the report "demonstrates" that "Congress fully understood the historical meaning of 'public charge' and the precedents interpreting that term." NY 35. But plaintiffs ignore the conclusion that the report draws from that history—namely, that courts and immigration officials had "given varied definitions" of the term "public charge" and that is was appropriate to leave the term's interpretation to the Executive Branch's discretion. S. Rep. No. 81-1515, at 347, 349.

Consistent with that recommendation, the INA, adopted shortly thereafter, did not define the term "public charge" and further emphasized the discretion afforded

the Executive Branch by providing that public-charge determinations are made "in the opinion of" Executive Branch officials. *See* Pub. L. No. 82-414 § 212(15) (1952); *see also San Francisco*, 944 F.3d at 791 ("in the opinion of" is "language of discretion"). The current public-charge inadmissibility provision retains the discretionary "in the opinion of" language. 8 U.S.C. § 1182(a)(4). Moreover, it identifies "various factors to be considered 'at a minimum,' without even defining those factors" or "limit[ing] the discretion of officials to those factors," making it "apparent that Congress left DHS and other agencies enforcing our immigration laws the flexibility to adapt the definition of 'public charge' as necessary." *San Francisco*, 944 F.3d at 792, 797.

Plaintiffs attempt to write off the discretionary "in the opinion of" language on the theory that it delegates discretion with respect to "*individual* determinations," but not discretion to interpret the term "public charge." MTR 38 n.9; NY 43. But where a statute commits a decision to an agency's discretion, "[t]he standards by which the [agency] reaches [that] decision" are likewise committed to its discretion. *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018). And, as discussed *supra* pp. 12-13, Congress plainly delegated DHS the authority to interpret the ambiguous term "public charge."

Plaintiffs also cite a tax that the 1882 Immigration Act imposed on shipowners bringing aliens to the United States as evidence that the term "public charge" did not include those aliens who might receive some amount of "public support" after admission. NY 8; MTR 8. But the immigrant fund created by the 1882 tax was

funded by those directly involved in and benefiting from the transport of aliens to the United States—*i.e.*, the shipowners, or, in some cases, the aliens themselves. *See* Pub. L. No. 64-301, ch. 29 § 2. Unlike modern-day public benefits such as SNAP and Medicaid, it was not financed by the public at-large. The tax is thus analogous to the modern affidavit-of-support provision, 8 U.S.C. § 1183a. Regardless, even if Congress had provided *public* assistance, a decision to provide a safety net does not entail an intent to admit individual aliens whom the government predicts are likely to need it.

Nor are plaintiffs correct that the Supreme Court's decision in *Gegiow v. Uhl*, 239 U.S. 3 (1915), interpreted "public charge" in a manner that conflicts with the Rule. NY 9; MTR 9. *Gegiow* answered "[t]he single question" whether "an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked." *Gegiow*, 239 U.S. at 9-10. Thus, when the Court opined that the public-charge inadmissibility determination depended on the alien's "permanent personal" characteristics, it did so simply to make clear that the determination must be based on something particular to the alien and not on "local conditions" in his destination city. *Id.* at 10. The Rule comports with *Gegiow*'s holding, as it mandates that public-charge inadmissibility determinations be "based on the totality of [an] alien's [particular] circumstances." 84 Fed. Reg. at 41,501.

Moreover, Congress revised the immigration laws to "overcome" the decision in *Gegiow*. *See* S. Rep. No. 64-352, at 5 (1916) ("The purpose of this change is to

overcome recent decisions of the courts limiting the meaning of the description of the excluded class . . . (See especially Gegiow v. Uhl, 239 U. S., 3.).'"); *see also* H.R. Doc. No. 64-886, at 3-4 (1916). In light of that history, there is no basis for presuming that *Gegiow* established a definition of "public charge" that should be attributed to subsequent Congresses.

Plaintiffs are also incorrect in asserting that BIA and judicial precedent established a settled meaning for the term "public charge" with which the Rule is inconsistent. NY 7-10; MTR 10-14. Like Congress, agency decisions have emphasized that the "elements constituting likelihood of an alien becoming a public charge are varied," and that the term is "not defined by statute," but rather "determined administratively." *Matter of Vindman*, 16 I. & N. Dec. 131, 132 (BIA 1977). Administrative and judicial decisions that have adopted a narrower definition than the Rule simply reflect that variation and confirm Congress's observation that "[d]ecisions of the courts have given varied definitions of the phrase 'likely to become a public charge.'" S. Rep. No. 81-1515, at 347.

In any event, there was no consensus among courts and the Executive Branch that the "modest" or "temporary" receipt of public benefits could not render an individual a public charge. NY 5, 22. In *Ex parte Turner*, for example, the court concluded that an alien was likely to become a public charge because he might be unable "to provide necessities *at all times* for himself, or his wife and children." 10 F.2d 816, 817 (S.D. Cal. 1926) (emphasis added). The court found it inconsequential

that he was employed in the interim. *Id.* Similarly, in *Guimond v. Howes*, 9 F.2d 412, 413 (D. Me. 1925), the court cited an alien's prior reliance on "charity aid" while her husband had been imprisoned for 60 days and 90 days as evidence that she was likely to become a public charge again. And, as explained *supra* pp. 10-11, the BIA and Attorney General long ago concluded that an alien's receipt and failure to repay public benefits, even if such receipt was only "temporary" and the benefits "modest" in amount, could render the alien deportable as a "public charge." *See Matter of B-*, 3 I. & N. Dec. at 323.

Although plaintiffs cite the 1999 Guidance as evidence that the INS understood "public charge" to have a narrow meaning, MTR 20, 33; NY 14-15, the accompanying notice of proposed rulemaking specifically noted that the term was "ambiguous," that it had "never been defined in statute or regulation," and that the 1999 Guidance's definition was only one "reasonable" interpretation of the term. 64 Fed. Reg. 28,677, 28,676-77 (May 26, 1999). And plaintiffs overread early decisions referencing persons in almshouses, MTR 9-10; NY 9, which simply reflect the means of public support at the time, and could not have taken into account the modern welfare state.

c. Plaintiffs' remaining arguments are similarly unavailing. Plaintiffs suggest that the Rule is invalid because many recipients of Medicaid and housing benefits are employed. NY 40. But, as noted elsewhere, Congress made clear that it sought to ensure that "aliens within the Nation's border not depend on public resources to meet

their needs" and instead be "self-sufficien[t]." 8 U.S.C. § 1601. DHS reasonably concluded that aliens who rely on government benefits to feed, house, or care for themselves for an intense or sustained period are not "self-sufficient." That remains true even if the aliens are employed, but not earning sufficient funds to support themselves without public aid.

Plaintiffs also imply that the Rule must be flawed because "half or more of U.S.-born citizens receive public benefits" covered by the Rule. MTR 47; NY 31-32. Congress has not, of course, applied the term "public charge" to U.S. citizens, and any effort to do so is nonsensical. U.S. citizens are neither subject to the public-charge inadmissibility provision, nor to the numerous other provisions that attempt to ensure that aliens "not depend on public resources to meet their needs," 8 U.S.C. § 1601(2). Citizens need not, for example, have sponsors who promise to support the individual and reimburse the government for any benefits received. And citizens are not generally obligated to reimburse the government for public benefits and cannot be removed from the country for failing to repay such benefits. More generally, aliens seeking admission or to adjust status are subject to any number of requirements that a significant number of U.S. citizens would not meet, including, for instance, the requirement that aliens have "received vaccination against vaccine-preventable diseases" such as "influenza type B and hepatitis B." 8 U.S.C. § 1182(a)(1)(ii); *see* CDC, *Vaccination Coverage Among Adults in the United States* (2016) (estimating that only

43% (influenza) and 25% (hepatitis B) of U.S. adults have received such vaccinations).[1]

Plaintiffs' statistic is also flawed on its own terms. The study on which plaintiffs rely did not even purport to apply the Rule's definition of "public charge." Instead, it acknowledged that it could not "appropriately model" the number of U.S. citizens who would meet the Rule's requirements, and that, while an estimated 40% of U.S. citizens participated in public-benefit programs in at least one year during a 16-year time span, estimates of benefits usage in any single year "overstates the share of U.S.-born citizens who meet the public charge test." Center on Budget & Policy Priorities, Comments on DHS Notice of Proposed Rulemaking 8, 10 (Dec. 7, 2018). The study also included benefits—such as the Children's Health Insurance Program—that the Rule excludes. *Id.* at 8; 84 Fed. Reg. at 41,313-14.

3. The Rule Is Not Arbitrary Or Capricious

As the government explained at length, AOB 41-50, DHS's reasoning satisfies deferential arbitrary-and-capricious review. Most of plaintiffs' arguments to the contrary reduce to a policy disagreement with DHS's line-drawing.

Plaintiffs assert, for example, that the Rule's definition is arbitrary because in their view it would include aliens who use benefits in amounts that plaintiffs deem "short-term" and "minor." NY 53-55. But DHS determined that it could best

[1] https://www.cdc.gov/vaccines/imz-managers/coverage/adultvaxview/pubs-resources/NHIS-2016.html

achieve Congress's statutory purposes by setting a threshold of more than twelve months of enumerated benefits within a 36-month period. That standard is not met with "minor" reliance on benefits—much less with "*any* amount," as plaintiffs suggest. NY 53. And judgments about the amount of public benefits that render an alien a public charge are precisely the kind of issue Congress delegated to DHS. *See Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 540 (1979).

Plaintiffs similarly argue that the Rule is irrational because noncash public benefits promote rather than inhibit self-sufficiency as plaintiffs would define the concept. MTR 46. Yet it was Congress that expressly equated a lack of self-sufficiency with receipt of "public benefits," which it defined broadly to include the noncash benefits at issue here. 8 U.S.C. §§ 1601(2)-(4), 1611(c). Contrary to plaintiffs' suggestion, MTR 46, DHS's choice to follow that policy cannot be characterized as irrational reliance on factors that are not "germane." *Judulang v. Holder*, 565 U.S. 42, 55-56 (2011); *see* 84 Fed. Reg. at 41,352-53; AOB 42-44.

Plaintiffs' repeated assertions that DHS "failed to provide any reasoned explanation" for its line-drawing are also incorrect. NY 53-55. DHS relied on various studies regarding patterns of benefits usage and determined that its definition (including the aggregate-counting framework) would "provide[] meaningful flexibility to aliens who may require one or more of the public benefits for relatively short periods of time, without allowing an alien who is not self-sufficient to avoid facing public charge consequences." 84 Fed. Reg. at 41,360-61. Similarly, DHS explained

that its aggregate-counting framework was designed to take into account that "receipt of multiple public benefits in a single month is more indicative of a lack of self-sufficiency," *id.* at 41,361, and noted that a different approach would illogically "result[] in differential treatment" between aliens who rely on public benefits to similar degrees. *Id.* at 41,361-62. DHS thus reasonably concluded that—despite any fringe hypothetical applications of the Rule—the Rule's "exercise in line-drawing" "appropriately balances the relevant considerations" and would provide more "meaningful guidance to aliens and adjudicators." *Id.* at 41,360-61.

Plaintiffs' argument that DHS "failed to adequately consider" the "harms [the Rule] would impose" is equally meritless. NY 59-60. As plaintiffs' plentiful citations to the Rule demonstrate, *id.*, DHS explained the possible public-health risks, and even took steps to mitigate them by excluding certain benefits and recipients from the Rule's coverage. *See* 84 Fed. Reg. at 41,384-85. That fact alone distinguishes the cases on which plaintiffs rely. *See* NY 60. Moreover, as the government explained, AOB 45-48, DHS reasonably weighed those inherently uncertain possible costs against difficult-to-measure policy benefits. The APA required nothing more. *See San Francisco*, 944 F.3d at 800-05; *see also Irvine Med. Ctr. v. Thompson*, 275 F.3d 823, 835 (9th Cir. 2002) (Medicare rule was not arbitrary simply because it "would possibly affect some Medicare beneficiaries in an adverse manner").

In arguing to the contrary, plaintiffs misstate the law and DHS's conclusions. They label DHS's actions arbitrary because it predicted some reduction in benefits

usage but failed to "quantify" the public-health effects that could result from it. NY 61. But under settled law, DHS only had to explain its uncertainty and its reasoning. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 104-106 (1983). DHS did so. *See* AOB 47. Relatedly, plaintiffs urge that DHS unjustifiably relied on a belief that the Rule "will ultimately strengthen" public health. NY 60 (quoting 84 Fed. Reg. at 41,314). But DHS did not rely on that statement as a justification for the Rule. Rather, the agency justified the Rule on the ground that it better accords with congressional intent and national immigration policy. 84 Fed. Reg. at 41,316-19.

Plaintiffs' contentions that Rule irrationally requires immigration officials to consider credit scores, English proficiency, and family size are likewise meritless. NY 56-58. DHS reasonably decided that those characteristics would be relevant, in the totality of the circumstances, to several factors it is statutorily required to consider—*i.e.*, an alien's "assets, resources, and financial status," "education and skills," and "family status." 8 U.S.C. § 1182(a)(4)(B). Plaintiffs argue that such factors do not *on their own* predict benefits usage. NY 56-58. But DHS said only that those characteristics are relevant in the totality of the circumstances, relying on statistics showing that low English proficiency and large family size make it more likely that a person will use public benefits, *see* 83 Fed. Reg. 51,114, 51,184-85, 51,196 (Oct. 10, 2018).

DHS plainly explained its consideration of those factors. Although plaintiffs assert, for example, that "DHS did not present *any* basis for concluding that credit scores rationally predict benefits use," NY 57, the same passage that plaintiffs cite explains at length why credit scores provide information that is relevant to an alien's financial resources, and provides an alternative way for adjudicators to proceed when aliens lack credit scores. 83 Fed. Reg. at 51,189. Similarly, DHS adequately explained that it would count health insurance acquired with credits under the Affordable Care Act as a generally positive factor, just not as a "heavily weighted" one, because the alien would be receiving "on a means-tested basis" a "government subsid[y] to fulfill a basic living need." 84 Fed. Reg. at 41,449. Nothing in those explanations is unreasonable.

Finally, plaintiffs erroneously assert that DHS "fail[ed] to provide any rational basis" for abandoning the 1999 Guidance. NY 53. As discussed in the government's opening brief, AOB 42-44, DHS explained why it "believe[d] [the new policy] to be better," *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009), which is all the law requires. DHS did not need to identify "negative consequences from the current public charge regime" to change its position, as plaintiffs suggest. NY 60. Nor was DHS precluded from changing position simply because the 1999 Guidance relied in part on recommendations from benefits-granting agencies. NY 53. As DHS noted, those recommendations merely addressed whether receipt of certain benefits met INS's proposed definition of a public charge as an alien "primarily dependent on the

government," and thus had no bearing on DHS's decision whether to change that standard. 84 Fed. Reg. at 41,351.

4. The Rule Does Not Violate The Rehabilitation Act

The Rule plainly does not violate the Rehabilitation Act. *See San Francisco*, 944 F.3d at 800. Congress expressly mandated that DHS "shall" consider an alien's "health" in making public-charge inadmissibility determinations. 8 U.S.C. § 1182(a)(4)(B)(i). It is that provision, and not the Rehabilitation Act, that specifically addresses considerations of an alien's physical or mental condition in public-charge inadmissibility determinations.

In any event, the Rule's totality-of-the-circumstances approach, 84 Fed. Reg. at 41,368, precludes denying admission or adjustment of status "solely by reason" of a disability, 29 U.S.C. § 794(a). For example, disability is not considered an adverse factor where the alien is "employed or otherwise has sufficient income, assets and resources to provide for himself or herself, or has family willing and able to provide for reasonable medical costs." 84 Fed. Reg. at 41,368, 41,409.

Plaintiffs note (NY 62) that a disabled person who relies on Medicaid to obtain necessary services is likely to be found inadmissible. An individual who regularly relies on Medicaid, however, is not "otherwise qualified" for admission under the Rule. *See Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979) ("An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.").

5. The Rule Does Not Violate Equal Protection

Plaintiffs do not defend the district court's rational-basis analysis, instead asserting that the Rule is subject to heightened scrutiny or is a product of animus. *See* MTR 48-50. This Court has made clear that "[t]he most exacting level of scrutiny that [it] will impose on immigration legislation is rational basis review." *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008). That is so even where, as in *Rajah*, an immigration law "applies to noncitizens within the nation's borders," MTR 49.

Even outside the immigration context, plaintiffs could obtain heightened scrutiny only by showing that "a discriminatory purpose has been a motivating factor in the [government's] decision," *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977). The district court did not find that the Rule was motivated by a discriminatory purpose, *see* SA 47-48, and nothing in the record would support that conclusion. A disparate impact alone does not give rise to heightened scrutiny, *see Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 278-79 (1979), and any disparate impact is not particularly probative of animus in the immigration context.

Plaintiffs also suggest, without elaboration, that the Rule was "developed and implemented" through "unique circumstances," and that those whom plaintiffs asserts are responsible for crafting the Rule have purportedly made "statements reflecting discriminatory animus." MTR 49. Those bare assertions are unavailing. DHS promulgated the Rule through notice-and-comment rulemaking, received and responded to tens of thousands of comments, took action to mitigate expected costs,

and provided a thorough, multi-hundred page explanation for its decision to issue the Rule. Nothing about that process suggests DHS acted with a discriminatory motive.

II. The Remaining Factors Weigh Against A Preliminary Injunction

The Supreme Court has already decided that the government's irreparable harm and the public interest outweigh plaintiffs' allegations of injury. *See New York*, 140 S. Ct. at 599. If the Rule is enjoined, DHS will be forced to implement an immigration policy that will result in the likely irreversible grant of lawful-permanent-resident status to aliens who are likely to become public charges, as the Secretary would define that term. 8 U.S.C. § 1182(a)(4)(A).

Contrary to plaintiffs' assertions, that concrete harm is not "mere delay in implementing a policy," MTR 58. Plaintiffs' contentions about the status quo and the lawfulness of the Executive Branch's *prior* exercise of authority similarly miss the point, as an injunction would cause the precise harm that Congress sought to avoid—allowing aliens to obtain lawful-permanent-resident status even though the Executive Branch would conclude that they are likely to become public charges.

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

Article III requires that injunctive relief "be tailored to redress the plaintiff's injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). For "when a court goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting

in the judicial role of resolving cases and controversies." *New York*, 140 S. Ct. at 600 (Gorsuch, J. concurring). That limitation is dispositive here. Plaintiffs acknowledge that their asserted injuries flow from benefit disenrollment by aliens living in the plaintiff States (where the organizational plaintiffs also operate) and the resulting harms and costs to the plaintiff States, City, and organizations. *See* NY 64-66; MTR 50-51, 55. An injunction limited to aliens who receive services from plaintiffs within the plaintiff States would fully remedy those alleged harms by removing the incentive for aliens in those States to disenroll.

Plaintiffs respond that a nationwide injunction is necessary to afford them complete relief because aliens living in the plaintiff States "may move between" different States not covered by the injunction, and may therefore disenroll from benefits in anticipation of such a move. MTR 59. That is far too speculative to support the district court's nationwide injunction. Plaintiffs "must present facts sufficient to show that [its] individual need requires the remedy for which [it] asks,'" *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974), and they must show that those likely harms outweigh the certain harm the government would suffer from nationwide relief. Plaintiffs have done none of these things.

Nor can plaintiffs justify their nationwide injunction on the basis of the supposed need for uniformity in national immigration policies. NY 71; MTR 61. Plaintiffs do not explain why the imposition of a uniform rule regarding public-charge inadmissibility determinations is necessary to remedy their specific harms. And, in

fact, Congress long ago recognized—and was not concerned by—variations in the standards used by different Executive Branch officers applying the public-charge inadmissibility provision in separate locales. *See supra* pp. 13, 16.

Finally, plaintiffs argue that, even if not necessary to provide them complete relief, the nationwide scope of the injunction is nevertheless authorized by the APA. Contrary to plaintiffs' assertions, NY 69; MTR 60, nationwide relief is not the required remedy under § 706 of the APA. *See Virginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 393-94 (4th Cir. 2001). Nor is it required by § 705, which provides that a court "may postpone the effective date" of challenged agency action. NY 68-70; MTR 59-60. Section 705 echoes generally applicable principles by specifying that a court should only "postpone the effective date" of agency action "to preserve status or rights pending conclusion of the review proceedings," and only "to the extent necessary to prevent irreparable injury," 5 U.S.C. § 705. Indeed, the district court correctly recognized that the "standard for a stay under 5 U.S.C. § 705 is the same as the standard for a preliminary injunction," and therefore granted a stay "for the same reasons it grant[ed] the injunction." SA 24 n.5.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

GEOFFREY BERMAN
United States Attorney

DANIEL TENNY

s/ Gerard Sinzdak

GERARD SINZDAK
JOSHUA DOS SANTOS
JACK STARCHER
Attorneys, Appellate Staff
Civil Division, Room 7242
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-0718
gerard.j.sinzdak@usdoj.gov

February 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32.1 because it contains 6,977 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

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Gerard Sinzdak
Gerard Sinzdak