Nicholas Espíritu (SBN 237665)
NATIONAL IMMIGRATION LAW CENTER
3450 Wilshire Boulevard, #108-62
Los Angeles, CA 90010
Telephone: (213) 639-3900
Fax: (213) 639-3911
espiritu@nilc.org

Antionette Dozier (SBN 244437)
WESTERN CENTER ON LAW & POVERTY
3701 Wilshire Boulevard, Suite 208
Los Angeles, CA 90010
Tel: (213) 487-7211
Fax: (213) 487-0242
adozier@wclp.org

Martha Jane Perkins (SBN 104784)
NATIONAL HEALTH LAW PROGRAM
200 N. Greensboro Street, Ste. D-13
Carrboro, NC 27510
Tel.: (919) 968-6308
Fax: (919) 968-8855
perkins@healthlaw.org

Laboni Hoq (SBN 224140)
ASIAN AMERICANS ADVANCING JUSTICE – LOS ANGELES
1145 Wilshire Blvd., 2nd Floor
Los Angeles, CA 90017
Telephone: (213) 977-7500
Fax: (213) 977-7500
lhoq@advancingjustice-la.org

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LA CLÍNICA DE LA RAZA; ET AL., Plaintiffs, v. DONALD J. TRUMP, ET AL. Defendants.	Case No. 4:19-cv-4980-PJH **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES** Judge: Hon. Phyllis J. Hamilton Date: October 9, 2019 Time: 9:00 AM Courtroom: 3 Trial Date: Not set Action Filed: August 16, 2019

NOTICE OF MOTION FOR A PRELIMINARY INJUNCTION

TO THE DEFENDANTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 9, 2019 at 9:00 AM, or as soon thereafter as the matter may be heard, in Courtroom 3 of the above-entitled Court, located at 1301 Clay Street, Oakland, California, Plaintiffs LA CLÍNICA DE LA RAZA; CALIFORNIA PRIMARY CARE ASSOCIATION; MATERNAL AND CHILD HEALTH ACCESS; FARMWORKER JUSTICE; COUNCIL ON AMERICAN ISLAMIC RELATIONS-CALIFORNIA; AFRICAN COMMUNITIES TOGETHER; LEGAL AID SOCIETY OF SAN MATEO COUNTY; CENTRAL AMERICAN RESOURCE CENTER, and KOREAN RESOURCE CENTER, will and hereby do move under Federal Rule of Civil Procedure 65 and Local Rules 7-2 and 65-2 for a preliminary injunction enjoining implementation of Defendants' Regulation, "Inadmissibility on Public Charge Grounds," 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. Parts 103, 212-14, 245, 248).

Because the Regulation violates the Administrative Procedure Act and will cause irreparable harm, and the equities and public interest weigh in Plaintiffs' favor, Plaintiffs seek a nationwide preliminary injunction against enforcement the Regulation and an order postponing the effective date of the Regulation pending judicial review pursuant to 5 U.S.C. § 705.

This Motion is based on this Notice, the following Memorandum of Points and Authorities, the Declarations of Leighton Ku, Danilo Trisi, Jennifer Van Hook, Thu Quach, Hope Nakamura, Lynn Kersey, Jenny Seon, Hussam Ayloush, Bruce Goldstein, Daniel Sharp, Amaha Kassa, Jane García, and Carmela R. Castellano-Garcia, and any Exhibits attached thereto, the pleadings and records in this action, and such further papers and arguments of counsel that the Court may consider.

Dated: September 4, 2019

Respectfully submitted,

/s/ Nicholas Espíritu
NICHOLAS ESPIRITU
Attorney for Plaintiffs

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ARTICLES AND LAW REVIEW

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Trump Administration seeks to drastically limit legal, family-based immigration to the United States, and replace it with a system that favors immigrants who are wealthy and white. Having failed to implement this vision through legislation, the Administration now attempts to force this change through administrative fiat. Defendants have promulgated a rule ("the Regulation") that radically alters the longstanding meaning of the statutory term "public charge."

Since its first appearance in immigration law almost 150 years ago, "public charge" has been construed consistently by courts and administrative agencies to refer to a limited group: people who are primarily dependent on the government to avoid destitution. The Regulation departs from this narrow definition to label as "public charges" vast numbers of low and moderate-income families. In so doing, the Regulation is contrary to the statute itself.

The Regulation is independently arbitrary and capricious because Defendants did not adequately analyze and respond to the evidence before it. Defendants ignored or failed to engage sufficiently with evidence-based comments describing how the Regulation would cause millions of people to disenroll from important health, nutrition, and housing programs, and the resulting economic and health harms. Instead of grappling with these important aspects of the problem, the agency focused myopically on promoting "self-sufficiency." At other times, however, Defendants justified aspects of the Regulation by considering, in the context of certain populations, the very types of harms they otherwise claim they cannot consider. Such inconsistency cannot constitute reasoned decisionmaking.

In addition, Defendant Kenneth Cuccinelli, who was appointed Acting Director of USCIS shortly before the Regulation was issued, was not properly appointed pursuant to the Federal Vacancies Reform Act. Because the Regulation was issued by an agency without a valid director, its enactment violated the Administrative Procedure Act ("APA").

For these reasons, Plaintiffs are likely to succeed on the merits of their challenge. Meanwhile, should the Regulation go into effect, it will inflict irreparable harm upon Plaintiffs, organizations that provide health, welfare, advocacy, and legal services to immigrant communities,

by interfering with their missions, forcing them to divert resources from providing their core services to handling the effect of the Regulation, and depriving them of revenue. Defendants themselves admit that many harms will follow from the Regulation. Additionally, no public interest is served by allowing it to go into effect during the pendency of this litigation. Only a nationwide injunction, or an order otherwise preventing the Regulation from taking effect, will address these irreparable harms and serve the public interest.

II. BACKGROUND

A. The Public Charge Statute.

The Immigration and Nationality Act ("INA") controls who may enter the United States and how long they may stay. *See* 8 U.S.C. § 1101 *et. seq*. The INA identifies several grounds of inadmissibility, among them any non-citizen "who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). To determine whether a person is likely to become a public charge, the statute directs that an adjudicator "shall at minimum consider the alien's--(I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." 8 U.S.C. § 1182(a)(4)(B)(i). These five factors (referred to as the "totality of the circumstances" test) were developed through case law and administrative policies.[1] An adjudicator may also consider affidavits of support—legally enforceable contracts declaring that a sponsor pledges to accept financial responsibility for an immigrant seeking lawful permanent residence while the affidavit is in force. 8 U.S.C. § 1182(a)(4)(B)(ii). If individuals are found to be inadmissible as a public charge, immigration officers may still admit them if they pay a "suitable and proper bond," an amount set (prior to the Regulation) at $1,000. 8 U.S.C. § 1183; 8 C.F.R. § 213.1 (2018).

[1] *See, e.g.*, 9 U.S. Dep't State, Foreign Affairs Manual 40.41 N.2 (Aug. 26, 1991); *Matter of Harutunian*, 14 I & N Dec. 583 (BIA 1974); *Zambrano v. INS*, 972 F.2d 1122 (9th Cir. 1992), *judgment vacated on other grounds*, 509 U.S. 918 (1993) (endorsing the "totality of the circumstances" test).

B. Prior Agency Interpretation.

As discussed in detail below, for more than a century, courts and agencies consistently interpreted the term public charge to encompass only individuals who are primarily dependent on the government to avoid destitution. *See* Section II.A, *infra*. In 1996, Congress passed two laws, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009–546 (1996). IIRIRA codified the public charge "totality of the circumstances" test, but neither law altered the term's longstanding meaning. Following passage of those laws, the Immigration and Naturalization Service ("INS") endorsed the historical interpretation of "public charge" in two ways. First, INS issued a notice of proposed rulemaking ("NPRM") for a rule that would have provided the agency's formal definition of the term "public charge." Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676 (May 26, 1999). The 1999 NPRM defined "public charge," consistent with court and BIA precedent, as an individual "who is likely to become . . . 'primarily dependent on the Government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense.'" *Id.* at 28,677.

Second, recognizing that IIRIRA and "recent welfare reform laws" had "sparked public confusion about the relationship between the receipt of . . . benefits and the meaning of 'public charge' under the immigration laws," INS published field guidance to clarify that relationship. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999) ("1999 Field Guidance"). The guidance directed that "officers should not place any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance with respect to determinations of admissibility or eligibility for adjustment on public charge grounds." *Id.*; *see also id.* at 28,692 ("It has never been Service policy that any receipt of services or benefits paid for in whole or in part from public funds renders an alien a public charge, or indicates that the alien is likely to become a public charge."). By focusing on cash assistance for income maintenance, INS 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.* These two 1999 documents defined the agency's position until one month ago.

C. Defendants' New Regulation.

In January 2017, days after President Trump took office, a draft executive order proposing a new definition of "public charge" was leaked to the public. Decl. of Michelle (Minju) Y. Cho ("Cho Decl."), Ex. A. That draft order would have redefined public charge in a manner substantially similar to the Regulation to include receipt of non-cash benefits for which eligibility is based on income or financial need. *Id.* at 3. The executive order never issued. Instead, the Administration sought to restrict family-based immigration by endorsing the 2017 Reforming American Immigration for Strong Employment ("RAISE") Act, which would have eliminated many family-based admission preferences put in place by the Immigration and Nationality Act of 1965, and would have evaluated intending immigrants based on their age, education, English proficiency, and monetary earnings. RAISE Act, S. 1720, 115th Cong. (2017-2018). The bill never made it out of committee in either chamber.

Having failed to pass legislation, the Administration turned to unilateral action to achieve the same result. On October 10, 2018, the Administration published a Notice of Proposed Rulemaking ("NPRM") for the challenged Regulation. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114. The NPRM proposed a substantial change to the definition of "public charge," including in the definition any individual who receives supplementary non-cash programs such as the Supplemental Nutrition Assistance Program (SNAP), Medicaid, and housing assistance.

The NPRM drew more than 266,000 comments, most of which opposed the proposed Regulation. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,304 (Aug. 14, 2019) (to be codified at 8 C.F.R. § 212.21(a)). Commenters highlighted the dangerous logical, legal, and methodological flaws in the NPRM.

For example, commenters pointed out that the proposed rule would dramatically increase the number of individuals denied adjustment of status and lawful entry or reentry, despite their ability to increase their earnings over time, or their family's ability to support them in the United

States. *See, e.g.*, Cho Decl., Ex. B (CBPP Cmt.) at 18–29 (the Regulation's assumptions regarding immigrants are undermined by evidence showing that "[o]n average, new immigrants and their children can be expected to strongly contribute to the economy and be net contributors to consolidated federal, state, and local government finances"); Ex. C (AAAJ – L.A. Cmt.) at 7–9 (describing the Regulation's impact on people seeking admission or readmission); Ex. D (Boundless Immigration Cmt.) at 8 (the proposed rule would deny immigration status to roughly half of those who currently apply for and obtain marriage based green cards). DHS estimated, based on a five-year average, that each year, approximately 380,000 individuals would seek to adjust to lawful permanent resident status through a pathway that would subject them to a public charge determination. 83 Fed. Reg. at 51,241 (Oct. 10, 2018). A Migration Policy Institute Report cited by many of the commenters examined individuals recently *granted* lawful permanent status, and found that 69% had at least one factor that weighed negatively in the rule; 43% had two negative factors; and 17% had 3 negatively weighted factors. Only 39% of the individuals recently granted green cards earned an income of over 250% of the Federal Poverty Level ("FPL"), one of the only heavily positive factors under the rule. Randy Capps, et al., *Gauging the Impact of DHS' Proposed Public Charge Rule on U.S. Immigration* (Nov. 2018), https://www.migrationpolicy.org/research /impact-dhs-public-charge-rule-immigration; *see also* Cho Decl., Ex. E (Heartland Alliance Cmt.) at 3 (discussing MPI study). Numerous commenters pointed in particular to the Regulation's disproportionate impact on non-white immigrant and non-immigrant populations. *Id.*, Ex. C at 5–6, 8–10, 28–30 (providing data on the Regulation's disparate impact on green card applications from API communities); *id.*, Ex. F (NILC Cmt.) at 55–59 (recognizing the Regulation's disparate impact on Latino, Asian and Pacific Islander, and Black Immigrants). *See also* Declaration of Jennifer Van Hook ("Van Hook Decl.") ¶¶ 10–14, 45–71, 77–79 (*id.* ¶ 65 "[A]ll of the non-European-origin groups are significantly more likely to be at the high-risk category of being deemed inadmissible, and significantly less likely to be in the low-risk category, compared with European-origin applicants."); *accord*, Declaration of Hussam Ayloush ("Ayloush Decl.") ¶¶ 20–22. Comments also explained that the Regulation would cause immigrants who now face a public charge determination—as well as many more immigrants and U.S. citizens, who do not—to forgo

participation in programs such as SNAP, Medicaid, and housing benefits based on fears that receiving such benefits would have negative immigration consequences for themselves or their family members. *See e.g.*, Cho Decl., Ex. G (CPCA Cmt.) at 5-6; *id.*, Ex. H (JIA Cmt.) at 2, 6 (noting that the Regulation would pressure large numbers of immigrant families to forego access to the Regulation's various public benefit programs). Finally, commenters emphasized that these changes would cause severe social, economic, and public health harms to individuals and families directly affected by the rule and to the U.S. population at large. *See e.g.*, *id.*, Ex. I (NHeLP Cmt.) at 2 (describing the scope of the harms as "needlessly harm[ing] individuals' and families' health and well-being, the greater public health, the U.S. economy, and the public budget").

Despite these comments, the Administration adopted, in principal part, the NPRM's definition of public charge in the final Regulation promulgated on August 14, 2019. 84 Fed. Reg. 41,292. The Regulation defines the term "public charge" to mean a non-citizen "who receives one or more public benefits, as defined in paragraph (b) of this section, for more than 12 months in the aggregate within any 36-month period" regardless of the value of the assistance received.[2] *Id.* at 41,501 (to be codified as 8 C.F.R. § 212.21(a)). Under the Regulation, "public benefits" now include not only cash assistance, but also Medicaid, SNAP, and certain federal housing assistance. *Id.* at 41,295 (to be codified at 8 C.F.R. § 212.21).

The Regulation outlines specific factors for adjudicators to use when assessing, under the totality of the circumstances, whether an individual is likely at any time to become a public charge. For example, when examining "income, assets, and resources," adjudicators must consider an individual's credit history and credit score in the United States. The Regulation also introduces "weighted" negative and positive factors. *Id.* at 41,504. Heavily weighted negative factors include: receipt of public benefits for more than 12 months within a 36-month period; certain medical conditions if the person lacks access to private health insurance or the resources to cover the cost of treatment; failure to demonstrate current, recent, or the prospect of future employment; and previous

[2] The durational calculation for using benefits is "stacked" such as receipt of two benefits in a given month counts was two months. 84 Fed. Reg. at 41,361–62 Thus, it would take only 4 months to be considered a public charge under this test.

findings of inadmissibility or deportability based on public charge. *Id.* The only heavily weighted positive factors are: income and assets over 250% of the FPL; authorization to work with an income over 250% of the FPL; and health coverage through private unsubsidized insurance. *Id*. at 41,298–99.

III. ARGUMENT

A. Standard Of Review.

To obtain a preliminary injunction, a plaintiff must demonstrate that (1) it "is likely to succeed on the merits," (2) it "is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [its] favor," and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Under the Ninth Circuit's application of *Winter*, a plaintiff is entitled to a preliminary injunction if it shows that there are "serious questions going to the merits" and "the balance of hardships tips sharply in the plaintiff's favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

In addition, the APA permits this Court to "postpone the effective date of an agency action" where "necessary to prevent irreparable injury . . . pending conclusion of the review proceedings." 5 U.S.C. § 705. The factors weighed in the standard for such a stay substantially overlap with the preliminary injunction factors. *See, e.g.*, *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1119 n.20 (N.D. Cal. 2018).

B. Plaintiffs Are Likely To Succeed On Their Claims That The Public Charge Regulation Violates The Administrative Procedure Act.

The Administrative Procedure Act ("APA") authorizes judicial review of agency rules. 5 U.S.C. § 706; *see Dep't of Commerce v. State of New York*, 139 S. Ct. 2551, 2567 (2019). Under the APA, a reviewing court must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction [or] authority," or "without observance of procedure required by law." 5 U.S.C. § 706(2); *see Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 945 (9th Cir. 2010).

Agency actions are "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, 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 United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Judicial review of agency rulemaking ensures that agencies have engaged in "reasoned decisionmaking." *Id.* at 52–53.

1. The Regulation's Definition of "Public Charge" Is Inconsistent with Its Plain and Established Meaning.

Section 1182 of Title 8 renders inadmissible a noncitizen who is "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). Since Congress first introduced the term in the immigration context in 1882, "public charge" has been interpreted narrowly to mean a person who is primarily dependent on public assistance to avoid destitution, i.e., extreme poverty. Prior to the Regulation, the term had been applied only to immigrants whose primary source of income or support was the government, and who would thus fall into extreme poverty without it. The term has never been understood to reach immigrants who, depend primarily on employment earnings or family support to avoid destitution, but who in addition receive the supplemental benefits covered by the Regulation, like roughly half of U.S.-born citizens. Declaration of Dr. Danilo Trisi ("Trisi Decl.") ¶¶ 12, 30.

The Regulation would exclude noncitizens who Defendants deem to be likely at any time in the future to receive for twelve months of supplemental benefits that half of the nation's U.S.-born citizens use at some point in their lifetime. This is a patently unreasonable interpretation of the statute. It is inconsistent with the text and structure of the statute and ignores a century of judicial and regulatory authority. Indeed, Congress rejected the very definition of public charge that this Regulation adopts. This Court therefore should reject it as contrary to law. *See Chevron, U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 842-43 (1984).

(a) Under the INA a Public Charge Is an Individual Who Is Primarily Dependent on the Government to Avoid Destitution.

(i) The term "public charge" is unambiguous.

"If the plain meaning of the statute is clear, this Court and the agency 'must give effect to the unambiguously expressed intent of Congress,'" *Queen of Angels/Hollywood Presbyterian Med.*

Ctr. v. Shalala, 65 F.3d 1472, 1477 (9th Cir. 1995) (quoting *Chevron*, 467 U.S. at 842–43). To determine plain meaning, courts evaluate the language of the statute "in light of the overall purpose and structure of the whole statutory scheme." *United States v. Lewis*, 67 F.3d 225, 229 (9th Cir. 1995). Here, the plain language clearly shows that public charge is intended to have a limited scope: to those individuals primarily dependent on the government to avoid destitution.

The term "public charge" was first used in the immigration context in the Immigration Act of 1882, which barred the admission of "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." An Act to Regulate Immigration, Pub. L. No. 47-***, ch. 376, 22 Stat. 214 (1882). Congress based this definition on the concept of "public charge" already used in several state and local laws, which described people "incompetent to maintain themselves" and who "have no visible means of support", such that they "might become a heavy and long continued charge to the city, town or state." *City of Boston v. Capen*, 61 Mass. 116, 121–22 (1851); *see also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 Colum. L. Rev. 1833, 1848–59 (1993).

In ordinary usage at that time, "public charge" meant a person who depended primarily, if not entirely, upon the government. Nineteenth-century dictionaries defined "charge" as a "person or thing committed to another[']s custody, care or management; a trust." *Charge*, WEBSTER'S DICTIONARY (1828 Online Edition), https://perma.cc/R9NN-5HFK; *Charge*, WEBSTER'S DICTIONARY (1886 Edition), https://perma.cc/LXX9-KF3K ("person or thing committed or intrusted [sic] to the care, custody, or management of another; a trust"); *see, e.g.*, *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 633–34 (2012) (normal usage, as reflected in dictionary definitions, governs interpretation of statutory terms). A "public charge," therefore, was a person committed or entrusted to the public for custody, care, or management—in other words, a person who lacked the ability to care for themselves and depended, primarily or entirely, on the public.

The words with which Congress surrounded the term confirm this interpretation. *United States v. Williams*, 553 U.S. 285, 294 (2008) ("[A] word is given more precise content by the neighboring words with which it is associated."). The Immigration Act of 1882 made inadmissible "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming

a public charge." An Act to Regulate Immigration, Pub. L. No. 47–***, ch. 376, 22 Stat. 214 (1882). Subsequent statutes retained this same association. *See* Act of Mar. 3, 1891, Pub. L. No. 51-551, ch. 551, 26 Stat. 1085 (1891) (amending 1882 Act to bar "[a]ll idiots, insane persons, paupers or persons likely to become a public charge"); An Act To regulate the immigration of aliens into the United States, Pub. L. No. 59-96, ch. 1134, 34 Stat. 898 (1907) (grouping those "likely to become a public charge" in a list that also included "paupers," "professional beggars," "idiots," "imbeciles," "feeble-minded persons," "insane persons," and "persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease."); Act of June 27, 1952, Pub. L. No. 82-414, ch. 477, 66 Stat. 163, 183 (1952) (excluding those "likely at any time to become public charges" and "paupers, professional beggars, or vagrants).

In the nineteenth century, the adjoining statutory terms "convict, lunatic, [and] idiot" had specific legal meanings: they were used to describe people "incompetent to act for themselves" and therefore subject to the state's "tutelary authority" as "*parens patriae* . . . to act as the[ir] general guardian and protector." *Stanley v. Colt*, 72 U.S. 119, 161 (1866); *see Penington v. Thompson*, 5 Del. Ch. 328, 350 (1880) (lunatics and idiots were "incompetent for self-protection" and subject to protection by the government acting as *parens patriae*). Because Congress associated "public charge" with these terms, "public charge" should "be understood in the same sense," *Neal v. Clark*, 95 U.S. 704, 708–09 (1877)—as referring to individuals incapable of caring for themselves and dependent on the government to serve as their "general guardian and protector." *See also Gegiow v. Uhl*, 239 U.S. 3, 10 (1915) (finding that term "public charge" had "to be read as generically similar to the other [excluded classes] mentioned before and after"); *Howe v. United States*, 247 F. 292, 294 (2d. Cir. 1917) ("The excluded classes with which th[e public charge] provision is associated are significant. It appears between 'paupers' and 'professional beggars.'"); *Wallis v. United States ex rel. Mannara*, 273 F. 509, 511 (2d Cir. 1921) ("A person likely to become a public charge is one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty."); *Lam Fung Yen v. Frick*, 233 F. 393, 396 (6th Cir. 1916) (interpreting "persons likely to become a public charge" as including paupers); *Ex parte Horn*, 292 F. 455, 457 (W.D. Wash. 1923) (interpreting "public charge" as "a pauper or an occupant of an

almshouse for want of means of support" (internal quotation marks omitted)); *Ex parte Mitchell*, 256 F. 229, 230 (N.D.N.Y. 1919) ("A 'person likely to become a public charge' is one who for some cause or reason appears to be about to become a charge on the public, one who is to be supported at public expense, by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty . . . .").[3]

Other provisions of the 1882 Act confirm that Congress used the term public charge to mean individuals who rely primarily on the government. The 1882 Act established a fund to provide "for the care of immigrants arriving in the United States [and] for the relief of such as are in distress," and empowered federal immigration officials "to provide for the support and relief of such immigrants therein landing as may fall into distress or need public aid." 1882 Act at §§ 1, 2. Thus, Congress anticipated that some immigrants would be in need of "support," "relief," or "public aid" after their arrival, and that these immigrants would not be excluded as people "unable to take care of [themselves] without becoming a public charge." *Id.* Indeed, legislative debate on the 1882 Act suggests Congress was not concerned with excluding all immigrants who might experience a need for public assistance, but rather sought to prevent foreign nations from "'send[ing] to this country blind, crippled, lunatic, and other infirm paupers, who ultimately become *life-long dependents* on our public charities.'" 13 Cong. Rec. 5108-10 (June 19, 1882) (statement of Rep. Van Voorhis) (emphasis added). Taken together, the plain language of the 1882 Act, its structure, and its history evince a clear congressional intent: to exclude as public charges only those who are likely to depend primarily on the government.

In immigration cases, courts have recognized this consistent meaning of the term "public charge." For example, the Second Circuit held over a century ago that the term was meant "to

[3] Congress removed the surrounding terms in 1990, *see* Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978, 5072, but did so because terms like "pauper" and "professional beggar" were deemed so similar to "public charge" as to not be necessary. *See* 136 Cong. Rec. 36,484 (statement of Rep. Fish) ("The bill removes some of the antiquated and unused exclusions that have been in our law since the early 1900's, such as the exclusions based on illiteracy, and the exclusions for aliens who are 'paupers, professional beggars, or vagrants.' These relics have been replaced by one generic standard which excludes aliens who are 'likely to become a public charge.'").

exclude persons who were likely to become *occupants of almshouses* for want of means with which to support themselves in the future." *Howe*, 247 F. at 294 (emphasis added). The Board of Immigration Appeals ("BIA") likewise held that the term "public charge" has an "ordinary meaning": "a money charge upon or an expense to the public for support and care, *the alien being destitute*." *Matter of Harutunian*, 14 I. & N. Dec. 583, 586 (BIA 1974) (emphasis added). In *Harutunian*, the BIA acknowledged a critical distinction between benefits upon which an individual was primarily dependent and "supplementary benefits" provided by the government. *Id.*; *see also Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974) (noting that past receipt of welfare benefits alone is not enough to render a noncitizen a public charge, and that instead "[s]ome specific circumstance, such as mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public" must be present, "especially where [the noncitizen] has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in the case of emergency").

Outside of the immigration context, the term "public charge" also has been interpreted to require *destitution* (meaning extreme poverty)—or equivalently, primary dependence on public support to avoid destitution. For example, many state *in forma pauperis* cases distinguish between those who are poor and need limited assistance with court costs (not public charges), and those who are so destitute as to be public charges.[4] Some state public assistance programs also equate "destitution" with "public charge."[5] In the family law context, states similarly liken being a public

[4] *See, e.g.*, *Martinez v. Kristi Kleaners, Inc.*, 364 F.3d 1305, 1307–08 (11th Cir. 2004); *Harris v. Harris*, 424 F.2d 806, 810 (D.C. Cir. 1970); *Brown v. Upfold*, 123 N.Y.S.2d 342, 345 (Sup. Ct. 1953).

[5] *See, e.g.*, N.Y. Soc. Serv. Law § 131 (McKinney 2019) (outlining duty of social services officials to "provide adequately for those unable to maintain themselves" and "further give such service to those liable to become destitute" to "prevent the necessity of their becoming public charges"); *William W. Backus Hosp., Inc. v. City of Norwich*, 155 A.2d 916, 918 (Conn. 1959) (finding that woman was "public charge" and thus entitled to public assistance under Connecticut law for medical costs "because she was in fact destitute" and without means or credit).

charge with being destitute or a "pauper."[6] Federal bankruptcy exemption rules equate being a public charge with being destitute as well.[7]

(ii) Congress has confirmed the plain meaning of "public charge" by declining to revise or amend the provision.

Congress enacted the current version of Section 1182(a)(4) against this backdrop of clear statutory language and consistent judicial and administrative interpretation, and indeed has rejected efforts to alter the meaning of public charge in precisely the manner that the Regulation adopts. This history evidences Congress's continued understanding that the "public charge" exclusion applies only to those persons who are or are likely to become primarily dependent on the government to avoid destitution. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422–23 (2019) (noting that Congress was aware of Court's interpretation but did not amend the statute, demonstrating its acceptance); *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 563 (2017) ("If courts have settled the meaning of an existing provision, the enactment of a new provision that mirrors the existing statutory text indicates, as a general matter, that the new provision has that same meaning."); *Watson v. United States*, 552 U.S. 74, 82–83 (2007) ("[I]n 14 years Congress has taken no step to modify [the Court's statutory interpretation], and this long congressional acquiescence 'has enhanced even the usual precedential force' we accord to our interpretations of statutes." (citation omitted)); *State*

[6] *See, e.g.*, *Broome v. Broome*, 684 N.E.2d 641, 645–46 (Mass. Ct. App. 1997) (equating lower court judge's finding that wife was public charge to finding that wife was destitute); *Savoy v. Savoy*, 641 A.2d 596, 599–600 (Pa. Super. Ct. 1994) (distinguishing between those who "need not be helpless and in extreme want" and someone "so completely destitute of property, as to require assistance from the public," like "a public charge" (internal quotation marks omitted)); *New York v. Hall*, 49 N.Y.S.2d 309, 310 (Otsego Cty. Ct. 1944) (affirming that abandoned wife was "destitute" and "being provided for by charity" and was thus public charge); *see also* 2 James Kent, *Commentaries on American Law* 160 (1827) (describing how children become "paupers" and "public charges" after both parents abandon them and leave their maintenance to government).

[7] *See, e.g.*, *Clark v. Rameker*, 573 U.S. 122, 129 n.3 (2014) (explaining that purpose of bankruptcy exemptions is to provide debtor "'with the basic necessities of life' so that she 'will not be left destitute and a public charge'" (quoting H.R.Rep. No. 95–595, at 126 (1977)); *In re Krebs*, 527 F.3d 82, 85 (3d Cir. 2008) (same).; *In re Collins*, 281 B.R. 580, 583 (Bankr. M.D. Pa. 2002) (explaining that to fulfill statute's purpose of preventing debtor from becoming public charge, court must "set aside an amount sufficient to sustain the basic needs," or "subsistence needs," of debtor).

Farm, 463 U.S. at 45 ("[A]n agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation . . . .").

The Immigration Reform and Control Act of 1986 made no change to the "public charge" provision that had been construed consistently and narrowly by the BIA and the courts as requiring public support to avoid destitution. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986). Immediately thereafter, in 1987, the INS promulgated regulations reaffirming the longstanding understanding of "public charge." Adjustment of Status for Certain Aliens, 52 Fed. Reg. 16,205 (May 1, 1987). The regulations established that an applicant was not a public charge if she could "demonstrate[] a history of employment in the United States evidencing self-support without receipt of *public cash assistance*," *id.* at 16,211 (emphasis added), which was defined as "income or needs-based monetary assistance . . . designed to meet *subsistence* levels," *id.* at 16,209 (emphasis added).[8] The regulations specifically *excluded* "assistance in kind, such as food stamps, public housing, or other non-cash benefits" from those benefits that might render an individual a public charge. *Id.*

If Congress had been concerned that the INS got it wrong—that is, if Congress intended a broader "public charge" definition—it could have corrected that error in subsequent legislation addressing the term. Instead, Congress passed three statutes that addressed the term "public charge," never once suggesting that the term had a different meaning than the primary dependence definition that courts and agencies—including the INS in 1987—had long given it.

First, as noted above, the Immigration Act of 1990's reorganization of the section containing the public charge exclusion did not change the meaning of "public charge." And the legislative history shows that Congress intended a continuation of prior interpretation by recognizing the term "public charge" as generally encompassing outdated terms like "paupers." *See supra* n.3. Nor had the meaning of "public charge" changed. *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 337

[8] "Subsistence" is defined as "the minimum (as of food and shelter) necessary to support life; a source or means of obtaining the necessities of life." *Subsistence*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/subsistence; *see also Minimal Level of Existence*, THE LITTLE OXFORD DICTIONARY OF CURRENT ENGLISH 656 (7th ed. 1994).

(1986) (defining public charge as "a person or thing committed or entrusted to the care, custody, management, or support of another").

Next, Congress made no change to the longstanding interpretation when it enacted the PRWORA and IIRIRA in 1996. In fact, Congress considered and rejected a definition of "public charge" that would have included, as does the Regulation, those who receive supplemental, "means-tested" benefits. *See* H.R. Conf. Rep. No. 104-828, at 138–39, 240–41 (Sept. 24, 1996).[9] Instead Congress simply codified the totality of the circumstances test that had been adopted in the case law for determining whether an individual is a likely to become a public charge. Pub. L. No. 104-208, § 531, 110 Stat. 3009–546 (listing as factors age, health, family status, financial status, education, and skills). As discussed above, *see supra*, pp. 3–4, following the passage of PRWORA and IIRIRA, the INS again endorsed the longstanding judicial and regulatory definition of public charge as an individual "who is likely to become . . . primarily dependent on the Government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." 1999 Field Guidance, 64 Fed. Reg. 28,689; *see also id.* ("[O]fficers should not place any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance with respect to determinations of admissibility or eligibility for adjustment on public charge grounds.").

In the last two decades, Congress has made several amendments to immigration statute, but has left the public charge provision unchanged. For example, in 2013, Congress declined to adopt a proposal that would have required applicants for green cards "to show they were not likely to qualify even for non-cash employment supports" such as Medicaid and SNAP. S. Rep. No. 113-40, at 42 (2013); *see also id.* at 63 (rejected amendment "would have expanded the definition of 'public

[9] Indeed, during this time period Congress purposefully rejected several amendments to public charge provisions that would have excluded, denied status adjustments to, or deported large segments of the U.S. immigrant population. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, H.R. 2202, 104th Cong. §532 (1995–1996) (referring to deportation); Immigration Control and Financial Responsibility Act of 1996, S. 1664, 104th Cong. § 202 (1995–1996) (referring to deportation); Immigration Stabilization Act of 1994, S. 1923, 103rd Cong. § 501 (1994) (referring to exclusion and adjustment of status).

charge' such that people who received non-cash health benefits could not become legal permanent residents"). Congress has had a "prolonged and acute awareness" of an established agency interpretation on a "precise issue," and, thus, its repeated failure to alter a law is evidence of acquiescence in the established interpretation. *Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01 (1983). DHS cannot now circumvent Congress to advance its own preferred policy outcome. *See, e.g.*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (rejecting construction of statute that would implement substance of provision that Conference Committee rejected).

(b) The Regulation's Interpretation of "Public Charge" is Not a Reasonable Interpretation of the Statute.

Even if the term "public charge" were ambiguous, Plaintiffs are likely to succeed on the merits of their claim because the Regulation's definition of the term is not reasonable. The new definition sweeps in individuals who use, or are in Defendants' view likely to use, any of a number of supplemental benefits for twelve months—such as Medicaid, SNAP, or Section 8 housing vouchers—that a large portion of the American public will use at some point in their lifetime. Thus, even if Defendants could depart from the longstanding meaning of public charge as a person so destitute as to be primarily dependent on the government to avoid destitution, no reasonable definition of "public charge" could suggest that a likelihood of future short-term receipt of these widely-used benefits would render someone a "public charge."

To the contrary, the benefits now covered by the Regulation are used by many low and moderate-income families who depend primarily on employment income or family support to meet their needs but receive assistance to supplement this income or support. In a single year, roughly one in four U.S.-born citizens receive one or more benefits included in the Regulation. Trisi Decl. ¶¶ 12, 23. And over the course of their lifetimes, about half of all U.S.-born citizens are expected to receive one or more of the covered benefits. *Id.* ¶¶ 12, 30. This is in marked contrast to the longstanding public charge definition currently employed by DHS. In a given year, just 5 percent of U.S.-born citizens (and only 1 percent of individuals working in the U.S.) meet DHS's existing benefit-related criteria in the public charge determination. Trisi Decl. ¶ 13.

No reasonable definition of "public charge" would deem roughly half of all U.S.-born citizens to be "public charges." Nor is it reasonable to ascribe to Congress's narrow exclusion for "public charges" an intent to admit only the select portion of the world that is better off than half of U.S.-born citizens. Defendants may wish that the immigration laws permitted only the wealthiest of non-citizens to adjust status—and indeed, Defendants supported legislation with that goal. But no reasonable interpretation of current immigration laws, including those containing the longstanding public charge provision that the Regulation distorts, would lead to that result.

2. The Regulation is arbitrary and capricious.

Plaintiffs are also likely to succeed on their claim that Defendants' reasoning is arbitrary and capricious. More than one quarter of a million public comments were submitted during the notice and comment period, the vast majority of which opposed the Regulation on the grounds that it would harm millions of people. 84 Fed. Reg. at 41,297. Defendants were required to "reflect upon the information contained in the record and grapple with contrary evidence." *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017). Where "the agency has failed to 'examine the relevant data' or failed to 'articulate a rational explanation for its actions,'" its decision cannot stand. *Genuine Parts Co. v. EPA*, 890 F.3d 304, 311-12 (D.C. Cir. 2018) (quoting *Carus Chem. Co. v. EPA*, 395 F.3d 434, 441 (D.C. Cir. 2005) (alterations adopted)). And where an agency is uncertain about the effects of agency action, it may not rely on "'substantial uncertainty' as a justification for its actions." *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011). Instead, it must "rationally explain why the uncertainty" supports the chosen approach. *Id.* Finally, an agency's "internally inconsistent analysis" in its rule "is arbitrary and capricious." *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015); *see also Gen. Chem. Corp. v. United States*, 817 F.2d 844, 853 (D.C Cir. 1987) (setting aside Interstate Commerce Commission decision as arbitrary and capricious for internal inconsistencies in its reasoning and inadequate explanation).

Commenters provided evidence that the Regulation would needlessly cause vast, systemic harms to individuals, families and communities across the nation. Yet Defendants, at best, merely acknowledge the contrary evidence in a conclusory manner, without adequately grappling with

commenters' concerns. At worst, Defendants ignore or dismiss the key concerns raised in these comments. As a result, the Regulation is arbitrary and capricious.

(a) Defendants failed to adequately analyze the record evidence demonstrating widespread chilling effects.

Commenters repeatedly emphasized that changes to the public charge definition could deter tens of millions of people from seeking critical programs and could cause many of them to disenroll from benefits they currently receive. They explained that even people who are not subject to a public charge test or whose benefit use is exempt from consideration would disenroll based on fear and confusion, particularly given the complexity of the Regulation. *See, e.g.*, Cho Decl., Ex. J (Am. Acad. Pediatrics Cmt.) at 2–3 (highlighting that approximately 26 million people would be chilled by the Regulation, a significant number of which are US citizen or immigrant children); *id.*, Ex. K (Am.'s Essential Hosps. Cmt.) at 4–5 (estimating that approximately 13 million Medicaid and Children's Health Insurance Program recipients could be harmed by the Regulation's chilling effect); *id.*, Ex. L (CHHS Cmt.) at 11–13 (explaining that the Regulation's complexity would cause exempt groups, including refugees, asylees, and U.S. citizens to disenroll); *see also* Declaration of Leighton Ku ("Ku Decl.") ¶¶ 24–32 (*id.* ¶ 25, "Research indicates there will be much broader 'chilling effects' for those in immigrant families, including U.S.-born citizen children, naturalized citizens, lawful permanent residents and others who are not specifically described by the regulation.")

Commenters emphasized that the Regulation would "cause harm to the children of immigrant parents, whether they are immigrants or citizens" due to concerns about the immigration status of other family members, and that "the health of children is inextricably linked to the health of their parents and families."' *See, e.g.*, Cho Decl., Ex. J at 3; 84 Fed. Reg. 41,311–312; Ku Decl. ¶ 25 (discussing confusion around the changes to PRWORA in 1996, finding that a reduction in use of Medicaid and similar benefits was higher for U.S.-born children [18%] than for children in immigrant families born outside the U.S [14%]").

Rather than "grapple" with the evidence before them, *see Fred Meyer Stores*, 865 F.3d at 638, Defendants summarily dismissed the chilling effect on individuals who are not subject to the

Regulation, calling those actions "unwarranted" and concluding that they determined it need not alter the Regulation "to account for such unwarranted choices." 84 Fed. Reg. at 41,313. Defendants were not free to dismiss the substantial record evidence regarding the well-documented effects on non-regulated populations, in favor of their own unsubstantiated "belief." *Id.* ("Accordingly, DHS *believes* that it would be unwarranted for U.S. citizens and aliens exempt from public charge inadmissibility to disenroll from a public benefit program or forego enrollment in response to this rule when such individuals are not subject to this rule. DHS will not alter this rule to account for such unwarranted choices.")

Moreover, where Defendants did assess the possibility that individuals subject to the regulation will disenroll from benefits, available data revealed that their analysis significantly underestimated the impact of the Regulation. In its "best" estimates, DHS stated that 9,632 households will disenroll from or forgo enrollment in a public benefit due to the final rule, using a rate of 2.5 percent disenrollment or forgone enrollment. 84 Fed. Reg. 41,463. This estimate is not only flawed, Ku Decl. ¶ 34 ("The 2.5 percent avoidance rate is based on DHS' estimate of the share of non-citizens who seek to adjust their immigration status each year, such as applying for lawful permanent resident status. DHS presumes that all immigrants who are adjusting status that year drop Medicaid, but that no others do so."), but it is also inconsistent with its own methodology, *id.* ¶¶ 33, 35 (describing DHS's methodology and the inconsistencies). It is also at odds with reports assessing the comparable impact of changes to PRWORA, which showed enrollment reductions between 21 and 54 percent among mixed-status households. Cho Decl., Ex. I at 46; Ex. B at 96–97**.** Evidence of *current* effects of the Regulation's introduction shared with the Office of Management and Budget by the National Immigrant Law Center before the Regulation was promulgated shows a 14 percent drop among in benefits use among immigrant families due to chilling effects,[10] and a 21

[10] Hamutal Bernstein, et al., *With Public Charge Rule Looming, One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018* (May 21, 2019), https://www.urban.org/urban-wire/public-charge-rule-looming-one-seven-adults-immigrant-families-reported-avoiding-public-benefit-programs-2018.

percent drop among low-income members of immigrant families whose incomes were below 200% of the federal poverty line. *See* Ku Decl. ¶ 27.

Defendants also summarily state "that there could be other costs, including 'Potential lost productivity, Adverse health effects, Additional medical expenses due to delayed health care treatment,'" in the preamble to the Regulation, but make no effort to quantify them. *Id.* ¶ 36. Defendants were asked to consider and give detailed explanations for the drastic differences in their own estimates as well as available government and private data, but did neither. Instead, Defendants dismissed the overwhelming evidence describing the chilling effect, claiming that it is "difficult to predict the rule's disenrollment impacts." 84 Fed. Reg. at 41,312. Where an agency is uncertain about the effects of agency action, however, it may not rely on "'substantial uncertainty' as a justification for its actions." *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011) (citation omitted).

(b) Defendants failed to adequately respond to the negative health consequences identified in the record comments.

Commenters also described how loss of benefits would trigger grave negative health consequences, including the spread of disease, aggravation of chronic illness, and acute harms to specific populations such as pregnant women. *See, e.g.*, Cho Decl., Ex. E at 10 (describing the association with food insecurity created by the rule with diabetes, heart disease, hypertension, and depression); *id.*, Ex. M (Kaiser Permanente Cmt.) at 4 (linking the rule's impacts on prescription adherence with increased chance of outbreaks of communicable disease); *id.*, Ex. N (Pub. Health Inst.) at 9 ("We cannot achieve universally agreed upon public health goals, such as reducing chronic diseases throughout the U.S., when we directly or indirectly deny large segments of our population the very building blocks they need for good health"); *see also* Ku Decl. ¶¶ 51–58. DHS casually refers to "worse health outcomes," "increased prevalence of communicable diseases," "increased rates of poverty and housing instability," and "reduced productivity and educational attainment." Regulatory Impact Analysis, at 109 (internal capitalizations omitted); *cf.* Cho Decl., Ex. O (Nat'l Assoc. Ped. Nurse Practitioners Cmt.) at 4 (discussing "worse health outcomes"); *id.*, Ex. P (Children's HealthWatch Cmt.) at 7 (discussing "increased prevalence of communicable diseases");

Ex. Q (Legal Aid Found. L.A.) at 12 (discussing "increased rates of poverty and housing instability"); *id.*, Ex. R (Lawyers' Comm. for Civ. Rights Under Law Cmt.) at 7 (discussing "reduced productivity and educational attainment"). Mere acknowledgment, however, is no substitute for reasoned consideration and explanation. *See, e.g.*, *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 446 (D.C. Cir. 2017).

These negative health outcomes identified by commenters were a key rationale for prior agency action: When issuing the 1999 guidance, INS described its primary motivation as "to reduce the negative public health consequences generated by the existing confusion." 1999 Field Guidance, 64 Fed. Reg. 28,689; *see also id.* at 28,692 (adopting regulation on an interim basis because "confusion . . . has deterred eligible [immigrants] and their families, including U.S. citizen children, from seeking important health and nutrition benefits," and that "reluctance to access benefits has an adverse impact not just on the potential recipients, but on public health and the general welfare"). But in reversing the 1999 guidance, Defendants do not attempt to confront and adequately explain why the health consequences that were so important to its prior position merit such little consideration now. Although an agency may change its position, it may not do so without a reasoned explanation for "disregarding facts and circumstances that underlay . . . the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009). The absence of such an explanation for ignoring the negative health outcomes of the Regulation renders it arbitrary and capricious.

(c) Defendants failed to adequately consider the Regulation's costs.

Costs are a "centrally relevant" factor in agency decision-making, since the "reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions." *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707–08 (2015); *Regents of Univ. of Cal. v. United States Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1045–46 (N.D. Cal. 2018). DHS failed to meaningfully consider the substantial financial harms that the Regulation will generate.

Commenters identified sweeping harms to various sectors of the economy that will stem from the widespread reduction in public benefit use. For instance, commenters explained that hospitals, health centers, and state and local medical providers would lose substantial Medicaid reimbursement, see an increased number of uninsured patients leading to higher uncompensated

care costs, and lose health care employees. *See, e.g.*, Cho Decl., Ex. J at 11 ("[H]ospitals, in addition to states, may see a rise in uninsured patients, which will . . . cause an increase in their uncompensated costs."); *id.*, Ex. G at 15 (predicting that California's health centers could see between 132,000 to 397,000 patients disenroll from Medicaid and become uninsured"); *id.*, Ex. S (W. Ctr. on Law and Poverty) at 8 (estimating that the Regulation "would lead to a loss of 13,200 jobs"); *see also* Ku Decl. ¶¶ 62–72 (noting, *id.* at ¶ 64, that "American hospitals could lose an estimated $17 billion," and finding, *id.* at ¶ 62, that health centers nationwide would sustain between an estimated $345 and $623 million in lost Medicaid revenue, a loss of 295,000 and 538,000 fewer patients, or a loss of around 3,400 to 6,100 staff).

While DHS briefly mentioned that comments "emphasized that disenrollment or foregoing enrollment would be detrimental to the financial stability and economy of . . . hospitals, safety net providers, foundations, and healthcare centers," 84 Fed. Reg. at 41,312, it declined to quantify those costs, claiming they were unable to calculate them, or dismissed them as merely "administrative" and "familiarization costs." *Id.* at 41,475.

Defendants ignored numerous comments with specific cost calculations. *See, e.g.*, Cho Decl., Ex. J at 11 (estimating that the Regulation would cost hospitals more than 17 billion in uncompensated care as a result of Defendants' regulation); *id.*, Ex. G at 15 (predicting California's health centers to lose between $74 million and $221 million per year as a result of patient disenrollment from Medicaid); *id.*, Ex. C at 22–23 (quantifying the losses to California as $2.8 billion in consumer spending, $1.76 billion losses to the State in federal revenue, and as many as 17,700 jobs lost); *id.*, Ex. K at 5–7 (detailing expected costs to essential hospitals); 84 Fed. Reg. at 41,475; *see also* Ku Decl. ¶¶ 62–72 (additionally noting, *id.* at ¶ 63, *inter alia*, estimates of up to $126 to $240 million in California community health center losses). Defendants were required to grapple with those estimates and explain why they chose not to credit them. *See Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1068–69 (9th Cir. 2018) (finding agency action arbitrary and capricious where the agency did not explain why it did not credit available data that did not support its action). They did not do so. That failure renders the Regulation openly arbitrary and capricious.

See Nat'l Parks Conservation Ass'n, 788 F.3d at 1141 (setting aside an EPA rule for failure to explain its use and combination of cost metrics).

(d) Defendants treated affected persons inconsistently.

Nearly all of Defendants' stated reasons for revising the longstanding policy are focused on "minimiz[ing] the incentive of aliens to immigrate to the United States because of the availability of public benefits and . . . promot[ing] self-sufficiency of aliens within the United States." 84 Fed. Reg. at 41,309. On this basis, they dismiss the myriad and extensive harms to immigrants and citizens, states and localities, and to the public at large. *See, e.g.*, *id.* at 41,312 (dismissing concerns over chilling effects on this ground). They largely do not dispute that these harms will follow from the rule; instead, they stated that they would not modify the Regulation to address these harms because, in their view, their job is solely to implement the public charge statute as they construe it.

Nonetheless, Defendants created limited exemptions to the operation of the regulation pertaining to children under 21 and pregnant women. First, Defendants exempt from the public charge test "Medicaid receipt by [children] under the age of 21 and pregnant women," 84 Fed. Reg. at 41,297. But this exemption is undermined by the provision that precludes them *from using that coverage* to overcome a health condition barrier. The rule treats certain medical conditions as "heavily weighted negative factors" unless the person can obtain *private* health insurance or has the resources to pay for foreseeable medical costs related to the medical condition. 212.22(c)(1)(iii), at 84 Fed. Reg. 41,504. Thus, despite Defendants' assurances that they have taken Medicaid use by these populations out of the public charge equation, these groups would be penalized for using the coverage (rather than private insurance) to address these health conditions.[11] Second, while Defendants argue that Congress' subsequent action making these populations eligible for Medicaid gives them a statutory basis for this exemption, 84 Fed. Reg. at 41,380, citing 42 U.S.C. 1396b(v)(4), they provide no similar exemption for SNAP, despite acknowledging that Congress in the 2002 Farm Bill restored eligibility to immigrant children without a waiting period. 84 Fed. Reg. at

[11] DHS claims that current Medicaid recipients have time to disenroll and enroll in ACA coverage instead, 84 Fed. Reg. 41,458, but they are not permitted to enroll in ACA if they are Medicaid eligible.

41,374–75. Defendants' only explanation of this distinction is that—although children are not required to list a sponsor's income when they apply for those programs—there is no sponsor liability for Medicaid used by children or pregnant women, while a sponsor may be obligated to reimburse SNAP benefits used by a child. *Id.* at 41,375. Defendants' purported justification, however, is inconsistent with its other rationales since the sponsor, and not the public, would be responsible for these costs.[12] This inconsistent treatment of Medicaid and SNAP cannot be justified on statutory or policy grounds, and is therefore irrational.

As Defendants' limited Medicaid exemptions pertaining to children under 21 and pregnant women demonstrate, Defendants can, and indeed should, consider harms to vast swaths of the population in the process of reasoned rulemaking. Thus, they cannot claim to ignore harms to other segments of the population rule on grounds that they are not required to take these harms into account by the statute without providing, at a minimum, a reasonably consistent analysis for changing their criteria. This "internally inconsistent analysis," *Nat'l Parks Conservation Ass'n*, 788 F.3d at 1141, for which Defendants provide no justification is arbitrary and capricious.

(e) <u>The Regulation's method of counting public benefits is arbitrary and has no rational connection to the evidence in the record.</u>

The NPRM proposed treating the receipt of public benefits that exceeded 15 percent of the Federal Poverty Guidelines for a one-person household as triggering a public charge finding. Many commenters opposed this approach, arguing that it was far *too low* to show dependency on benefits. *See e.g.*, Cho Decl., Ex. I at 34–35 (rejecting the proposed 15% threshold arguing that it was an arbitrary and inappropriate measurement for any program); *id.*, Ex. T (NCLEJ Cmt.) at 19 ("The proposed rule would penalize people who are, by definition, nearly self-sufficient."); *id.*, Ex. D at

[12] There is similarly no policy distinction to be made between ensuring that pregnant women and children have access to Medicaid and access to SNAP, which is also essential to "improving[ing] birth outcomes and long term health." Cho Decl., Ex. B at 44–47); *see also* Ex. J at 5–7 (describing impact of nutrition on a child's development); *id.*, Ex. L at 20–21) ("For children, SNAP drives nutritional health, growth, and learning"); *see also id.*, Ex. S at 12 (explaining that increasing access to CalFresh "is a childhood obesity prevention program"); *id.*, Ex. C at 15–16; Declaration of Lynn Kersey ("Kersey Decl.") ¶¶ 24, 31. *Cf.* 84 Fed. Reg. at 41,379–80 (explaining the public health and policy benefits of providing Medicaid to children and pregnant women).

44–45 (describing "several aspects" of the 15% determination measure as arbitrary and capricious). Without any reasoned basis, Defendants responded to those concerns by adopting an approach that treats an individual who receives *any value* of benefits, for 12 months in the aggregate within any 36-month period, as a public charge. *See* 84 Fed. Reg. at 41,357–58. Put differently, Defendants responded to comments that consistently argued that the agency had set the public charge threshold too low by making that threshold even lower. For example, an individual receiving $15 per month in SNAP benefits for a year (totaling $180 in benefits) would meet the definition of public charge under the Regulation. That is simply not a reasonable response to the comments.

Additionally, the 12-month duration standard the Regulation claims to adopt is misleading. *Cf. Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1986) ("For an agency to say one thing . . . and do another . . . is the essence of arbitrary action."). Defendants contend that one year is evidence of "long-term" benefits use. *See* 84 Fed. Reg. at 41,360–61. But the Regulation does not actually require any "long-term" use because multiple benefits received within the same month are treated as multiple months of the required twelve. Consequently, an applicant could reach "twelve months" of benefits use in just four months if she, for example, simultaneously received Medicaid, Section 8 housing, and SNAP during those months.

Compounding that error further, in this rule, Defendants weigh negatively *any* prior benefits use—regardless of *whether the 12-month threshold is met*. Thus, even an application for, or one month's use of a program will weigh against an individual seeking lawful permanent residence. 84 Fed. Reg. at 41,358. This undermines the notion that there is any threshold at all for benefits use; there is effectively no "*de minimis*" exception in this rule.

(i) Defendant Cuccinelli's Role in the Issuance of the Regulation While Improperly Appointed as Acting Director of USCIS Violates the APA.

To be valid, an agency regulation must be promulgated "in accordance with law." 5 U.S.C. § 706(2). Defendant Cuccinelli was significantly involved in—and appointed in part to facilitate—

promulgating and publicizing the Regulation.[13] The agency he directs will likewise have responsibility for implementing the Regulation. However, Defendant Cuccinelli lacked authority to assist in the promulgation of the Regulation, as he was appointed in violation of the Federal Vacancies Reform Act ("FVRA"). The required remedy is vacatur. *See* 5 U.S.C. § 706(2)(A), (C); *id.* § 3348(d)(1) .

The USCIS director must be appointed by the President with the advice and consent of the Senate. 6 U.S.C. § 113(a)(1)(E). Such positions are known as "PAS" positions. "Congress has long accounted for th[e] reality" that the process of filling PAS vacancies might otherwise leave positions unfilled and has thus "authoriz[ed] the President to direct certain officials to temporarily carry out the duties of a vacant PAS office in an acting capacity, without Senate confirmation." *N.L.R.B. v. SW General, Inc.*, 137 S. Ct. 929, 934 (2017). The FVRA currently provides that authority. The process set forth by the FVRA is the only way to temporarily fill PAS positions, unless another statute expressly provides otherwise. *See SW General, Inc. v. NLRB*, 796 F.3d 67, 69–70 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017).

Under the FVRA, when a PAS position is vacated, such vacancy may only be filled by "the first assistant to the office of such officer," by a person who has already been confirmed by the Senate for a different office, or by a person who, during the year prior to the vacancy, served as an officer or employee in the same agency for at least 90 days. 5 U.S.C. § 3345(a). If the President

[13] Louise Radnofsky, *Ken Cuccinelli Takes Reins of Immigration Agency with Focus on Migrant Vetting*, The Wall Street Journal (July 6, 2019), https://www.wsj.com/articles/ken-cuccinelli-takes-reins-of-immigration-agency-with-focus-on-migrant-vetting-11562410802 (noting in context of public charge Regulation that "[a] new rule on that topic from USCIS, which would then be used by the Departments of State and Justice, may come by the fall, said Mr. Cuccinelli"); *see* Ted Hesson, *Visa denials to poor Mexicans skyrocket under Trump's State Department* (Aug. 6, 2019), https://www.politico.com/story/2019/08/06/visa-denials-poor-mexicans-trump-1637094 (quoting Administration official describing that USCIS "had 'become a bottleneck' for top immigration priorities"); *Transcript: Ken Cuccinelli on Face the Nation* (July 7, 2019), https://www.cbsnews.com/news/transcript-ken-cuccinelli-on-face-the-nation-july-7-2019/ (Defendant Cuccinelli offering public charge regulation when asked to "[t]ell . . . about some of the regulatory changes you think you can make without Congressional approval"); *see also* 83 Fed. Reg. 51,114 (Oct. 10, 2018) (directing public comments on proposed Regulation to USCIS Regulatory Coordination Division and further information requests to USCIS Office of Policy and Strategy).

takes no action to fill the vacancy, the first assistant automatically becomes the acting replacement. 5 U.S.C. § 3345(a)(1)–(3).

The Director of USCIS, Francis L. Cissna, resigned at the President's request effective June 1, 2019. *See USCIS Names Acting Director as Director Cissna Exits After Posting Metrics Report* (June 3, 2019), https://www.natlawreview.com/article/uscis-names-acting-director-director-cissna-exits-after-posting-metrics-report. USCIS first assistant, Deputy Director Mark Koumans became acting director on June 2, 2019. On that date, Defendant Cuccinelli was ineligible for the acting directorship, as he: (1) had not already been confirmed by the Senate for a different office; (2) was not the first assistant to the office of the Director; and (3) had not served as an officer or employee in the USCIS for a least 90 days during the year prior. *See* 5 U.S.C. § 3345(a).

On June 10, 2019, Acting DHS Secretary McAleenan created a new position— "Principal Deputy Director" of USCIS—and amended the USCIS Order of Succession to declare this new position to be "first assistant" under the FVRA. He appointed Defendant Cuccinelli to that new position and to the position of Acting Director of USCIS. Both Defendant Cuccinelli's appointment as Principal Deputy Director and the revised order of succession terminate *the day that the President appoints a new USCIS Director*. Cho Decl., Exs. U (memo re Cuccinelli appointment), and V (memo re order of succession).

Defendant Cuccinelli's appointment thus violated the FVRA. The eligibility criteria in the FVRA must attach at the time the vacancy arises in order to effectuate the goal of the statute. To hold otherwise would be to render the FVRA dead letter, allowing any President at any time to, after an officer resigns, temporarily create a new "first assistant" role and appoint a person of his choice to that role, in order to bypass Congress's chosen method of succession. This is the precise result Congress aimed to prevent in passing the FVRA. *See Hooks v. Kitsap Tenant Support Services*, 816 F.3d 550, 564 (9th Cir. 2016) ("The Senate Report suggests that the FVRA was motivated by a desire to reassert the Senate's confirmation power in the face of what was seen as executive overreach.")

As such, the Regulation cannot stand. *See SW General*, 796 F.3d at 70–71 ("[A]ctions taken by persons serving in violation of the [FVRA are] void *ab initio*"); 5 U.S.C. § 3348(d)(1).

C. Without An Injunction, the Regulation Will Cause Plaintiffs Irreparable Harm In the Form of Frustration of Their Missions, Diversion of Their Resources, and Reductions In Their Funding.

Plaintiffs are already suffering irreparable harm due to the Regulation, and, absent preliminary relief, they will suffer even greater harms. Plaintiffs are and increasingly will be injured through the frustration of their organizational missions, diversion of their resources, and reduction of their funding, each of which is independently sufficient to show irreparable harm. *E.g.*, *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018, 1029 (9th Cir. 2013); *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1116 (N.D. Cal. 2018) (*East Bay I*). A preliminary injunction is necessary to alleviate these harms.

The missions of Plaintiff California Primary Care Association ("CPCA") and its healthcare provider members, including Plaintiff La Clínica de La Raza ("La Clínica") and Asian Health Services ("AHS"), are to provide high quality health care to low-income communities. Declaration of Carmella Castellano-García ("Castellano-García Decl.") (CPCA) ¶ 5; Declaration of Jane García ("García Decl.") (La Clínica) ¶ 3; Declaration of Thu Quach ("Quach Decl.") (AHS) ¶ 4; *see also* Cho Decl., Ex. G at 1; *id.*, Ex. W (La Clínica Cmt.) at 1; *id.*, Ex. X (AHS Cmt.) at 1–2. Many of the health-care providers' patients are immigrants with one or more characteristic that the Regulation weighs negatively, including receipt of public benefits like Medi-Cal (California's Medicaid program) and CalFresh (California's SNAP program). Castellano-García Decl. ¶¶ 17–19 (66% of members' patients enrolled in Medi-Cal); García Decl. ¶¶ 8–9; Quach Decl. ¶¶ 16–19 (estimating two-thirds of patients enrolled in Medi-Cal). As a result, these health-care providers have diverted resources from their core missions to address community and individual patient concerns about the public charge determination. García Decl. ¶¶ 13, 16, 21; Quach Decl. ¶¶ 26–29 (diverting an estimated $1 million to education campaigns about the Regulation). These education efforts take away from their ability to serve their core organizational purposes, constituting irreparable harm. *Valle del Sol*, 732 F.3d at 1018; *East Bay I*, 354 F. Supp. 3d at 1116. In addition, CPCA's members, including La Clínica and AHS, obtain a substantial portion of their funding through Medi-Cal reimbursements. Castellano-García Decl. ¶¶ 7, 19–21; García Decl. ¶ 16; Quach Decl. ¶ 24 (Medi-Cal reimbursements accounting for 52% of annual budget). Some also help

patients enroll in public benefits, such as CalFresh. Quach Decl. ¶ 13. Due to the Regulation, many of their patients have begun opting out of services or disenrolling from Medi-Cal and other benefits entirely; Plaintiffs expect this disenrollment and forbearance to grow if the Regulation goes into effect. García Decl. ¶¶ 11–12 (projecting at least 20% Medi-Cal disenrollment rate due to Regulation); Quach Decl. ¶¶ 20–22; Castellano-García Decl. ¶ 20 (estimating 82,000 to 247,000 of members' patients will disenroll from Medi-Cal due to Regulation); *see also* Ku Decl. ¶ 62 (estimating community health center losses nationwide between 295,000 to 538,000 fewer patients). Some patients will continue to seek services but without Medi-Cal coverage, and some will decide to seek services only when their health problems become more serious and costly to address; moreover, these health problems will be exacerbated by the effects of not using other benefits that improve health outcomes. Castellano-García Decl. ¶ 22; García Decl. ¶¶ 14–15; Quach Decl. ¶ 21–23.

Health care providers like CPCA's members thus face drastic decreases in funding at the same time they face an increase in uncompensated, more expensive care, making their existing funding less effective. Castellano-García Decl. ¶¶ 16, 20–22 (estimating members will lose between $46 and $138 million annually in Medi-Cal reimbursements); García Decl. ¶¶ 13, 16, 18; Quach Decl. ¶ 24 (estimating annual loss of $5.2 million in Medi-Cal reimbursements); *see also* Ku Decl. ¶ 63 (noting estimated California community health center losses, in the aggregate, of $126 to $240 million). Some will have to lay off employees and change or cancel programs. García Decl. ¶ 18; *see also* Ku Decl. ¶ 62 (estimating nationwide community health center staffing losses of 3,400 to 6,100 employees). These direct economic harms are irreparable in APA cases, where money damages are not available. *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018); *State v. Azar*, 385 F. Supp. 3d 960, 978 (N.D. Cal. 2019); *East Bay I*, 354 F. Supp. 3d at 1116; *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 957 (N.D. Cal. 2019) (*East Bay II*); *Doe v. Trump*, 288 F. Supp. 3d 1045, 1082 (W.D. Wash. 2017).

The advocacy and legal organizational Plaintiffs—African Communities Together ("ACT"), Council on American Islamic Relations-California ("CAIR-CA"), Central American Resource Center ("CARECEN"), Farmworker Justice ("FJ"), Korean Resource Center ("KRC"), Legal Aid

Society of San Mateo County ("Legal Aid"), and Maternal and Child Health Access ("MCHA")—face similar ongoing irreparable harms. Their missions are to provide advocacy and/or legal services to their clients and members, including obtaining immigration relief and helping to secure public benefits. Declaration of Amaha Kassa ("Kassa Decl.") (ACT) ¶¶ 3–7 Ayloush Decl. (CAIR-CA) ¶¶ 4–7; Declaration of Daniel Sharp ("Sharp Decl.") (CARECEN) ¶¶ 4–7; Declaration of Bruce Goldstein ("Goldstein Decl.") (FJ) ¶¶ 4–5; Declaration of Jenny Seon ("Seon Decl.") (KRC) ¶¶ 3–7; Declaration of Hope Nakamura ("Nakamura Decl.") (Legal Aid) ¶¶ 3–8; Kersey Decl. (MCHA) ¶¶ 6–7, 14–20. All serve low-income immigrant communities; many of their clients receive one or more public benefit and have other characteristics weighed negatively by the Regulation. Kassa Decl. ¶¶ 6, 10; Ayloush Decl. ¶ 8; Sharp Decl. ¶¶ 8–9; Goldstein Decl. ¶ 7; Seon Decl. ¶¶ 5, 10; Nakamura Decl. ¶¶ 7–8, 13; Kersey Decl. ¶¶ 10, 12–15. Plaintiffs' missions and the services they provide are frustrated by the Regulation. Many of their clients will no longer be eligible for immigration relief or will choose to not enroll or to disenroll from benefits to remain eligible for immigration relief; even those who may still be eligible for relief or choose to apply for benefits will require additional time and resources from Plaintiffs to address the effects of the Regulation. Kassa Decl. ¶¶ 10–13, 16; Ayloush Decl. ¶¶ 11–14; Sharp Decl. ¶¶ 12–15, 18; Goldstein Decl. ¶ 8; Seon Decl. ¶¶ 10–14; Nakamura Decl. ¶¶ 12, 14–15; Kersey Decl. ¶¶ 23–30. This additional time and rising ineligibility or disenrollment means that Plaintiffs will be able to file fewer cases and help fewer clients. Kassa Decl. ¶¶ 10, 12–13; Ayloush Decl. ¶¶ 11–12; Sharp Decl. ¶ 13; Seon Decl. ¶¶ 10–14; Nakamura Decl. ¶¶ 14–16; Kersey Decl. ¶¶ 34, 36.

Plaintiffs also will lose funding as they file fewer cases, because for many of them, funding is directly proportional to the number of cases filed or clients served. Kassa Decl. ¶ 16; Ayloush Decl. ¶¶ 14, 18–19; Sharp Decl. ¶¶ 20–21; Seon Decl. ¶ 20; Nakamura Decl. ¶ 15; Kersey Decl. ¶ 34. The Regulation's complexity also decreases the utility of Plaintiffs' existing funding, as cases and client advocacy take longer and cost more money. Kassa Decl. ¶ 16; Ayloush Decl. ¶¶ 11–12, 14, 19; Sharp Decl. ¶¶ 12–14, 21; Seon Decl. ¶¶ 14, 23; Kersey Decl. ¶¶ 26, 29–30, 34, 36. Some Plaintiffs also have increased operational costs as they address the impact of the Regulation on their services, such as by hiring additional staff or adding new programs or services. Ayloush Decl. ¶ 14;

Seon Decl. ¶ 14; Nakamura Decl. ¶¶ 13–14, 16–17; Kersey Decl. ¶¶ 21, 26–30, 35; *see also* Cho Decl., Ex. Y (Legal Aid Soc. San Mateo Cmt.) at 1–2; *id.*, Ex. Z (CARECEN Cmt.) at 1; *id.*, Ex. AA (CAIR-CA Cmt.) at 1; *id.*, Ex. BB (Farmworker Justice Cmt.) at 1; *id.*, Ex. CC (Maternal and Child Health Access Cmt.) at 1. As stated above, these direct economic harms are sufficient to show a likelihood of irreparable harm. *E.g.*, *California*, 911 F.3d at 581; *East Bay I*, 354 F. Supp. 3d at 1116; *East Bay II*, 385 F. Supp. 3d at 957; *State*, 385 F. Supp. 3d at 978. Plaintiffs also have had to divert resources from other core services and priorities to staffing, training, education, and public outreach addressing the Regulation. Kassa Decl. ¶¶ 11, 14–17; Ayloush Decl. ¶¶ 13, 15–16; Sharp Decl. ¶¶ 14–16; Goldstein Decl. ¶ 7–12; Seon Decl. ¶ 16–19, 21; Nakamura Decl. ¶¶ 13–14, 16–17; Kersey Decl. ¶¶ 26–29, 35–36. This diversion of resources constitutes ongoing irreparable harm. *Valle del Sol*, 732 F.3d at 1018; *Doe*, 288 F. Supp. 3d at 1082.

Therefore, to address Plaintiffs' ongoing, serious harms, Plaintiffs have promptly filed this action within days of the Regulation's final publication and moved for this injunctive relief in a matter of weeks. *See California*, 911 F.3d at 581 (promptly filing an action challenging the government's action "also weighs in [plaintiffs'] favor" for granting a preliminary injunction). Indeed, Defendants have already acknowledged that the Regulation will cause harms such as those suffered by Plaintiffs. For example, they admit that the Regulation will increase costs and time for health-care providers, legal services, and nonprofit organizations to address the application of the Regulation. 84 Fed. Reg. at 41,300–01.

A preliminary injunction would provide immediate relief. Plaintiffs cannot simply shift their services and resources to avoid the harms caused by the Regulation. Ayloush Decl. ¶ 23; Sharp Decl. ¶ 17. Doing so could cause Plaintiffs to incur more harm, such as the loss of goodwill in their community, which some Plaintiffs are already suffering as they are unable to assist their communities as much as they did before the Regulation. *See Doe*, 288 F. Supp. 3d at 1082; *see also Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (intangible harms like loss of goodwill are irreparable and appropriately redressed through preliminary injunctive relief); *see also* Ayloush Decl. ¶ 11; Sharp Decl. ¶ 13, 17; Seon Decl. ¶ 21; Kersey Decl. ¶ 37. If this Court enjoins operation of the Regulation, Plaintiffs' harms would be substantially alleviated. If clients

and patients believed they were still eligible for immigration relief and were not, therefore, motivated to disenroll from or refuse public benefits, Plaintiffs would not face these same strains on their funding. Quach Decl. ¶ 30; García Decl. ¶ 20; Ayloush Decl. ¶ 24; Sharp Decl. ¶ 22; Kersey Decl. ¶ 34. They also could redirect time and resources back to their core functions and other priorities besides the Regulation. Kassa Decl. ¶¶ 18; Ayloush Decl. ¶ 24; Sharp Decl. ¶ 22; Goldstein Decl. ¶¶ 8, 13; Seon Decl. ¶¶ 22–23; Nakamura Decl. ¶¶ 14, 16; Quach Decl. ¶ 27. Further, without the threat of imminent implementation, Plaintiffs could target any education efforts about the Regulation on non-affected community members in order to reduce the Regulation's chilling effect, which has led and will lead to broader benefits disenrollment. Ayloush Decl. ¶ 24; Sharp Decl. ¶ 22. Plaintiffs' ongoing irreparable harm to their missions, services, resources, and funding would therefore be adequately addressed by a preliminary injunction.

D. The Balance of Equities and Public Interest Favors Granting Plaintiffs' Preliminary Injunction to Maintain the Status Quo.

The last two preliminary injunction factors, the balance of equities and the public interest, merge when the government is a party. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). An injunction maintaining the status quo or restoring law to its prior, settled state "weigh strongly in favor of injunctive relief." *East Bay II*, 385 F. Supp. 3d at 958; *cf. East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778–79 (9th Cir. 2018). By contrast, allowing the government to violate the law is neither equitable nor in the public interest. *Valle del Sol*, 732 F.3d at 1029. Instead, "[t]he public interest is served by compliance with the APA" and "from proper process itself." *California*, 911 F.3d at 581–82. Moreover, Plaintiffs have credibly alleged, and Defendants themselves acknowledge, that the Regulation will lead to significant negative public health consequences. *See id.*; 84 Fed. Reg. at 41,310–12; *see also* Quach Decl. ¶ 21; García Decl. ¶¶ 15, 17, 19. Millions of individuals across the country will drop Medicaid coverage, leaving them uninsured and unable to obtain treatment for serious and chronic conditions, including diabetes, high-blood pressure, heart disease, and cancer. Ku Decl. ¶¶ 9, 24, 35–52, 51–59. Evidence shows that such widespread reductions in Medicaid coverage will translate to increased mortality rates, and that the Regulation could result in an additional 1,300 to 4,000 deaths. Ku Decl. ¶¶ 9, 53, 56.

Plaintiffs and many commenters on the Regulation also highlighted that the Regulation will have a disparate impact on immigrants based on age, race, gender, and other protected characteristics. Van Hook Decl. ¶ 10–14, 45–71, 77–79; Ayloush Decl. ¶¶ 20–22; *see also* Cho Decl., Ex. G at 10–11 ("[O]f the 25.9 million people who would be potentially chilled by the proposed rule, approximately 90% are people from communities of color."); *id.*, Ex. F at 55–59 (recognizing that the Regulation disparately impacts Latino, Asian and Pacific Islander, and Black Immigrants); *id.*, Ex. H at 2, 6 (opposing the Regulation highlighting its disparate impact on seniors of color); *id.*, Ex. C at 5–6, 8–10, 28–30 (providing data regarding the Regulation's disparate impact, including on green card applications and applications from API communities).

Plaintiffs seek an injunction that would preserve the pre-Regulation status quo—the way the law has been interpreted for over a century—while Defendants seek to implement an impermissible interpretation of the statute that is contrary to law and will harm at least hundreds-of-thousands. *See Ariz. Dream Act Coal.*, 757 F.3d at 1060–61 (explaining that a prohibitory injunction "prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits," and that "the 'status quo' refers to the legally relevant relationship between the parties before the controversy arose"). The equities and public interest clearly favor an injunction.

E. The Court Should Enter a Nationwide Injunction and Postpone the Effective Date of the Regulation.

Given the irreparable harms and public interests at stake, as well as the balance of the equities, the Court should enter a nationwide preliminary injunction and postpone the effective date of the Regulation. 5 U.S.C. § 705; *East Bay I*, 354 F. Supp. 3d at 1119 n.20. A nationwide injunction is appropriate in this case because "[i]n immigration matters, [the Ninth Circuit] ha[s] consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis." *East Bay Sanctuary Covenant*, 932 F.3d at 779. "Such relief is commonplace in APA cases, promotes uniformity in immigration enforcement, and is necessary to provide the plaintiffs here with complete redress." *Id.* (quoting *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 512 (9th Cir. 2018)); *see also East Bay Sanctuary Covenant v. Barr*, -F.3d-, No. 19-16487, 2019 WL 3850928, at *2 (9th Cir. Aug.16, 2019) ("We have upheld nationwide injunctions

where such breadth was necessary to remedy a plaintiff's harm."). Nationwide relief is necessary to provide Plaintiffs with complete redress because Plaintiffs FJ and ACT are based outside of California and serve populations across the United States. *See* Kassa Decl. ¶ 3; Goldstein Decl. ¶¶ 3–5.

Moreover, all of Plaintiffs' clients and patients would still be effected by the Regulation with anything less than nationwide injunctive relief because they may move states or have family members living in other states who are considered under the Regulation, *see* § 212.21(d)(1)(iv–vi), (2)(iii–iv, vi–vii). That means Plaintiffs would still be harmed by the Regulation with a geographically-limited injunction, because clients and patients would remain ineligible for immigration relief or would not access public benefits. And a geographically limited injunction has the potential for increased confusion and chilling effects caused by disparate enforcement of the Regulation in different locales. Therefore, only a nationwide injunction will provide complete redress to Plaintiffs and be consistent with the Ninth Circuit's clear direction that such relief is warranted in APA cases involving immigration enforcement.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court issue a nationwide preliminary injunction against enforcement of the Regulation and postpone its effective date until after the Court has completed judicial review of its validity.

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Respectfully submitted,

/s/ Nicholas Espíritu

NICHOLAS ESPÍRITU (SBN 237665)
espiritu@nilc.org
LINTON JOAQUIN (SBN 73547)
joaquin@nilc.org
ALVARO M. HUERTA (SBN 274787)
huerta@nilc.org
MAYRA B. JOACHIN (SBN 306065)
joachin@nilc.org
NATIONAL IMMIGRATION LAW CENTER
3450 Wilshire Boulevard, #108-62
Los Angeles, CA 90010
Telephone: (213) 639-3900
Fax: (213) 639-3911

ANTIONETTE DOZIER (SBN: 244437)
adozier@wclp.org
ROBERT D. NEWMAN (SBN) 86534)
rnewman@wclp.org
DAVID KANE (SBN: 292186)
dkane@wclp.org
WESTERN CENTER ON LAW & POVERTY
3701 Wilshire Boulevard, Suite 208
Los Angeles, CA 90010
Tel: (213) 487-7211
Fax: (213) 487-0242

MARTHA JANE PERKINS (SBN 104784)
perkins@healthlaw.org
NATIONAL HEALTH LAW PROGRAM
200 N. Greensboro Street, Ste. D-13
Carrboro, NC 27510
Tel.: (919) 968-6308
Fax: (919) 968-8855

LABONI HOQ (SBN 224140)
lhoq@advancingjustice-la.org
YANIN SENACHAI (SBN 288336)
ysenachai@advancingjustice-la.org
MICHELLE (MINJU) CHO (SBN 321939)
mcho@advancingjustice-la.org
ASIAN AMERICANS ADVANCING JUSTICE – LOS ANGELES
1145 Wilshire Blvd., 2nd Floor
Los Angeles, CA 90017
Telephone: (213) 977-7500
Fax: (213) 977-7500

TANYA BRODER (SBN 136141)
broder@nilc.org
NATIONAL IMMIGRATION LAW CENTER
2030 Addison Street, Suite 420
Berkeley, CA 94704
Telephone: (510) 663-8282
Fax: (213) 639-3911

JOANNA ELISE CUEVAS INGRAM** (SBN 290011)
cuevasingram@nilc.org
NATIONAL IMMIGRATION LAW CENTER
P.O. Box 170392
Brooklyn, NY 11217
Telephone: (213) 377-5258
Fax: (213) 377-5258

MAX S. WOLSON*
wolson@nilc.org
NATIONAL IMMIGRATION LAW CENTER

P.O. Box 34573
Washington, D.C. 20043
Telephone: (202) 216-0261
Fax: (202) 216-0266

* Admitted *Pro hac vice*
**Admitted to Practice in New York and California

Attorneys for Plaintiffs