No. 19-17213

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

REPLY BRIEF

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TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY 1

ARGUMENT 2

I. Plaintiffs Lack Standing 2

II. Plaintiffs Are Not Likely To Succeed On The Merits 4

A. The Rule Is Consistent With The INA 4

B. DHS Has Broad Discretion To Define The Term "Public Charge" 12

C. The Rule Is Not Arbitrary Or Capricious 22

D. The Rule Does Not Violate The Rehabilitation Act 26

III. The Remaining Factors Weigh Against An Injunction 27

CONCLUSION 28

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: **Page(s)**

Air Courier Conference of Am. v. American Postal Workers Union AFL-CIO,
498 U.S. 517 (1991) 4

Bank of America Corp. v. City of Miami,
137 S. Ct. 1296 (2017) 4

Barnhart v. Walton,
535 U.S. 212 (2002) 13

City & Cty. of San Francisco v. USCIS,
944 F.3d 773 (9th Cir. 2019) 1, 4, 5, 12, 13, 15, 24, 25, 26, 27, 28

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 2

Clarke v. Securities Indus. Ass'n,
479 U.S. 388 (1987) 3, 4

Department of Homeland Sec. v. New York,
No. 19A785, 2020 WL 413786 (Jan. 27, 2020) 5

East Bay Sanctuary Covenant v. Barr,
934 F.3d 1026 (9th Cir. 2019) 5

Epic Systems Corp. v. Lewis,
138 S. Ct. 1612 (2018) 6, 7

FCC v. Fox Television Stations,
556 U.S. 502 (2009) 22, 23

Gebhardt v. Nielsen,
879 F.3d 980 (9th Cir. 2018) 16

Gegiow v. Uhl,
239 U.S. 3 (1915) 17

Guimond v. Howes,
9 F.2d 412 (D. Me. 1925) 19

Horn, Ex parte,
292 F. 455 (W.D. Wash. 1923) 17

Irvine Med. Ctr. v. Thompson,
275 F.3d 823 (9th Cir. 2002) 25

Matter of B-,
3 I. & N. Dec. 323 (BIA and AG 1948) 10, 11, 19

Matter of Harutunian,
14 I. & N. Dec. 583 (BIA 1974) 10

Matter of Vindman,
16 I. & N. Dec. 131 (BIA 1977) 18

Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1976) 27

Southeastern Cmty. College v. Davis,
442 U.S. 397, 406 (1979) 26

Turner, Ex parte,
10 F.2d 816 (S.D. Cal. 1926) 19

Van Hollen, Jr. v. FEC,
811 F.3d 486 (D.C. Cir. 2016) 14

Statutes:

Illegal Immigration Reform and Immigrant Responsibility Act of 1996,
Pub. L. No. 104-208 6

Immigration Act of 1917,
Pub. L. No. 64-301, ch. 29:
§ 2 18
§ 3 16

Immigration and Nationality Act,
Pub. L. No. 82-414, § 212 (1952) 15, 16
8 U.S.C. § 1103(a)(1) 13
8 U.S.C. § 1103(a)(3) 13
8 U.S.C. § 1182(a)(1)(A)(ii) 21
8 U.S.C. § 1182(a)(4) 7, 15
8 U.S.C. § 1182(a)(4)(B)(i) 27
8 U.S.C. § 1182(s) 7, 8
8 U.S.C. § 1183a 3, 6, 7, 18
8 U.S.C. § 1183a(a)(1)(B) 8

Personal Responsibility and Work Opportunity Reconciliation Act of 1996,
Pub. L. No. 104-193, § 423 (1996) 6

8 U.S.C. § 1601 ..... 6, 20

8 U.S.C. § 1601(2) 5, 10, 21

8 U.S.C. § 1601(2)(A) 10

8 U.S.C. § 1601(5) 6, 9

29 U.S.C. § 794(a) 26

Legislative Materials:

142 Cong. Rec. S11872 (daily ed. Sept. 30, 1996) 12

S. Rep. No 64-352 (1916) 16

S. Rep. No 81-1515 (1950) 14, 15, 18

Other Authorities:

CDC, Dep't of Health & Human Servs., *Vaccination Coverage Among Adults in the United States* (2016), https://www.cdc.gov/vaccines/imz-managers/coverage/adultvaxview/pubs-resources/NHIS-2016.html 21

64 Fed. Reg. 28,689 (May 26, 1999) 20

83 Fed. Reg. 51,114 (Oct. 10, 2018) 10, 22, 23

84 Fed. Reg. 41,292 (Aug. 14, 2019)..... 3, 17, 22, 23, 24, 24, 25, 25, 26

Danilo Trisi, Ctr. on Budget & Policy Priorities, *Trump Administration's Overbroad Public Charge Definition Could Deny Those Without Substantial Means A Chance To Come To Or Stay In The U.S.* (May 30, 2019), https://perma.cc/4J72-GF6P 22

INTRODUCTION AND SUMMARY

The preliminary injunction barring the Department of Homeland Security (DHS) from enforcing the new public-charge Rule should be set aside. Both the Supreme Court and this Court have now granted the government's requests for stays of injunctions against the Rule. In so ruling, both courts have necessarily 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. Nothing in plaintiffs' submissions casts doubt on those conclusions.

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

On the merits, plaintiffs identify no 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 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 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 believes should be inadmissible.

ARGUMENT

I. Plaintiffs Lack Standing

Plaintiffs assert that they have standing to challenge the Rule because the Rule will cause aliens within their jurisdictions to disenroll from public benefits which will, in turn, cause plaintiffs to lose Medicaid funding, to provide additional emergency medical services, and to incur new operational costs. *See* Cal. Br. 14-19; SF Br. 15-19. But whether the Rule will have a net adverse impact on plaintiffs' budgets is inherently "speculative" and reliant "on a highly attenuated chain of possibilities," *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409-10 (2013). Plaintiffs emphasize that they will lose Medicaid funding if aliens disenroll from the program. *See* Cal Br. 15. But because States pay part of the cost of Medicaid, such disenrollment should produce cost savings. Similarly, to the extent plaintiffs anticipate that aliens will use plaintiffs' emergency services to a greater degree, that 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). And, notwithstanding plaintiffs' protestations, if money spent "analyzing the impact" of a new federal policy and "reconfiguring" operations in response to that policy, Cal. Br. 16; *see also* SF Br. 18, were sufficient, state and local governments would have standing to challenge any new policy, a sweeping view of standing no court has endorsed.

Even if plaintiffs could establish Article III standing, their asserted injuries are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). Plaintiffs assert that the public-charge provision is designed to "protect states and their political subdivisions' coffers." Cal. Br. 20; SF Br. 21. They also note that, through the affidavit-of-support provision, 8 U.S.C. §1183a, Congress granted States and their subdivisions the right to seek reimbursement for any means-tested benefits they provide to covered aliens. *See* Cal. Br. 20; SF Br. 21. But the plain purpose of both the public-charge inadmissibility provision and the affidavit-of-support provision is to reduce the amount of taxpayer funds federal, state, and local governments must expend to support aliens seeking admission or adjustment of status. The interests plaintiffs seek to further through this lawsuit—greater use of public benefits by aliens and larger taxpayer expenditures on such benefits—are directly opposed to that purpose.

Plaintiffs' assert (SF Br. 21) that they "will be forced to incur [financial and public-health] costs" as a result of the Rule. But even assuming those expected costs

were sufficient to establish their standing, "injury in fact does not necessarily mean one is within the zone of interests to be protected by a given statute." *Air Courier Conference of Am. v. American Postal Workers Union AFL-CIO*, 498 U.S. 517, 524 (1991). Plaintiffs' asserted injuries stem from reduced usage of public benefits by aliens, and they seek to bar the Rule's enforcement so that aliens within their jurisdictions will use public benefits at elevated rates. Plaintiffs' interests are thus fundamentally inconsistent with "the purposes implicit" in the public-charge inadmissibility statute. *Clarke*, 479 U.S. at 399.

Plaintiffs' reliance (SF Br. 21) on *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017), is likewise misplaced. There, discriminatory lending practices hindered a "City's efforts to create integrated, stable neighborhoods," a harm at the heart of the Fair Housing Act's zone of interests. *Id.* at 1304. Here, in contrast, plaintiffs' interest in increasing alien enrollment in public benefits is at odds with the statute's core purpose.

II. Plaintiffs Are Not Likely To Succeed On The Merits

A. 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 this Court held, the Rule "easily" qualifies a reasonable interpretation of the statute. *San*

Francisco, 944 F.3d at 799. In granting a stay of two injunctions barring the Rule's enforcement, the Supreme Court has also concluded 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 (Jan. 27, 2020).[1]

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 depends primarily on the government for subsistence." SF Br. 22; Cal. Br. 24. 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 1996, the last time the public-charge inadmissibility provision was amended. In enacting welfare and immigration-reform legislation in 1996, 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.

[1] Plaintiffs correctly note that the stay panel's decision does not bind the merits panel. *See East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 n.2 (9th Cir. 2019). But that point is irrelevant. The motions panel's well-reasoned, thorough decision was correct, as confirmed by the Supreme Court's decision granting a stay of identical injunctions against the Rule, and plaintiffs provide no basis for second-guessing that decision.

Plaintiffs contend that the statements lack relevance because they were enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193 (1996) (PRWORA), which did not amend the public-charge inadmissibility provision itself, rather than as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, which was enacted one month later and did amend the public-charge provision. SF Br. 38; Cal. Br. 34. But there is no basis to conclude—and plaintiffs offer none—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.

In any event, there is a direct statutory connection between the public-charge inadmissibility provision, PRWORA, and Congress's statements on immigration policy. PRWORA altered the public-charge determination by introducing the affidavit-of-support provision, 8 U.S.C. § 1183a. *See* Pub. L. No. 104-193, § 423; *see also* Appellants' Opening Brief (AOB) 19-20. And, in its statements of policy, 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).

DHS's reliance on Congress's statutory statements of policy bears no resemblance to the "cross-statutory interpretation," Cal. Br. 35, that the Supreme Court found problematic in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). In that case, an agency attempted to interpret a "distinct" statute over which it had no

"particular interest . . . or expertise" in order to "diminish" that statute's scope "in favor of a more expansive interpretation" of a statute the agency did administer. *Id.* at 1629. Here, by contrast, the two relevant statutes are closely intertwined, and DHS has interpreted the statute it administers (the public-charge provision) in a manner that furthers Congress's statements of policy.

Plaintiffs similarly err in refusing to acknowledge the significance of the affidavit-of-support provision. As the government explained, AOB 19-20, 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 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 20. Plaintiffs' claim that Congress viewed "public charge" as including only those aliens who are expected to rely primarily on the government for subsistence cannot be squared with that provision.

Plaintiffs attempt to discount the affidavit-of-support provision and the battered-immigrant provision, 8 U.S.C. § 1182(s), because those provisions do "not define or list the means-tested benefits to which" the provisions refer. Cal. Br. 37.

But the provisions apply to "*any* means-tested public benefit" the alien receives. 8 U.S.C. § 1183a(a)(1)(B) (emphasis added); *see also id.* § 1182(s). Plaintiffs do not suggest that the phrase "any means-tested public benefit" excludes nutrition assistance, public housing, and Medicaid.

Plaintiffs also suggest that the affidavit-of-support provision altered "the *method* of determining who is likely to become a public charge," but did not "change the settled meaning of 'public charge.'" Cal. Br. 37. Whatever plaintiffs are driving at, their argument misses the point. Congress went to considerable lengths to avoid admitting aliens who were likely to receive publicly funded benefits, going so far as to require an affidavit of support even when an alien's circumstances do not suggest that the alien is likely to receive such benefits. In classifying aliens who fail to submit a required affidavit of support as being inadmissible on the public-charge ground, Congress necessarily rejected plaintiff's narrow understanding of "public charge" as limited to aliens who are expected to be primarily dependent on the government.

Plaintiffs point out that, in authorizing some aliens to receive public benefits in some circumstances and authorizing state and federal agencies to seek reimbursement for means-tested public benefits an alien receives, "Congress confirmed that some immigrants would be expected to access public benefits after admission." Cal. Br. 37; *see also* Cal. Br. 35; SF Br. 37. But it does not follow that, in allowing aliens to receive benefits in some circumstances, Congress concluded that aliens who are predicted to receive such benefits should not be deemed inadmissible as likely to become public

charges. Indeed, plaintiffs themselves 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. Congress's intent to exclude aliens who appear likely to rely on public assistance is not inconsistent with its decision to assist certain 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 fare no better in urging that the Rule is impermissible because it defines "public charge" to include the receipt of benefits in amounts plaintiffs deem "small," SF Br. 26, or "minimal," Cal. Br. 4. Plaintiffs note that, under the Rule, an individual who receives "both Medicaid and food stamps" for more than six months out of a three-year period would meet the definition "public charge" and argue that the Rule therefore covers individuals "receiving very limited assistance." Cal. Br. 33. But DHS did not run afoul of congressional intent in concluding that an individual who relies on the government for food and healthcare for more than six months at a time is not "self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601(5). Moreover, plaintiffs concede that DHS can properly consider an alien's expected receipt of cash benefits in making public-charge inadmissibility determinations. *See* Cal. Br. 6. DHS estimated that an individual who receives Medicaid and SNAP benefits for six months would receive more in benefits on average ($4,477/six months) than would an individual who receives three years' worth

of cash assistance under the Temporary Assistance for Needy Families program ($3,818/three years). *See* 83 Fed. Reg. 51,114, 51,265 (Oct. 10, 2018). Six months of Medicaid and SNAP benefits are thus far from "very limited" or "minimal" assistance.

To the extent plaintiffs disagree, moreover, judgments about the amount of public benefits that render an alien a public charge is an issue Congress delegated to DHS in the INA. *See infra* Part B. Especially given the importance Congress attached to ensuring that aliens will "not depend on public resources to meet their needs," 8 U.S.C. § 1601(2)(A), DHS's judgment about the appropriate threshold is permissible.

Plaintiffs similarly fail in attempting 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 then fails to repay that benefit after the relevant agency demands repayment. Plaintiffs first attempt to discount *Matter of B-* on the ground that it addressed deportability under § 1227(a)(5), rather than inadmissibility under § 1182(a)(4). Cal. Br. 40 n.15; SF Br. 34. But that distinction only hurts plaintiffs: administrative decisions have long applied the public-charge provision in the deportation context more narrowly than in the admissibility context, *see Matter of Harutunian*, 14 I. & N. Dec. 583, 588 (BIA 1974), rendering even more implausible plaintiffs' assertion that the admissibility provision unambiguously encompasses fewer aliens than the deportability provision.

Next, plaintiffs assert that *Matter of B-* "did not address the quantum or type of benefits" that could "render an immigrant a public charge." SF Br. 34. To the

contrary, after setting forth the "test [to] be applied to determine whether an alien has become a public charge," the Board in *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. In other words, the alien's receipt of temporary, small, and noncash benefits could have rendered the alien deportable as a public charge, had those benefits not been repaid. While, as plaintiffs note (SF Br. 35), the 1999 Guidance limited deportation under *Matter of B-* to an alien's failure to repay cash benefits or the cost of institutionalization, that limitation cannot plausibly be attributed to Congress when it revised the relevant provisions three years earlier. Thus, in mandating that sponsors repay any means-tested public benefits an alien receives, Congress would have understood that it was subjecting aliens to potential deportation as public charges for failing to repay such benefits.

Finally, plaintiffs assert (Cal Br. 40 n.15; SF Br. 35) that *Matter of B-* is distinguishable because it "involved a noncitizen living in a mental institution." But nothing in the relevant portion of *Matter of B-* turned on the alien's institutionalization. In fact, as noted, the decision indicates that the alien would have been deportable as a public charge if she had failed to repay the cost of "clothing" and "transportation" provided by the government. *Matter of B-*, 3 I. & N. Dec. at 327. 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.

Disregarding the text and context of the public-charge provision, plaintiffs ask this Court to place significant weight on two failed legislative proposals, which they contend demonstrate that Congress rejected the Rule's definition of "public charge." Cal. Br. 27-28, 34; SF Br. 43-44. 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 definition. *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.

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

As this Court 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.

1. In arguing to the contrary, plaintiffs first assert that "Congress has not authorized" DHS to provide "an interpretation [of 'public charge'] that carries the force of law." SF Br. 23. This Court correctly rejected that contention. *San Francisco*, 944 F.3d at 792. 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); *San Francisco*, 944 F.3d at 792. Plaintiffs note (SF Br. 25) that, under 8 U.S.C. § 1103(a)(1), a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." But plaintiffs do not suggest that the Attorney General has made a determination and ruling that conflicts with the Rule. And plaintiffs cite no authority for the remarkable proposition that the mere possibility the Attorney General might issue such a determination overrides Congress's express delegation of rulemaking authority to DHS.

Indeed, even absent the express delegation in subsection (a)(3), DHS would possess the authority to interpret the public-charge inadmissibility provision that it must implement. *See Barnhart v. Walton*, 535 U.S. 212, 225 (2002). Plaintiffs concede that Congress has never defined the term "public charge." Cal. Br. 24.

"Congressional silence of this sort is, in *Chevron* terms, an implicit delegation from Congress *to the agency* to fill in the statutory gaps." *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016).

2. The INA's history 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 24-25, in a report on the country's immigration laws that provided the foundation for the INA, the Senate Judiciary Committee acknowledged that "the elements constituting likelihood of becoming a public charge are varied" and that different Executive Branch officials "enforced [public-charge] standards highly inconsistent with one another." S. Rep. No. 81-1515, at 349 (1950). Yet, the Committee determined that "there should be no attempt to define the term in the law," because the public-charge inadmissibility determination should "rest[] within the discretion of" Executive Branch officials. *Id.*

In attempting to reconcile that significant report with their claim that Congress has at all times understood "public charge" to have a fixed, narrow meaning, plaintiffs claim that the Judiciary Committee merely recommended that the term "not be *further* defined" in law. Cal. Br. 39-40. Plaintiffs' gloss on the Committee's report finds no support in the report itself, and plaintiffs cite nothing in the report indicating that Congress understood "public charge" to have a settled meaning. To the contrary, the Report could not be clearer that the Committee understood courts and immigration

officers to have "given varied definitions of the phrase 'likely to become a public charge.'" S. Rep. No. 81-1515, at 347, 349. Notwithstanding that variation, the Committee recommended against *any* "attempt to define the term in the law." *Id.* at 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 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 ("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 public charge determinations," but not discretion to define the term "public charge." Cal. Br. 38; SF Br. 26. 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. 13-14, Congress plainly delegated DHS the authority to interpret the ambiguous term "public charge."

In nevertheless arguing that "public charge" has a fixed meaning that DHS lacks discretion to interpret, plaintiffs assert that "the plain-text meaning of public charge, both [in 1882] and today, is consistent with the term's placement alongside 'convict, lunatic, [and] idiot'" in the Immigration Act of 1882. SF Br. 29. Plaintiffs' contention cannot be squared with statutory history. In the Immigration Act of 1917, Congress deliberately "change[d]" the "position" of "persons likely to become a public charge" in the list of excluded persons. S. Rep. No. 64-352, at 5 (1916). It did so "to overcome recent decisions of the courts limiting the meaning of [public charge] because of its position between other descriptions conceived to be of the same general and generic nature." *Id.* In the 1917 Act, the "public charge" ground of exclusion was thus separated from the "idiot[]," "insane," and "convict[]" grounds, with a number of excluded groups in-between. *See* Pub. L. No. 64-301, ch. 29 § 3 (1917). Similarly, when it enacted the INA in 1952, Congress listed the public-charge ground for exclusion separately from the "feeble-minded," "insane," and "convict[]" grounds, with as many as fourteen other grounds for exclusion in-between. *See* Pub. L. No. 82-414, § 212. Thus, contrary to plaintiffs' claim (SF Br. 29), Congress has deliberately disassociated the public-charge inadmissibility ground from the "convict, lunatic, [and] idiot" grounds. The better reading of the statute's history is that "public

charge" has always been broader than the other items: a catch-all that referred to all persons whose care would impose a "charge" on the "public."

Plaintiffs are likewise wrong when they suggest that, in *Gegiow v. Uhl*, 239 U.S. 3 (1915), the Supreme Court held that the term "public charge" was equivalent to "paupers and professional beggars." Cal. Br. 31-32. *Gegiow* held only that an alien could not be deemed likely to become a public charge based solely on labor-market conditions in his destination city. *See* AOB 30. Instead, the determination was to be based on an alien's personal characteristics, which is precisely the approach the Rule employs, *see* 84 Fed. Reg. at 41,501 (public-charge inadmissibility determinations must be "based on the totality of the alien's [particular] circumstances"). And, as noted above, Congress revised the immigration laws to "overcome" *Gegiow* and other cases that suggested that the term was limited by its proximity to other grounds of exclusion, further undermining any suggestion that subsequent Congresses embraced the broad interpretation of *Gegiow* that plaintiffs assert. *See also* AOB 30-31; *Ex parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923) ("The term 'likely to become a public charge' is not associated with paupers or professional beggars" and "is differentiated from the application in *Gegiow v. Uhl*.").

Plaintiffs also 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 those aliens who might receive "some public support" after their admission. SF Br. 30; Cal. Br. 24. But the immigrant fund created by the 1882

tax was financed 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 paid for by the public at-large. The tax was thus analogous to the current affidavit-of-support and sponsor provision, 8 U.S.C. § 1183a. There is in any event no indication that the fund was designed to provide sustained support to those whose need for support was known at the moment of admission, and it certainly provides no evidence of plaintiffs' distinction between cash and in-kind benefits.

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. SF Br. 31-36; Cal. Br. 25-26. 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. In *Ex parte Turner*, 10 F.2d 816 (S.D. Cal. 1926), for example, the court concluded that an alien was properly excludable as likely to become a public charge where there was "no assurance that he will earn or save sufficient [funds] to provide necessities *at all times* for himself, or his wife and children." *Id.* at 817 (emphasis added). As evidence that the alien failed to meet that test, the court cited the fact that he had been hospitalized on two previous occasions, once for two months and once for two weeks. *Id.* at 816-17. The court found it inconsequential that he was employed in the interim. *Id.* at 817. Thus, the alien's "temporary" setbacks, notwithstanding his otherwise gainful employment, were sufficient to render him likely to become a public charge.

Similarly, in *Guimond v. Howes*, 9 F.2d 412, 413 (D. Me. 1925), the court cited an alien's husband's temporary imprisonments of 60 and 90 days, during which time the alien had to rely on "charitable aid," as evidence that the alien was likely to become a public charge again in the future. In so doing, the court emphasized that "[i]n order to be a public charge, a man may not be a technical pauper." *Id.* at 414. It was sufficient that he is "likely to become a charge . . . upon the public." *Id.* Moreover, as explained *supra* pp. 10-11, the BIA and AG 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.

Plaintiffs assert that "the dominant application" of the public-charge ground of exclusion in the late 1800s "was to an immigrant likely to be housed in a state institution such as an almshouse." Cal. Br. 25 (citing cases); SF Br. 33. But those cases simply reflect the means of public support at the time, and could not have taken into account the modern welfare state.

Plaintiffs cite the 1999 Guidance as evidence that the INS understood "public charge" as limited to "people primarily dependent on the government for subsistence." SF Br. 38-39; Cal. Br. 6. But 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. 28,689, 28,676-77 (May 26, 1999).

3. Plaintiffs' remaining arguments are similarly unavailing. In arguing that the Rule is invalid, plaintiffs assert that many recipients of Medicaid, SNAP, and housing benefits are "member[s] of working families." Cal. Br. 28. 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 did not violate those principles in concluding that aliens who are expected to 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 its definition of "public charge" "might deem 40% of U.S. citizens public charges." SF Br. 23, 42; Cal. Br. 41. 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 not subject 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). U.S. citizens need not, for example, have sponsors who must promise to support the individual and reimburse the government for any benefits received. And U.S. 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* The Centers for Disease Control and Prevention, *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).[2]

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

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 while an estimated 40% of U.S. citizens participate in public-benefit programs at some point in their lives, "not all citizens who participate in the programs listed in the proposed rule would technically meet the proposed definition of public charge" and the study could not "appropriately model" the number of U.S. citizens who would meet the Rule's requirements. Study 11-12.[3] The study also included benefits—such as the Children's Health Insurance Program—that the Rule excludes. Study 12; 84 Fed. Reg. at 41,501.

C. The Rule Is Not Arbitrary Or Capricious

Plaintiffs assert that the Rule fails arbitrary-and-capricious review because, according to plaintiffs, the agency failed to explain its reasons for departing from the 1999 Guidance and failed to adequately "grapple" with the potential costs and public-health effects of the Rule. Cal. Br. 42-49; SF Br. 44-54. Those assertions do not withstand scrutiny.

DHS acknowledged its policy change and provided "good reasons" for it, *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). *See* AOB 36-37; *see also, e.g.*, 84 Fed. Reg. at 41,295, 41,319-20; 83 F3d. Reg. at 51,123, 51,163-64. Specifically, the agency

[3] Danilo Trisi, Ctr. on Budget & Policy Priorities, *Trump Administration's Overbroad Public Charge Definition Could Deny Those Without Substantial Means A Chance To Come To Or Stay In The U.S.* (May 30, 2019), https://perma.cc/4J72-GF6P (Study).

explained that the 1999 Guidance drew an "artificial distinction between cash and non-cash benefits," 83 Fed. Reg. at 51,123, and was, as a result, "overly permissi[ve]" and out of sync with congressional intent, 84 Fed. Reg. at 41,319. The Rule's definition of "public charge" corrected these deficiencies and brought the definition into alignment with Congress's goal of ensuring that aliens admitted to the country or permitted to adjust status do not rely on public resources to meet their needs. 83 Fed. Reg. at 51,122.

Plaintiffs contend that DHS failed to adequately explain why it overrode the 1999 Guidance's conclusion that exempting Medicaid from the public-charge assessment would promote public health. Cal. Br. 47-48; SF Br. 50. To the contrary, the agency explained that, to the extent the 1999 Guidance justified its more limited definition of public charge on public-health grounds, the agency was no longer comfortable disregarding the "longstanding self-sufficiency goals set forth by Congress" in "the hope that doing so might" improve public health. 84 Fed. Reg. at 41,314. As the agency emphasized, it did "not believe that Congress intended for DHS to administer [the public-charge inadmissibility provision] in a manner that fails to account for aliens' receipt of food, medical, and housing benefits." *Id.* The agency thus plainly offered a "justification for departing from" the 1999 Guidance, SF Br. 50, and explained why it "believe[d] [the new policy] to be better," *Fox Television*, 556 U.S. at 515. That is all the law requires.

Plaintiffs likewise err in asserting that the agency failed to adequately address the potential costs and other adverse effects of the Rule, including the likely disenrollment in public-benefit programs by some who are subject to the Rule and some who are not. SF Br. 51-54; Cal. Br. 44-45. DHS expressly acknowledged that the Rule would likely cause aliens to disenroll in public-benefit programs and that such disenrollment could impose downstream costs on state and local governments, healthcare providers, and the aliens themselves. *See, e.g.,* 84 Fed. Reg. at 41,313. DHS thus did not "*declin[e] to discuss what the likely costs in fact are*," as plaintiffs assert. Cal Br. 44. *See San Francisco*, 944 F.3d at 801 (noting that DHS addressed the costs and benefits of the Rule "at length").

As plaintiffs point out, the agency acknowledged that estimating the precise impact of its Rule was difficult, given the inherent uncertainty regarding how many aliens might disenroll, how long they would remain disenrolled, and how such disenrollment would ultimately effect stakeholders. *See* 84 Fed. Reg. at 41,313. DHS also made the commonsense observation that disenrollment by aliens not subject to the Rule was "unwarranted." *Id.* But DHS nonetheless took steps to mitigate the adverse public-health and other potential impacts of the Rule by, for example, excluding certain benefits and recipients from the Rule's coverage and committing to provide clear guidance on the Rule's scope. *See* AOB 39-40. And it ultimately concluded that furthering Congress's stated goal of alien self-reliance outweighed whatever public-health benefits a more permissive rule might have. 84 Fed. Reg. at

41,313. Thus, DHS acknowledged the potential costs, took steps to mitigate those costs, and explained why it was adopting the Rule notwithstanding those potential costs. Those actions satisfy arbitrary-and-capricious review. *See San Francisco*, 944 F.3d at 803; *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 similarly miss the mark when they argue that DHS failed to adequately address certain public-health concerns that commentators raised, including, in particular, the possibility that the Rule could result in lower vaccination rates. Cal. Br. 46-47; SF Br. 45-49. "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. For example, in response to comments, DHS excluded the Children's Health Insurance Program and Medicaid benefits received by those under 21 from the Rule's coverage, thereby addressing "a substantial portion" of the "vaccinations issue." 84 Fed. Reg. at 41,384.

Plaintiffs (SF Br. 46) urge that DHS was unjustified in asserting that it "believe[d] [the Rule] will ultimately strengthen" public health by denying admission or adjustment "to aliens who are not likely to be self-sufficient." 84 Fed. Reg. at 41,314. But, as the government explained, AOB 43, DHS did not cite that prediction 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.

D. The Rule Does Not Violate The Rehabilitation Act

As the district court correctly determined, plaintiffs do not raise even serious questions with respect to whether the Rule violates the Rehabilitation Act. ER50; *see also San Francisco*, 944 F.3d at 800. The Rehabilitation Act bars federal agencies from denying a program benefit to an "otherwise qualified individual with a disability . . . solely by reason of her or his disability." 29 U.S.C. § 794(a). Nothing in the Rule indicates that an individual will be denied admission or adjustment of status solely by reason of their disability. 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.

Plaintiffs note (Cal. Br. 50-51) that an alien's disability will be considered a negative factor if it interferes with an alien's ability "to provide and care for himself or herself, to attend school, or to work." Plaintiffs also note (Cal. Br. 52) that a disabled person who relies on Medicaid to obtain necessary services is likely to be found inadmissible under the Rule. But individuals who cannot care for themselves or rely on Medicaid on a regular basis are not "otherwise qualified" for admission under the Rule. *See Southeastern Cmty. College 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."). Put differently, a nondisabled person who could not care for himself or was expected to use Medicaid regularly is equally likely to be found inadmissible under the Rule.

In addition, in 1996, Congress explicitly added "health" as a factor DHS "shall" consider in evaluating whether the alien is likely to become a public charge. 8 U.S.C. § 1182(a)(4)(B)(i). The Rule thus effectuates Congress's express command that DHS take an alien's medical condition, including a disability, into account. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (A "specific statute will not be controlled or nullified by a general one.").

III. The Remaining Factors Weigh Against A Preliminary Injunction

The remaining preliminary-injunction factors also mandate reversal. Plaintiffs do not dispute that, while the Rule is enjoined, DHS will be forced to continue 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 San Francisco*, 944 F.3d at 806. Quoting the district court, plaintiffs instead assert that DHS conceded that it would not "suffer any hardship in the face of an injunction." SF Br. 57 (quoting ER86). As is clear from context, the court was merely stating that the government would be able to continue to administer the public-charge provision under the interpretation that the Rule superseded. That statement is accurate, but it misses the fundamental point that 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.

Plaintiffs' asserted injuries are based on speculation and do not demonstrate irreparable harm justifying a preliminary injunction. *See supra* Part I. But even if they did demonstrate such 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; *New York*, 2020 WL 413786, at *1.

CONCLUSION

The judgment of the district court should be reversed.

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) and Circuit Rule 32-1 because it contains 6,994 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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