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,*

vs.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al.,

*Defendants-Appellants,*

On Appeal from the United States District Court, Northern District of California
Case No. 4:19-cv-04717-PJH (Hon. Phyllis J. Hamilton)

# ANSWERING BRIEF OF APPELLEES CITY AND COUNTY AND SAN FRANCISCO AND COUNTY OF SANTA CLARA

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## INTRODUCTION

Throughout our nation's history, millions of people have come to the United States looking for a better life—some of them with little more than the clothes on their back. For over a century, federal law has instructed immigration officials to deny admission and adjustment of status to anyone likely to become a "public charge." During that entire time, officials employed this public charge exclusion in only one narrow circumstance: if the person was likely to become *primarily dependent* on the government for subsistence. Accordingly, less than one percent of all applicants were denied admission based on this ground.

Last year, however, the Department of Homeland Security (DHS) suddenly changed course. Bucking almost 140 years of precedent, it issued a regulation that dramatically expands the universe of individuals who will be deemed a public charge and, thus, denied admission or an adjustment of status. *See Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("Rule"). Under the new Rule, DHS would deem someone a public charge if they use health-promoting benefits, like Medicaid and food stamps, even in amounts as low as 17 cents per day—benefits that more than 40% of American citizens receive at some point their lifetime. The Rule thus converts the public charge ground from a narrow exclusion into a far-reaching bar to immigration for low-income immigrants.

This effort to rewrite the underlying statute via rulemaking flies in the face of the plain meaning of the federal law, Congress's directives, decades of case law, and federal agency guidance. And in promulgating the Rule, DHS failed to account for the far-reaching harms the Rule would cause as it deters immigrants from using public benefits. It also failed to grapple with the fact that its predecessor agency concluded that DHS's purported goals of health and welfare would be better served by noncitizens accessing public benefits. For both these reasons, the district court correctly concluded that plaintiffs the City and County of San Francisco and the County of Santa Clara (collectively, the "Counties") are likely to succeed on the merits of their claims that the Rule violates the Administrative Procedure Act.

Unsurprisingly, given the Counties' role as safety-net providers of last resort, the Rule will also wreak havoc on the Counties' health and safety-net systems, public health, and economies. As DHS acknowledges, if allowed to go into effect, the Rule will cause thousands of County residents to forgo federal benefits like Medicaid and food stamps. Significant harm will inexorably flow to the Counties. For example, the Rule will strip the Counties of millions of dollars in health-related federal funds while increasing the costs to the Counties of providing care. And without critical preventive care, public health will

undoubtedly deteriorate. Accordingly, this Court should affirm the district court's decision to grant a preliminary injunction.

## STATEMENT OF THE ISSUES

1. Whether the Counties—which will suffer imminent financial injury if the Rule goes into effect—(a) have standing to challenge the Rule and (b) have established the requisite irreparable harm to warrant a preliminary injunction.

2. Whether the Rule is contrary to law because its new definition of "public charge" contravenes the term's longstanding statutory meaning.

3. Whether the Rule is arbitrary and capricious because DHS failed to adequately consider issues raised by commenters and proffered explanations contrary to the evidence before it.

## STATEMENT OF JURISDICTION

The Counties agree with Defendants' statement of jurisdiction.

## STATEMENT OF THE CASE

### A. Longstanding Definition of "Public Charge."

Under the Immigration and Nationality Act (INA), the federal government may deny admission or adjustment of status[1] to any noncitizen it determines is

[1] Public charge determinations generally apply to (1) noncitizens applying to enter the United States (admission), (2) noncitizens applying to adjust their immigration status to become lawful permanent residents (LPRs, also known as

"likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). For nearly 140 years, this provision has been consistently understood and applied to deny admission and lawful permanent residence to a narrow category of noncitizens: those who are likely to be primarily dependent on the government for subsistence.

In 1999, DHS's predecessor, the Immigration and Naturalization Service (INS), issued guidance formalizing this longstanding understanding of "public charge." It was spurred to do so after welfare and immigration reforms caused confusion that led noncitizens and their families to disenroll from public benefits, which INS explained had "an adverse impact not just on the potential recipients, but on public health and the general welfare." *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28,689, at 28,689 (May 26, 1999) ("1999 Field Guidance"). In the 1999 Field Guidance, INS made clear that a noncitizen would be deemed likely to become a "public charge" only if he or she was likely to become "primarily dependent on the government for subsistence." *Id.* INS explained this definition came from the plain meaning of the term, historical usage, and case law. *See id.* And, following extensive consultation with benefits-granting agencies, it determined that only the receipt of

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green card holders) (adjustment of status), and (3) LPRs returning to the United States after a 180-day absence (also admission).

two specific types of benefits could demonstrate that type of dependence: (1) public cash assistance for income maintenance purposes (*e.g.*, Supplemental Security Income (SSI), Temporary Assistance to Needy Families (TANF), or state or local cash assistance programs); or (2) long-term, institutionalized care at public expense. *Id.* INS made clear these were the only benefits it would consider when making public charge assessments.

Congress has considered proposals to alter this settled meaning of public charge—but never enacted any such changes. *See* pp. 43-44, *infra*.

### B. The Rule Dramatically Changes the Public Charge Assessment.

On October 10, 2018, DHS published a notice of proposed rulemaking in the Federal Register titled *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114 (Oct. 10, 2018) ("Proposed Rule"). In response to the Proposed Rule, DHS received over 266,000 comments. The "vast majority" of commenters urged DHS to rescind or significantly alter the Proposed Rule to avoid causing substantial harm to individuals, communities, and government entities. 84 Fed. Reg. 41,297. For example, "[m]any commenters particularly emphasized that disenrollment or forgoing enrollment would be detrimental to the financial stability and economy of

communities, States, local organizations, hospitals, safety net providers, foundations, and healthcare centers." *Id.* at 41,312; *see also* SER80-166.[2]

Despite the significant concerns raised during the comment period, DHS issued the substantially identical Final Rule on August 14, 2019. If allowed to take effect, the Rule will dramatically overhaul the public charge assessment in two key ways.

*First*, the Rule would require immigration officials to take non-cash benefits into account for the first time. Specifically, the Rule directs consideration of non-emergency Medicaid, Supplemental Nutrition Assistance Program (SNAP, formerly known as food stamps), public housing, and Section 8 housing assistance in addition to the cash benefits and institutionalized care previously considered (the "enumerated benefits"). 8 C.F.R. §§ 212.21(b)(2), (6).

*Second*, the Rule would replace the longstanding definition of the term "public charge"—a noncitizen *primarily* dependent on the government for income maintenance or institutionalized care—with a far broader definition that sweeps in any noncitizen who receives any enumerated benefit for more than 12 months within a 36-month period, 8 C.F.R. § 212.21(a), even in amounts as low as 17 cents per day. ER 47.

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[2] ER refers to Appellants' Excerpts of Record. SER refers to Appellees' Supplemental Excerpts of Record.

### C. The Counties Are Responsible for Core Health and Safety-Net Functions, Which Depend on People Accessing Public Benefits.

The Counties serve as the frontline providers of essential health and safety-net services to their residents. And in both Counties, more than one-third of all residents are foreign born. SER69 ¶4; SER3 ¶6. Both San Francisco and Santa Clara operate extensive safety-net health care systems that serve as providers of last resort, offering care to low-income and other vulnerable residents regardless of their ability to pay. SER45 ¶7; SER33 ¶3. Both Counties own and operates a Level I trauma center hospital, additional hospitals, a public health department, and many clinics that together provide residents and visitors with a range of emergency services, as well as specialized, preventive, primary, and routine care. SER44-45 ¶¶4-6; SER63-64 ¶¶4-5; SER33 ¶3; SER30 ¶¶2-3. Both Counties are required by law to provide emergency care to all persons in need of medical care, regardless of their insurance status or ability to pay. 42 U.S.C. § 1395dd(b)(1); Cal. Welf. & Inst. Code § 17000. And the two Counties spend millions of dollars each year to provide uncompensated care to patients who are not covered by insurance and cannot pay for their care. SER20 ¶8; SER47-48 ¶15.

In addition, the Counties bear responsibility for administering federal public benefits, including SNAP and TANF, and assisting County residents in applying for Medicaid, SSI, and other federal programs. SER54-55 ¶¶4-8; SER70 ¶¶6-7; SER8 ¶¶3-4. They also provide critical locally funded programs such as nutrition

assistance to address food insecurity. SER9 ¶8. The Counties often receive questions from current and potential enrollees about eligibility and/or associated immigration concerns. SER55-56 ¶¶8, 11-12; SER41 ¶9; SER13 ¶8. And when there are dramatic changes in the public-benefits landscape, the Counties must expend resources to educate their staff on the new regulations, amend communication materials, and adjust programming. *See* SER56 ¶¶11-12; SER71-72 ¶¶10-11; SER12-13 ¶¶4-9; SER5-6¶¶13-15; SER10 ¶11.

The Counties' health and safety-net programs depend on community members enrolling in federal public benefits that allow them to access healthcare, nutritional, and other benefits available to them. SER47 ¶14; SER49 ¶19. Delays in, or lack of access to, preventative care can lead to serious and urgent health problems that the Counties' hospitals must treat regardless of a patient's ability to pay. SER47-48 ¶¶14-16; SER19-20 ¶7; SER33-34 ¶¶5-7; SER27-28 ¶¶4-6; SER37-38 ¶¶5-6. Further, for the Counties' public health departments to prevent communicable disease, all residents must be able to obtain vaccines and medical treatment for contagious illnesses. SER64-65 ¶7; *see also* SER23-24 ¶¶7-13.

Accordingly, it is unsurprising that even DHS acknowledges that the Rule would have dramatic consequences both for immigrant communities and for localities. For example, DHS projects that the Rule would cause immigrants to disenroll from benefits, thereby shifting enormous costs onto the Counties as the

health providers of last resort. *See* 84 Fed. Reg. at 41,300-01 (estimating $2.5 billion annual reduction in transfer payments). DHS also recognizes that negative public health consequences could flow from the Rule, including diminished vaccination rates. *Id.* at 41,412-13.

### D. Procedural History.

The same week DHS issued the Rule, the Counties filed suit challenging its validity. ER101. The Counties asserted that the Rule is "not in accordance with law" and is "arbitrary, capricious, [and] an abuse of discretion" in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). ER120-22.

On October 11, 2019, the Northern District of California enjoined the Rule within the Counties, as well as within plaintiffs-appellees states in related case No. 19-17214. ER92. After carefully examining the history of Congress's use of the term "public charge," the district court concluded that "plaintiffs are likely to succeed on the merits with respect to their claim that the Rule's definition of public charge is unreasonable and not based on a permissible construction of the statute." ER16-48. Specifically, the court explained that due to the term's "long-standing focus" on whether a person was able to support themselves, and its well established allowance for modest aid, as well as the legislative history of revisions to the INA in 1996, "it is likely that the Rule's interpretation defining anyone who receives any quantity of benefits for 12 months (or fewer) out of a floating 36-

month window as a public charge is not a permissible or reasonable construction of the statute." ER46.

The district court separately held that the Rule is likely arbitrary and capricious. ER53-62. First, the court held that Defendants failed to appropriately weigh the costs and benefits of the Rule, noting that "even under the deferential APA analysis, DHS appears to have wholly failed to engage with th[e] entire category of comments[ ]" concerning the effects on state and local governments. ER55. Second, DHS "simply declined to engage with certain, identified public-health consequences of the Rule," such as the public health harms that would flow from fewer people being vaccinated after disenrollment from Medicaid. ER62. The district court also concluded that DHS had failed to explain why it had departed from its predecessor's assessment that discouraging usage of supplemental, health promoting benefits harmed the public health. ER62-63.

Finally, the district court observed that the harm to the Counties would be immediate and irreparable absent an injunction (ER82), and that there "is little question that the balance of equities and hardships tip sharply in favor of the States and Counties" because "implementing the Rule after decades of a consistent policy prior to a determination of this action on the merits . . . does little to advance the defendants' interests, and it would entirely upend the plaintiffs' (and the non-party aliens') interests." ER86-87.

All four other district courts to have considered legal challenges to the Rule have agreed that it is likely invalid and enjoined it from going into effect. *See Washington v. DHS*, No. 4:19-CV-5210-RMP, 2019 WL 5100717 (E.D. Wash. Oct. 11, 2019); *New York v. DHS*, No. 19-CIV-7777 (GBD), 2019 WL 5100372 (S.D.N.Y. Oct. 11, 2019); *Cook Cty., Ill. v. McAleenan*, No. 19-C-6334, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019); *CASA De Md., Inc. v. Trump*, No. PWG-19-2715, 2019 WL 5190689 (D. Md. Oct. 14, 2019).

On December 5, 2019, a motions panel of this Court granted Defendants' motion to grant a stay of the Northern District of California and Eastern District of Washington injunctions.[3] Dkt. No. 27. The Counties moved for en banc reconsideration of the motions panel's order on December 19, 2019. Dkt. No. 30. The Counties' motion remains pending.

[3] As this Court recently recognized, a motions panel's finding concerning whether a party has made an adequate showing of likelihood of success on the merits to obtain a stay "does not bind the merits panel in reviewing" the underlying injunction, "as that is not the standard the merits panel will apply." *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 n.2 (9th Cir. 2019). Indeed, the entire purpose of a stay motion on an expedited timeline with limited briefing is to prevent irreparable harm while the appeal is pending in order to allow time for briefing and a merits decision in the ordinary course of the litigation. *Compare* Fed. R. App. P. 27(a) & 9th Cir. R. 27-3, *with* Fed. R. App. P. 32(a). The very nature of a motions panel's decision to grant or deny a stay pending appeal thus implies that the motions panel's analysis may be revisited after full merits briefing.

## STANDARD OF REVIEW

This Court reviews a "district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017). This "review is limited and deferential." *Id.* The Court "review[s] the district court's legal conclusions de novo" and "the factual findings underlying its decision for clear error." *Id.* The Court reviews "the injunction's scope for abuse of discretion." *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 969 (9th Cir. 2015).

## SUMMARY OF ARGUMENT

The district court properly granted the Counties' motion for a preliminary injunction. The Rule is both contrary to law and arbitrary and capricious in violation of the APA. And the Counties, which will be immediately and irreparably harmed if the Rule goes into effect, have standing to challenge the Rule and have demonstrated the need for preliminary injunctive relief. This Court should affirm.

1. The Counties have standing to challenge the Rule. It is undisputed that the Rule will cause millions of people—thousands in San Francisco and Santa Clara alone—to disenroll from or forgo critical public benefits. Significant harm will necessarily flow. The Counties will lose millions of dollars in Medicaid reimbursement funds as a result of people disenrolling from Medicaid. The Counties' uncompensated care costs will go up as newly uninsured individuals

present at the Counties' emergency departments requiring urgent care. Public health in the Counties will suffer as vaccination rates and preventive care decline—risking disease outbreaks. And the Counties will incur significant administrative burdens—e.g., answering patient and client questions, processing requests for disenrollment, and preparing and distributing materials to train staff and educate the public. Each of these are direct cognizable injuries sufficient to support standing. Furthermore, the Counties satisfy the modest zone-of-interest requirement because they, *inter alia*, administer and pay for public benefit programs that are integral to the public charge assessment, have legally-enforceable rights with respect to affidavits of support, and will incur financial and public health costs as a result of the Rule.

2. The Counties are likely to succeed on the merits of their claim that the Rule is contrary to law. The Rule is irreconcilable with the longstanding meaning of "public charge" established and preserved by Congress. Every applicable tool of statutory interpretation makes plain that the term "public charge" has always captured the concept of a person primarily or entirely dependent on the government for subsistence. And even as Congress substantially changed, reorganized, and reenacted immigration law, it never altered that meaning. DHS's contrary interpretation is entitled to no deference because Congress has not vested DHS with authority to promulgate interpretations of the INA that carry the force of

law. But even if DHS were accorded deference, the Rule would still be unlawful because the language, historical context, and subsequent legislative history of the public charge law demonstrate that the Rule is not a reasonable interpretation of the statute.

3. The Counties are also likely to succeed on the merits of their claim that the Rule is arbitrary and capricious. Although the "scope of review under the 'arbitrary and capricious' standard is narrow," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), an agency must still engage in "reasoned decisionmaking," *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015). DHS failed to meet this standard in at least three ways. First, DHS disregarded the myriad evidence that the Rule would have significant negative public health consequences—asserting without any analysis or support that the Rule would instead lead to a net health benefit. Relatedly, DHS ignored without explanation its predecessor agency's conclusion that dispelling noncitizens' fear of using public benefits was key to protecting public health. Finally, DHS failed to grapple with the well-documented and significant harm the Rule will cause localities and states.

4. The remaining preliminary injunction factors all weigh heavily in support of granting preliminary relief. As discussed above, the Counties will suffer imminent and irreparable harm if the Rule goes into effect. Defendants

meanwhile will suffer no harm other than the temporary inability to implement their new policy preference. Moreover, the predictable disenrollment from Medicaid in the absence of an injunction will have adverse health consequences for both individuals who disenroll and the entire populations of the Counties. Accordingly, the district court properly concluded that the balance of hardships and public interest "tip sharply" in favor of the Counties. ER86.

# ARGUMENT

## I. The Counties Have Standing To Bring This Suit.

Defendants first argue that the Counties have not alleged a cognizable injury within the zone of interest protected by the public charge statute. Appellants' Opening Brief ("AOB") 14-18. Defendants are incorrect.

### A. The Counties Have And Will Continue To Suffer Direct Injuries As A Result Of The Rule.

There is no dispute that if the Rule goes into effect, it will cause individuals—including noncitizens and naturalized citizens who are not subject to public charge assessments—to disenroll from or forgo critical public benefits out of fear of potential immigration consequences. As the district court found—after reviewing more than twenty declarations submitted by the Counties—both San Francisco and Santa Clara have *already* experienced a significant decline in enrollment in certain benefits among impacted households since the proposed rule was issued. ER79 (citing declarations). This trend will unquestionably continue if

the Rule goes into effect. Indeed, DHS acknowledges this fact, projecting that 2.5% of "individuals who are members of households with foreign-born non-citizens" will disenroll from programs like Medicaid and SNAP that are covered by the Rule. 84 Fed. Reg. at 41,463.

Significant harm will inexorably flow to the Counties from this disenrollment in at least three ways:

1. First, the Counties will lose millions of dollars in Medicaid reimbursement funds as a result of people disenrolling from Medicaid. *See, e.g.*, SER19 ¶5 (estimating a $7.5 million loss in Medicaid reimbursement funds for San Francisco if 2.5% of individuals in households with a noncitizen disenroll from Medicaid); SER60 ¶32 (estimating $4.6 million in Medicaid fund losses for Santa Clara from a 1.9% decline in enrollment). Once again, DHS itself acknowledges the inevitability of this result, projecting more than a billion dollar reduction in Medicaid reimbursement payments due to benefit drop-offs. 83 Fed. Reg. 41,301.

Defendants argue that this injury is insufficient to support standing because any funds the Counties lose will be offset by a reduction in the costs they would have incurred to provide medical care and benefits to individuals who choose to disenroll as a result of the Rule. AOB 15. Defendants are wrong.

As an initial matter, an individual's decision to forgo Medicaid does not mean that they will not get sick. In fact, absent the preventative care and

vaccinations available to Medicaid recipients, an individual is *more likely* to get sick. SER48 ¶16. And the Counties must treat anyone who enters their emergency departments in need of screening and emergency care, regardless of insurance status or ability to pay, as required by federal and state law. SER47 ¶14. Thus, as the unrebutted evidence provided by the Counties establishes, the Counties will incur substantial costs providing uncompensated care to patients who are no longer covered by Medicaid and cannot pay for their care. SER19-20 ¶¶7-8; SER27-28 ¶¶4-6; SER33-34 ¶¶5-7; SER47-49 ¶¶14-18. Defendants' contend that these financial injuries to the Counties will be offset "by a reduction in the costs they would have incurred to provide public benefits." AOB 15. But this is incorrect. Although some states subsidize a portion of Medicaid expenses and offer state and federal funding for healthcare through unified programs, counties, including Santa Clara and San Francisco, do not. Accordingly, the Counties will see no reduction in public benefit outlays as noncitizens forgo federal public benefits, and Defendants' arguments on this point are irrelevant to the Counties. If anything, the Counties will have to increase their spending on local benefits—such as local food stamp or food delivery services—to compensate for the loss of federal assistance. SER9-10 ¶¶8, 11.

2. In addition to reduced Medicaid reimbursement funds and increased uncompensated care costs, the evidence establishes that the Counties will incur

substantial new operational costs as a result of the Rule. *See* ER81-83; SER71-72 ¶¶9-11; SER12-13 ¶¶ 4-9; SER5-6 ¶¶13-15. Indeed, the evidence demonstrates they already have. San Francisco has spent more than 1,100 hours and $88,000, *inter alia*, processing disenrollment requests from persons terminating benefits as a result of the Rule, answering questions about the Rule, analyzing caseload data to understand the Rule's impacts and implications for program operations, and developing contingency plans to respond to disenrollment from SNAP and Medicaid. SER13 ¶9. Santa Clara has likewise spent over 1,000 hours on similar efforts. SER56 ¶12. The district court correctly found that these costs will continue to mount if the Rule goes into effect. ER82.

Defendants do not deny that this is so. Nor could they, given that DHS specifically contemplated these costs when promulgating the Rule. *See, e.g.*, 83 Fed. Reg. 51,260; 84 Fed. Reg. 41,389. Rather, Defendants argue that such costs are insufficient to establish standing. AOB 15-16. Not so. Numerous cases have found governmental administrative costs caused by changes in federal administrative policy to be cognizable Article III injuries. *See, e.g.*, *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004); *Texas v. United States*, 787 F.3d 733, 748-41 (5th Cir. 2015); *California v. Trump*, 267 F. Supp. 3d 1119, 1126 (N.D. Cal. 2017).

Notably, the only authority Defendants offer in support of their contrary argument is a case holding that a state does not "acquire standing to challenge any federal law merely by enacting a statute—even an utterly unenforceable one—purporting to prohibit the application of the federal law." *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 271 (4th Cir. 2011) (cited at AOB 16). This is entirely irrelevant where—as here—standing is based not on a legislative statement, but proof that the Counties will suffer "predictable, likely, and imminent" costs. ER82.

3. Finally, the Counties' economies will also suffer as the Rule causes noncitizens and their families to forgo and disenroll from benefits. SNAP, for example, provides eligible individuals with electronic funds to purchase food from retailers like grocery stores. Not only does the benefit inject money into the local economy via these retailers, but those funds have beneficial economic ripple effects as they circulate in the economy: according to a United States Department of Agriculture study, every dollar issued to a SNAP recipient results in $1.79 in local economic activity. SER16 ¶10. Thus, even under DHS's 2.5% disenrollment projection, San Francisco alone stands to lose nearly $1 million in economic activity due to SNAP disenrollment. SER15-16 ¶¶8-10.

In each of these ways, the Counties will suffer direct injuries as a result of the Rule.

### B. The Counties Are Within The Zone Of Interest.

A plaintiff falls within the zone of interests of the APA's "generous review provisions" unless its "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Lexmark Int'l, Inc. v. Static Control Comp., Inc.*, 572 U.S. 118, 130 (2014) (internal quotation marks and citations omitted). The test reflects a "lenient approach" and is "not especially demanding." *Id.* (same). Indeed, in the APA context, the Supreme Court has "often conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Id.* (same).

Defendants contend that only the federal government and noncitizens subject to public charge assessments have "judicially cognizable interests" in the public charge provision because "Congress has not given any third party a judicially enforceable interest in the admission or removal of an alien." AOB 17. This is a red herring. "[T]here need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987) (footnote omitted).

Here, the Counties' interests are squarely within the zone of interests regulated by the Rule and the INA. The Counties administer public benefit programs that are integral to the public charge assessment. *See* pp. 7-9, *supra*. In

addition, the public charge assessment calls for consideration of affidavits of support, which are intended to allow the Counties and other governments the option to recover the costs of benefits they have paid to noncitizens. *See* 8 U.S.C. §§ 1182(a)(4)(B)(ii), 1183a(a), (b), (e)(2).

As the district court concluded, "[b]y recognizing that states (and political subdivisions of states) would be paying means-tested public benefits to those subject to a public charge analysis, requiring that states and their subdivisions have legally-enforceable rights to recover those expenses when an alien is admitted based on consideration of an affidavit of support, and guaranteeing state-court jurisdiction for such enforcement actions, Congress clearly intended to protect states and their political subdivisions with the challenged statute." ER70.

Moreover, DHS explicitly acknowledges that the Counties will be forced to "incur costs" as a result of the Rule. 84 Fed. Reg. at 41,313, 41,389, 41,469-70, 41,472; AOB 38. And the Supreme Court has consistently found that economic injuries—like those DHS concedes here—satisfy the zone of interest test. *See, e.g.*, *Bank of Am. Corp. v. City of Miami*, Fla., 137 S. Ct. 1296, 1304-05 (2017) (finding city's discriminatory lending claims within zone of interests of Fair Housing Act, despite economic nature of harms alleged and absence of any indication that Act was intended to protect municipal budgets).

In the face of these clearly sufficient interests, Defendants resort to mischaracterizing the public charge provision as targeted only at preventing any public benefit usage at any costs, and claim that the Counties fall outside that zone of interest because their harms flow from benefit disenrollment. AOB 17. As explained in greater detail below, the public charge provision has never sought to cut off *all* immigrant access to public benefits, but rather only to prevent persons who are likely to become primarily dependent on the government from being admitted. *See, e.g.*, Immigration Act of 1882, 22 Stat. 214, ch. 376, §§ 1-2 (1882) (the "1882 Act") (providing for public assistance for immigrants even as it barred admission of public charges). In other words, DHS's cramped reading fails to account for the actual ends of the public charge provision: preserving the public fisc.[4] The Counties fall well within the zone of interests here.

## II. The Counties Are Likely To Succeed On The Merits.

### A. The Final Rule Is Contrary to Law.

For nearly 140 years, Congress has used the statutory term public charge to describe a person who depends primarily on the government for subsistence. The

[4] Moreover, under Defendants' argument, taken to its logical conclusion, an immigrant denied admission under the public charge ground would not fall within the zone of interest, because the provision *limits* admissibility. This is absurd and even Defendants concede that an immigrant denied admission is within the zone of interest. AOB 17.

Rule abandons this longstanding definition and dramatically expands the term to encompass noncitizens who receive any of a broad array of public benefits, even in minimal amounts. It sweeps in noncitizens who receive as little as 17 cents in benefits per day, and might deem 40% of U.S. citizens public charges if were they subject to the Rule. This definition is far broader than the statute can bear. It contravenes unambiguous congressional intent as reflected in the term's plain and longstanding meaning, as confirmed by its statutory context, legislative history, and judicial construction. The definition is therefore contrary to the INA.

#### 1. DHS's Rule Is Due No Deference Under *Chevron*.

As a threshold matter, DHS's interpretation of the term "public charge" is not entitled to deference.[5] The Supreme Court has repeatedly emphasized that the *Chevron* framework does not apply where, as here, Congress has not authorized the agency to fill a statutory gap with an interpretation that carries the force of law. *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006); *see Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018); *United States v. Mead Corp.*, 533 U.S. 218, 227-30, (2001). The fact that an agency administers a statutory scheme that includes

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[5] The Counties argued in their opposition to the motion for a stay that the *Chevron* framework does not apply to DHS's interpretation of the term public charge. *See* Counties' Opposition to Defendants Motion for Stay Pending Appeal (Dkt. 16) ("Counties' Opp'n") at 12-13. The motions panel, which granted a stay of the district court's preliminary injunction, employed the *Chevron* framework without ever addressing the threshold question of whether that framework applies. *See* Order Staying Preliminary Injunction (Dkt. 27) at 31.

ambiguous terms is not sufficient to trigger *Chevron*. *Gonzales*, 546 U.S. at 258. Rather, courts defer to reasonable agency interpretations of ambiguous statutory terms under *Chevron* only when Congress has empowered agencies with the *interpretive lawmaking power* to offer authoritative interpretations that carry the force of law. *See id.* at 258-66; *King v. Burwell*, 135 S. Ct. 2480, 2489-91. When an agency lacks such authority, the agency's "interpretation is 'entitled to respect' only to the extent it has the 'power to persuade.'" *Gonzales*, 546 U.S. at 256 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Here, while the INA permits DHS to promulgate regulations necessary for the "administration and enforcement" of the INA and to "carry[] out" its authority, 8 U.S.C. § 1103(a)(1), (3), it reserves to the *Attorney General* the power to determine "all questions of law," and carves out from the Secretary of the Department of Homeland Security's authority any "powers . . . conferred upon the . . . Attorney General." *Id.* § 1103(a)(1). Thus, Congress specifically *excluded* interpretive lawmaking power from DHS's authority over the INA, reserving any such authority instead for the Attorney General. *See Gonzales*, 546 U.S. at 264-66.

The Rule itself reflects that DHS lacks the authority to offer interpretations of the public charge provision of the INA that carry the force of law. Three agencies conduct public charge assessments under Section 212(a)(4): DHS, the Department of State, and the Department of Justice. If DHS could authoritatively

construe the term "public charge," the Final Rule's definition of the term would necessarily govern the State and Justice Departments' public charge assessments, which are controlled by the exact same language in Section 212(a)(4). But DHS expressly disavows authority over these assessments in the Rule. *See* 84 Fed. Reg. at 41,315, 41,324, 41,461, 41,478. And it could not claim to control those assessments given that DHS's authority does not extend to "the powers, functions, and duties conferred upon the . . . Attorney General . . . or diplomatic or consular officers" under the INA. 8 U.S.C. § 1103(a)(1). DHS thus itself implicitly acknowledges that it cannot offer an authoritative interpretation of the term that any outside entity—including this Court—should defer to.[6]

Moreover, even Defendants do not claim DHS has authority to interpret the INA with the force of law. While Defendants repeatedly imply that the "Executive Branch" should be accorded deference, AOB 24-26, the question is whether deference is due to the agency that promulgated this Rule. And nowhere do Defendants claim that DHS is entitled to such deference, because they simply cannot. Defendants seek refuge in the fact that the determination of whether

[6] The Final Rule's enormous legal, political, and economic impacts, *e.g.*, 84 Fed. Reg. at 41,300-01, as well as the fact that it would dramatically limit who can be admitted to this country, *see*, *infra*, sections (II)(A)(2)(c), *further* suggest that Congress never meant courts to defer to DHS's interpretation of the statutory term "public charge." *See King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

someone is "likely" to become a public charge is entrusted to the opinion of the individual making the public charge assessment. *Id.* at 25. But this deference extends only to the factual question of whether a person is likely to become a public charge—not the legal question of what the definition of public charge is. *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915) (While immigration officers' public charge assessments are "conclusive[] upon matters of fact," courts are to decide whether they "agree with the requirements of the act."). Yet Defendants seem to suggest that "public charge" means whatever the individual immigration officer making such an assessment decides it means. AOB 25. This cannot be. While broad deference to the factual findings of immigration officers may be appropriate, Congress—not whichever immigration officer happens to receive a person's application for admission or adjustment of status—sets immigration policy regarding who can come to or remain in this country.

#### 2. Public Charge Has Always Meant A Person Primarily Dependent On The Government For Support.

Because no deference is due DHS's Rule, the Court's role is to "exercise independent interpretive judgment" to determine the meaning of the term public charge in context. *See Epic Sys.*, 138 S. Ct. at 1629. Every tool of statutory interpretation points to a single, century-old meaning of the term public charge: a person *primarily* dependent upon the government for support. While the exact

words used to embody this concept have shifted over time, this core meaning has long been fixed.

#### a. Since Congress First Used The Term, "Public Charge" Has Described Primary Dependency on Public Aid, Not Mere Receipt of Some Support.

Even before 1882, when Congress first used the term "public charge," state courts defined the term as describing a person "incompetent to maintain themselves" and who "might become a heavy and long continued charge to the city, town or state"—"not merely destitute persons, who, on their arrival here, have no visible means of support." *City of Boston v. Capen*, 61 Mass. 116, 121-22 (1851); *see* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 Colum. L. Rev. 1833, 1848-59 (1993).[7]

Dictionary definitions at that time further reflect that "public charge" refers to a person unable to provide for their own subsistence and largely dependent upon public support. When describing people, dictionaries defined "charge" as a "a "person or thing committed to another[']s custody, care or management; a trust." *Charge*, Webster's Dictionary (1828 Online Edition) (July 23, 2019),

[7] State court articulations of the meaning of public charge from shortly after Congress first used the term also accord with this understanding. *See Yeatman v. King*, 51 N.W. 721, 723 (N.D. 1892) ("affording [poor persons] temporary relief," could *prevent* them "from becoming a public charge"); *Twp. of Cicero v. Falconberry*, 42 N.E. 42, 44 (Ind. 1895) (The "mere fact that a person may occasionally obtain assistance from the county does not necessarily make such person a pauper or a public charge.").

http://webstersdictionary1828.com/Dictionary/charge [https://perma.cc/R9NN-5HFK]; *Charge*, Webster's Dictionary (1886 Edition) (Aug. 22, 2019) https://archive.org/details/websterscomplete00webs/page/218 [https://perma.cc/LXX9-KF3K] ("person or thing committed or intrusted [sic] to the care, custody, or management of another; a trust"); *accord Charge*, Merriam-Webster Online (Sept.15, 2019), https://www.merriam-webster.com/dictionary/charge [https://perma.cc/7VZA-BT7X]; *see Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 633-34 (2012) (contemporaneous dictionary definitions reflect normal usage and govern statutory interpretation). Thus, a *public* charge is a person committed or entrusted to the *public* for custody, care, or management—in other words, a person unable to care for themselves who relies, primarily or entirely, on the public to survive.[8]

[8] Defendants' reliance on two Black's Law Dictionary definitions from the 1930s and 1950s is unavailing. AOB 28. Those definitions simply do not specify the quantum of support that renders a person a charge on the public, and so do not support Defendants' argument that minimal benefits usage renders a person a public charge. And the 1929 Cook treatise Defendants cite that suggests any support renders a person a public charge—the only source Defendants identify from the past 150 years that has offered such a definition—is simply wrong. *See Cook Cty., Ill. v. McAleenan*, No. 19 C 6334, 2019 WL 5110267, at *10 (N.D. Ill. Oct. 14, 2019) ("The [Cook] treatise is wrong. It does not address [Supreme Court precedent] in expressing its understanding of 'public charge.' And the sole authority it cites, *Ex parte Kichmiriantz*, 283 F. 697 (N.D. Cal. 1922), does not support its view.").

It was with that common understanding of the phrase public charge that Congress first used the term in the Immigration Act of 1882. In that law, Congress authorized exclusion of "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." 1882 Act, 22 Stat. 214, ch. 376, § 2.

The plain-text meaning of public charge, both at the time and today, is consistent with the term's placement alongside "convict, lunatic, [and] idiot." In the nineteenth century, those terms were used to describe people "incompetent to act for themselves" and therefore subject to the state's "tutelary authority" as "*parens patriae* . . . to act as the[ir] general guardian and protector." *Stanley v. Colt*, 72 U.S. 119, 161 (1866); *see Penington v. Thompson*, 5 Del. Ch. 328, 350 (1880) (lunatics and idiots were "incompetent for self-protection" and subject to protection by the government acting as *parens patriae*). That Congress associated "public charge" with these terms confirms it should "be understood in the same sense," *Neal v. Clark*, 95 U.S. 704, 708 (1877)—as referring to individuals incapable of caring for themselves and dependent on the government to serve as their "general guardian and protector." *Accord Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917) (Given the immediate statutory context of the public charge ground, "[w]e are convinced that Congress meant the act to

exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future.”).

Moreover, under the 1882 Act, an immigrant could receive temporary aid without becoming a public charge. In fact, the 1882 Act itself raised funds to support immigrants in “distress” or who “need public aid” (1882 Act, 22 Stat. 214, ch. 376 §§ 1, 2), even as it barred persons likely to become public charges from entering the country. Thus, Congress expressly acknowledged that persons admitted under the Act might also require some public support, and it further ensured funding for a program to offer such aid.

Ultimately, the 1882 Act’s text, context, design, and structure reflect that Congress sought to prevent foreign nations from “‘send[ing] to this country blind, crippled, lunatic, and other infirm paupers, who ultimately become *life-long dependents* on our public charities,’” not merely those who might access small-scale support. 13 Cong. Rec. 5108-10, 47th Congress (June 19, 1882) (statement of Rep. Van Voorhis) (emphasis added).

This meaning from 1882 has endured until today. It is a fundamental “canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.” *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). The term public charge has been

reincorporated in an unbroken line of predecessor statutes that have contained that same term without any indication that the meaning had shifted. *See* ER18-42.

#### b. Judicial And Administrative Decisions From The Twentieth Century Reflect This Longstanding Definition.

Judicial and administrative interpretations of the Act and of the Act's subsequent iterations further confirm the definition of public charge as a person primarily dependent on the government. When called upon to address the proper application of the term in 1915, the Supreme Court held that based on the statutory context, individuals "likely to become a public charge" were those akin to "paupers and professional beggars," i.e., those requiring near total support from the public. *Gegiow*, 239 U.S. at 9-10. The Court went on to explain that the persons excluded by the Act, including public charges, were "to be excluded on the ground of permanent personal objections accompanying them." *Id.* at 10. Thus, the Supreme Court understood a public charge to be a person who by virtue of some persistent condition was mainly dependent on public aid for support.

Relying on a senate committee report, Defendants claim that a 1916 reorganization of the terms enumerating bases for exclusion—which merely shifted "public charge" from between "paupers" and "professional beggars" to later in the list of excludable persons—unsettled *Gegiow*. *See* AOB 30-31. But a senate committee report is a thin reed indeed on which to hang an overwriting of the

definition of a statutory term. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[J]udicial reliance on legislative materials like committee reports . . . may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text."). Further, the report does not even explain *how* the reorganization affected the term.

Moreover, as Defendants acknowledge, this Court in *Ex parte Hosaye Sakaguchi* made clear that the 1916 reorganization of the terms "does not change the meaning that should be given them, and that it is still to be held that a person 'likely to become a public charge' is one who, by reason of poverty, insanity, or disease or disability, will probably become a charge on the public." 277 F. 913, 916 (9th Cir. 1922). This Court continued that if there were "any evidence whatever of mental or physical disability or any fact tending to show that the burden of supporting the appellant is likely to be cast upon the public," then the government might deem such a person a public charge. *Id.* This explanation is in line with *Gegiow*'s pronouncement that "permanent personal objections" requiring the government to offer comprehensive support to a person can render them a public charge. *See Gegiow*, 239 U.S. at 10.

Courts have further reiterated that the public charge provision applies only when a person is highly dependent on the government. For example, this Court and several others have concluded that the public charge provision is "meant . . . to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future." *Ng Fung Ho v. White*, 266 F. 765, 769 (9th Cir. 1920); *see, e.g.*, *Ex parte Mitchell*, 256 F. 229, 232-33 (N.D.N.Y. 1919) (explaining a person is likely to become a public charge if they are "a pauper, or poor person who will be, or might properly be, sent to an almshouse and supported at the public expense"), *aff'd in part and rev'd in part on other grounds*, 259 U.S. 276 (1922); *see also Ex parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923) (A "public charge" is "a person *committed to the custody* of a department of the government," for example, when, "for want of means of support," she is "*sent to an almshouse* for support at public expense." (emphases added)). The modern equivalent of almshouse occupancy is not mere receipt of *some* supplemental benefits, but a high degree of *dependence* upon governmental assistance.

The cases Defendants cite are not contrary. *See* AOB 28. In *Ex parte Turner*, for example, the court determined that family members were likely to become public charges because the husband had been recurrently hospitalized and was likely to be "incapacitated from performing any work." 10 F.2d 816, 817

(S.D. Cal. 1926). The family did not merely access some supplementary aid: they had no other source of support—their only property being a few hundred dollars' worth of furniture—and were entirely dependent on public aid while the husband was ill. *See id* at 816. Likewise, in *Guimond v. Howes*, 9 F.2d 412 (D. Me. 1925), the family had been entirely supported by the town while the husband was incarcerated multiple times. Neither case dealt with supplementary aid, but rather addressed families who were periodically entirely dependent on the state for survival due to persistent issues with the primary income earners.

Defendants argue that since the Attorney General's 1948 ruling in *Matter of B—*, 3 I. & N. Dec. 323, 323 (BIA 1948), receipt of short-term aid has been enough to qualify someone as a public charge. AOB 26-27. Defendants are wrong. First, *Matter of B—* dealt with the public charge criterion for deportation, 3 I. & N. Dec. at 323, *not* the inadmissibility criterion DHS now seeks to rewrite. The two grounds, though related, find their bases in different statutory provisions, and occur at procedurally distinct moments: the inadmissibility assessment is a forward-looking projection, while the deportability assessment requires an evaluation of what has happened since a noncitizen has been in the country. *Compare* 8 U.S.C § 1182(a)(4), *with id.* § 1227(a)(5).

Even more critically, *Matter of B—* did not address the quantum or type of benefits (or therefore debts) that render an immigrant a public charge, but merely

clarified the procedural safeguards that must be satisfied before the public charge deportability ground can be applied—that is, a charge for public services imposed by law, a demand for payment, and a failure by the immigrant to pay. *See Matter of B—*, 3 I. & N. Dec., at 326. *Matter of B—* does not offer a specific substantive definition of the term public charge, and it certainly does not redefine the term to somehow describe a lesser degree of dependence. INS recognized this substantive/procedural distinction in its 1999 Field Guidance, explaining that a noncitizen was deportable only if they had "an outstanding public debt for a cash benefit or the costs of institutionalization," *and*, procedurally, efforts to collect that debt had complied with the *Matter of B—* framework. 1999 Field Guidance, 64 Fed. Reg. at 28,690-91; *see Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,676, 28,679 (laying out the same requirements). INS also treated *Matter of B—* as irrelevant to the *inadmissibility* criteria in Section 212(a)(4).

This distinction is further evidenced by the fact that *Matter of B—* and cases citing it consider persons institutionalized at public expense or who receive cash assistance. *See, e.g.*, *Matter of Kowalski*, 10 I. & N. Dec. 159, 159 (BIA 1963); *Matter of Harutunian*, 14 I. & N. Dec. 583, 589 (BIA 1974). The test from *Matter of B—* has *never* been applied to determine that receipt of a small amount of

unrepaid aid by a person capable of obtaining gainful employment rendered someone a public charge.

Ensuing administrative and Attorney General decisions again confirmed that in the absence of other permanent problems or heavy dependence on the state, a person was not likely to become a public charge. *See, e.g.*, *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (BIA 1962); *Matter of Harutunian*, 14 I. & N. Dec. at 586 ("The words 'public charge' had their ordinary meaning, that is to say, a money charge upon or an expense to the public for support and care, the alien being *destitute*."). Further, in 1987, INS explicitly stated that a person was a "public charge" only if they had received cash assistance, and excluded "assistance in kind, such as food stamps" from consideration. Adjustment of Status for Certain Aliens, 52 Fed. Reg. 16,205-1, 16,209 (May 1, 1987). While INS did not specifically address the amount of cash aid that rendered a person a public charge, this guidance reflects that supplementary benefits like SNAP or Medicaid do not reflect the kind of fundamental dependence sufficient to render a person a public charge. *See id.* at 16,211.

#### c. Following Congressional Amendments To The INA In 1996, INS Again Confirmed This Longstanding Meaning.

Defendants focus largely on the 1996 amendments to immigration and welfare law, downplaying the core meaning the term public charge had by then

already carried for a century.[9] AOB 18-23. But even focusing on 1996, Defendants' arguments are unavailing. Affidavits of support, which were introduced in 1996, did allow the government to recoup public benefits used by certain noncitizens. Nonetheless, Congress continued to allow such immigrants to access public benefits—demonstrating that it continued to contemplate that immigrants rightfully admitted to country would access public benefits. This is in line with the longstanding principle that an immigrant may make use of some public aid without becoming a public charge, and that only when benefits use reflects primary dependence on the government does the immigrant become a public charge.

Moreover, the same Congress that made affidavits of support enforceable left the definition of public charge *undisturbed*. That provision remained intact—despite contemporaneous proposals to expand the meaning. Proposals that would have offered a similar redefinition to the one DHS now puts forward were met with presidential pushback and the admonition that a version of the bill including those changes "still goes too far in denying legal immigrants access to vital safety net programs which could jeopardize public health and safety." Statement on Senate

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[9] This is an about face from Defendants' district court briefing which focused on the meaning of "public charge" in 1882 and offered no argument regarding the 1996 inclusion of the Affidavit of Support provision. *See* Defendant's Opposition to Motion for Preliminary Injunction (N.D. Cal 19-4717, Dkt. 98) at 10-14.

Action on the "Immigration Control and Financial Responsibility Act of 1996," President William J. Clinton, Weekly Compilation of Presidential Documents Volume 32, Issue 18 (May 6, 1996) at p. 783; *see* 142 Cong. Rec. 24,425-27 (Sept. 24, 1996) (*reprinting* H.R. Rep. No. 104-828, at H.R. 2022 at §§ 532, 551) (proposing redefinition).

Defendants' heavy reliance on 8 U.S.C. Section 1601, which was also added in 1996, is likewise misplaced. AOB 22. As an initial matter, Defendants misconstrue Section 1601, asserting that "self-sufficiency" means *no* receipt of public benefits. AOB 22. Perplexingly, DHS relies *exclusively* on self-sufficiency for the Rule's interpretation even while acknowledging that self-sufficiency is not "the primary purpose of U.S. immigration laws." 84 Fed. Reg. at 41,306. It is the role of Congress—not DHS—to balance the immigration laws' purposes.

Further, Section 1601 states principles *not* of the INA, but of the 1996 welfare reform law, over which DHS has no administrative or regulatory authority. DHS cannot leverage its overreading of "self-sufficiency" from a different statute to construe the INA to exclude people based on the possibility they will use benefits Congress authorized them to receive. *See Epic Sys.*, 138 S. Ct. at 1629 (criticizing agency for similar cross-statutory interpretation).

Following these enactments, in 1999 the INS concluded that text, historical context, and case law made plain that "public charge" describes people "primarily

dependent on the government for subsistence." 1999 Field Guidance, 64 Fed. Reg. at 28,689; *Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,676, 28,677 (May 26, 1999). The INS also issued guidance clarifying this definition to ensure that the public could understand receipt of which public benefits would render a person "committed to the care, custody, management, or support of the public." *See* 64 Fed. Reg. 28,677; 64 Fed. Reg. at 28,692 (explaining that this guidance was being promulgated to remedy public confusion regarding receipt of which benefits rendered a person a public charge). The parties agree that the 1999 Field Guidance's definition of "public charge" is consistent with Section 212 (a)(4). AOB 26. And despite intervening amendments to the INA and Section 212(a)(4) itself,[10] Congress has never disturbed INS's formulation of the term's meaning, reflecting congressional agreement and acceptance. *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983).

Defendants also argue that the INA's prohibition on considering a battered person's receipt of public benefits means that Congress contemplated that public benefit receipt would be considered as part of a public charge assessment. AOB 19. The language Defendants cite was incorporated into the INA in 2000 as part of

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[10] *See, e.g.,* Human Rights Enforcement Act Of 2009; Emergency Supplemental Appropriations Act For Defense, The Global War On Terror, And Tsunami Relief, 2005; Family Sponsor Immigration Act Of 2002.

the Battered Immigrant Women Protection Act of 2000. H.R. Conf. Rep. 106-939, 106th Congress, 64-65. That Act attempted to ensure that women and children did not remain in abusive home situations out of fear of potential negative immigration consequences. It was not aimed at defining, or redefining, the meaning of the term public charge. *See id.* at 56. Instead, this provision made clear to battered persons that they could access *all* authorized public benefits that they need as a result of having been battered, including cash assistance, without fear of immigration consequences. *See* 8 U.S.C. § 1641(c). And indeed, such persons are entirely exempt from a public charge admissibility assessments. 8 U.S.C. § 1182(a)(4)(E). Moreover, even if this provision could suggest that Congress thought INS might consider receipt of non-cash benefits in assessing the likelihood that a person *would become* a public charge (i.e., that they would be institutionalized at state expense or receive cash support in the future), it certainly does not suggest that Congress believed mere receipt of SNAP or Medicaid would render a person a public charge.

In sum, "public charge" in Section 212(A)(4) describes a person who is primarily dependent on the public for support. Congress understood that to be the meaning of the term when it passed the 1882 Act. Administrative and judicial decisions consistently reaffirmed that meaning over the next hundred years. And after the 1996 amendments to welfare and immigration law, which left the public

charge language untouched, INS reiterated that well-established meaning yet again. The Rule offers a dramatic departure from this definition, as it would deem *any* amount of support from a broad range of benefits over a modest timeframe to render a person a public charge. The Rule should be struck down as contrary to law.

#### 3. Even If DHS's Interpretation Were Accorded Deference, The Rule Is Not A Reasonable Interpretation Of The Statute.

Even if the Court determines that *Chevron* deference is applicable here, the interpretation that DHS now offers through the Rule is flatly irreconcilable with the statute. Where deference is due it is not unbounded: an agency's construction must be "reasonable." *See, e.g.*, *Util. Air Regulatory Grp. v. E.P.A*, 573 U.S. 302, 321 (2014). Reasonable statutory interpretation must account for both "the specific context in which . . . language is used" as well as "the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997). Thus, an agency interpretation that is "inconsisten[t] with the design and structure of the statute as a whole," *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013), does not merit deference.

First, Section 212(a)(4), "interpreted in its statutory and historical context . . . unambiguously bars" DHS's newfound definition. *Am. Trucking*, 531 U.S. at 471; *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017). Even if

there is ambiguity as to the precise meaning of the term public charge, the 130-plus years of interpretation and understanding make clear that the term cannot, as the Rule would, describe a person who receives less than twenty-five cents a day in public support. *See* ER 47. As described above, the term has always described a significant level of reliance on the government, reflected by institutionalization at government expense—such as in an almshouse or at a care facility—or by broad cash aid.

Further, previous Attorney General interpretations have made clear that "[a] healthy person in the prime of life cannot ordinarily be considered likely to become a public charge." *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (BIA 1962). Indeed, historically less than one percent of all applicants were denied admission based on a determination that they were likely to become a public charge. USCIS, *Public Charge Provisions of Immigration Law A Brief Historical Background*, https://perma.cc/8YM8-6T8U. Yet, more than 40% of *American citizens* over their lifetime can expect to receive exactly those same benefits that under the Rule can render a person a public charge. ER 48. Thus, the Rule would convert the public charge ground from a discrete and narrow exclusion into a far-reaching bar to immigration for non-affluent immigrants.

This seismic shift is also at odds with the INA's "design and structure" and the "broader context of the statute as a whole." *Util. Air Regulatory Grp.*, 573 U.S.

at 321, 325-26. Family-reunification principles undergird federal immigration law.[11] But the Rule dramatically restricts noncitizens' ability to adjust status based on family ties, and its factors heavily favor wealth and employment over family relationships. *See* 8 C.F.R. § 212.22. DHS's recognition that exclusions will increase under the Rule, *see, e.g.*, 84 Fed. Reg. at 41,479, is confirmed by a study's finding that two-thirds of recent green-card recipients had at least one of the Rule's negative factors, and nearly half had two. *See* ER 48. Only Congress may make such massive changes to immigration law. *See Am. Trucking Ass'ns*, 531 U.S. at 468 (agency cannot exploit textual ambiguity to fundamentally alter a regulatory regime because Congress does not "hide elephants in mouseholes").

And Congress did not do so here. Instead, Congress affirmatively rejected definitions strikingly similar to the one DHS now puts forward. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (holding that Congress had "ratified" pre-existing interpretations of a law in rejecting an amendment to a reenactment of the law that would have reversed those interpretations); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 441-43 (1987). During the 1996 amendments to the INA, at one point a proposal was put forward that would have

[11] *E.g.*, 8 U.S.C. § 1151 (b)-(d) (70% of annual cap on green cards dedicated to immigrants sponsored by citizen and green-card-holding relatives, and cap excludes citizens' immediate relatives); H.R. Rep. 82-1365 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680, 1691.

defined public charge to mean a noncitizen who receives specified means-tested benefits, including those enumerated in the Rule, "for an aggregate period of at least 12 months." 142 Cong. Rec. 24,425-27, 105th Cong. (Sept. 24, 1996) (*reprinting* H.R. Rep. No. 104-828, at H.R. 2022 at §§ 532, 551). Days before passage, in response to presidential pressure, Congress removed the definition and the specified benefits. 142 Cong. Rec. H12099 (Sept. 28, 1996) (statement of Rep. Smith). And in 2013, Congress again rejected efforts to "*expand*[] the definition of 'public charge' such that people who received non-cash benefits could not become legal permanent residents." S. Rep. No. 113-40, at 42, 63 (2013).

In sum, DHS's Rule would constitute a sea change in immigration law that goes far beyond the bounds of any reasonable interpretation that Congress could have thought permissible or to which this Court should defer.

**B. The Final Rule Is Arbitrary And Capricious.**

DHS also failed to meet its obligations under the APA. *See* 5 U.S.C. § 706(2)(A).

Although the "scope of review under the 'arbitrary and capricious' standard is narrow," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), an agency must still engage in "reasoned decisionmaking," *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2706 (2015). Agency action is invalid under this standard if the agency fails to give adequate reasons for

its decisions, fails to examine "the relevant data," or offers no "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43; *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

The district court correctly found that DHS failed to meet its obligations under the APA in at least three key respects. First, DHS asserted that the Rule would lead to a net health benefit without any analysis or support, and in the face of overwhelming evidence to the contrary. Second, and relatedly, DHS ignored without explanation its predecessor's conclusion in the 1999 Field Guidance that dispelling noncitizens' fear of using public benefits was key to protecting public health. And third, DHS failed to grapple with the full scope of disenrollment impacts and the effects those impacts would have on localities and states. Each of these infirmities renders DHS's actions arbitrary and capricious, and the Rule invalid.

**1. Baseless Assertion Of Net Health Benefits.**

As discussed above, DHS has acknowledged that the Rule could harm public health in a number of ways. *See* 84 Fed. Reg. at 41,312-14, 41,384-85. Numerous commenters during the rulemaking process explained that studies and research demonstrate that noncitizens and citizens alike will disenroll from public-benefit programs to avoid the reach of the Rule. *Id.* at 41,300, 41,310. Their comments thoroughly documented myriad harms of such disenrollment: decreased

vaccination rates against communicable diseases; worsened educational attainment; decreased nutrition, including one study estimating that almost 3 million U.S. citizen children would forgo SNAP benefits because of the Rule; increased uncompensated care costs; increased reliance on emergency rooms; increased risks to maternal and infant health; decreased access to health insurance for children; decreased access to dental services; decreased funding for school-based health programs; increased risks of communicable disease epidemics; and undermined trust in governmental public health authorities. *See id.* at 41,310-13; 41,384. After summarizing these comments, DHS purported to respond by asserting that it "believes [the Rule] will ultimately strengthen public . . . health[] and nutrition . . . by denying admission or adjustment of status to aliens who are not likely to be self-sufficient." *Id.* at 41,314.

This bald and baseless assertion of net health benefits fails the requirements of reasoned decisionmaking. In the Rule, DHS offers no evidence or rationale to substantiate its speculation that there will be health benefits, despite its obligation to offer a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. Deference to agency judgments "must be based on some logic and evidence, not sheer speculation." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014) (citation omitted); *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (Courts "do

not defer to the agency's conclusory or unsupported suppositions." (citing *State Farm*, 463 U.S. at 43)). Further, DHS fails to explain how these unsubstantiated benefits would outweigh the likely harms of the Rule. Although an agency may rely on "common sense, . . . the wisdom of agency action is rarely so self-evident that no other explanation is required." *Sorenson*, 755 F.3d at 708. A reasoned explanation is especially important where, as here, agency action is based in part on a "premise that is flatly contradicted by the agency's own record." *City of Kansas City, Mo. v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991); *see also Clark Cty., Nev. v. FAA*, 522 F.3d 437, 441 (D.C. Cir. 2008) (The agency's "failure to further explain its conclusions here is problematic because the only evidence in the record available to this Court actually supports the opposite conclusions.").

Defendants offer two arguments in reply. Both miss the mark. First, Defendants assert that DHS's "long-term prediction that denying admission or adjustment of status to aliens unlikely to be able to support themselves would be beneficial is unobjectionable and consistent with Congress's own findings." AOB 42-43 (citing 8 U.S.C. § 1601). As a threshold matter, in the Rule, DHS did not rely on the congressional statement of national policy in Section 1601 in support of its bare assertion that the Rule will lead to improved public safety, health, and nutrition, and Defendants cannot now offer a post hoc rationalization. *See State*

*Farm*, 463 U.S. at 50 ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."). More fundamentally, though, Section 1601 does not address public health. Rather, it simply reaffirms congressional commitment to the principle of self-sufficiency, among other interests. *See* 8 U.S.C. § 1601(1). But self-sufficiency is not the same thing as improved public health, and DHS failed to articulate in the Rule how the two are connected. Defendants may not attempt to explain away that failure now. *See State Farm*, 463 U.S. at 50.

Moreover, even assuming the Rule might have some public health benefits, DHS failed to explain why such benefits would outweigh the acknowledged costs. Defendants do not address their failure to weigh the potential harm to public health against any benefits. Instead, they simply seek to minimize the harms the Rule could cause. Defendants assert that the "agency explained that there were reasons to believe that the costs would not be as great as some feared." AOB 39 (citing 84 Fed. Reg. at 41,313); *see also id.* at 42. For instance, the Rule excludes as a public benefit either "receipt of Medicaid by a child under age 21, or during a person's pregnancy." 84 Fed. Reg. at 41,384. According to DHS, these exclusions "should address a substantial portion, though not all, of the vaccinations issue." *Id.* But the fact that DHS hoped to reduce the harm to public health does not explain how it

determined that the benefits of the Rule outweighed the harms it acknowledged would occur.

In sum, DHS failed to support its assertion that the Rule would result in net health benefits and failed to explain how the Rule's assumed health benefits would outweigh the contrary evidence in the record. As these failures illustrate, DHS fell well short of the requirements of reasoned rulemaking. *See State Farm*, 463 U.S. at 43.

#### 2. Failure To Explain Departure From Factual Conclusions Of The Field Guidance.

DHS's disregard for the evidence that the Rule will have negative impacts on public health is particularly egregious because it constitutes a reversal of its predecessor's prior position. INS adopted the 1999 Field Guidance specifically "to reduce the negative public health consequences generated by the existing confusion" surrounding the immigration impacts of the receipt of public benefits. 64 Fed. Reg. at 28,689. INS had found that "reluctance to access benefits has an adverse impact not just on the potential recipients, but on public health and the general welfare." *Id.* at 28,692.

Where a new agency policy "rests upon factual findings that contradict those which underlay its prior policy," the agency must provide a "more detailed justification" than would normally suffice when rulemaking on a "blank slate." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also id.* at

537 (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate."). The agency must offer "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id*. at 516.

Defendants point out that DHS acknowledged it was changing course from the 1999 Field Guidance, but they fail to address the fact that DHS did not offer any justification for departing from the factual findings underlying the that guidance. AOB 43. Defendants' insistence that DHS took account of "reliance interests," and that it therefore satisfied the "detailed justification" requirement evinces a misunderstanding of its obligations. *See Id.* at 43. The requirement for a "more detailed justification" applies *either* when the "new policy rests upon factual findings that contradict those which underlay" the prior one *or* when the prior policy "has engendered serious reliance interests that must be taken into account." *Mingo Logan Coal Co. v. E.P.A.*, 829 F.3d 710, 719 (D.C. Cir. 2016) (quoting *Fox*, 556 U.S. at 515). Because DHS failed to offer a detailed justification in response to its asserted belief that the Rule would improve instead of harm public health, it does not matter whether the agency separately took into account reliance interests. This failing, too, renders DHS's action arbitrary and capricious, and the Rule invalid.

### 3. Disregarding Disenrollment Rates And Ensuing Costs To Local And State Governments.

Defendants also rely on DHS's summary assertions that the benefits of the Rule outweigh its harms as evidence that the agency properly considered costs to localities and states. *See* AOB 38. But as with the public-health implications of the Rule, DHS failed to grapple with evidence regarding the extent to which the Rule will cause disenrollment as well as the predicted effect of such disenrollments on local and state governments—again, falling short of the requirements of reasoned decisionmaking.

The Rule catalogues the detailed comments describing the dangers that stem from disenrollment from public benefits, including the higher costs that fall on local and state governments as healthcare providers of last resort. *See* 84 Fed. Reg. at 41,310-13. DHS conceded that the Rule may cause members of mixed-status households (including U.S. citizens) and others not subject to the Rule to disenroll from public-benefits programs. *Id.* at 41,300, 41,310-12. It also acknowledged the Rule may lead to costs "downstream . . . on state and local economies, large and small businesses, and individuals." *Id.* at 41,477, 41,486; *see also id.* at 41,312.

But instead of grappling with these evidence-backed concerns, DHS summarily minimized or dismissed them, and then maintained that whatever the costs were, they could not outweigh the government's overarching policy interests. This, too, falls short of reasoned decisionmaking. *See Rodway v. U.S. Dep't of*

*Agric.*, 514 F.2d 809, 817 (D.C. Cir. 1975) (The APA requires agencies "to respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.").

First, DHS minimized the costs of disenrollment by noncitizens subject to public charge determinations by claiming it had mitigated such harms, and then dismissed any such costs because "data limitations" made disenrollment and its ensuing harms "difficult to predict." 84 Fed. Reg. at 41,313. But "[t]he mere fact that the . . . effect" of a rule "is uncertain is no justification for disregarding the effect entirely." *See Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004); *see also Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011) (When an agency is uncertain about the effects of its action, it may not rely on "'substantial uncertainty' as a justification" and must instead "rationally explain why the uncertainty" supports its chosen approach.).

Second, DHS refused to consider the costs associated with disenrollment by those not subject to a public charge determination. According to the agency, "DHS believes that it would be unwarranted for U.S. citizens and aliens exempt from public charge inadmissibility to disenroll from a public benefit program or forgo enrollment in response to this rule when such individuals are not subject to this

rule. *DHS will not alter this rule to account for such unwarranted choices*." 84 Fed. Reg. at 41,313 (emphasis added). But reasoned decisionmaking requires an agency to address—not ignore—an undisputed impact of its actions, even if it believes that impact is "unwarranted." *See Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 242 (D.D.C. 2016) ("In the end, cost must be balanced against benefit because '[n]o regulation is 'appropriate' if it does significantly more harm than good.'" (quoting *Michigan*, 135 S. Ct. at 2707)); *cf. Michigan*, 135 S. Ct. at 2707 ("Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.").

Ultimately, DHS concluded that whatever the "potential 'chilling effects' or disenrollment impacts," the Rule's "overriding consideration, i.e. the Government's interest [in self-sufficiency] as set forth in PRWORA, is a *sufficient* basis to move forward." 84 Fed. Reg. at 41,312 (emphasis added). In other words, regardless of what the costs of disenrollment were, they were an acceptable price to pay to promote the agency's stated self-sufficiency goals. *See also id.* at 41,313 (DHS would not "limit the effect of the rulemaking to avoid the possibility that individuals subject to this rule may disenroll or choose not to enroll, as self-sufficiency is the rule's ultimate aim."). DHS thus dismissed harms to local and state governments without seriously responding to the comments about them, on

the ground that it would not change the Rule no matter what those harms were. But "ventilat[ing]" "major issues of policy" requires more than merely cutting off an inquiry into a cost that weighs against the agency's preferred outcome. *See Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993); *see also Rodway*, 514 F.2d at 817 (part of responding to comments in "reasoned manner" includes "explain[ing] how the agency resolved any significant problems raised by the comments, and [] show[ing] how that resolution led the agency to the ultimate rule").

Defendants' response is two-fold. First, they point out that agency took steps to "mitigate . . . disenrollment impacts" such that the negative effects of the Rule would not be as severe as some feared. AOB 39 (quoting 84 Fed. Reg. at 41,313); *see also* AOB 40 (explaining that agency would, at some point in future, issue "clear guidance" explaining which groups of individuals are not subject to public charge determinations (citing 84 Fed. Reg. at 41,313). Second, they contend the Rule would lead to general "benefits obtained from promoting self-sufficiency." AOB 40 (citing 84 Fed. Reg. at 31,314). Again, DHS's explanation fell short of reasoned decision making: the agency asserts that a variety of benefits will flow from the Rule without providing any supporting evidence, while ignoring or dismissing out of hand the evidence of significant costs (mitigated or not) the Rule will likely inflict on various interested parties, including local governments.

Once more, DHS fails to offer a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43.

## III. Absent an Injunction, The Counties Will Suffer Irreparable Harm.

The district court correctly concluded that the Counties would suffer irreparable harm in the absence of a stay. ER78-83.

There is no dispute that at least 2.5% of individuals who are members of households with foreign-born noncitizens—thousands of people in San Francisco and Santa Clara (SER15-16 ¶¶7, 9)—will disenroll from programs like Medicaid and SNAP. Indeed, the district court found that this disenrollment was already occurring in the Counties and that "strong evidence" indicates it "is likely to continue between now and the resolution of this issue on the merits, absent an injunction." ER79. Defendants do not even attempt to challenge this conclusion.

As explained in detail above, the Counties will suffer significant harm if the Rule goes into effect: reduced Medicaid reimbursement funds, increased uncompensated care costs, substantial new operational costs, and a decrease in local economic activity. *See* Part I(A), *supra*. Defendants' only response is to state that these harms are "speculative, founded on an attenuated chain of inferences, and fail to account for cost savings that the Rule is likely to generate for plaintiffs." AOB 44. Each of these assertions fails.

The Counties' harms are not speculative. Each one necessarily flows from disenrollment in public benefits. *See* pp. 16-19, *supra*. Indeed, it is disingenuous for DHS to argue to the contrary when it expressly acknowledged these costs in the rulemaking process. *See, e.g.*, 83 Fed. Reg. 41,301, 51,260; 84 Fed. Reg. 41,389.

Nor are the Counties' harms too attenuated to support standing. Although the harms are dependent on the actions of third parties, the Supreme Court recently concluded that this type of "predictable effect of Government action on the decisions of third parties" is sufficient to establish standing. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019); *see also Bennett v. Spear*, 520 U.S. 154, 169-70 (1997) (a plaintiff has standing if their injury is due to the "determinative or coercive effect" of the defendant's action); *California v. Azar*, 911 F.3d at 571-72 ("The states show, with reasonable probability, that the [rules] will first lead to women losing employer-sponsored contraceptive coverage, which will then result in economic harm to the states.").

Finally, Defendants are wrong to suggest that the Rule will generate any cost savings for the Counties. As explained above, the Counties will not save any money as a result of not providing medical care to people who disenroll from Medicaid. Pursuant to law and policy, the Counties will continue to treat anyone who enters their emergency departments in need of care, regardless of insurance status or ability to pay. But they will now do so at their own expense without any

federal reimbursement from Medicaid. *See* pp. 16-17, *supra*. And because counties do not pay any portion of Medicaid expenses, they will see no savings there either. *Id.*

In short, not one of Defendants' arguments concerning irreparable harm has merit. The district court certainly did not abuse its discretion in determining—based on its review of numerous declarations and documents—that the Counties faced "predictable, likely, and imminent" harm in the absence of a stay. ER82.

## IV. The Balance Of Equities And Public Interest Favor An Injunction.

The district court was also correct to conclude that the balance of equities tips in the Counties' favor, and that an injunction is in the public interest.

Defendants conceded below that they would not "suffer any hardship in the face of an injunction." ER86. They argued only that "Congress has made a policy judgment that aliens should be self-sufficient, and the executive should not be prevented from implementing a rule that advances that policy." *Id.* They similarly argue here that they will be harmed by having to grant lawful-permanent-resident status, under long-standing policy, to individuals whom the Secretary would deem likely to become public charges under the new Rule. AOB 44. But an executive agency cannot establish harm based on the mere fact that it will be temporarily prevented from implementing a new policy preference. If this were sufficient, the Executive Branch would suffer irreparable harm from virtually any restriction on

its conduct—creating an inordinately high barrier to obtaining interim relief against executive action. That is not sound. *See E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1085, 1092 (N.D. Cal. 2018) ("reject[ing] Defendants' argument that an injunction against the Executive Branch 'a fortiori' imposes irreparable injury").[12] Accordingly, in the absence of any other harm to the defendants, the district court properly concluded that the balance of hardships "tip[s] sharply" in favor of the Counties. ER86.

Moreover, where the impact of an injunction "reaches beyond the parties, carrying with it a potential for public consequences," courts are required to consider those broader consequences in evaluating whether interim relief is warranted. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). This is indisputably the case here. Substantial evidence supports the district court's findings that "the public interest cuts sharply in favor of an injunction" because "the predictable disenrollment from Medicaid absent an injunction would have adverse health consequences" to both individuals who disenroll and the entire populations of the relevant areas, and could result in outbreaks of fatal disease.

[12] The cases identifying the irreparable harm from the injunction of State *statutes* are not to the contrary. The irreparable harm a State suffers when a court enjoins enforcement of a state *law* is a "starkly different situation" than where a federal agency is "enjoined from effectuating [its] interpretation" of a statute. *New Mexico Dep't of Game & Fish v. U.S Dep't of the Interior*, 854 F.3d 1236, 1255 (10th Cir. 2017); *see also E. Bay Sanctuary Covenant*, 354 F. Supp. 3d at 1092 (citing *New Mexico Dep't of Game & Fish*, 854 F.3d at 1255-56).

ER87; SER23 ¶¶7-9, 11-13; SER64-66 ¶¶6-8, 10.

In such cases—where public health and safety are at issue—the public interest and balance of the hardships favor injunctive relief. *See Stormans, Inc.*, 586 F.3d at 1139 ("The general public has an interest in the health of state residents.") (internal quotation marks and citation omitted); *cf. Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) ("Faced with . . . a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly" in favor of the latter.).

## CONCLUSION

This Court should affirm the decision of the district court.

Dated: January 16, 2020

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**9th Cir. Case Number(s)** 19-17213

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*State of California v. USDHS,* No. 19-17214

*State of Washington v. USDHS*, No. 19-35914

Dated: January 16, 2020

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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I am the attorney or self-represented party.

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# CERTIFICATE OF SERVICE

I, CATHERYN M. DALY, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECFsystem on January 16, 2020.

**ANSWERING BRIEF OF APPELLEES
CITY AND COUNTY AND SAN FRANCISCO
AND COUNTY OF SANTA CLARA**

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*/s/* CATHERYN M. DALY
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