No. 19-35914

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants-Appellants.

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

REPLY BRIEF

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INTRODUCTION AND SUMMARY

The preliminary injunction barring the Department of Homeland Security (DHS) from enforcing the new public-charge inadmissibility Rule should be set aside. Both the Supreme Court and this Court have now granted stays of district-court injunctions against the Rule, necessarily having concluded that the government is likely to prevail on the merits in this litigation, 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. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Nothing in plaintiffs' submissions undermines those conclusions.

As a threshold matter, plaintiffs' speculative fiscal harms do not establish standing, and, even if they did, plaintiffs fail to explain how their interest in *increasing* aliens' use of public benefits aligns with the public-charge 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. This Court correctly rejected that assertion. *See City & Cty. of San Francisco v. USCIS*, 944 F.3d 773, 792 (9th Cir. 2019). Nothing in the statute's text, context, or history

requires plaintiffs' narrow reading, or precludes DHS's 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 on appeal, it should not have to bear the undisputed harm the injunction imposes: the likely irreversible adjustment to lawful-permanent-resident status of individuals DHS concludes should be inadmissible.

ARGUMENT

I. Plaintiffs Lack A Cognizable Injury

For starters, plaintiffs are wrong to suggest (Br. 15-16) that this Court may review the district court's standing analysis only for abuse of discretion: Standing is a "threshold jurisdictional issue[]" that this Court reviews de novo. *Daniel v. National Park Serv.*, 891 F.3d 762, 765-766 (9th Cir. 2018).

Plaintiffs argue that they have standing because they will lose Medicaid funding and provide uncompensated medical services if the Rule causes aliens within their jurisdictions to disenroll from public benefits. Br. 15-16. As the government explained, Appellants' Opening Brief (AOB) 17-22, that allegation is speculative. States pay part of the cost of Medicaid, so disenrollment would produce offsetting cost savings. And greater use of emergency services should not adversely affect plaintiffs' finances, as the Rule expressly exempts Medicaid coverage for emergency services. 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019). Plaintiffs offer no response.

These considerations distinguish this case from *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). There, a State had standing because a new census question would have the "predictable effect" of lowering census response rates, which would almost inevitably result in the State's losing federal funds that are allocated based on state population. *Id.* at 2565-66. But here, even if the Rule's "predictable effect" is decreased enrollment in public benefits, a countervailing benefit to state budgets makes the States' putative harms far from likely—much less "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013).

Even if plaintiffs had Article III standing, "it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). Plaintiffs do not contest that the public-charge provision's purpose is to ensure that federal, state, and local governments do not have to expend taxpayer funds to support aliens. Yet they also make clear that their asserted injuries stem from reduced usage of federal benefits by aliens, and that they seek for aliens within their jurisdictions to use federal benefits at elevated rates. *See* Br. 16. That interest is fundamentally inconsistent with "the purposes implicit" in the public-charge inadmissibility statute. *Clarke*, 479 U.S. at 399.

Plaintiffs' only response is that the public-charge inadmissibility provision is intended to protect state fiscs. Br. 17-18. But the provision plainly is not intended to do so by encouraging aliens to rely on federal benefits. Plaintiffs similarly assert that the INA generally "recognizes states' authority to provide and administer" their public

benefits programs. Br. 18. In support, they cite the affidavit-of-support provisions that seek to prevent aliens' use of public benefits, and a case that found States to be within the zone of interest of an INA provision because they sought to *curb* alien use of benefits. Br. 18 (citing 8 U.S.C. § 1183a, and *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015)). Those authorities instead confirm that plaintiffs' suit contradicts the statute's purpose. In any event, the Rule in no way interferes with state authority to administer benefits programs, and that general interest is too marginally related to the statute to be within its zone of interests. *See* AOB 21-22.

II. Plaintiffs Are Not Likely To Succeed On The Merits

Plaintiffs are also unlikely to succeed on the merits. DHS reasonably interpreted "public charge" to refer to an alien who causes a charge to the public for his support over a sustained period; the agency then implemented that interpretation by establishing an administrable threshold level of benefits below which it will not consider an alien to be a public charge. As this Court 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. 2018). And the Supreme Court, in granting a stay of two injunctions materially similar to the one here, has likewise made clear that the government is likely to prevail against challenges to the Rule's validity. *See Department of Homeland Sec. v. New York*, No. 19A785, 2020 WL 413786 (U.S. Jan. 27, 2020).

Much of plaintiffs' contrary argument turns on their erroneous contention that the term "public charge" has a fixed and narrow meaning that Congress implicitly

adopted. Specifically, plaintiffs assert that the term "public charge" describes "individuals fundamentally unable to care for themselves and primarily reliant on public benefits for survival." Br. 42. The public-charge provision's text, context, and history negate plaintiffs' contention.

A. The Rule Is Consistent With The INA

As an initial matter, plaintiffs seek to sidestep what they concede is Congress's "broad goal of self-sufficiency" because Congress stated that policy goal in a "different statute" that was "designed to address U.S. social welfare policy." Br. 49-50 (emphasis omitted). Yet Congress expressly said that it was outlining its "national policy with respect to welfare *and immigration*," 8 U.S.C. § 1601 (emphasis added), and it declared that policy just one month before it amended the public-charge inadmissibility provision. Plaintiffs provide no support for their apparent view that Congress's "national policy," 8 U.S.C. § 1601, changed in the intervening month.

In any event, there is a direct connection between the public-charge inadmissibility provision and Congress's statements on immigration policy. In the legislation that declared that policy, Congress altered the public-charge inadmissibility determination by introducing the affidavit-of-support provision, 8 U.S.C. § 1183a. *See* Pub. L. No. 104-193, § 423. And the statements of policy reference the "sponsorship agreements" that are central to public-charge determinations under the provisions of the public-charge inadmissibility statute itself. 8 U.S.C. § 1601(1), (5); *id.* § 1182(a)(4)(B)(ii), (C)-(D).

Plaintiffs assert that Congress "did not delegate DHS authority to interpret" Congress's policy statements. Br. 49-50. But DHS is not seeking "authority to interpret" a policy statement; it is taking congressional policy into account when exercising its delegated authority. Plaintiffs' reliance (Br. 50) on *Comcast Corp. v. F.C.C.*, 600 F.3d 642 (D.C. Cir. 2010), is likewise inapposite, as DHS is not relying on a policy statement to regulate conduct it could not otherwise regulate.

Plaintiffs similarly err in refusing to acknowledge the significance of the affidavit-of-support provision. As the government explained, AOB 23-24, the affidavit-of-support provision, 8 U.S.C. § 1183a, and the public-charge provision, 8 U.S.C. § 1182(a)(4), require many aliens seeking to adjust status to obtain sponsors, mandate that those sponsors agree to repay means-tested benefits the alien receives, and declare inadmissible on the public-charge ground any alien who fails to submit 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 23.

Plaintiffs offer no real response. They label the affidavit-of-support provisions "ancillary" for having the allegedly "different purpose" of "provid[ing] a reimbursement mechanism for DHS *after* admission," Br. 51-52 (emphasis added)—without acknowledging that it is the public-charge statute itself that renders

inadmissible certain aliens who lack a required affidavit. They further assert that if Congress wanted "to expand the public charge definition, it would have made [those provisions] applicable to all applicants." Br. 52. No one contends that these provisions expand the definition of public charge. The point is that, through these provisions, Congress chose to treat certain aliens as likely public charges without any circumstances suggesting that those aliens would be "primarily reliant on the government for survival." Br. 42.

Plaintiffs likewise cannot avoid the inference to be drawn from the special rule that bars DHS from considering a battered alien's past receipt of "any benefits." *See* 8 U.S.C. § 1182(s); AOB 23. Plaintiffs observe that "there is no inconsistency between these provisions and the 1999 Field Guidance," Br. 52, but that does not mean that INS was *statutorily required* to adopt that policy. Plaintiffs never explain why, if Congress believed that *only* cash benefits could be relevant to public-charge inadmissibility determinations, it would have used broad language prohibiting consideration of "*any* benefits" "authorized under section 1641(c)"—a section that authorizes both cash and non-cash benefits. 8 U.S.C. § 1182(s) (emphasis added); *see id.* § 1641(c).

Against this textual support for the Rule's approach, plaintiffs cite a failed legislative proposal as "unmistakable" evidence that the 1996 Congress "rejected the interpretation of 'public charge' now embodied in the Rule." Br. 34-36. (Notably, plaintiffs do not defend the district court's reliance on a failed proposal to define

"public charge" in 2013, *see* AOB 29-30, perhaps recognizing that later congressional inaction sheds little light on a statute's meaning.) As the government explained (*id.*), however, the proposal in 1996 was broader than the Rule's definition, and the history suggests that Congress dropped the proposal to preserve executive discretion. *Id.* Plaintiffs' citations to legislative history do not show the contrary; more so, the cited pages highlight that members of Congress did not understand "public charge" as plaintiffs do.[1] Plaintiffs contend that "the Court does not need to guess at the 1996 Congress's motivation for rejecting" the proposal "because the Senate floor manager for the bill . . . expressly stated that it was to 'ensure passage'" of the bill. Br. 34-35. Even accepting the dubious assertion that a single legislator's statement establishes Congress's motive, on its own terms the statement merely illustrates 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.

[1] *See* 142 Cong. Rec. S4401 (1996) (statement of Mr. Simpson) (explaining that, through the "public charge" provision, "immigrants make a promise to the American people that they will not became a financial burden, period"); *id.* at S4408 ("I remain quite unconvinced why any newcomer should be able to freely access the majority of Federal noncash welfare programs within the first 5 years after entry, given that all aliens must promise not to become a public charge at any time after entry."); *id.* at S4409 (criticizing an amendment to the proposal because aliens would be able to "access almost all noncash welfare programs for the entire time they are in the United States, without ever being deportable as a public charge. That is contrary to the stated national policy that no one may immigrate if he or she is likely to use any needs-based public assistance.").

Plaintiffs further assert that aliens cannot be considered public charges for using benefits that "Congress expressly authorized" them to use. Br. 31. That interpretation generally would make it impossible for an alien to be a public charge by relying on federal benefits, which are all authorized by Congress. Plaintiffs themselves do not believe that to be true, as they concede that Congress at least intended to exclude aliens who would be institutionalized or primarily dependent on cash benefits. In any event, Congress's intent to exclude aliens who appear likely to rely on public assistance is consistent with its decision to assist some aliens who end up needing assistance after admission; the dichotomy simply reflects that immigration officials cannot with perfect accuracy predict which aliens will become public charges.

Plaintiffs misunderstand the government's argument when they say that Congress's 1996 legislation "did not alter the settled meaning of 'public charge.'" Br. 48. It is not that Congress changed the definition of "public charge" in 1996; it is just that those provisions show that Congress did not understand the term in the narrow way that plaintiffs define it, but instead had in mind a broad interpretation that easily encompasses the Rule's definition.

Plaintiffs make a similar mistake in asserting that the government has abandoned an argument "that the Rule fell within the 'plain meaning' of the public charge statute" in favor of an argument that the Rule "is 'permissible' based on two other provisions of the INA." Br. 50. The government's position has consistently been that Congress "delegated to the Executive Branch the authority to determine

who constitutes a public charge for purposes of that provision," that the "Rule is consistent with the plain meaning of the statutory text," and that "[n]othing about the plain meaning of this term" or "the structure of the statute" compels plaintiffs' preferred interpretation. Dkt. 155, at 4, 18-19, 20, 22 (quotation marks omitted).

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

As discussed in the government's opening brief (AOB 33-36) and recognized by the motions panel, 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.

1. Although plaintiffs concede that DHS has some "discretion to interpret the term" public charge, Br. 35, 49, they argue that Congress adopted a rigid "common law meaning" of the term, Br. 47. Plaintiffs' only support for that proposition, *id.*, is that the Senate Judiciary Committee's 1950 report, which formed the basis for the INA, recommended "that the clause excluding persons likely to become public charges should be retained in the law," S. Rep. No. 81-1515, at 349 (1950). Plaintiffs ignore, however, the Committee's acknowledgment that "the elements constituting

likelihood of becoming a public charge are varied" and its recommendation against "attempt[ing] to define the term in the law." *Id.*

They likewise ignore that, in the INA, Congress adopted the Committee's recommendation to let the term's implementation "rest[] within the discretion of" Executive Branch officials. S. Rep. No. 81-1515, at 349 (1950). The INA did not define the term "public charge" and provided that public-charge inadmissibility 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 (noting that "in the opinion of" is "language of discretion"). The current public-charge provision retains that discretionary language. 8 U.S.C. § 1182(a)(4). It also 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 say nothing about that discretion-granting language.

2. Instead, plaintiffs erroneously insist that the term "public charge" has had their preferred, narrow interpretation since 1882. They say that, because the 1882 statute excluded "any person unable to take care of himself . . . without becoming a public charge," Pub. L. No. 47-376, § 2, then "public charge" "plainly" must have meant only aliens who could not take care of themselves *at all*. Br. 37. Yet Congress did not exclude those who could not take care of themselves at all, but those who

could not do so *without becoming a public charge*—which is to say, without becoming a "charge" on the "public." An alien who relies on public assistance for food, healthcare, and housing fits within the meaning of that language.

Plaintiffs similarly assert that, because the term "public charge" first appeared in a list that included "idiots, insane persons," and "paupers," the term must have included only aliens who "required long-term care or institutionalization." Br. 38. That interpretation, however, would in effect make "public charge" coextensive with the other items on the list, impermissibly rendering the term "superfluous in all but the most unusual circumstances." *TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001). The better reading is that "public charge" was a catch-all that referred to all persons whose care would impose a "charge" on the public. Moreover, in the Immigration Act of 1917, Congress deliberately "change[d]" the "position" of the public-charge exclusion in the statute, so that it would not be read as similar to the others. S. Rep. No. 64-352, at 5 (1916). And in 1952, Congress listed the public-charge exclusion separately from the other grounds for exclusion. See Pub. L. No. 82-414 § 212. That history hardly suggests that those grounds were redundant.

Plaintiffs cite the 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 aliens who receive temporary "support and relief." Br. 38 (quotation marks omitted). But the immigrant fund created by that tax was funded by those directly involved in immigration—*i.e.*, shipowners, or sometimes the aliens themselves. *See*

Pub. L. No. 47-376, § 2 (1882); Pub. L. No. 64-301, § 2 (1917). Unlike modern-day public benefits, it was not paid for by the public, and thus was not a "charge" on the "public." Regardless, even if Congress had provided *public* assistance, a decision to provide a safety net does not entail an intent to admit aliens who are likely to need it.

Plaintiffs also cite one definition of "charge" as a person "committed" to another's "custody, care, concern, or management." Br. 39-40 (quoting several dictionaries). Yet plaintiffs themselves do not argue that "public charge" includes only persons in government custody. Such an interpretation would be inconsistent with the government's practice for 138 years, including the interpretation in the 1999 Guidance that plaintiffs approve. Furthermore, plaintiffs ignore that another contemporaneous definition of the word "charge" was merely "an obligation or liability." 1 Stewart Rapalje *et al.*, Dictionary of Am. and English Law (1888); *see, e.g.*, Henry Campbell Black, A Dictionary of Law (1891). And that definition reflects the usage of the phrase in many decisions. *See, e.g.*, *Ex parte Horn*, 292 F. 455 at 457 (defining "public charge" as one who "impose[s]" a "tax, duty, or trust" upon the "public"); *Guimond v. Howes*, 9 F.2d 412, 414 (D. Me. 1925) (asking whether alien was "likely to become a charge upon the municipality in which he lives or upon the public"); *Ex parte Turner*, 10 F.2d 816, 817 (S.D. Cal. 1926) (referring to "public charge" as "a charge upon the public").

Plaintiffs also quote language from the 1933 edition of Black's Law Dictionary, Br. 40, without acknowledging that the same edition says that, "[a]s used in" the 1917

Immigration Act, "public charge" means simply "one who produces a money charge upon, or an expense to, the public for support and care." AOB 37. Plaintiffs' reliance on a modern dictionary is no better. They cite a definition of "public charge" as "a person who is dependent upon the State for care or support." Br. 40. But they do not explain why a person who depends on public resources to meet basic needs such as food, shelter, or health care cannot be characterized as "dependent on the State for . . . support."

Nor are plaintiffs correct that the Supreme Court's decision in *Gegiow v. Uhl*, 239 U.S. 3 (1915), provided an "authoritative interpretation" with which the Rule conflicts. Br. 39-41. *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. The decision thus did not turn on the facts that plaintiffs cite. Br. 40-41; *see Gegiow*, 239 U.S. at 9. The court merely presumed that because of the position of "public charge" within a list in the 1907 statute, the public-charge determination was to be based on an alien's personal characteristics, rather than the labor market at large. *Id.* at 10.

The Rule is consistent with that approach, requiring that public-charge inadmissibility determinations must be "based on the totality of the alien's [particular] circumstances." 84 Fed. Reg. at 41,501. And in any event, Congress amended the public-charge provision in the Immigration Act of 1917 to "overcome" the decision in *Gegiow*. *See* S. Rep. No. 64-352, at 5 (1916); Immigration Act of 1917, Pub. L. No.

64-301, § 3 (1917); *see also* H.R. Doc. No. 64-886, at 3-4 (1916). Given that history, there is no basis for presuming that *Gegiow* sets out a definition of "public charge" that should be attributed to subsequent Congresses.

Indeed, such a presumption is especially dubious in light of later sources, which confirmed that, in the 1917 Act, "public charge" was broad enough to encompass a person who required any assistance rendered from public funds. *See* AOB 37. Contrary to plaintiffs' suggestion (Br. 40), those sources are not "flawed" because they fail to cite the narrow (and abrogated) decision in *Gegiow*.

3. Plaintiffs attempt to portray a line of "consistent judicial interpretations over the last century" in support of their narrow definition of public charge. Br. 42-43. Notably, the 1950 Senate Judiciary Committee found no such consistency, even from its vantage point far closer in time to the cases which plaintiffs cite. *See* AOB 34. In any event, none of plaintiffs' cited decisions articulate the plaintiffs' preferred definition of public charge. *See, e.g.*, *Hosaye Sakaguchi v. White*, 277 F. 913, 916 (9th Cir. 1922) (describing "public charge" as "a charge on the public"); *Ex parte Mitchell*, 256 F. 229, 230 (N.D.N.Y. 1919) ("A 'person likely to become a public charge' is one who for some cause or reason appears to be about to become a charge on the public.").

Plaintiffs further misapprehend the decision in *Hosaye Sakaguchi*, which rested not on a narrow meaning of public charge, but on the alien's "well-to-do sister and brother-in-law, domiciled in this country, who st[oo]d ready to receive and assist her." 277 F. at 916. They likewise misconstrue decisions referencing paupers and persons

in almshouses. *See* Br. 42-43 (citing, among others, *Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917)). Those courts merely described the primary group of aliens to which the public-charge statute applied at that time, and could not have taken into account the modern welfare state. *See United States v. Williams*, 175 F. 274, 275 (S.D.N.Y. 1910) (stating that, although the "primary" example of a public charge was a pauper, "[l]iterally taken the words in question" are broader and covered aliens who would be temporarily incarcerated).

The state decisions on which plaintiffs rely do not support their theory either. In *City of Boston v. Capen*, the court was construing the statutory phrase "paupers in any other country," not "public charge," and the court noted that a different statutory provision required a $2 head tax on arriving ships "to indemnify the public against any charges which might be incurred for the relief or support of those who were not permanently disabled, and who had never been paupers prior to their arrival here." 61 Mass. 116, 121-22 (1851). That is hardly support for plaintiffs' suggestion that States were content to provide non-pauper aliens with relief from the public purse. And plaintiffs' other state cases likewise do not establish their preferred definition of public charge. *See Yeatman v. King*, 51 N.W. 721, 723 (N.D. 1892) (discussing receipt of relief that recipients had a statutory duty "to pay back to the public treasury"); *In re O'Sullivan*, 31 F. 447 (C.C.S.D.N.Y. 1887) (holding only that aliens were not likely public charges just because the British government had paid their passage); *Township of Cicero v. Falconberry*, 42 N.E. 42, 44 (1895) (stating that "occasional[]" aid was

insufficient to render someone a public charge); *Davies v. State ex rel. Boyles*, 1905 WL 629, at *2 (Ohio Cir. Ct. July 8, 1905) (considering constitutionality of statute providing aid to the blind).

Other contemporaneous cases further belie plaintiffs' assertion that temporary receipt of benefits is insufficient to render an alien a public charge. In *Ex parte Turner*, for example, the court concluded that an alien was likely to become a public charge where there "[wa]s no assurance that he will earn or save sufficient [funds] to provide necessities *at all times* for himself, or his wife and children." 10 F.2d at 817 (emphasis added). Similarly, in *Guimond v. Howes*, 9 F.2d 412, 413 (D. Me. 1925), the court cited the fact that an alien's husband had been imprisoned for 60 days and 90 days, during which time the alien had to rely on "charitable aid," as evidence that she was likely to become a public charge again.

4. Past administrative practice similarly contradicts plaintiffs' claim that "public charge" had the settled meaning they ascribe to it. As the government explained, AOB 35-36, the Attorney General long ago concluded that an alien's receipt of and failure to repay public benefits, even if such receipt was temporary, could render the alien deportable as a "public charge." *See Matter of B-*, 3 I. & N. Dec. 323 (BIA and AG 1948).

Plaintiffs dismiss *Matter of B-* because the case concerned an alien "involuntarily detained in a state psychiatric hospital." Br. 45-46. The relevant portion of *Matter of B-*, however, did not turn on the fact that the plaintiff had been institutionalized.

Rather, the decision expressly stated that the alien would have been deportable as a public charge if she had failed to repay the cost of "clothing, transportation, and other incidental expenses" provided by the government. 3 I. & N. Dec. at 327. Nor is the decision irrelevant because it concerned the public-charge *deportation* provision rather than the one that governs *admission*. If anything, one would expect the inadmissibility provision to encompass more aliens than the deportation provision, as the deportation provision has long been applied more narrowly, *see Matter of Harutunian*, 14 I. & N. Dec. 583, 588 (Reg'l Comm'r 1974).

Plaintiffs' contention (Br. 44) that the Rule is inconsistent with other administrative decisions is likewise mistaken. The Rule requires a finding that an alien be *likely* to become a public charge; it does not render an alien inadmissible based solely on past receipt of benefits or on the mere *possibility* that an alien will receive benefits. *See* 84 Fed. Reg. at 41,295, 41,351-52. Plaintiffs similarly mischaracterize the agency decision in *Matter of Harutunian* as stating that aliens cannot be public charges by receiving non-cash benefits, because they are "supplementary." Br. 44 (quoting 14 I. & N. Dec. at 589). But that case contrasted "supplementary benefits, directed to the general welfare of the public as a whole" with "individualized public support to the needy," and the non-cash benefits at issue here would fall in the latter category. 14 I. & N. Dec. at 589.

Finally, plaintiffs' reliance on past administrative policies is misplaced. Br. 44. In the notice of proposed rulemaking that accompanied the 1999 Guidance, INS

noted that the term was "ambiguous," that it had "never been defined in statute or regulation," and that its definition was just one "reasonable" interpretation of the term. 64 Fed. Reg. 28,676, 28,676-77 (1999). That prior exercise of discretion does not foreclose DHS from changing course. *See FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). Moreover, the 1987 Rule that excluded consideration of non-cash benefits was implementing a "special rule" for aliens seeking adjustment of status under the 1986 amnesty bill, 8 U.S.C. § 1255a(d); 52 Fed. Reg. 16,205 (1987), which only confirms that the ordinary public-charge inquiry does not exclude consideration of non-cash benefits.

C. The Rule Is Not Arbitrary Or Capricious

As the government thoroughly explained, AOB 38-45, DHS provided a "satisfactory explanation" for purposes of deferential arbitrary-and-capricious standard of review. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Plaintiffs' contrary argument reduces to a disagreement with DHS's weighing of costs and benefits.

Plaintiffs' argument about the "effects on public health" that DHS allegedly "ignored," Br. 20, consists of a discussion about possible public-health consequences caused by alien disenrollment from public benefits, supported by citations to the Rule's discussion of them, Br. 21. By plaintiffs' own account, then, DHS did address these arguments. Indeed, as this Court recognized, "DHS not only addressed th[o]se

concerns directly, it changed [the] Final Rule in response to the comments." *San Francisco*, 944 F.3d at 804.

Specifically, DHS explained the possible public-health risks, but noted that they were likely less serious than the commenters believed because the majority of aliens subject to the Rule are ineligible for public benefits in the first place. 83 Fed. Reg. 51114, 51118 (2018); 84 Fed. Reg. at 41,312-13. And to the extent confusion over the Rule's coverage might cause further disenrollment, the agency reasoned that such disenrollment might be short-lived, as the Rule painstakingly detailed which aliens it applied to, DHS planned to issue further guidance, and those individuals could re-enroll after realizing their mistake. 84 Fed. Reg. at 41,292, 41,336-46, 41,463. DHS also took steps to mitigate any adverse public-health effects by, for example, excluding certain benefits and recipients from the Rule's coverage. *See* 84 Fed. Reg. at 41,384. DHS thus gave a rational explanation for its weighing of costs and benefits, which is all that is required. AOB 41-44; *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").

Plaintiffs suggest that DHS could not make a decision until it had "attempt[ed] to measure the full magnitude of such potential harm," and criticize DHS for issuing the Rule without "experience in health care policy." Br. 22-23. But under settled principles that plaintiffs themselves cite, an agency must do no more than acknowledge its uncertainty and explain its decision. Br. 23 (citing *Center for Biological*

Diversity v. Zinke, 900 F.3d 1053, 1072 (9th Cir. 2018)). Here, DHS explained that it could not precisely predict the dis-enrollment impact, given the inherent uncertainty regarding how many aliens might disenroll and for how long. *See* 84 Fed Reg. at 41,313. And, as discussed, it noted reasons why that impact would likely be smaller than some feared. That was sufficient, and the cases that plaintiffs rely on do not suggest otherwise. *See, e.g.*, *American Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 928, 931 (D.C. Cir. 2017) (agency had not acknowledged its change in position as to one issue, and had denied the existence of countervailing concerns as to another).

Plaintiffs' second argument veers toward disagreement with the public-charge statute itself. They say the Rule's application to children is irrational because minors' "use of public benefits in no way suggests they are likely to become a public charge in the future." Br. 26. But the public-charge ground of inadmissibility applies to aliens who are likely to become charges on the public "at any time," not just as adults. 8 U.S.C. § 1182(a)(4). Indeed, children historically could be subject to public-charge exclusion, *see United States ex. rel. De Sousa v. Day*, 22 F.2d 472, 473 (2d Cir. 1927), and plaintiffs cannot seriously contest that a child with no means of support would be a public charge.

As to the possible decrease in vaccinations, plaintiffs again cite passages demonstrating that DHS considered all the potential costs. *See, e.g.*, Br. 28-29. Contrary to plaintiffs' assertions, DHS did not say that the Rule would not affect vaccinations at all, only that its impact might not be very large. DHS noted that

"vaccines would still be available for children and adults even if they disenroll from Medicaid" because "free or low cost vaccines" were available through certain programs. 84 Fed. Reg. at 41,384-85. And more than that, DHS changed the Rule to lessen the possible adverse impact on vaccinations. It explained that "this final rule does not consider receipt of Medicaid by a child under age 21, or during a person's pregnancy," which DHS explained "should address a substantial portion, though not all, of the vaccinations issue." *Id.* This careful analysis belies plaintiffs' assertions, and incidentally also disproves plaintiffs' accusation that DHS "offered no rational justification for exempting Medicaid coverage but still counting food and housing benefits against children," Br. 27.

Plaintiffs are also mistaken to suggest that DHS contradicted itself. Br. 27-28. As to the Rule's effect on benefits usage, DHS's observation that most aliens are ineligible for benefits at the time the Rule is applied to them is consistent with its prediction that the Rule would reduce benefits usage in the future. And there is nothing inconsistent about line-drawing that allows for truly short-term and minimal receipt of benefits, 84 Fed. Reg. at 41,360-61, but not receipt over a significant or intense period, even if that receipt is temporary, *id.* at 41,352.

D. The Rule Does Not Violate The Rehabilitation Act

Plaintiffs appear to concede that their definition of "public charge" would have a disproportionate impact on disabled persons, Br. 53, but nonetheless say DHS's Rule violates the Rehabilitation Act. Their assertions are meritless.

To begin, plaintiffs cannot get around Congress's express mandate that DHS "shall . . . consider" an alien's "health." 8 U.S.C. § 1182(a)(4)(B)(i). Plaintiffs say that the Rehabilitation Act is the statute that specifically addresses discrimination on the basis of "disability," and thus assert that it controls over the INA's less-specific reference to "health." But the question is whether DHS may consider disability in public-charge inadmissibility determinations. It is the INA that addresses that situation more specifically. Plaintiffs' theory would leave DHS unable to exclude even aliens with disabilities that require institutionalization.

In any event, nothing in the Rule indicates that an alien will be denied admission or adjustment of status "solely by reason" of her or his disability. 29 U.S.C. § 794(a). Rather, as the Rule repeatedly emphasizes, immigration officials will make public-charge inadmissibility determinations based on a review of the totality of an individual's circumstances. *See, e.g.*, 84 Fed. Reg. at 41,368. For example, the Rule explains that an "alien's disability will not be considered an adverse factor in the inadmissibility determination" 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." *Id.*

Plaintiffs note (Br. 55) that a disabled person who relies on Medicaid to obtain necessary services is likely to be found inadmissible on the public-charge ground. But an individual who regularly relies on Medicaid is not an "otherwise qualified person

. . . who is able to meet all of [the Rule's] requirements in spite of his handicap." *See Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979).

Finally, plaintiffs erroneously attempt to rely on a disparate-impact theory on the ground that the Rule "has the effect of 'denying meaningful access to public services.'" Br. 53 (quoting *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013)). But this is a case about immigration status, not access to government services or buildings, and in any event changing the Rule to accommodate aliens with disabilities who regularly rely on means-tested public benefits would require a fundamental change that DHS need not make. *See Alexander v. Choate*, 469 U.S. 287, 299-300 (1985).

III. The Remaining Factors Weigh Against A Preliminary Injunction

The remaining preliminary injunction factors also support reversal. Plaintiffs do not dispute that, if the Rule is enjoined, DHS will be forced to follow 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. *See* 8 U.S.C. 1182(a)(4)(A); *San Francisco*, 944 F.3d at 806. Plaintiffs instead claim that DHS will not suffer irreparable harm because the effect of the injunction is to "[r]eturn[] the nation 'temporarily to the position it has occupied for many previous years.'" Br. 58. That misses the point. The injunction causes 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.

On the other side of the ledger, plaintiffs' speculative asserted injuries—many of which would arise, if ever, over the long term—do not demonstrate irreparable harm justifying an injunction during this litigation. And even if plaintiffs have demonstrated irreparable harm, plaintiffs cannot establish that the balance of equities and the public interest favor enjoining the Rule, as both this Court and the Supreme Court have concluded. *See San Francisco*, 944 F.3d at 806-07; *Department of Homeland Sec. v. New York*, No. 19A785, 2020 WL 413786, at *1 (U.S. Jan. 27, 2020) (Mem.).

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

Plaintiffs do not contest that, under this Court's precedents, courts may only issue a nationwide injunction in "exceptional cases" where "such breadth [is] necessary to remedy" the harms the plaintiff has shown. *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019). "[W]hen 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." *Department of Homeland Sec.*, 2020 WL 413786, at *2 (Gorsuch, J. concurring). That limitation is dispositive here. Plaintiffs' asserted injuries flow from "the Rule's 'predictable' effect of causing disenrollment by immigrants" living in the plaintiff States and the resulting "harms to

Plaintiff States' finances and the health and well-being of their residents." Br. 56. An injunction limited to the plaintiff States would fully remedy those alleged harms.

In response, plaintiffs stretch to imagine a scenario where a nationwide injunction might be necessary—positing that a limited injunction could cause "uncertainty" for hypothetical aliens who plan to move from a plaintiff State to some State where the Rule is not enjoined. Br. 58-59. But plaintiffs must show that their harms are likely, rather than merely possible. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 21 (2008). Moreover, plaintiffs "must present facts sufficient to show that [their] individual need requires the remedy for which [they] ask[]," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974) (quoting *McCabe v. Atchison, T. & S.F.R. Co.*, 235 U.S. 151, 164 (1914)), 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.

Plaintiffs alternatively claim that a nationwide injunction is necessary because the "types of harms" the Rule will cause "show no respect for State boundaries." Br. 59. That argument is out of sync with plaintiffs' own description of their harms. *See* Br. 16. The only injuries plaintiffs have alleged are various kinds of financial harm arising from aliens' disenrollment in public benefits *while in the plaintiff States*. Those injuries certainly "respect … State boundaries" and would be fully remedied by a preliminary injunction limited to the plaintiff states.

Plaintiffs' other arguments equally lack merit. They impermissibly attempt to seek relief for non-parties by asserting that a limited injunction would unjustly result in differing consequences for aliens in other States. Br. 59. They also contend that a court should grant broader relief than necessary on the ground that a nationwide injunction is the ordinary remedy under the APA and is more administrable—arguments that this Court has already rejected. *See East Bay* 934 F.3d at 1030 & n.8.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,883 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.

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