

1 JOSEPH H. HUNT  
 Assistant Attorney General  
 2 DAVID L. ANDERSON  
 United States Attorney  
 3 ALEXANDER K. HAAS, SBN 220932  
 Branch Director  
 4 ERIC J. SOSKIN  
 Senior Trial Counsel  
 5 KERI L. BERMAN  
 KUNTAL V. CHOLERA  
 6 JOSHUA M. KOLSKY, DC Bar No. 993430  
 Trial Attorneys  
 7 United States Department of Justice  
 Civil Division, Federal Programs Branch  
 8 P.O. Box 883  
 Washington, D.C. 20044  
 10 Telephone: (202) 305-7664  
 11 Facsimile: (202) 616-8470  
 Email: Joshua.kolsky@usdoj.gov

12 Attorneys for Defendants

13  
 14 **IN THE UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
 15

16 CITY AND COUNTY OF SAN FRANCISCO, *et al.*,  
 17 *Plaintiffs,*  
 18 v.  
 19 U.S. CITIZENSHIP AND IMMIGRATION  
 20 SERVICES, *et al.*,  
 21 *Defendants.*

Case No. 19-cv-4717-PJH

**MEMORANDUM OF LAW IN  
 SUPPORT OF DEFENDANTS'  
 MOTION FOR STAY OF  
 INJUNCTION PENDING APPEAL**

23 STATE OF CALIFORNIA, *et al.*,  
 24 *Plaintiffs,*  
 25 v.  
 26 U.S. DEPARTMENT OF HOMELAND  
 27 SECURITY, *et al.*,  
 28 *Defendants.*

Case No. 19-cv-4975-PJH

Date: December 4, 2019  
 Time: 9:00 am  
 Judge: Hon. Phyllis J. Hamilton

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on December 4, 2019, at 9:00 am or as soon thereafter as it may be heard before Chief Judge Phyllis J. Hamilton, Defendants will and do hereby move for an order staying the preliminary injunction in these cases pending the government’s appeal to the Ninth Circuit Court of Appeals. This motion is based on this notice and the below Memorandum of Points and Authorities. The undersigned counsel conferred with Plaintiffs’ counsel who stated that Plaintiffs oppose this motion.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**INTRODUCTION**

The federal government respectfully moves to stay pending appeal the Court’s order granting preliminary injunction in San Francisco City and County, Santa Clara County, California, Oregon, the District of Columbia, Maine, and Pennsylvania. At the least, the Court should stay the injunction insofar as it applies beyond redressing the relevant injuries to Plaintiffs in these cases.

All the factors justifying a stay are met here. The government is likely to succeed on appeal both because the Plaintiffs lack standing and do not fall within the zone of interests of the relevant statute, and because the Department of Homeland Security (“DHS”) rule—*Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292 (Aug. 14, 2019) (“Rule”)—is fully consistent with the Immigration and Nationality Act (“INA”) and the Administrative Procedure Act (“APA”). The government will also suffer irreparable harm in the absence of a stay. As things currently stand, DHS may be forced to grant lawful permanent residence (“LPR”) status to aliens likely to become public charges at any time under the Rule and depend on public resources designated as public benefits for purposes of a public charge inadmissibility determination under the Rule. This state of affairs irreparably harms the government (and hence the public), who, as Congress has confirmed, has a “compelling ... interest” in ensuring that “aliens be self-reliant.” 8 U.S.C. § 1601(7).

Such an ongoing and significant intrusion into DHS’s authority over who is entitled to an

1 adjustment of their immigration status is particularly unwarranted here, where the only alleged injuries  
 2 Plaintiffs would face from a stay are speculative downstream effects from the decisions of nonparties  
 3 in response to the challenged Rule during the pendency of the litigation. Even if these purported  
 4 injuries could give Plaintiffs standing (they cannot), they certainly would not justify inflicting such  
 5 substantial harm on DHS, especially as it is likely to prevail on appeal.

6 This Court should therefore stay its injunction of the Rule pending the resolution of the  
 7 government's appeal.

### 8 **ARGUMENT**

9 In considering whether to grant a stay pending appeal, the Court must consider four factors:  
 10 (1) the applicant's likelihood of success on the merits; (2) whether the applicant will suffer irreparable  
 11 injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public  
 12 interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). All four factors favor a stay here.

#### 13 **I. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS**

14 The government respectfully submits that notwithstanding the Court's decision, it is likely to  
 15 succeed on the merits of its appeal. As Defendants explained in their Oppositions to Plaintiffs'  
 16 Motions for Preliminary Injunction and at oral argument, Plaintiffs are neither the appropriate parties  
 17 to challenge the Rule nor have they presented tenable objections to it. *California v. DHS*, ECF No. 97  
 18 (CA PI Opp.) 5-32; *San Francisco v. USCIS*, ECF No. 98 (SF PI Opp.) 5-20.<sup>1</sup> The Court's conclusions  
 19 to the contrary are unlikely to withstand appellate review.

20 **A.** The Court concluded that Plaintiffs have suffered a cognizable injury—and have ripe  
 21 claims—on the theory that the Rule will have various downstream effects on their fisci based on the  
 22

---

23  
 24 <sup>1</sup>The Court considered a third related case simultaneously with the two cases identified herein, *La*  
 25 *Clinica de la Raza v. Trump*, Case No. 19-cv-4980. However, the Court determined that the plaintiff  
 26 organizations in that case had not demonstrated a likelihood of success or serious questions going to  
 27 the merits of their APA causes of action and therefore did not consider their alleged harms in the  
 28 scope of the injunction ordered. *California v. DHS*, Case No. 19-cv-4975, ECF No. 120 at 70-72, 91  
 n.24. Defendants do not intend to appeal that ruling and will not, therefore, address the allegations of  
 the *La Clinica* case in this memorandum.

1 independent decisions of nonparty aliens affected by the Rule. PI Order 79-83. But the Supreme Court  
2 has repeatedly “decline[d] to abandon [its] usual reluctance to endorse standing theories that rest on  
3 speculation about the decisions of independent actors,” and that reluctance should apply with even  
4 more force where, as here, such a theory “relies on a highly attenuated chain of possibilities.” *Clapper*  
5 *v. Amnesty Int’l USA*, 568 U.S. 398, 410, 414 (2013); *see* CA PI Opp. 7-9; SF PI Opp. 6-8. And even if  
6 Plaintiffs were able to establish that they would incur these speculative costs, they have not and cannot  
7 show that these costs would outweigh the ones they would have incurred based on aliens who would  
8 have resided within their jurisdictions, and consumed their resources, but for the Rule. *Cf. Henderson*  
9 *v. Stalder*, 287 F.3d 374, 379-80 (5th Cir. 2002) (use of plaintiffs’ tax dollars to produce a challenged  
10 license plate “is insufficient to confer standing” in part because motorists who choose the license plate  
11 pay additional fees that “offset the administrative costs” of the plates). Nor can Plaintiffs rely on  
12 “increased operational costs” related to “answering questions about the Rule, processing  
13 disenrollments, analyzing the impact of the rule on their services and undertaking community  
14 education and outreach.” PI Order 81-83. Plaintiffs have identified no authority for the remarkable  
15 proposition that States and municipalities may challenge any federal policy so long as it would require  
16 them to make administrative updates. *See Crane v. Johnson*, 783 F.3d 244, 253 (5th Cir. 2015) (rejecting  
17 state officials’ claim that they have standing to challenge DACA on the theory that policy would  
18 require that them to “alter their current processes to ensure” compliance) and agreeing that “a  
19 government employee responsible for carrying out an agency policy does not have standing to  
20 challenge that policy merely because of work responsibilities related to that policy”). For similar  
21 reasons, Plaintiffs claims are not ripe since they cannot allege that they have witnessed a material  
22 increase in State benefit enrollment, or that they will otherwise soon incur any other cost that is  
23 considered a cognizable Article III injury.  
24

25 In any event, even if Plaintiffs had Article III standing, they would fall outside the zone of  
26 interests governed by 8 U.S.C. § 1182(a)(4). *See* CA PI Opp. 11-12; SF PI Opp. 8-9. It is aliens  
27 improperly determined inadmissible, not States, who “fall within the zone of interests protected” by  
28

1 any limitations implicit in §§ 1182(a)(4)(A) and 1183, because they are the “reasonable—indeed,  
2 predictable—challengers” to DHS’s inadmissibility decisions. *Match-E-Be-Nash-She-Wish Band of*  
3 *Pottawatomi Indians v. Patchak*, 567 U.S. 209, 227 (2012). And to the extent the public charge  
4 inadmissibility provision anticipated that it would implicate States’ interests, those interests are the  
5 inverse of those Plaintiffs seek to protect here. The Rule is constructed to better ensure that aliens  
6 seeking to come to the United States temporarily or permanently will be self-sufficient.<sup>2</sup>

7 **B.** On the merits, this Court held that the “Rule’s interpretation defining anyone who  
8 receives any quantity of benefits for 12 months (or fewer) out of a floating 36-month window as a  
9 public charge is not a permissible or reasonable construction of the statute” or that in the alternative  
10 Plaintiffs have raised serious questions as to whether the statute “unambiguously forecloses ... DHS’s  
11 expansive interpretation of the term.” PI Order 46-48. However, as Defendants demonstrated, the  
12 Rule’s interpretation falls squarely within the historical understanding of the term public charge, which  
13 was defined to generally include anyone that is “an obligation or liability.” Stewart Rapalje et al., Dict.  
14 Of Am. And English Law (1888); *see also* CA PI Opp. 12-13. Indeed, no historical source uses the  
15 definition promoted by Plaintiffs of a person that is permanently, *see* CA PI Opp. 16, and “primarily  
16 dependent on the government,” *see* SF PI Opp. 11. Here, the new standard effectuates the general  
17 “principle of United States immigration law” of “[s]elf-sufficiency,” 8 U.S.C. § 1601—and the specific  
18 requirement that “[a]ny alien who ... is likely at any time to become a public charge is inadmissible,”  
19 8 U.S.C. § 1182(a)(4)—by ensuring that aliens who seek admission or an adjustment of status have  
20 not received or will not receive public benefits for an extended period. That determination is well  
21 within Defendants’ delegated interpretive authority.

22  
23 Congress delegated broad interpretive authority concerning the meaning of the statutory term  
24 “public charge” to the Executive Branch. That delegation permits the Executive Branch to adopt  
25 different interpretations of the same statutory language over time, so long as those interpretations are

26  
27 <sup>2</sup> Grounds for Exclusion of Aliens under the Immigration and Nationality Act, House Committee on  
28 the Judiciary, 100th Congress, Doc. No. 95 at pg. 124-25 (Sept. 1988) (public charge ground of  
inadmissibility is intended to address issue of aliens “receiv[ing] public assistance”).

1 “based on a permissible construction of the statute.” *Altera Corp. & Subsidiaries v. Comm’r*, 926 F.3d  
2 1061, 1075 (9th Cir. 2019) (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984)). Indeed,  
3 “[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency considers  
4 varying interpretations and the wisdom of its policy on a continuing basis, for example, in response  
5 to changed factual circumstances, or a change in administrations.” *National Cable & Telecommunications*  
6 *Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)) (cleaned up). As the Political Branches have  
7 long recognized, “[s]ince the elements constituting likelihood of becoming a public charge are varied,”  
8 the Executive Branch should have considerable “discretion” in determining whether “an alien falls  
9 into that category.” *Matter of Harutunian*, 14 I. & N. Dec. 583, 588 (BIA 1974) (quoting S. Rep. No.  
10 81-1515 at 349 (1950)). DHS’s Rule is therefore a permissible and reasonable interpretation of the  
11 public charge inadmissibility statute, and well within the authority delegated by Congress to the  
12 Executive Branch.

13  
14 This Court further held that the Rule’s interpretation of “public charge” is “at odds with  
15 persuasive Supreme Court” precedent in *Gegion v. Uhl*, 239 U.S. 3 (1915). PI Order 47-48. But *Gegion*  
16 has never been understood to have conclusively settled the meaning of “public charge” in subsequent  
17 immigration laws, let alone to have adopted a fixed definition of public charge that the Executive  
18 Branch must apply. Rather, the “single question” presented in *Gegion* was “whether an alien can be  
19 declared likely to become a public charge on the ground that the labor market in the city of his  
20 immediate destination is overstocked” under “the act of February 20, 1907.” 239 U.S. at 9-10. The  
21 Supreme Court answered no. As it observed, in the 1907 Act, “[p]ersons likely to become a public  
22 charge’ are mentioned between paupers and professional beggars, and along with idiots, persons  
23 dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect  
24 of a nature to affect their ability to earn a living, convicted felons, prostitutes, and so forth.” *Id.* at 10.  
25 Because these classes of enumerated aliens appeared “to be excluded on the ground of permanent  
26 personal objections accompanying them irrespective of local conditions,” the Court concluded that  
27  
28

1 the term “public charge” is presumably “to be read as generically similar to the others mentioned  
2 before and after.” *Id.*

3 As the government explained, Congress abrogated *Gegion*’s holding in a 1917 immigration  
4 statute. *See* PI Opp. 16-17; *see also United States ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929)  
5 (explaining that in the wake of the 1917 act, the public-charge statute “is certainly now intended to  
6 cover cases like *Gegion*”). But even if this Court continues to disagree on that score, Op. at 19-21,  
7 *Gegion*—resting as it did on a specific application of *noscitur a sociis* to a list in a 1907 statute—would  
8 not control the meaning of “public charge” in Illegal Immigration Reform and Immigrant  
9 Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996), enacted eight decades later.  
10 For one thing, *Gegion* did not hold that “public charge” within the 1907 statute “encompasses only  
11 persons who ... would be substantially, if not entirely, dependent on government assistance on a long-  
12 term basis,” Op. 19, but rather that an alien could not be classified as a public charge based solely “on  
13 the ground that the labor market in the city of his immediate destination is overstocked,” *Gegion*, 239  
14 U.S. at 9-10; *see id.* at 8-9 (“the only ground for the order was the state of the labor market at Portland  
15 at that time”). And even if *Gegion* could be read as broadly as this Court believes, there is no basis for  
16 importing its construction of the 1907 statute, which rested on specific application of *noscitur a sociis*,  
17 to the significantly different public-charge regime created by IIRIRA.  
18

19 The Court also observed that Congress previously rejected proposed expansions of the  
20 statutory term “public charge” to include non-cash benefits. PI Order 45-46. But “[f]ailed legislative  
21 proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute,”  
22 because “[a] bill can be proposed for any number of reasons, and it can be rejected for just as many  
23 others.” *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170  
24 (2001) (citation omitted). For that reason, “unsuccessful attempts at legislation are not the best of  
25 guides to legislative intent” as a general matter, and “the views of a subsequent Congress form a  
26 hazardous basis for inferring the intent of an earlier one.” *City of Milwaukee v. Illinois & Michigan*, 451  
27 U.S. 304, 332 n.24 (1981) (citations omitted).  
28



1           C.       The Court further erred in holding that the Rule is arbitrary and capricious because  
2 DHS failed to consider and respond to predictable costs to states and municipalities, PI Order 57-59,  
3 and failed to explain the Rule’s departure from the previous guidance’s concern with health effects  
4 created by decreased enrollment in public benefits, *id.* 61-62. The Court may not disregard DHS’s  
5 “explanations, reasoning, and predictions” simply because Plaintiffs “disagree[] with the policy  
6 conclusions that flowed therefrom.” *California by and through Becerra v. Azar*, 927 F.3d 1068, 1079 (9th  
7 Cir.), *reh’g en banc granted*, 927 F.3d 1045 (9th Cir. 2019).

8           First, an agency’s obligation to respond to comments on a proposed rulemaking is “not  
9 ‘particularly demanding.’” *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441-42 (D.C.  
10 Cir. 2012). “[T]he agency’s response to public comments need only ‘enable [courts] to see what major  
11 issues of policy were ventilated . . . and why the agency reacted to them as it did.’” *Pub. Citizen, Inc. v.*  
12 *FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993). Contrary to the Court’s finding, DHS considered comments  
13 about potential harms to state and local governments from the disenrollment effects of the Rule, and  
14 in fact modified the Rule in response. DHS devoted several pages of the Rule to describing and  
15 responding to comments that the Rule would lead to disenrollment from public benefits and increase  
16 costs for states and localities. Rule at 41310-14, 41469-70. DHS explained why the Rule was justified,  
17 notwithstanding the potential disenrollment impact. The “rule’s overriding consideration, *i.e.*, the  
18 Government’s interest . . . is a sufficient basis to move forward.” *Id.* at 41312 (explaining that the  
19 relevant Government interest are those set forth in PRWORA and codified at 8 U.S.C. § 1601). DHS  
20 has the “authority to take past, current, and likely future receipt of public benefits into account, even  
21 where it may ultimately result in discouraging aliens from receiving public benefits.” *Id.* at 41312. Also,  
22 the extent to which disenrollment might impact state and local governments is unknown because data  
23 limitations make it difficult to predict the disenrollment impact. *Id.* at 41313. Moreover, DHS made a  
24 number of changes to the Rule to mitigate some of the concerns raised regarding disenrollment  
25 impacts, such as excluding certain benefits from the scope of the Rule. *Id.* at 41313-14. This process—  
26 full consideration of the issues and the evidence on both sides, the adoption of changes in response,  
27  
28



1 and an articulated statement of the reasons for the agency’s ultimate decision—was neither arbitrary  
2 nor capricious.

3 Second, the Court erred in holding that DHS was required to do more to explain its changes  
4 from the 1999 Interim Guidance. All that DHS was required to do to permissibly change course was  
5 to acknowledge that the Rule does change course, provide a reasoned explanation for the change, and  
6 explain how it believes the new interpretation is reasonable. *See generally FCC v. Fox Television Stations,*  
7 *Inc.*, 556 U.S. 502 (2009). The Rule did all of these things. *See, e.g.*, Rule at 41308, 41319 (explaining  
8 that the prior guidance “failed to offer meaningful guidance for purposes of considering the  
9 mandatory factors and was therefore ineffective”). Having addressed these issues, DHS is entitled to  
10 full deference to its changed interpretations, consistent with its obligation to “consider varying  
11 interpretations and the wisdom of its policy on a continuing basis.” *Chevron*, 467 U.S. at 863-64  
12 (recognizing agencies receive deference to a “changed . . . interpretation of [a] term”).

## 14 II. THE REMAINING FACTORS FAVOR A STAY

15 Both the federal government and the public will be irreparably harmed if the injunction is not  
16 stayed. The federal government sustains irreparable injury whenever it “is enjoined by a court from  
17 effectuating statutes enacted by representatives of its people,” *Maryland v. King*, 567 U.S. 1301 (2012)  
18 (Roberts, C.J., in chambers). That injury is particularly acute here because the Court’s injunction will  
19 require DHS, on a nationwide basis, to grant lawful permanent resident status to aliens who are likely  
20 at any time to become public charges under the Rule and who depend on public resources designated  
21 as public benefits for purposes of a public charge inadmissibility determination under the Rule to meet  
22 their needs. See 8 U.S.C. § 1601 (“principle of United States immigration law” of “[s]elf-sufficiency”);  
23 *Id.* § 1601(2)(A) (“[T]he immigration policy of the United States [is] that aliens within the Nation’s  
24 borders not depend on public resources to meet their needs.”). DHS estimates that roughly 382,264  
25 people apply for an adjustment of status and are subject to a public charge inquiry each year. *See*  
26 Declaration of Daniel Renaud, Exh. 1, ¶ 4; Rule at 41497, 41464. If the Rule remains enjoined, some  
27 subset of this population will receive an adjustment of status that otherwise would not under the Rule’s  
28

1 more thorough review process. Renaud Decl. ¶ 4. DHS currently has no practical means of revisiting  
2 these determinations made under the prior guidance, and subjecting them to the Rule, if the injunction  
3 against the Rule is ultimately vacated. *Id.* And because those persons, by definition, are likely to receive  
4 government benefits in the future, the injunctions will inevitably result in the additional expenditure  
5 of government resources, precisely the harm that Congress and the rule seek to prevent. Moreover,  
6 every day the effective date of the Rule remains stayed, the Rule's future effectiveness is reduced: any  
7 public benefits received by aliens submitting status adjustment applications before the Rule takes  
8 effect will be counted only if they would have been covered by the 1999 Interim Field Guidance, Rule  
9 41321, which means that even if the government ultimately prevails, the Rule's future operation will  
10 be irreparably undermined.

11         The injunction also imposes significant administrative burdens on Defendants and needless  
12 uncertainty on the aliens Plaintiffs claim to support. For instance, USCIS has devoted significant time  
13 to preparing implementation of the Rule, including preparing training for the relevant officers at its  
14 National Benefit Center as well as across 88 Field Offices. *Id.* ¶ 5. The rollout of such widespread  
15 training cannot happen overnight, and USCIS will be forced to start much of the process over again  
16 if and when the injunction is vacated. *Id.* USCIS also hired contractors to enter the significant amount  
17 of data required on its new forms associated with the Rule. *Id.* ¶ 6. If the injunction is not stayed in  
18 the near future, contractors are likely to seek other employment, which will only further impede  
19 USCIS's ability to implement the Rule if and when the injunction is vacated. *Id.*

20         On the other side of the ledger, Plaintiffs will not suffer any irreparable injury. Their alleged  
21 harms stemming from possible downstream effects of the Rule are insufficient to create standing, *see*  
22 *supra* Pt. I.A, much less satisfy the more exacting requirements to establish irreparable injury, *see* CA  
23 PI Opp. 32-34; SF PI Opp. 20-23. And even if the Court accepts that the Rule will *eventually* cause  
24 Plaintiffs irreparable injury, they have provided no evidence that the Rule will irreparably drain their  
25 fiscs *during the pendency of an appeal*. *See* CA PI Opp. 34; SF PI Opp. 22-23. And even then, if it were  
26 clear that a stay would somehow irreparably harm these States, any such injuries would be substantially  
27  
28

1 outweighed by the harms to the government (and the public) associated with the threat of mandating  
2 the ongoing admission of aliens likely to become public charges under the Rule.

3 **CONCLUSION**

4 The government respectfully requests that the Court stay its preliminary injunction pending  
5 final resolution of the government's appeal.

6  
7 Dated: October 25, 2019

Respectfully submitted,

8 JOSEPH H. HUNT  
9 Assistant Attorney General

10 ALEXANDER K. HAAS  
11 Director, Federal Programs Branch

12 /s/ Joshua M. Kolsky  
13 ERIC J. SOSKIN  
14 Senior Trial Counsel  
15 KERI L. BERMAN  
16 KUNTAL V. CHOLERA  
17 JOSHUA M. KOLSKY, DC Bar No. 993430  
18 U.S. Dept. of Justice, Civil Division,  
19 Federal Programs Branch  
20 1100 L Street, N.W., Rm. 12002  
21 Washington, DC 20001  
22 Phone: (202) 305-7664  
23 Fax: (202) 616-8470  
24 Email: joshua.kolsky@usdoj.gov

25 *Attorneys for Defendants*