Case No. 19-35914

In the

United States Court of Appeals

for the

Ninth Circuit

STATE OF WASHINGTON, COMMONWEALTH OF VIRGINIA,
STATE OF COLORADO, STATE OF DELAWARE, STATE OF ILLINOIS,
STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS,
DANA NESSEL, Attorney General on behalf of the People of Michigan,
STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY,
STATE OF NEW MEXICO, STATE OF RHODE ISLAND and STATE OF HAWAII,
Plaintiffs and Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency,
KEVIN K. MCALEENAN, in his official capacity as Acting Secretary of the United States Department of Homeland Security,
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency,
and KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services,
Defendants and Appellants.

On Appeal from a Decision of the United States District Court for the Eastern District of Washington, Case No. 4:19-cv-05210-RMP · Honorable Rosanna Malouf Peterson, District Judge

CONSENT MOTION OF IMMIGRANT AND HEALTHCARE SERVICE ORGANIZATIONS TO PARTICIPATE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION FOR RECONSIDERATION *EN BANC*

NICHOLAS ESPIRITU
LINTON JOAQUIN
ALVARO M. HUERTA
MAYRA B. JOACHIN
MAX S. WOLSON
NATIONAL IMMIGRATION LAW CENTER
3450 Wilshire Boulevard, Suite 108-62
Los Angeles, California 90010
(213) 639-3900 Telephone

ALLON KEDEM
GRAHAM WHITE
JAYCE BORN
HILLARY ANDERSON
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, D.C. 20001
(202) 942-6234 Telephone
allon.kedem@arnoldporter.com

Counsel for Amici Curiae Immigrant and Healthcare Service Organizations

CONSENT MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION FOR RECONSIDERATION *EN BANC*

La Clínica De La Raza, California Primary Care Association, Maternal and Child Health Access, Farmworker Justice, Council on American Islamic Relations-California, African Communities Together, Legal Aid Society of San Mateo County, and Central American Resource Center (collectively, *amici*) request leave to file the accompanying amicus brief in support of Plaintiffs-Appellees.[1] *Amici* are health care and legal services providers who brought suit in *La Clínica de la Raza v. Trump*, No. 4:19-cv-04980, a lawsuit related to the Northern District of California cases at issue in the motions for rehearing *en banc*.

INTEREST OF *AMICI* AND REASONS WHY THE MOTION SHOULD BE GRANTED

Amici litigated their own motion for preliminary injunction simultaneously with Plaintiffs-Appellees; however, the district court ruled that *amici* did not fall within the zone of interests required to pursue their injunction, a ruling that *amici* have appealed, *see La Clínica de la Raza v. Trump*, No. 19-17483. While *amici* strongly disagree with the district court's zone of interests analysis, the district court

[1] No party's counsel authored *amici*'s brief in whole or in part. No party or party's counsel made a monetary contribution intended to fund the preparation or submission of *amici*'s brief, and no person other than *amici curiae* or their counsel made such a monetary contribution. Rule 29(a)(4)(E). All parties have consented to the filing of *amici*'s brief pursuant to Circuit Rule 29-2(a).

did correctly hold that *amici* have standing to bring suit against the rule at issue in this petition. *City & County of San Francisco v. U.S. Citizenship & Immigration Servs.*, _ F. Supp. 3d _, 2019 WL 5100718, at *50 (N.D. Cal. Oct. 11, 2019). Specifically, the district court held that the Public Charge Final Rule frustrates *amici*'s organizational purpose, requires *amici* to divert funds, and increases some of *amici*'s operating costs. Those redressable harms differ from those of Plaintiffs-Appellees. Accordingly, *amici* have a unique perspective on the harmful consequences that would result from a stay of the district court's ruling.

Amici, as organizations that provide vital services to immigrants, have a unique perspective on the harmful consequences that would result from a stay of the district court's ruling. *Amici* seek to inform this Court of the nature and extent of these harms, which were considered and evaluated by the district court in evaluating the merits of the preliminary injunction motions below. In contrast, the panel *expressly* failed to consider all the relevant factors governing a stay pending appeal when it declined to address the harms that the Final Rule would inflict on interested non-parties such as *amici curiae* and the people they serve. Had it done so, the panel should have concluded that Defendants-Appellants' stay request should be denied.

CONCLUSION

For the foregoing reasons, *amici*'s motion for leave to file the attached *amicus* brief should be granted.

Dated: December 27, 2019

Respectfully submitted,

/s/ *Nicholas Espíritu*
Nicholas Espíritu
Linton Joaquin
Alvaro M. Huerta
Mayra B. Joachin
Max S. Wolson
NATIONAL IMMIGRATION LAW CENTER
3450 Wilshire Boulevard, #108-62
Los Angeles, CA 90010
(213) 639-3900

Allon Kedem
Graham White
Jayce Born
Hillary Anderson
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
allon.kedem@arnoldporter.com
(202) 942-6234

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Nicholas Espíritu*
Nicholas Espiritu

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BRIEF OF IMMIGRANT AND HEALTHCARE SERVICE ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION FOR RECONSIDERATION *EN BANC*

NICHOLAS ESPIRITU
LINTON JOAQUIN
ALVARO M. HUERTA
MAYRA B. JOACHIN
MAX S. WOLSON
NATIONAL IMMIGRATION LAW CENTER
3450 Wilshire Boulevard, Suite 108-62
Los Angeles, California 90010
(213) 639-3900 Telephone

ALLON KEDEM
GRAHAM WHITE
JAYCE BORN
HILLARY ANDERSON
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, D.C. 20001
(202) 942-6234 Telephone
allon.kedem@arnoldporter.com

Counsel for Amici Curiae Immigrant and Healthcare Service Organizations

COUNSEL PRESS · (213) 680-2300 PRINTED ON RECYCLED PAPER

CORPORATE DISCLOSURE STATEMENT
(PURSUANT TO FED. R. APP. P. 26.1)

The immigrant and healthcare service organizations that make up the *Amici Curiae* hereby assert that there are no parent corporations and there are no publicly held corporations that own ten percent or more of their stock.

Dated: December 27, 2019

Respectfully submitted,

/s/ *Nicholas Espíritu*
Nicholas Espíritu

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici, La Clinica De La Raza, California Primary Care Association, Maternal and Child Health Access, Farmworker Justice, Council on American Islamic Relations-California, African Communities Together; Legal Aid Society of San Mateo County, and Central American Resource Center, are health care and legal services providers who brought suit in *La Clínica de la Raza v. Trump*, No. 4:19-cv-04980, a lawsuit related to the Northern District of California cases at issue in the motion for reconsideration *en banc*. *Amici* litigated their own motion for preliminary injunction simultaneously with petitioners; however, the district court ruled that *amici* did not fall within the zone of interests required to pursue their injunction, a ruling that *amici* have appealed, *see La Clínica de la Raza v. Trump*, No. 19-17483.

While *amici* strongly disagree with the district court's zone of interests analysis, the district court did correctly hold that *amici* have standing to bring suit against the rule at issue in this petition. *City & County of San Francisco v. U.S. Citizenship & Immigration Servs.*, _ F. Supp. 3d _, 2019 WL 5100718, at *50 (N.D. Cal. 2019). Specifically, the district court held that the Public Charge Final Rule frustrates

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici curiae* or their counsel made such a monetary contribution. All parties have consented to the filing of this brief pursuant to Circuit Rule 29-2(a).

amici's organizational purpose, requires *amici* to divert funds, and increases some of *amici*'s operating costs. Those redressable harms differ from those of petitioners.

INTRODUCTION AND SUMMARY OF ARGUMENT

Reconsideration *en banc* is appropriate where "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35. This is undoubtedly such a case.

The Administration seeks to drastically limit legal, family-based immigration to the United States, and to replace it with a system that disfavors immigrants from less-affluent countries. Having failed to obtain legislative authority for this sea-change, the Administration now seeks to force it through by administrative fiat. Defendants have accordingly promulgated a regulation that would fundamentally alter the longstanding meaning of the statutory term "public charge." *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (Final Rule).

Since the term's first appearance in immigration law almost 150 years ago, Congress has repeatedly rejected the change that the Administration seeks here: Time and again, Congress has rejected efforts to redefine "public charge" to include those who receive certain in-kind benefits. *See*, *e.g.*, 142 Cong. Rec. 24313, 24425 (1996); S. Rep. No. 113-40, at 42, 63 (2013). These efforts have been rejected precisely because they would disincentivize immigrants from obtaining crucial

public benefits, in turn jeopardizing the health and safety not only of those lawfully eligible for benefits, but also of the public at large.

The district court, noting that the Final Rule is "strikingly similar" to previously rejected legislative proposals, concluded (among other things) that the Final Rule conflicts with the well-established meaning of "public charge"; the court accordingly enjoined the Final Rule from going into effect. *La Clínica de La Raza v. Trump*, Case No. 19-cv-04980, slip op. at 46 (N.D. Cal. Oct. 11, 2019). A panel of this Court has now stayed the district court's injunctions pending appeal.

The panel's decision warrants correction. The panel *expressly* failed to consider all the relevant factors governing a stay pending appeal, when it declined to address the harms that the Final Rule would inflict on interested parties such as *amici curiae* and the people they serve. Had it done so, the panel would have concluded that defendants-appellants' stay request should be denied.

ARGUMENT

As the panel recognized, the decision whether to grant a stay pending appeal is an "exercise of . . . discretion." Slip op. at 28 (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)). Yet "[t]he fact that the issuance of a stay is left to the court's discretion does not mean that no legal standard governs that discretion." *Nken*, 556 U.S. at 434 (quotation marks omitted). Rather, a "motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided

by sound legal principles." *Id.* Any consideration of an appellate stay request thus must address four prerequisites: (1) whether the stay applicant has made a strong showing that she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *See id.* By its own admission, the panel failed to discharge that responsibility.

I. The Panel Failed to Properly Consider the Third Stay Factor

The third factor—whether issuance of a stay will substantially injure *other parties interested in the proceeding*—differs from the familiar standard governing a preliminary injunction, which asks whether "the balance of equities tips in [the movant's] favor." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As the Supreme Court has observed, while these factors address similar concerns, they are not "one and the same." *Nken*, 556 U.S. at 434.

The panel's decision paid lip service to the appropriate standard, *see* slip op. at 27, but nevertheless failed to consider harm to interested parties. That failure to account for interested parties is particularly noteworthy here, where the preliminary injunction opinion on appeal *itself* addressed the harm to parties before the court other than petitioners.

The panel began its decision by focusing extensively on the likelihood of success on the merits, *see id.* at 29-68, and on irreparable harm, *see id.* at 68-70. But rather

than evaluate potential harm to non-parties interested in the proceedings (such as *amici*), the panel instead "consider[ed] the hardships *each party* is likely to suffer if the other prevails." Slip op. at 70 (emphasis added). The panel thus acknowledged harm that a stay would inflict on plaintiffs-appellees (financial, public health, and administrative harms), as well as the hardships claimed by defendants-appellants that might result from the lack of a stay (the grant of lawful-permanent-resident status to noncitizens who would likely be inadmissible under the Final Rule). *Id.* 70-72. Yet defendants-appellants did not purport—and cannot claim—to represent the interests of all persons affected by the Final Rule, including those of *amici*; indeed, the only interest asserted by defendants-appellants (in preventing some noncitizens from improving their immigration status) is directly *opposed* to *amici*'s core mission. Nor are *amici*'s interests identical to those asserted by plaintiffs-appellees. The panel thus failed to address the harms that would be suffered by any party interested in the proceeding other than the parties to the appeal.

The panel committed a further error. After acknowledging that balancing the parties' hardships would be "particularly difficult in this case," *id.* at 72, the panel simply declined to do so. The panel justified that failure by stating its view that "the harms are not comparable," such that the panel had "few standards for announcing which interest is greater." *Id.* at 72-73. Failing to determine which harm was greater,

the panel went on to grant a stay on the purported strength of defendants-appellants' merits arguments and demonstration of irreparable harm. *Id.* at 73.

In so ruling, the panel doubly erred: Not only did the panel fail even to acknowledge the potential for harm to "other parties interested in the proceeding," *Nken*, 556 U.S. at 434 (quotation marks omitted), the panel also failed to balance the parties' interests against one another. As explained below, had the panel properly taken account of the appropriate interests, it would have concluded that those interests weigh heavily against a stay.

II. A Stay Would Inflict Substantial Harm on Interested Parties Like *Amici*

As organizations that provide vital services to immigrants, *amici* have a unique perspective on the harmful consequences that would result from a stay of the district court's ruling.

A. *Amicus* California Primary Care Association (CPCA) and its health care provider members, including *amici* La Clínica de La Raza, provide high-quality health care to low-income communities. Many of *amici*'s patients are immigrants who rely on public benefits programs, such as Medi-Cal (California's Medicaid program) and CalFresh (California's supplemental nutrition program), that would count against them under the Final Rule. As a result, *amici* have been forced by the Final Rule to divert precious resources from their core missions to address concerns of individual patients and their communities about the public charge determination.

Although necessary under the circumstances, these efforts have interfered with *amici*'s ability to serve their core organizational purposes.

The Final Rule has also undermined these organizations in other ways. *Amici* health care providers obtain a substantial portion of their funding through Medi-Cal reimbursements. *See* Ex. A, Decl. of Carmela R. Castellano-García ¶¶ 7, 19-21, ECF No. 35-3; Ex. B, Decl. of Jane García ¶ 16, ECF No. 35-5.[2] Some *amici* also help patients enroll in other public benefit programs, such as CalFresh. *See* Ex. C, Decl. of Hope Nakamura ¶¶ 7, 10.

In anticipation of the Final Rule, many patients have already begun opting out of services or disenrolling entirely from Medi-Cal and other benefits programs; *amici* expect this disenrollment and forbearance to grow substantially if the Final Rule goes into effect. Ex. A ¶ 20 (estimating that the Rule will cause 82,000 to 247,000 of *amici*'s patients to disenroll from Medi-Cal); Ex. B ¶¶ 11-12 (projecting at least a 20% Medi-Cal disenrollment rate). Some patients will continue to seek *amici*'s services, but will do so without Medi-Cal coverage; others will turn to *amici* only when their health problems have become more serious and costly to address. The consequence will be an unprecedented resource gap, rendering *amici* unable to

[2] These declarations and all others cited herein were filed in support of *amici*'s motion for preliminary injunction in a related suit. *See* Pls.' Notice of Mot. and Mot. for Prelim. Inj.; Mem. of Points and Authorities, *La Clínica De La Raza v. Trump*, No. 4:19-cv-04980-PJH (N.D. Cal. Sept. 4, 2019), ECF No. 35.

provide necessary health services. And these challenges will only be exacerbated by the compounding effects that the Rule will have in dissuading potential patients from utilizing other health-promoting programs (such as food assistance).

In sum, health care providers like CPCA's members face drastic decreases in funding at the same time that they face an increase in the demand for uncompensated, higher-cost care. The loss of Medi-Cal reimbursements alone is estimated at between $46 and $138 million annually. *See* Ex. A ¶¶ 16, 20-22; Ex. B ¶¶ 13, 16, 18. The consequence: Providers will have to lay off employees and diminish or cancel programs altogether. Ex. B ¶ 18; *see also* Ex. D, Decl. of Leighton Ku ¶ 65, ECF No. 37 (estimating nationwide community health center staffing losses of 3,400 to 6,100 employees).

B. *Amici* advocacy and legal organizations—African Communities Together, Council on American Islamic Relations-California, Central American Resource Center, Farmworker Justice, Legal Aid Society of San Mateo County, and Maternal and Child Health Access—face analogous harms. The mission of these organizations is to provide advocacy and legal services to their clients and members, including by helping them obtain immigration relief and public benefits for which they are legally eligible. All of these *amici* serve low-income immigrant communities; many of their clients participate in one or more public benefit programs and have other characteristics weighed negatively by the Final Rule. Ex.

E, Decl. of Amaha Kassa ¶¶ 6, 10, ECF No. 35-2; Ex. F, Decl. of Hussam Ayloush ¶ 8, ECF No. 35-7; Ex. G, Decl. of Daniel Sharp ¶¶ 8-9, ECF No. 35-4; Ex. H, Decl. of Bruce Goldstein ¶ 7, ECF No. 35-6; Ex. I, Decl. of Jenny Seon ¶¶ 5, 10, ECF No. 35-8; Ex. C, Decl. of Hope Nakamura ¶¶ 7-8, 13, ECF No. 35-10; Ex. K, Decl. of Lynn Kersey ¶¶ 10, 12-15, ECF No. 35-9.

Amici's ability to carry out their core missions will be severely frustrated by the Final Rule. Many of their clients will no longer be eligible for immigration relief; others will disenroll from or choose not to enroll in benefits programs to preserve their eligibility. Still others, even if they ultimately remain eligible, will require additional time and resources from *amici* to address the Rule's effects. Ex. E ¶¶ 10-13, 16; Ex. F ¶¶ 11-14; Ex. G ¶¶ 12-15, 18; Ex. H ¶ 8; Ex. I ¶¶ 10-14; Ex. J ¶¶ 12, 14-15; Ex. K ¶¶ 23-30. As a result, *amici* will be required to devote more resources in order to file fewer cases and help fewer clients. Ex. E ¶¶ 10, 12-13; Ex. F ¶¶ 11-12; Ex. G ¶ 13; Ex. H ¶¶ 10-14; Ex. I ¶¶ 14-16-; Ex. J ¶¶ 34, 36.

For several *amici*, their funding is directly proportional to the number of cases filed or clients served; fewer cases and clients thus means less funding. Ex. E ¶ 16; Ex. F ¶¶ 14, 18-19; Ex. G ¶¶ 20-21; Ex. H ¶ 20; Ex. I ¶ 15; Ex. J ¶ 34. The Final Rule's complexity also decreases the utility of existing funding, as each case takes longer and costs more money to resolve. Ex. E ¶ 16; Ex. F ¶¶ 11-12, 14, 19; Ex. G ¶¶ 12-14, 21; Ex. H ¶¶ 14, 23; Ex. I ¶¶ 26, 29-30, 34, 36. Some *amici* have already

endured increased operational costs in response to the Final Rule, such as by hiring additional staff or adding new programs or services. Ex. E ¶ 14; Ex. J. ¶¶ 13-14, 16-17; Ex. K ¶¶ 21, 26-30, 35. *Amici* have also been forced to divert resources from other core services and priorities in order to provide more staffing, training, education, and public outreach addressing the Final Rule. Ex. E ¶¶ 11, 14-17; Ex. F ¶¶ 13, 15-16; Ex. G ¶¶ 14-16; Ex. H ¶ 7-12; Ex. I ¶ 16-19, 21; Ex. J ¶¶ 13-14, 16-17; Ex. K ¶¶ 26-29, 35-36.

C. The panel's failure to address the Final Rule's negative consequences for other interested parties was particularly glaring because defendants-appellants have themselves acknowledged that the Final Rule will cause harms such as those suffered by *amici*. They admit that health-care providers, legal-services providers, and other nonprofit organizations will be forced to devote additional resources to address the Final Rule's application. 84 Fed. Reg. at 41,300-01. And *amici* cannot simply adjust their services and resources to avoid these consequences. Ex. F ¶ 23; Ex. G ¶ 17. Doing so could cause *amici* to incur even *more* harm, such as the loss of goodwill in their community, which some *amici* are already suffering as they are unable to assist their communities as they did before the Final Rule's promulgation. *See* Ex. F ¶ 11; Ex. G ¶ 13, 17; Ex. K ¶ 37; *see also Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (intangible harms like loss of goodwill are irreparable and appropriately redressed through preliminary injunctive relief); *Stuhlbarg Int'l Sales*

Co., Inc. v. John D. Brush & Co., Inc., 240 F.3d 832, 841 (9th Cir. 2001); ("Evidence of threatened loss of . . . goodwill certainly supports a finding of the possibility of irreparable harm.").

CONCLUSION

The Court should grant plaintiffs-appellees' motion for reconsideration *en banc*.

Dated: December 27, 2019

Respectfully submitted,

/s/ *Nicholas Espíritu*

Nicholas Espíritu
Linton Joaquin
Alvaro M. Huerta
Mayra B. Joachin
Max S. Wolson
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3450 Wilshire Boulevard, #108-62
Los Angeles, CA 90010
(213) 639-3900

Allon Kedem
Graham White
Jayce Born
Hillary Anderson
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
allon.kedem@arnoldporter.com
(202) 942-6234

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a) and Ninth Circuit Local Rule 29-2(c)(2) because this brief contains 2578 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman typeface.

Dated: December 27, 2019

Respectfully submitted,

/s/ *Nicholas Espíritu*
Nicholas Espíritu

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