No. 19-35914

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, et al.,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants-Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 4:19-cv-05210-RMP
The Honorable Rosanna Malouf Peterson
United States District Court Judge

PLAINTIFF STATES' ANSWERING BRIEF

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INTRODUCTION

Administrative agencies are supposed to implement the law, not transform it. In this case, the Department of Homeland Security adopted a rule intended to "transform" the American immigration system. The rule violates multiple statutes, arbitrarily ignores massive harms to States and the public, and is fundamentally un-American, disqualifying young children from future citizenship in the United States because their families briefly live in public housing or receive food stamps. The district court below, and four others around the country, preliminarily enjoined the rule. This Court should affirm.

Since 1882, when Congress first authorized exclusion from the United States based on an individual's likelihood to become a "public charge," the exclusion has been extremely narrow. When Congress enacted the law, it was clearly not intended to cover individuals briefly receiving government assistance. Courts interpreting the law and administrative agencies enforcing it have consistently understood the term the same way. Applying this widely understood meaning, less than one percent of immigrants have been excluded as public charges. And when Congress has readopted the term over the years without substantive change, it understood and endorsed the term's accepted meaning. Indeed, Congress has consistently rejected efforts to expand the term's meaning and has authorized a

variety of forms of temporary and public assistance to be provided to many immigrants.

Nonetheless, in August 2019 the Department of Homeland Security (DHS or Defendants) issued a new rule radically redefining "public charge." *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019). The Rule massively expands the number of immigrants excludable as public charges by redefining the term to cover any immigrants, including children, likely to receive even a small amount of public benefits on a temporary basis. If the Rule were applied to U.S.-born individuals, roughly forty percent could qualify as likely to become "public charges."

DHS received hundreds of thousands of comments opposing the Rule and pointing out the harms it would cause. In particular, commenters warned that the Rule would trigger a public health crisis as millions of low-income immigrants, including U.S. citizen children, disenrolled from critical safety net programs for fear of compromising their or their families' immigration status. Such predictable disenrollment would lead to delayed or foregone medical treatment, decreased vaccinations, increased risk of communicable diseases, and increased homelessness and hunger. The Rule would inflict especially severe and lasting harm on young children, who would suffer the adverse effects of illness, malnutrition, and homelessness for many years to come.

Without meaningfully responding to these comments or explaining how the Rule could be reconciled with statute, DHS implemented the Rule.

Fourteen states sued DHS and moved for injunctive relief. The district court preliminarily enjoined the Rule. The court appropriately held the Rule was likely contrary to law because it adopted an interpretation of "public charge" rejected by Congress for over 100 years. The court also found the Rule was likely arbitrary and capricious given DHS's internally inconsistent, superficial, and unsupported justification for the irreparable harm the Rule would likely inflict.

DHS does not demonstrate that the injunction is an abuse of discretion, as required to warrant relief. DHS challenges the order by mischaracterizing the Rule's impacts, disregarding controlling law, adopting new arguments never presented to the district court, and distorting the statutory, judicial, and administrative context of the public charge exclusion. Nor does DHS show any error in the district court's conclusion that the balance of equities and public interest favor an injunction. DHS's desire to "transform" the law by illegal regulation cannot justify a radical departure from over 100 years of consistent practice while this case is litigated on the merits. The district court also appropriately awarded Plaintiff States nationwide relief because a limited injunction would not avoid the Rule's adverse impacts on Plaintiff States.

This Court should affirm the district court's order.

STATEMENT OF THE ISSUES

1. Whether Plaintiff States have standing to challenge a rule likely to cause public health crises and financial harms to the States.

2. Whether the Rule is arbitrary and capricious based on DHS's failure to adequately respond to comments warning of potentially devastating harm to public health and vulnerable populations.

3. Whether the Rule's new definition of "public charge" is contrary to law because it contradicts clear Congressional intent in ratifying the term's longstanding meaning.

4. Whether the Rule violates the Rehabilitation Act because it discriminates against individuals with disabilities by double- and triple-counting their disabilities against them.

STATEMENT OF THE CASE

A. History of the Public Charge Exclusion

The Immigration and Nationality Act allows the federal government to exclude individuals seeking to enter the United States who are likely to become a "public charge." 8 U.S.C. § 1182(a)(4). Since its first enactment more than 135 years ago, the public charge exclusion has been rarely and narrowly applied. DHS's records show that between 1892 and 1980 (the last reported data), less than

one percent of all immigrants were excluded as public charges.[1]

Throughout this time, court and agency interpretations have consistently rejected the receipt of minimal or temporary public assistance as grounds for exclusion as a "public charge."[2] Against this backdrop, Congress has reenacted the public charge exclusion numerous times over the past 135 years and has repeatedly rejected efforts to expand the definition to include receipt of in-kind benefits. In 1996, Congress, in conference committee considering the most recent reenactment of the exclusion, rejected a definition of "public charge" that included individuals receiving means-tested public benefits for limited periods of time. *Immigration Control & Financial Responsibility Act of 1996*, H.R. 2202, 104th Cong. § 202 (1996). In 2013, the Senate again rejected efforts to "*expand*[] the definition of 'public charge'" to include receipt of non-cash benefits such as Medicaid. S. Rep. No. 113-40, at 42, 63 (2013).

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[1] *See* Dep't of Homeland Security, Table 1. Persons Obtaining Lawful Permanent Resident Status: Fiscal Years 1820 to 2016 (Dec. 18, 2017), https://www.dhs.gov/immigration-statistics/yearbook/2016/table1 (last visited Jan. 17, 2020); Immigration and Naturalization Service, 2001 Statistical Yearbook of the Immigration and Naturalization Service 258 (2003), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2001.pdf (last visited Jan. 17, 2020); *see also* Mae Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America 18 (2004).

[2] For example, DHS's predecessor agency confirmed in 1999 Field Guidance that receipt of in-kind benefits are not considered in making public charge determinations. *See* INS, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28,689-01 (May 26, 1999).

Despite consistent congressional reenactment of the public charge exclusion premised on this narrow construction, on August 12, 2019, DHS published the Rule enacting what Congress rejected in 1996. 84 Fed. Reg. 41,292. DHS described the Rule as a "transformative" tool to reshape American immigration policy.[3] The Rule dramatically enlarges the scope of the public charge exclusion by redefining a "public charge" as an "alien who receives one or more public benefits. . . for more than 12 months in the aggregate within any 36-month period." 8 C.F.R. § 212.21(a). If applied to U.S.-born individuals, the new definition of public charge could sweep in more than 40 percent of the population. *See* SER181 (Comment by Center on Budget and Policy Priorities).

The Rule's core policy change is to make receipt of even small amounts of commonly-used benefits such as health insurance and food and housing assistance a basis for deeming an individual a public charge. 8 C.F.R. § 212.21(b). Under the new 12/36 standard, receipt of two cash or noncash benefits in a given month counts as two months, three benefits as three months, and so forth, regardless of amount. 84 Fed. Reg. at 41,501. The Rule makes receipt of the following cash and non-cash "public benefits" a basis for deeming an individual a public charge: (1)

[3] See Eileen Sullivan & Michael D. Shear, *Trump Sees an Obstacle to Getting his Way on Immigration: His Own Officials*, N.Y. TIMES (Apr. 14, 2019), https://www.nytimes.com/2019/04/14/us/politics/trump-immigration-stephen-miller.html.

any "Federal, state, local or tribal cash assistance for income maintenance," including Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF) or state "General Assistance" (2) Supplemental Nutrition Assistance Program (SNAP or "food stamps"); (3) Section 8 housing vouchers or rental assistance; (4) Medicaid, with certain limited exceptions; and (5) public housing under Section 9 of the U.S. Housing Act of 1937. 8 C.F.R. § 212.21(b).

Public charge determinations under the Rule must be made under a "totality of circumstances" test that requires consideration of factors including age; health; family status; education and skills; and assets, resources, and financial status. 8 C.F.R. § 212.22(a), (b).[4] The Rule also creates new "positively" and "negatively" weighted factors, placing heavily negative weight on factors that include past receipt of public benefits and having certain medical conditions. 8 C.F.R. § 212.22(c)(1)(i)–(iv). Other negative criteria under the Rule include whether the immigrant is under 18 or over the retirement age; is not proficient in English or

[4] The "totality of the circumstances" established in the 1996 Immigration and Reform Act codified the existing public charge standard in case law. *See In re Perez*, 15 I. & N. Dec. 136, 137 (B.I.A. 1974) (citing Foreign Affairs Manual, Part III, Vol. 9, Note 1 to 22 CFR § 42.91(a)(15)); *see also* Adjustment of Status for Certain Aliens, 53 Fed. Reg. 43986-01, 43996 (1988) (in making public charge determination, financial responsibility of immigrant based on "totality of the alien's circumstances" at the time of application), *codified at* 8 C.F.R. § 245a.3(g)(4)(i); U.S. Dep't of Justice, Final Rule: Adjustment of Status for Certain Aliens, 54 Fed. Reg. 29442-01 (July 12, 1989), codified in relevant part at 8 C.F.R. §§ 245a.2(k)(4), 245a.3(g)(4)(iii), 245a.4(b)(1)(iv)(C) (financial responsibility determined based on "totality of the alien's circumstances" at the time of application).

lacks a high school diploma; and whether the immigrant has income under 125% of the poverty line, minimal assets, financial liabilities, foreseeable medical costs or a low credit score. *Id.*

Prior to enacting the Rule, DHS received 266,077 comments on the proposed rule, "the vast majority of which opposed the rule." 84 Fed. Reg. at 41,297. Leading medical associations and health care providers warned of the Rule's harmful effects on public health, including delayed or foregone medical treatment, decreased access to vaccinations and increased risk of outbreaks of dangerous communicable diseases.[5] Commenters further warned about the long-term, compounding harm caused by the Rule's predictable effects on increasing food and economic insecurity, destabilizing housing, and decreasing access to medical and disability treatment, including for children.[6]

B. Prior Proceedings

Shortly after DHS announced the Rule, fourteen states—Washington, Virginia, Colorado, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, and Rhode Island

[5] *See, e.g.*, SER158 (Comment by American Thoracic Society) (warning the Rule would weaken the "detection, diagnosis, and treatment for any communicable diseases" such as influenza, measles, pneumonia, and tuberculosis).

[6] *See, e.g.*, SER161 (Comment by Association of State Public Health Nutritionists) (warning of increased food insecurity, hunger, and malnutrition, which are "particularly damaging to the overall health, development, and well-being of children").

(Plaintiff States)—sued and moved to enjoin and stay the Rule. The district court granted a stay and nationwide preliminary injunction barring DHS from implementing the Rule on October 11, 2019. ER058-59.

The court made detailed factual findings about the imminent irreparable harms Plaintiff States would suffer, citing from over 50 declarations submitted by the States, and numerous amicus briefs filed by domestic violence, healthcare, disability, education, and elder care service providers. ER013-23. Consistent with the warnings of virtually every medical association and healthcare services provider to submit a comment, the court determined the Rule would lead to disenrollment in critical safety net services by immigrants and their U.S. citizen children, triggering cascading, long-term harms to the health and wellbeing of Plaintiff States' residents. ER052. DHS conceded that "disenrollment would occur" and could cause predictable harms, including spiking emergency room visits due to loss of medical benefits, increased uncompensated medical care, and heightened risks of outbreaks of dangerous communicable diseases. *Id.*

The court found the Rule would inflict particular and lasting harm on young children by pressuring entire families to disenroll from benefits programs out of fear of compromising their immigration status. ER022-23. The corresponding rise in untreated illness, severe hunger, malnutrition, and homelessness in children

would likely cause developmental delays, long-term health issues, lower achievement, and lasting trauma. *Id.*

The court further found the Rule "disproportionately penalizes" individuals with disabilities by "triple-counting" the effects of being disabled under the Rule's weighted factors. ER018-19. This would lead to a "significant possibility" that disabled individuals would be barred entry "primarily on the basis of their disability." ER019. Similarly, the Rule's negative factors "inherently apply to the elderly" by negatively weighting circumstances common in such populations. ER020. The chilling effect of the Rule similarly risks depriving victims of domestic violence essential support to leave abusive situations, leaving them vulnerable to violence and long-term trauma. ER021.

The court cited the predictable "cascade of costs to states as immigrants disenroll from federal and state benefits programs" as supporting Plaintiff States' Article III and prudential standing. ER023-24. These costs include loss of federal Medicaid reimbursements, rising costs of uncompensated care, expenses related to treating public health crises, and loss of future tax revenue from residents with diminished abilities to contribute to their families and communities. ER051-52.

The court also concluded Plaintiff States were likely to succeed in proving the Rule was arbitrary and capricious and in violation of the Administrative Procedure Act. ER034-50. The court held that Congress had repeatedly rejected the

policy embodied in the Rule and that DHS failed to address the Rule's potentially devastating effects on public health. ER045-50. And based in part on DHS's own admission of the "potentially outsized impact" the Rule would have on individuals with disabilities, the court found the plain language of the Rule "casts doubt" on whether it contravenes the Rehabilitation Act. ER046.

Another district court in this Circuit also preliminary enjoined the Rule based on similar factual findings and legal conclusions. *City and County of San Francisco v. U.S. Citizenship and Immigration Services*, 19-cv-04717, *et al*., consolidated at 2019 WL 5100718 (N.D. Cal. Oct. 11, 2019). Every other district court to consider similar challenges did the same. *New York v. U.S. Dep't of Homeland Sec.*, 19-7777, 2019 WL 5100372 (S.D.N.Y. Oct. 11, 2019); *Casa De Maryland, Inc. v. Trump*, PWG-19-2715, 2019 WL 5190689 (D. Md. Oct. 14, 2019); *Cook County v. McAleenan*, 19-6334, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019).

On December 5, 2019, a motions panel of this Court stayed the California and Washington district court injunctions in a published order, over a dissent by Judge Owens. *See* Dkt. 25. Plaintiff States and the California Plaintiffs thereafter filed petitions for reconsideration en banc. Dkt. 34. The motions panel ordered

DHS to respond to the petitions, which the agency did on January 9, 2020. Dkt. 33, 38.[7] The petitions are currently pending.

STANDARD OF REVIEW

The Court reviews the district court's entry of a preliminary injunction for abuse of discretion. *Network Automation, Inc. v. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011). The Court's review is "limited," *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,* 422 F.3d 782, 793 (9th Cir. 2005), and "highly deferential to the district court." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012). The Court "review[s] conclusions of law de novo and findings of fact for clear error." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 872, 881 (9th Cir. 2011) (internal quotation marks omitted). Where the district court has appropriately identified the correct legal standards, a preliminary injunction should be vacated only if the district court's application of those standards is "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (citation omitted).

[7] The Seventh Circuit (*Cook County, Illinois, et al. v. Chad F. Wolf, et al.,* Dkt. 41) and Second Circuit (*Make the Road New York v. Cuccinelli*, Dkt. 129) both denied similar motions by DHS to stay district court preliminary injunctions, whereas the Fourth Circuit granted a similar stay request. *Casa De Maryland, Inc. v. Donald Trump,* Dkt. 21.

This Court's role in reviewing a preliminary injunction order is to decide "only the temporal rights of the parties until the district court renders judgment on the merits of the case based on a fully developed record." *Nat'l Wildlife Fed'n*, 422 F.3d at 793. Thus, this Court does not "determine the ultimate merits," but "only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand." *Fyock v. Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015).

To obtain a preliminary injunction, the plaintiff must establish (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of injunctive relief; (3) that the balance of equities favors an injunction; and (4) that an injunction is in the public interest. *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018) (citing *Winter v. Nat. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). In reviewing the issuance of a preliminary injunction, this Court weighs those factors "on a sliding scale." *Karnoski v. Trump*, 926 F.3d 1180, 1198 n. 14 (9th Cir. 2019) (emphasis in original) (quoting *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013)). A preliminary injunction may be upheld where there is less than a clear likelihood of success on the merits, provided there are "serious questions going to the merits, . . . the balance of hardships tips *sharply* in the plaintiff's favor, and the other two factors are satisfied." *Id.* (emphasis in original).

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in finding the Plaintiff States had Article III and prudential standing. DHS conceded the Rule would cause increased costs and worse health outcomes for the States. The INA is intended to prevent the imposition of uncompensated costs on the States and recognizes the States' authority to administer benefit programs.

Neither did the district court abuse its discretion in holding the Rule is likely arbitrary and capricious based on DHS's failure to meaningfully address comments warning of its potentially devastating effects on public health. The agency received comments showing the Rule would reduce access to vaccinations, increase the spread of communicable diseases, and exacerbate hunger, malnutrition, housing insecurity, and homelessness, including for young children. Although DHS conceded these public health crises may well occur, the agency—without any experience in healthcare policy—arbitrarily moved forward with the Rule without ever attempting to understand the full scope of harm it is likely to inflict.

The district court also did not abuse its discretion in finding the Rule likely contrary to law based on finding Congress had spoken to the precise question at issue. By reenacting the public charge exclusion seven times since its adoption in 1882 without changing its meaning, Congress ratified the historical understanding of the term. That understanding is demonstrated by dictionary definitions,

accompanying statutory sections affirmatively providing government assistance to immigrants, 120 years of consistent judicial decisions, and uniform agency practice. These sources reflect that, for 135 years before adoption of the Rule, Congress never intended for the term "public charge" to reach immigrants who may receive temporary, modest assistance from the government.

The district court was similarly within its discretion in finding the Rule likely violates the Rehabilitation Act, because it targets immigrants with disabilities for disparate treatment and treats the receipt of assistance often necessary to their daily functioning as disqualifying. The fact the Rule excludes immigrants for other reasons as well does not reduce the Rule's discrimination *because* of their disability.

Finally, the district court properly stayed and enjoined the rule on a nationwide basis. It would be irrational and unworkable to have different exclusion standards for immigrants in different states. Even if possible, a narrower remedy would not protect Plaintiff States from the Rule's financial and health harms.

ARGUMENT

A. The District Court Did Not Abuse Its Discretion in Finding Plaintiffs Have Article III and Prudential Standing

The trial court did not abuse its discretion in holding Plaintiff States had established standing based on allegations the Rule would harm the States as their residents disenroll from public benefits programs. To establish standing, a plaintiff

must show a "concrete and particularized injury" that is "fairly traceable to the challenged conduct of the defendant" and "is likely to be redressed by a favorable judicial decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). States have standing to challenge rulemaking that imposes financial costs on them. *Massachusetts v. E.P.A.*, 549 U.S. 497, 521-26 (2007); *California v. Azar*, 911 F.3d 558, 571-73 (9th Cir. 2018). At this preliminary stage of litigation, a court may rely on allegations in the complaint or other evidence submitted by plaintiffs. *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017) (per curiam).

Plaintiff States submitted numerous declarations from state and local health officials supporting their allegations the Rule would result in significant costs and negative effects to States. *See* ER002, 016; *see, e.g.*, SER076 (Fehrenbach Decl.) (warning the Rule could result in "higher rates of contagion and worse community health" by "discouraging immigrants from obtaining vaccines because of potential adverse consequences to their immigration status"). DHS *conceded* many of the costs and negative effects of disenrollment by immigrants from state and federal benefits programs. *See* 84 Fed. Reg. at 41,300-01; *see also id.* at 41,469 ("state and local governments . . . would incur costs related to the changes"); 83 Fed. Reg. at 51,270 (Rule could lead to "[w]orse health outcomes," "[i]ncreased use of emergency rooms," and "[i]ncreased prevalence of communicable diseases").

Defendants claim such harms cannot be attributed to the Rule. But Defendants fail to even cite—much less discuss—the Supreme Court's recent analysis of standing in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). Rejecting the same argument Defendants make here, the Court held the plaintiffs established standing based on "the predictable effect of Government action on the decisions of third parties." *Id.* Given DHS's concessions here regarding the Rule's predictable harms, the divided motions panel in this case reached unanimity on just a single point—namely, that DHS's jurisdictional arguments were "unavailing" and "disingenuous." Dkt. 25 at 23-24.

Defendants are no more successful in claiming Plaintiff States fall outside the applicable zone of interests. Defendants ignore that the requirement is "not meant to be especially demanding." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 and n.16 (1987). Agency action is "presumptively reviewable," and "the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). A party will fail the zone-of-interests test only if its interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.*

The standard is readily met here, where the initial purpose of the public charge exclusion was to protect state fiscs by preventing immigrants from

becoming primarily dependent on state governments for subsistence. *See* Hidetaka Hirota, *Expelling the Poor* 185 (2017) (detailing state campaigns precipitating public charge exclusion). Further, the INA expressly recognizes states' authority to provide and administer public benefits programs. *See* 8 U.S.C. §§ 1183a(a), (b), (e)(2); *see also Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015) (states' role in administering public benefits programs puts them within INA's zone of interests). Plaintiff States are well within the zone of interests, as the Rule imposes significant uncompensated costs on them and undermines the administration of their comprehensive public assistance programs.

B. The District Court Did Not Abuse Its Discretion in Finding the Plaintiff States Likely to Succeed on the Merits

The trial court did not abuse its discretion in finding the Rule is likely arbitrary and capricious, contrary to law, and in violation of the Rehabilitation Act.

1. The district court did not abuse its discretion in holding the Rule is likely arbitrary and capricious

The district court correctly held the Rule is likely arbitrary and capricious based on DHS's failure to address the Rule's potentially devastating effects on public health. Agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency

expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). An agency must therefore articulate a "rational connection between the facts founds and the choice made." *Id.* Where—as here—an agency departs from prior guidance that engendered serious reliance interests, the agency must provide an even more "detailed justification" for its actions. *See F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515-16 (2009) (requiring a more reasoned explanation for "disregarding facts and circumstances that underlay or were engendered by the prior policy").

In finding DHS failed to sufficiently address the Rule's potentially devastating effects on public health and vulnerable populations, the district court cited comments and evidence from medical associations and healthcare providers warning the Rule would "increase the burden of both disease and healthcare costs across the country," and inflict especially severe and lasting harm on vulnerable populations, including young children. ER014, 017-18 ("Perhaps best documented in the extensive submissions . . . are the anticipated harms to children from disenrollment as a result of the Public Charge Rule."). In light of these dire public health concerns, the district court found the agency's responses to the comments internally inconsistent, conclusory, and outside DHS's expertise or statutory mandate. ER016-21, 049-50. Supported by extensive evidence from professional medical associations and healthcare service providers, the district court's findings

were far from illogical or implausible, and its holding does not amount to an abuse of discretion.

a. DHS failed to address concerns regarding the Rule's devastating effects on public health

From its review of voluminous pleadings, comments, and supporting declarations from state and local health officials, the district court appropriately concluded DHS had received—but largely ignored—compelling evidence of public health crises likely to result from the Rule's implementation. For example, commenters warned that by deterring eligible individuals from accessing Medicaid benefits, the Rule would result in decreased vaccination rates and corresponding increases in the transmission of deadly communicable diseases. *See* 84 Fed. Reg. 41,384. On this point, DHS received evidence showing "uninsured individuals are much less likely to be vaccinated," and "even a five percent reduction in vaccine coverage could trigger a significant measles outbreak." *Id.* Similarly, numerous medical associations warned the Rule would have a "devastating impact" on public health, resulting in "[d]ecreased vaccinations and untreated communicable diseases" that would "place the American public at risk for outbreaks." SER119-22, SER305-23 (Comments by Adult Vaccine Access Coalition and Center for Health and Human Rights at Harvard University).

DHS also received compelling evidence that implementing the Rule would lead to other public health crises.[8] For example, commenters warned the Rule would worsen health outcomes and undermine treatment options for individuals with chronic medical conditions and diseases such as Hepatitis B[9]; illnesses and trauma related to homelessness and housing instability[10]; blood cancers such as leukemia[11]; and sexually transmitted diseases.[12] Far from being illogical, implausible, or an abuse of discretion, the district court's findings are supported by a wealth of evidence by experienced medical associations and professionals.

Even DHS conceded the Rule might lead to public health crises. For example, the agency acknowledged "disenrollment or forgoing enrollment in

[8] *See, e.g.*, SER147 (Comment by American College of Obstetricians and Gynecologists) (warning of increased homelessness for women, associated with "higher rates of poor health outcomes, mental illness, substance use disorder, poor birth outcomes, and mortality," and "higher rates of chronic conditions like asthma, anemia, chronic bronchitis, hypertension, and ulcers").

[9] *See, e.g.*, SER324-27 (Comment by Hepatitis B Foundation) (warning of worse health outcomes and costlier health services, particularly for individuals with a 'silent' asymptomatic disease like Hepatitis B).

[10] *See, e.g.*, SER236 (Comment by Center on Budget Policy and Priorities) (noting childhood homelessness "is associated with increased likelihood of cognitive and mental health problems, physical health problems such as asthma, physical assaults, accidental injuries, and poor school performance").

[11] *See, e.g.*, SER330 (Comment by American Leukemia and Lymphoma Society) (warning immigrants may be unable to access healthcare "essential to preventing the onset of a disease, accurately diagnosing a health condition, or treating a debilitating or life-threatening illness.")

[12] *See, e.g.*, SER334 (Comment by National Association of County & City Health Officials) (warning "untreated sexually transmitted infections and diseases" could spread rapidly and, for more devastating illnesses, including Ebola, a reluctance to seek out treatment could result in mass casualties").

public benefits programs by [otherwise eligible] aliens" may result in "worse health outcomes" from lack of timely treatment; increased use of emergency rooms as primary health care; increased homelessness and poverty; and "increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated." 83 Fed. Reg. at 51,270.[13] Notably, DHS's predecessor agency reached the same conclusions in its 1999 Field Guidance, where it explained that receipt of such "supplemental benefits" does *not* render an individual more likely to become a public charge. 64 Fed. Reg. at 28,692-93 (immigrants' reluctance to use benefits such as Medicaid for immunizations and treatment of communicable diseases "has an adverse impact not just on the potential recipients but on public health and the general welfare").

As commenters feared, however, DHS never made any serious attempt to measure the full magnitude of such potential harm before deciding to implement the Rule. *See, e.g.*, SER121 (Comment by Adult Vaccine Access Coalition) ("[W]e are concerned that [DHS] failed to quantify the human and economic impact from [either] the increased prevalence of communicable diseases [or] the fact that the prevalence could be exacerbated by fewer vaccinated individuals."). Instead of addressing such concerns, DHS—an agency with no experience in health care

[13] *See, e.g.*, SER158 (Comment by American Thoracic Society) (urging DHS to exempt Medicaid benefits from consideration to preserve critical access to "detection, diagnosis, and treatment for any communicable diseases").

policy—simply exempted receipt of Medicaid benefits for pregnant women and individuals under 21 and then moved forward with the Rule, uncertain of the full scope of harm it might inflict. *Compare* 84 Fed. Reg. at 41,384 (speculating that such limited Medicaid exemptions "should address a substantial portion, though not all, of the vaccinations issue"); *with* SER088 (Persichilli Decl.) ("Among adults, it is estimated that the economic burden is approximately $9 billion for a single year, 2015, from vaccine-preventable diseases related to ten vaccines recommended for adults ages nineteen and older."); *see also Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1072 (9th Cir. 2018) (an agency "must explain why uncertainty justifies its conclusion, otherwise we might as well be deferring to a coin flip"). The agency's responses to similar public health concerns were equally deficient. *See, e.g.*, 84 Fed. Reg. at 41,384 (speculating that "local health centers and state health departments *may* provide certain health services addressing substance abuse and mental disorders" (emphasis added)).

DHS's cursory responses reflect a fundamental disregard for the dire public health warnings the agency received from public comments. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment."). Despite such risks, DHS justified the Rule based primarily on the agency's purported interest in promoting "self-sufficiency" among immigrants. The district court

rightly concluded that DHS likely acted arbitrarily and capriciously in reflexively retreating to this justification to explain away nearly any public health harm, particularly where the agency made no meaningful effort to understand the potential scope of those harms. *See Am. Wild Horse Preservation v. Purdue*, 873 F.3d 914, 932 (D.C. Cir. 2017) (vacating agency action for failure "to consider or to adequately analyze [the] consequences of those changes"); *McDonnell Douglas Corp. v. U.S. Dep't of Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (courts will not defer to an agency's "conclusory or unsupported suppositions"); *see also* ER044-45 (DHS failed to show it had authority or expertise to define "self-sufficiency" or dictate what policies promote it). The district court's well-supported findings on this point do not amount to an abuse of discretion.

b. DHS failed to address concerns regarding the Rule's devastating effects on vulnerable populations

DHS received numerous comments and compelling evidence showing the Rule's most severe and lasting harms would likely fall on vulnerable populations, including young children and U.S. citizen children. For example, many commenters warned DHS that "[n]ot having enough food, inadequate or unstable housing, and economic insecurity are all examples of adverse experiences that can lead to toxic stress in young children," "interfer[ing] with brain development" and

causing "physical and mental health problems that last into adulthood."[14] Commenters also explained that the lasting trauma of such childhood deprivation can lead to decades of negative outcomes, including chronic asthma, higher incidences of unplanned pregnancies, substance abuse, depression, and mental illness.[15] As one commenter explained, the increased food insecurity and malnutrition that children are likely to experience because of the Rule can be linked to diabetes, heart disease, kidney disease, hypertension, depression, birth defects, asthma, anxiety, and suicidal ideation. *See* SER159-65 (Comment by Association of State Public Health Nutritionists).

The district court agreed, concluding the evidence overwhelmingly showed that children suffering the "predictable effects of the[se] adverse childhood experiences" would likely carry the trauma of such deprivation with them long into adulthood. ER022. The court noted the Rule's predictable harms, such as "[c]hronic hunger and housing insecurity in childhood," are "associated with disorders and other negative effects later in life," "threaten[ing] the Plaintiff States with a need to re-allocate resources that will only compound over time." ER050-

[14] *See, e.g.,* SER296 (Comment by Child Care Law Center) (warning of "profound negative outcomes for children during childhood and into adulthood"); SER345 (Comment by Robert Wood Johnson Foundation) (cautioning that "children can be expected to bear the disproportionate impact" of the Rule, which "flag[s] poor families as a result of their poverty and the presence of children").

[15] *See, e.g.*, SER303 (Comment by Childhood Asthma Leadership Coalition) (warning of greater childhood homelessness, with nearly a quarter of homeless young children suffering from asthma, "over twice the national average").

51. As a "natural consequence" of the Rule, the court concluded, "Plaintiff States are likely to lose tax revenue from affected children growing into adults with a compromised ability to contribute to their families and communities." ER051-52.

Commenters also questioned what reason DHS could possibly have for applying so rigid a public charge analysis to children in the first place, as they are too young to work and their use of public benefits in no way suggests they are likely to become a public charge in the future. 84 Fed. Reg. at 41,370. In fact, commenters cited research showing *just the opposite*—namely, that "use of these programs in childhood helps children complete their education and have higher incomes as adults, be healthy, have better educational opportunities, and become more likely to be economically secure and contribute to their communities as adults." *Id.* Even DHS conceded many of the targeted benefits programs "aim to better future economic and health outcomes for minor recipients." 84 Fed. Reg. at 41,371. Nevertheless, DHS responded to such concerns merely by clarifying it would continue to count a child's receipt of SNAP and housing benefits as evidence suggesting the child was likely to become a public charge. *See* 84 Fed. Reg. at 41,365, 41,369-371. DHS conceded this could have negative health effects on children, but again reflexively justified any such harms as outweighed by its interest in promoting "self-sufficiency." *Id.* at 41,365, 41,369-371.

DHS offered no rational justification for exempting Medicaid coverage but still counting food and housing benefits against children, and the agency made no effort to understand the full scope of harm its decision might inflict. *See* ER052; *see also Ctr. for Biological Diversity*, 900 F.3d at 1072 (9th Cir. 2018); *Am. Wild Horse Preservation*, 873 F.3d at 932. The district court did not abuse its discretion in finding the agency's shallow reasoning reflects the arbitrariness of a rule that would promote so absurd a goal as childhood self-sufficiency at so great a cost.

c. DHS understates the full scope and effect of the Rule

The district court did not abuse its discretion in finding DHS had failed to consider or address the full magnitude of harms likely to result from the Rule. Defendants continue to understate the full scope and effect of such harms here, wrongly claiming the Rule (1) will not have a significant effect on receipt of public benefits by covered immigrants; (2) does not impair immigrants' access to vaccinations; and (3) does not encompass immigrants who use public benefits for brief periods to become self-sufficient. All are incorrect.

First, Defendants assert the Rule "was unlikely to substantially affect the receipt of public benefits by those subject to the Rule." DHS Br. at 42. This is plainly false, as DHS previously explained the purpose of the Rule is just that—to further DHS's purported goal of "ensuring the self-sufficiency and non-reliance on public benefits of aliens." *See* 84 Fed. Reg. at 41,477. Indeed, DHS estimated the

Rule would result in yearly savings of more than $2 billion in transfer payments "due to disenrollment or foregone enrollment in public benefits programs by foreign-born non-citizens who may be receiving public benefits." 84 Fed. Reg. at 41,485.

DHS conceded such massive disenrollment might result in severe harms to public health, including (1) "worse health outcomes;" (2) "increased use of emergency rooms and emergency care as a method of primary health care;" (3) "increased rates of poverty and housing instability;" and (4) "increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated." *See* 83 Fed. Reg. at 51,270; *see also* 84 Fed. Reg. at 41,314 (DHS does not believe it is "sound policy" to encourage immigrants' use of benefits in the hopes of "alleviat[ing] food and housing insecurity [or] improv[ing] public health"). Put simply, DHS cannot credibly claim its "transformative" Rule *designed* to trigger massive disenrollment from benefits programs is somehow unlikely to have substantial effects on eligible immigrants' receipt of public benefits.

Second, Defendants claim that although the Rule pressures immigrants to disenroll from Medicaid coverage to preserve their status, it "does not, in fact, impair aliens from obtaining vaccinations." DHS Br. at 19. This, too, is false. As described above, virtually every professional medical association to submit a

public comment against the Rule or amicus brief in this case has warned the Rule will do just that, endangering the public by decreasing access to vaccinations and increasing the spread of dangerous communicable diseases. *See, e.g.*, SER119-22 (Comment by Adult Vaccine Access Coalition). Even DHS conceded the Rule might lead to "increased prevalence of communicable diseases." *See* 83 Fed. Reg. at 51,270. And DHS made clear that if an immigrant accesses Medicaid benefits solely "for purposes of obtaining immunizations," the agency will still consider such use a negative factor suggesting a likelihood of becoming a public charge. 84 Fed. Reg. at 41,384-85.

Third, contrary to DHS's own prior statements, Defendants now claim the Rule "does not encompass those aliens who rely on Medicaid for short periods of time to become or remain self-reliant." *See* DHS Br. at 45. DHS took precisely the opposite position in its efforts to justify the Rule's unprecedented scope. *See* 84 Fed. Reg. at 41,352. There, the agency conceded certain immigrants may "require short-term help, and that the goal of these benefits assists them to become self-sufficient in the short-, and eventually, long-term." *Id.* Nevertheless, DHS flatly rejected the idea it was desirable for immigrants to use such benefits for the purposes of achieving "self-sufficiency." *Id.* Rather, as DHS explained, the agency "implement[ed] the [Rule] . . . to better ensure that those who are seeking admission to the United States and adjustment of status . . . are self-sufficient, *so*

that they do not need public benefits to become self-sufficient." *Id.* (emphasis added). Although the Rule purportedly promotes self-sufficiency, DHS argued in the NPRM that "receipt of such benefits even in a relatively small amount or for a relatively short duration would in many cases be sufficient to render a person a public charge." 83 Fed. Reg. at 51,164.

The district court did not abuse its discretion in citing such fundamental inconsistency and DHS's failure to respond substantively to the Rule's admitted harms as evidence the Rule is likely arbitrary and capricious. *See* ER050; *see also Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015) ("[A]n internally inconsistent analysis is arbitrary and capricious."). The district court's findings were not implausible or illogical, and this Court should reject Defendants' attempt to contest them by understating the Rule's full scope and effect.

2. The district court did not abuse its discretion in finding DHS's new definition of "public charge" is likely contrary to law

The district court applied the *Chevron* standard to determine whether the Rule is consistent with Congressional intent. ER034-35. When considering whether a rule is consistent with controlling law under *Chevron*, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Courts

use the "traditional tools of statutory construction" to determine "whether the intent of Congress is clear." *Chevron*, 467 U.S. at 842 and n.9; *Brown & Williamson*, 529 U.S. at 132 ("traditional tools" include the statutory text, history, structure, "context"—including its place among other statutes enacted previously or subsequently—and "common sense"). If the statute does not address the precise question after applying all of those tools, the court asks whether the Rule is a reasonable interpretation of the statute. Here, the Rule fails both tests: Congress has clearly rejected the Rule's definition of public charge, and the Rule reflects an unreasonable interpretation of the statute.

a. The district court correctly concluded that Congress addressed the precise question presented

The district court correctly found that Congress "unambiguously rejected key components of the [Rule]." ER044. The court determined Congress's intent based primarily on two factors: first, Congress had repeatedly authorized lawful immigrants to receive specific benefits the Rule would make a basis for exclusion; and second, Congress rejected the policy embodied in the Rule when it reenacted the "public charge" provision. ER035-41, 44. These findings are correct.

The district court cited numerous statutes in which Congress expressly authorized lawful immigrants to receive the specific types of noncash benefits the Rule now makes a basis for exclusion. The district court cited the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),

allowing lawful permanent residents to receive many forms of federal public benefits included in the Rule—including Medicaid and SNAP—beginning five years after entry. Pub. L. 104-193, 110 Stat. 2105 (1996) (codified as amended at 8 U.S.C. §§ 1601-46) (*see* ER037); 8 U.S.C. §§ 1612(a)(2)(L), 1613(a). Lawful immigrants are eligible for other benefits covered by the Rule, like Section 8 housing vouchers, even earlier. *Id.* §§ 1612(a)(2)(A) & (a)(2)(C), 1613(b)(1)-(2). Two later-enacted statutes further expanded the availability of certain benefits, such as SNAP, to "qualified aliens," particularly children. *See* ER039 (citing Agricultural Research, Education and Extension Act of 1998, Pub. L. No. 105-185, 112 Stat. 523 (restoring eligibility for certain elderly, disabled and child immigrants who resided in the United States when PRWORA was enacted), and Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (restoring eligibility for food stamps to qualified aliens). The district court reasonably concluded these statutes expressed clear Congressional intent that an immigrant's receipt of these same benefits should not alone be a basis upon which DHS may refuse to extend a visa on public charge grounds.

The district court also properly cited Congress's repeated rejection of efforts to expand the public charge exclusion as additional evidence of its clear intent to reject the Rule. In the debate leading up to enactment of the Immigration Reform Act, Congress considered and rejected a strikingly similar proposal to the Rule to

redefine a public charge as anyone who received means-tested public benefits for an aggregate of twelve months. *Immigration Control and Financial Responsibility Act of 1996*, H.R. 2202, 104th Cong. § 202 (1996); Pub. L. 104-208, Div. C, 110 Stat. 3009 (1996). The express purpose of the proposed amendment was to overturn the settled understanding of "public charge" established in case law. *See* 142 Cong. Rec. S4401, S4408–09 (1996).

The effort to redefine "public charge" failed. Although a version of the bill with the expanded definition cleared one chamber of Congress, the bill could not be passed until the provision was removed in conference. *See* 142 Cong. Rec. S11872, S11882 (1996) (statement of Sen. Kyl, floor manager of bill) ("in order to ensure passage of this historic immigration measure, . . . provision that . . . an immigrant could be deported—but would not necessarily be deported—if he or she received Federal public benefits for an aggregate of 12 months over a period of 7 years" "was removed").

The district court's analysis of Congressional intent is neither illogical nor implausible. It is consistent with established law. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (after conference committee rejected one house's bill and enacted statute without it, agency could not adopt interpretation mirroring rejected bill); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01 (1983) ("[i]n view of its prolonged and acute awareness of so important an issue,

Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress" expressed a preference for the prevailing agency interpretation); *see also Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 533 (2009) (an agency may not do through administrative action "what Congress declined to do"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (agency may not adopt an interpretation that Congress had expressly rejected).

DHS's attempt to distinguish this line of cases is meritless. Contrary to DHS's argument, the district court did not infer the intent of one Congress from the inaction of a later Congress. Rather, the very same Congress that reenacted the most recent public charge exclusion rejected the interpretation of "public charge" now embodied in the Rule. *Compare Albermarle Paper*, 422 U.S. at 414 n.8, *with Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 169-70 and n.5 (2001) (rejecting inferring "intent of the 92d Congress" from "inactions of the 95th Congress"), and *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (citation omitted) ("subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress").

Further, the Court does not need to guess at the 1996 Congress's motivation for rejecting DHS's new formulation among "several equally tenable inferences," *Pension Ben. Guar. Corp.*, *id*., because the Senate floor manager for the bill, Senator Kyl, expressly stated that it was to "ensure *passage* of this historic

immigration measure." 142 Cong. Rec. S11882 (emphasis added). And the district court did not attribute to Congress "an unambiguous meaning to the still-undefined term 'public charge'" or deny that DHS lacks all discretion to interpret the term. DHS Br. at 30. Instead, the court held that "Congress had expressed its intent" on this "specific definition of public charge" based on instance after instance in which Congress authorized legal immigrants to access the very benefits DHS now seeks to use as a basis for exclusion. ER035-41.

b. The traditional tools of statutory interpretation further demonstrate that Congress foreclosed the interpretation of "public charge" embodied in the Rule

In determining the meaning of "public charge" and whether Congress has spoken to the precise question at issue here, this Court begins by looking to the plain meaning of the term as understood when it was enacted. *See, e.g., New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). And given that Congress repeatedly readopted the "public charge" exclusion without substantive change over the last 135 years, the Court also looks to judicial and agency interpretations of the term over that time, because Congress is "presumed to be aware of" an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts statutory language without change. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)); *see also, e.g.*, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 n.4 (2004) ("The doctrine

of ratification states that 'Congress is presumed to be aware of [a] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'"); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 589-90 (2010) ("[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.") (internal citations, quotation marks, and ellipsis omitted); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 193-94 (2002), *superseded by statute on other grounds*, ADA Amendments Act of 2008, Pub.L. 110–325, 122 Stat. 3553 (2008) ("Congress' repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."). Here, these tools all lead to the same unmistakable conclusion: Congress has rejected the meaning of "public charge" DHS adopted here.

(1) The statutory text supports the district court's conclusion

DHS's definition of "public charge" cannot be reconciled with Congressional intent as reflected in the statutory text. The starting point of determining the meaning of a statutory term begins with the language of the statute. *Resident Councils of Wash. v. Leavitt*, 500 F.3d 1025, 1030 (9th Cir. 2007). 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.*, 139 S. Ct. at 539. Given its historical context, the analysis here begins with the late nineteenth century meaning of the term. *See Cook Cty.*, 2019 WL 5110267, at *8 ("the term 'public charge' entered the statutory lexicon in 1882 and has been included in nearly identical inadmissibility provisions ever since," and therefore "the late 19th century [is] the key time to consider for determining the meaning of the term 'public charge'") (citation and quotation marks omitted); *City & Cty. of San Francisco*, 2019 WL 5100718, at *9 ("the court considers the meaning ascribed to the term by Congress [in 1996], but in doing so it must afford due consideration to Congress's understanding of the term given the long historical context it was operating within").

The text of the original 1882 public charge exclusion provided that a "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge . . . shall not be permitted to land." *Immigration Act of 1882*, ch. 376, § 2, 22 Stat. 214. A "public charge" was, as the text plainly stated, one who is "unable to take care of himself or herself," not one who temporarily receives a small amount of benefits. *See id.*; *see also* 13 Cong. Rec. 5109 (June 19, 1882) (statement of Rep. Davis) (1882 Act was intended to bar immigrants likely to become long-term residents of "poor-houses and alms-houses").

Indeed, in the 1882 statute that first established the "public charge" exclusion, Congress also authorized "support and relief" for "immigrants *therein landing* as may fall into distress or need public aid." *Act to Regulate Immigration*, ch. 376, § 2, 22 Stat. 214 (1882) (emphasis added). In the terminology of the time, an immigrant who "landed" was one who was permitted entry; by contrast, a person deemed a "public charge" was not "permitted to land." *Id*. Thus, Congress expressly contemplated that obtaining "support and relief" alone did not itself make an immigrant a "public charge."

By contrast, immigrants subject to exclusion in the late nineteenth century required long-term care or institutionalization, and thus had primary dependence on the government. *See Act of March 3, 1891*, ch. 551, § 1, 26 Stat. 1084 (1891) (excluding "idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, [etc.]"). Following the "commonsense canon of *noscitur a sociis*, which counsels that a word is given more precise content by the neighboring words with which it is associated," these surrounding terms confirm that a "public charge" determination likewise requires primary dependence on the public as a means of survival. *United States v. Williams*, 553 U.S. 285, 293 (2008).

The Supreme Court confirmed this interpretation in *Gegiow v. Uhl*, holding that "persons likely to become a public charge" must be interpreted in context of the terms surrounding it, each of which refers to people to be "excluded on the ground of permanent personal objections accompanying them[.]" 239 U.S. 3, 10 (1915). *Gegiow* is binding on the meaning of the late-nineteenth-century statutory public charge exclusion. *See Hosaye Sakaguchi v. White*, 277 F. 913, 916 (9th Cir. 1922) (citing *Gegiow*); *Ng Fung Ho v. White*, 266 F. 765, 769 (9th Cir. 1920), *affirmed in part and reversed in part on other grounds*, 259 U.S. 276 (1922) (same). *Gegiow* forecloses an interpretation of "public charge" as "encompass[ing] persons who receive benefits, whether modest or substantial, due to being temporarily unable to support themselves entirely on their own." *Cook Cty.*, 2019 WL 5110267, at *9.

These plain statements of congressional intent are also consistent with then-contemporaneous dictionary definitions. *See Dir. Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994) (undefined statutory term presumably has its "ordinary or natural meaning" from the "year [it] was enacted"). The period's most comprehensive American dictionary defined the root word "charge" to mean "[a]nything committed to another's custody, care, concern, or management." *See The Century Dictionary of the English Language*, Vol. IV at 929 (1889-91); *see also Webster's Condensed*

Dictionary of the English Language 85 (3d ed. 1887) (defining "charge" as "[t]he person or thing committed to the care or management of another"); *accord* Stay Order at 37 (citing Charge, *Webster's Dictionary* (1828 Online Edition), http://webstersdictionary1828.com/Dictionary/charge).

DHS fails to cite even one contemporaneous dictionary definition supporting its interpretation. Instead, it cites to later definitions, but even these support Plaintiff States' argument and show the original definition of "public charge" endured consistently over time. *See, e.g.*, *Black's Law Dictionary*, 311 (3d ed. 1933) (defining the term as "[a] person whom it is necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, or idiocy and poverty"); *see also Public charge, Oxford English Dictionary* (3d. ed. 2007) (defining "public charge" as "a thing which is the responsibility of the state; a person who is dependent upon the State for care or support").

As DHS did before the district court, it cites a flawed 1929 legal treatise to redefine public charge. *See* Arthur Cook, et al., *Immigration Laws of the United States* § 285 (1929). This treatise—like DHS's brief itself—ignores *Gegiow*, the authoritative Supreme Court case on this issue at the time. In *Gegiow*, the Court held that illiterate Russian immigrants were not excludable as public charges, even though they had arrived in the country with almost no money, could speak no English, had "no one legally obligated here to assist them," and it likely "would be

impossible for [them] to obtain employment" where they intended to live. *Id.* at 8. As the Court in *Gegiow* explained, the public charge exclusion applied not to immigrants facing such temporary hardships, but rather to those who had "permanent personal objections accompanying them." *Id.* The plain meaning of the original statutory text, contemporaneous dictionary definitions, and *Gegiow*'s authoritative interpretation all foreclose DHS's new construction of "public charge."

(2) Consistent judicial decisions support the district court's conclusion

DHS fails to cite *any* judicial decision holding that the public charge exclusion applies to noncitizens who received modest public benefits on a temporary basis. Indeed, it does not cite even a single court decision earlier than *1973*—almost 100 years after Congress first enacted the public charge exclusion.

Early judicial decisions applying state poor laws—the predecessors to the federal ground for exclusion—make clear the common law understanding of "public charge" required more than mere temporary receipt of public benefits. *See City of Boston v. Capen*, 61 Mass. 116, 121-22 (1851) ("public charge" does not refer to "merely destitute persons, who . . . have no visible means of support," but to those who "are unable to maintain themselves" and "might become a heavy and long continued charge to the city, town, or state"). Rather, as the early cases demonstrate, the exclusion applied only to persons fundamentally "unable to take

care of themselves." *In re O'Sullivan*, 31 F. 447, 449 (C.C.S.D.N.Y. 1887); *see also Davies v. State ex rel. Boyles,* 17 Ohio Cir. Dec. 593, 595-96 (July 8, 1905) ("Public interests are subserved by the aiding of persons who might become a public charge, if left to their own resources, to such an extent that, by combining the small fund given them by the state with what they may be able to earn . . . they might be able to maintain themselves and avoid becoming a charge."); *Yeatman v. King*, 51 N.W. 721, 723 (1892) (emphasizing "obligation" on the public "to keep a portion of the population destitute of means and credit from becoming a public charge by affording them temporary relief"); *Twp. of Cicero v. Falconberry*, 42 N.E. 42, 44 (Ind. App. 1895) ("The mere fact that a person may occasionally obtain assistance from the county does not necessarily make such person a pauper or public charge.").

After Congress incorporated the concept of a "public charge" into the 1882 Act, federal decisions applying the public charge exclusion uniformly maintained the term's plain meaning—namely, that public charges were those individuals fundamentally unable to care for themselves and primarily reliant on public benefits for survival. *See Gegiow*, 239 U.S. 3 (public charge exclusion applies only to immigrants with "permanent personal objections accompanying them"); *Howe v. United States ex rel. Savitsky*, 247 F. 292, 294 (2d Cir. 1917) (public charge category excludes only "persons who were likely to become occupants of

almshouses for want of means to support themselves in the future"); *Ex parte Mitchell*, 256 F. 229, 233 (N.D.N.Y. 1919) ("public charge" is "generically similar to 'paupers,' . . . 'professional beggars,' [and] . . . 'occupants of almshouses'"); *United States v. Williams*, 175 F. 274, 275 (S.D.N.Y. 1910) (L. Hand, J.) ("the primary meaning" of public charge was "likelihood of his becoming a pauper"); *Hosaye Sakaguchi*, 277 F. at 916 (citing *Gegiow*, 29 U.S. at 3) (holding 25-year-old woman with some job skills and "disposition to work" not a public charge, despite limited English and temporary inability to support herself); *see also Ng Fung Ho*, 266 F. at 769 (citing *Howe*, 247 F. at 294) ("words 'likely to become a public charge' are meant to exclude only those persons who are likely to become occupants of almshouses for want of means with which to support themselves in the future"). These consistent judicial interpretations over the last century speak volumes. Congress's repeated reenactment of the "public charge" exclusion against the backdrop of this longstanding interpretation of the term further illustrates its rejection of the policy embodied in the Rule.

(3) Uniform agency action supports the district court's conclusion

A consistent line of agency decisions and interpretations of the public charge exclusion also show that mere temporary receipt of public benefits is insufficient to render someone a public charge. For example, in *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (A.G. 1964), the Attorney General detailed the public charge

exclusion's "extensive judicial interpretation," explaining the INA "requires more than a showing of a possibility that the alien will require public support." *See also Matter of Perez*, 15 I. & N. Dec. 136, 137 (B.I.A. 1974) ("The fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge."); *In re Harutunian*, 14 I. & N. Dec. 583, 588 (B.I.A. 1974) (receipt of "essentially supplementary benefits, directed to the general welfare of the public as a whole" not a basis for exclusion); *Adjustment of Status for Certain Aliens*, 52 Fed. Reg. 16205, 16209 (May 1, 1987) (Medicaid and "assistance in kind, such as food stamps, public housing, or other non-cash benefits" *not* a basis for exclusion because they are not "designed to meet subsistence levels").

In 1999, the agency crystallized over 100 years of congressional, judicial, and administrative interpretations, confirming in formal guidance that it had "never been [agency] policy that *any* receipt of services or benefits paid for in whole or in part from public funds renders an alien a public charge." 64 Fed. Reg. 28,689, 28,692 (1999) (emphasis in original). By "focusing on cash assistance" as the basis for public charge determinations instead of non-cash supplemental assistance, INS explained it could "identify those who are primarily dependent on the government for subsistence without inhibiting access to non-cash benefits that serve important public interests." *Id.*

Given these administrative decisions and interpretations, DHS cites to just a *single* agency case—*Matter of B-*, 3 I. & N. Dec. 323 (B.I.A. 1948)—and misconstrues it. DHS characterizes the case as holding that a noncitizen qualifies as a "public charge" by failing to repay a public benefit upon demand "regardless of the nature of the benefit." DHS Br. at 36; *see also id*. at 25. But this is wrong. The respondent in *Matter of B-* had been involuntarily detained in a state psychiatric hospital, placing her squarely within the historical meaning of "public charge." *Id. Matter of B-* held that failure to repay a public benefit upon lawful demand was a *necessary* condition of being deemed a public charge for deportation purposes. Neither the opinion, nor any subsequent case construing it, however, suggests a public charge finding could be based solely on the failure to repay, regardless of amount.

DHS also overlooks language in *Matter of B-* that the receipt of benefits "for which no specific charge is made, does not in and of itself make the alien a public charge." 3 I. & N. Dec. at 324. Indeed, the agency's own formal guidance in 1999 refutes DHS's characterization of the decision. 64 Fed. Reg. at 28,692 (agency had "never" taken position that receipt of minimal benefits could trigger public charge finding). *Matter of B-* merely affirmed that additional requirements apply before *deporting* an immigrant who has become a public charge after admission, rather than enunciating a new "public charge" standard. *Matter of B-*, 3 I. & N. Dec. at

324 (citing seven deportation cases dating back to 1929). These requirements are inapplicable to the public charge *exclusion*. *In re Harutunian*, 14 I. & N. Dec. 583, 584, 588-89 (B.I.A. 1974) ("The test set forth in *Matter of B-* . . . for determining deportability as a person who has become a public charge . . . , is inapplicable to a determination of excludability . . .as a person likely to become a public charge . . ."). *Accord Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,676 (May 26, 1999).

(4) Congress ratified the historical understanding of public charge

Since its first enactment, Congress has readopted the public charge exclusion without substantive change seven times.[16] In doing so, Congress ratified the settled understanding that an immigrant must receive more than temporary, modest benefits to be deemed a "public charge." Under established rules of statutory construction, Congress is "presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts statutory

[16] *See Immigration Act of 1891*, ch. 551, 26 Stat. 1084, 1084; *Immigration Act of 1907*, ch. 1134, 34 Stat. 898, 899; amended by *Act of March 26, 1910*, ch. 128, § 1, 36 Stat. 263, 263 (1910); *Immigration Act of 1917*, ch. 29 § 3, 39 Stat. 874, 876; *Immigration and Nationality (McCarran-Walter) Act of 1952* (INA), Pub. L. No. 414, § 212(a), 66 Stat. 163, 183 (codified as amended at 8 U.S.C. § 1101, *et seq*.); *Immigration Act of 1990*, Pub. L. No. 101-649, § 601(a)(4), 104 Stat. 4978, 5072 (codified as amended at 8 U.S.C. § 1182); *Illegal Immigration Reform and Immigrant Responsibility Act*, Pub. L. No. 104-208, § 531(a), 110 Stat. 3009-546, 3009-674-75 (1996); *Violence Against Women Reauthorization Act of 2013*, Pub. L. No. 113-4, 127 Stat. 54 (2013).

language without change. *Forest Grove*, 557 U.S. at 239-40 (quoting *Lorillard*, 434 U.S. at 580); *see also supra* at 36.

While Congress changed the location of the public charge exclusion within the statute in 1917, that shift did not change the plain meaning of the term. *See Hosaye Sakaguchi*, 277 F. at 916 (the 1917 Act's "change of location of the words does not change the meaning that should be given them . . ."); *Ex parte Mitchell*, 256 F. 229, 232 (N.D.N.Y. 1919) (the court is "unable to see that [the] change of location of these words in the [1917 act] changes the meaning that is to be given them").

When Congress reorganized immigration law into the present statutory framework in 1952, the INA retained the long-established exclusions of "paupers" and those "likely at any time to become a public charge." INA, Pub. L. No. 414, § 212(a), 66 Stat. 163, 182-83. The legislative history shows that Congress intended to retain the common law meaning of "public charge" in the present framework. *See* S. Rep. No. 1515, 81st Cong., 2d Sess., at 349 (1950) ("The subcommittee recommends that the clause excluding persons likely to become public charges should be retained in the law.").

The legislative history to the 1990 Act similarly confirmed Congress's awareness that courts equated "likelihood of becoming a public charge" to "destitution coupled with inability to work." *See* Staff of the H. Comm. on the

Judiciary, 100th Cong., Grounds for Exclusion of Aliens under the Immigration and Nationality Act: Historical Background and Analysis 121 (Comm. Print 1988). With this understanding, Congress chose not to amend the statutory language. *Id.*

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Immigration Reform Act) reenacted the existing INA public charge exclusion, codifying the established practice of immigration authorities to consider the "totality of the alien's circumstances." 8 U.S.C. § 1182(a)(4).[17] The Immigration Reform Act did not alter the settled meaning of "public charge" under the INA. In reenacting the exclusion against this backdrop, Congress made clear its intent that immigrants' modest use of public benefits did not make them public charges.

c. DHS's authority to make admissibility determinations does not permit it to ignore Congress's intent on the precise question at issue

DHS argues that it has broad discretion to make admissibility determinations, which makes the definition in the Rule permissible under *Chevron* step two. But this argument improperly bypasses *Chevron* step one. Regardless of DHS's authority to make admissibility decisions, evidence of Congress's intent when it reenacted the public charge provision in 1996 shows that Congress spoke to the issue presented here, and precludes the Rule's inconsistent interpretation. *See Brown & Williamson*, 529 U.S. at 125–26.

[17] *See supra* at 7, n.4.

Plaintiff States' arguments do not hinge on the theory that DHS lacks authority to interpret the term "public charge." Nor, contrary to DHS's assertion (DHS Br. at 33), did the district court's ruling rely on such a theory. Rather, Congress addressed the precise question raised by the Rule and rejected DHS's interpretation. The district court agreed. ER044.

For similar reasons, the absence of an express statutory definition of "public charge" does not control determination of Congressional intent. DHS Br. at 33-35. DHS argues that, in the absence of an express definition, *Chevron* step two applies (*id*. at 33). The Supreme Court, however, has repeatedly applied *Chevron* step one in assessing Congressional intent regarding undefined statutory terms. *See, e.g.*, *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586 (2004) (intent as to meaning of "age"); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-441, 445 n.29 (1987) (intent as to meaning of "well-founded fear of persecution"); *Brown & Williamson*, 529 U.S. at 156 (intent as to meaning of "drug"). The absence of an express definition does not give DHS license to enact an interpretation that Congress has specifically rejected.

Likewise, the district court correctly ruled that PRWORA's broad goal of self-sufficiency, 8 U.S.C. § 1601, does not authorize DHS to ignore Congress's rejection of the policy embodied in the Rule. ER043-44. Further, the district court acted within its discretion in concluding that Congress did not delegate DHS

authority to interpret 8 U.S.C. § 1601, a statute designed to address U.S. social welfare policy. *See E.E.O.C. v Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102–166, § 109(c), 105 Stat. 1074. DHS may not justify massive social harm to promote a policy reflected in a *different* statute outside its expertise or mandate, because that "would virtually free [DHS] from its congressional tether." *Comcast Corp. v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010); *see also id.* at 654 ("Policy statements are just that—statements of policy. They are not delegations of regulatory authority").

d. DHS improperly relies on statutory provisions and legal arguments not raised before the district court

DHS makes several legal arguments never raised to the district court, including that other statutes support its effort to re-define "public charge." Defendants argued to the district court that Congress had spoken directly to the question at issue and that the Rule fell within the "plain meaning" of the public charge statute. *See* SER003-12. Defendants now argue, however, that DHS's attempt to transform American immigration policy is "permissible" based on two other provisions of the INA. DHS Br. at 32-34.

DHS's primary argument is that the government's right of recovery against sponsors for immigrants' means-tested benefits in PRWORA shows that "the mere possibility" that aliens could receive public benefits was sufficient to render them a

public charge. DHS Br. at 24. DHS, however, made this argument only *after* all five district courts preliminarily enjoined implementation of the Rule, thereby waiving it.[18] *See* SER002, 013-15 (citing sponsorship provision only in background and arbitrary and capricious sections).

These new arguments are also wrong on the merits. DHS is incorrect that such ancillary provisions support fundamentally recasting immigration policy through the public charge exclusion. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Further, in adopting the sponsorship requirements set forth in section 1182(a)(4)(C), Congress chose *not* to change the public charge standard to include receipt of non-cash benefits. Congress instead affirmatively *authorized* lawful immigrants to receive certain means-tested benefits. *See supra* at 31-33. And just one month after Congress adopted PRWORA, Congress rejected an effort to redefine "public charge" to include receipt of non-cash benefits. *See supra* at 32-34.

[18] *See Honcharov v. Barr*, 924 F.3d 1293, 1295-96 (9th Cir. 2019) (the doctrine of waiver "prevent[s] parties from withholding secondary, back-up theories at the trial court level" and "preserve[s] the integrity of the appellate structure by ensuring that an issue must be presented to, considered and decided by the trial court before it can be raised on appeal").

DHS's argument is also overbroad. As DHS admits (DHS Br. at 23), PRWORA required only a subset of applicants subject to the public charge exclusion to obtain affidavits of support. *See* 8 U.S.C. § 1182(a)(4)(C)-(D). If Congress had intended for sponsorship requirements to expand the public charge definition, it would have made them applicable to all applicants subject to the public charge test. It did not, though, because the sponsorship affidavits serve a different purpose: to provide a reimbursement mechanism for DHS after admission. 8 U.S.C. § 1183a(b). Nothing in this limited post-admission remedy suggests that Congress surreptitiously transformed American immigration policy by redefining "public charge" to include any applicant likely to receive non-cash benefits in the future.

DHS also wrongly cites INA provisions excluding from the public determination the past receipt of benefits by immigrants "battered or subjected to extreme cruelty" (DHS Br. at 23, citing 8 U.S.C. §§ 1182(s), 1641(c)). But these benefits include cash benefits that would have been considered in public charge determinations under the 1999 Field Guidance. *See* 8 U.S.C. § 1611(c). Congress's exception of such benefits from the public charge determination thus does not demonstrate that all non-cash benefits be considered. There is no inconsistency between these provisions and the 1999 Field Guidance.

3. The district court did not abuse its discretion in finding the Rule likely violates Section 504 of the Rehabilitation Act

The district court did not abuse its discretion in holding the Rule likely discriminates against immigrants with disabilities in violation of Section 504. Although some disabilities may render an individual more likely to become a public charge (e.g., conditions requiring long-term institutionalization), the Rule will have a disparate impact on individuals with disabilities by double- and triple-counting their disabilities against them and significantly increasing the likelihood they will be deemed public charges because of their disabilities.

Under Section 504, executive agencies are prohibited from excluding, denying benefits to, or subjecting to discrimination any individual "solely by reason of her or his disability." 29 U.S.C. § 794(a). "Exclusion or discrimination [under Section 504] may take the form of disparate treatment, disparate impact, or failure to make a reasonable accommodation." *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016); *see also Mark H. v. Lemahieu*, 513 F.3d 922, 937 (9th Cir. 2008) (Section 504 requires "reasonable modifications" to existing programs to ensure disabled individuals are not prevented access because of their disability). A party may show disparate impact under Section 504 even where a government policy is facially neutral, provided the policy has the effect of "denying meaningful access to public services." *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013).

In reviewing the Rule's effects on individuals with disabilities, the district court noted that Medicaid frequently covers services and devices unavailable under private insurance, which are "essential" for millions of people living with disabilities. *See* ER046-47; *see also* 84 Fed. Reg. at 41,367 ("Medicaid is often the only program available to and appropriate for people with disabilities); SER132 (Comment by ACLU) ("receipt of Medicaid is inseparable from the status of being disabled.").[19] The Rule's positive and negative factors impermissibly double- and triple-count not only an individual's disability, but also their receipt of Medicaid benefits that "enable [them] to work." ER046-47. DHS concedes the Rule might have a "potentially outsized impact . . . on individuals with disabilities." 84 Fed. Reg. at 41,368. Defendants offer only two rationales for challenging the district court's conclusion; both fail.

First, Defendants are incorrect that the public charge statute is more "specific" than—and thus controls over—the Rehabilitation Act. As between the two statutes, Section 504's narrow prohibition against disability-based discrimination is far more targeted than the INA's generalized direction to consider "health" as a factor in the public charge analysis. Section 504 contains express

[19] *See id.* ("Individuals with significant disabilities, including even highly educated professionals and business owners, typically must retain Medicaid coverage because no other public or private program covers the attendant care and equipment they need to get up, get dressed, and go to work.").

definitions for what does and does not constitute a disability. By contrast, even Defendants concede Congress left the meaning of "health" undefined. Further, the INA does not specifically address how to evaluate individuals with disabilities; Section 504, by contrast, directly addresses the treatment of individuals with disabilities. *See* 29 U.S.C. § 794(a); *see also Law v. Siegel*, 571 U.S. 415, 421 (2014) ("A statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere.").

Second, Defendants incorrectly rely on Section 504's use of the word "solely" to argue the Rule is permissible merely because it considers other factors in addition to an individual's disability. The Ninth Circuit rejected this argument in *Lovell v. Chandler*, 303 F.3d 1039, 1052-53 (9th Cir. 2002). The defendant in *Lovell* argued it had not wrongly excluded individuals based "solely" on their disabilities because the determination also considered income as a factor. *Id.* at 1052. The Ninth Circuit disagreed, holding it was enough that the defendant had denied coverage to "disabled people who, but for their disability, were eligible for healthcare benefits." *Id*. Thus, differing treatment of people with and without disabilities constituted discrimination, even though other factors were also considered. *See id.*; *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 278-79 (2d Cir. 2003) (violation of Rehabilitation Act shown where disability is "substantial cause," among other contributory causes, for denial of benefits).

Here, the Rule discriminates against individuals based solely on their disabilities by double- and triple-counting factors directly related to those disabilities. For example, an individual with a disability who uses Medicaid (rather than private insurance) to cover services allowing them to continue working and supporting a family would be penalized not just for their disability, but also for their Medicaid use and their lack of private insurance. Thus, the Rule ensures that two otherwise similarly situated individuals who both work—one with a disability, and one without—would likely face different outcomes *because of* the individual's disability. *See* 84 Fed. Reg. at 41,368 (conceding the Rule may have a "potentially outsized impact . . . on individuals with disabilities"). The district court's holding that the Rule likely violated the Rehabilitation Act was not an abuse of discretion.

C. The District Court Did Not Clearly Err in Finding the Balance of Equities Favored a Stay and Injunction

The district court properly found "[t]he Plaintiff States are likely to incur multiple forms of irreparable harm if the Public Charge Rule takes effect as scheduled." ER051. Specifically, the district court found the Rule's "predictable" effect of causing disenrollment by immigrants from benefit programs would cause severe harms to Plaintiff States' finances and the health and well-being of their residents. ER051. These findings, and the determination that the balance of the

equities favors an injunction (ER054-55) were not "clear error." *Int'l Molders & Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 551 (9th Cir. 1986).

The district court's findings as to Plaintiff States' irreparable harm are also amply supported by the record without any contradiction from DHS. Supporting evidence includes (1) public comments to the Rule at the time of its proposal, ER013-14; (2) declarations from experienced state and local policy and public health officials in the Plaintiff States regarding public health crises likely to follow the Rule's implementation, *see, e.g.*, SER081-94 (Perischilli Decl.), SER095-105 (MacEwan Decl.), SER063-80 (Fehrenbach Decl.), SER037-62 (Peterson Decl.), SER015-36 (Rubin Decl.); and (3) extensive briefing and evidence from numerous amici curiae, *see* ER002. All uniformly warned of the Rule's dire public health consequences.

DHS offered no evidence to rebut Plaintiff States' assertions, likely because DHS concedes the Rule may cause the types of injury alleged. *See* 83 Fed. Reg. at 51,270 (conceding the Rule could result in "worse health outcomes" and "increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated"); 84 Fed. Reg. at 41,384 (conceding that medical care will shift to the emergency room); *id.* at 41,463 (conceding disenrollment will occur). Given the volume and uniformity of the

evidence offered by Plaintiff States, the district court's findings were not an abuse of discretion. *Arc of Cal. v. Douglas*, 757 F.3d 975, 984 (9th Cir. 2014).

DHS argued to the district court that an injunction would harm the agency's interest in administering the national immigration system. Returning the nation "temporarily to the position it has occupied for many previous years," however, is not irreparable harm. *Washington v. Trump*, 847 F.3d at 1168. For these reasons, the district court did not err in determining the balance of equities and public interest both favor an injunction, which merely "restore[s] the law to what it had been for many years prior." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778 (9th Cir. 2018).

D. Nationwide Relief Is Appropriate

The district court correctly stayed and enjoined the Rule on a nationwide basis. Nationwide relief is appropriate both because of the nature of the Rule and to give Plaintiff States complete relief.

This Court has emphasized the importance of national "uniformity in immigration policy." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018). "Congress has instructed that the immigration laws of the United States should be enforced vigorously and uniformly; and the Supreme Court has described immigration policy as a comprehensive and unified system." *Id.* (citations and internal quotation marks omitted). Limiting the

injunction to Plaintiff States would create an unjust, two-tiered immigration system. Immigrants in Plaintiff States and in non-Plaintiff States would inexplicably face very different consequences for accessing the exact same types of benefits.

In addition, any narrower remedy would deny Plaintiff States complete relief. *See, e.g., California v. Azar*, 911 F.3d at 582. A limited injunction would cause immigrants in Plaintiff States tremendous uncertainty, unsure whether their use of benefits might be used against them if they moved. This would dissuade many immigrants from accessing benefits and lead to many of the harms described above. Moreover, the types of harms the Rule will cause show no respect for State boundaries. A measles outbreak in Idaho threatens residents of Washington and Oregon, just as a child who goes hungry in Texas and later moves to New Mexico will have suffered permanent harm affecting his ability to succeed in his new home. The scope of the injunction must be broad to afford Plaintiff States the relief to which they are entitled.

Finally, a nationwide stay also serves the public interest because it protects nonparties from unlawful regulations and is more administrable than a geographically limited stay. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (upholding preliminary injunction in part with respect to "parties similarly situated to" named plaintiffs); *Nat'l Min. Ass'n v. U.S. Army*

Corps of Engineers, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("'[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'" (quoting *Harm v. Thornbaugh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). As one court explained in a similar situation, an injunction issued only as to limited plaintiffs "would cause all others [similarly] affected . . . to file separate actions for declaratory relief." *Nat'l Min. Ass'n*, 145 F.3d at 1409.

CONCLUSION

The preliminary injunction should be affirmed.

RESPECTFULLY SUBMITTED this 17th day of January, 2020.

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