UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

STATE OF TEXAS, *Plaintiff*,	§	
v.	§	CIVIL ACTION No. 6:23-CV-00001
ALEJANDRO MAYORKAS, et al., *Defendants*.	§	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Federal immigration law bars the admission of aliens who are "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). Although "public charge" is not defined by statute, a 1996 statute reads, "Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," and "[i]t continues to be the immigration policy of the United States that—(A) aliens within the Nations border not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (B) the availability of public benefits not constitute an incentive for immigration to the United States." 8 U.S.C. § 1601(1), (2) (commonly known as the "Welfare Reform Act"). Another 1996 statute added a list of factors which "shall at a minimum" be considered when determining whether an alien is "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(B)(i). It also rendered family-sponsored aliens inadmissible without an affidavit of support from the alien's sponsor. 8 U.S.C. § 1182(a)(4)(C).

In 2022, Defendants adopted a Final Rule which violates these provisions in several ways, most obviously by (1) failing to take non-cash benefits into account when determining whether an alien "is likely at any time to become a public charge," (2) being primarily concerned with making sure that aliens receive public benefits, rather than "rely[ing] on their own capabilities and the resources of their families, their sponsors, and private organizations," in direct violation of 8 U.S.C. § 1601(2), and (3) empowering sponsors of family-sponsored aliens to submit false support affidavits, making the affidavit requirement toothless.

Defendants also violated the Administrative Procedure Act ("APA") by (1) illegally declaring a previous adopted Rule repealed without notice and comment, (2) failing to give a

reasoned justification for its significant departures from the previous Rule, and (3) failing to take into account important state interests.

The 2022 Rule will result in more aliens being admitted into Texas, which will cost the State money and harm it in ways that courts have already held give Texas standing to sue other immigration policies. And, as Defendants admit, the very purpose of the Final Rule is to get more already admitted aliens enrolled in benefits programs, which, again, will cost Texas money and harm Texas in ways that courts have already held give Texas standing to sue other immigration policies. Any admitted aliens *will* be eligible for even more benefits five years after admission, further harming Texas.

The Court should vacate the 2022 Rule and the illegal repeal of the 2019 Rule.

BACKGROUND

I. Statutory Definition of "Public Charge"

The term "public charge" first appeared in statute in the Immigration Act of 1882, where Congress barred the admission of "any person unable to take care of himself or herself without becoming a public charge." 22 Stat. 213, ch. 376, § 2 (1882).

The current version of the Immigration and Nationality Act (the "INA") states "[a]ny alien 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 is inadmissible." 8 U.S.C. § 1182(a)(4)(A).

In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, commonly known as the "Welfare Reform Act." 8 U.S.C. § 1601 et seq. (Pub. L. 104-193, 110 Stat. 2105). It stated:

- "Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," and
- "It continues to be the immigration policy of the United States that—(A) aliens within the Nation's border not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organization, and (B) the availability of public benefits not constitute an incentive for immigration to the United States."

8 U.S.C. § 1601(1), (2).

The Welfare Reform Act restricted the federal benefits aliens are able to receive. It broadly defined "public benefits" to include in-kind benefits, including "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency" of, or funds appropriated by, federal, state or local governments. 8 U.S.C. §§ 1611(c)(1)(B), 1621(c)(1)(B). It also inserted into the INA language describing an affidavit of support to be executed by a person, usually the family member petitioning for the alien's admission, who sponsored an alien applying for admission to the United States. 110 Stat. 2105 § 423, codified at 8 U.S.C. § 1183a.

The Welfare Reform Act also "restrict[s] most noncitizens from eligibility for many federal and state public benefits. It grants lawful permanent residents access to means-tested public benefits only after they have spent five years as a lawful permanent resident." *Cook Cnty., Illinois v. Walsh*, 962 F.3d 208, 225 (7th Cir. 2020) (citing 8 U.S.C.§§ 1611, 1613, 1621). "But the exclusions are not absolute. Congress specified instead that immigrants may at any time receive

emergency medical assistance; immunizations and testing for communicable diseases; short-term, in-kind emergency disaster relief; various in-kind services such as short-term shelter and crisis counseling; and certain housing and community development assistance." *Id.* (8 U.S.C.§§ 1611, 1613, 1621). Defendants acknowledge this. 87 Fed. Reg. at 55,498–99. And "[l]ater enactments lightened some of the statutory restrictions, in order to allow additional categories of immigrants to qualify for certain benefits without a five-year waiting period. *See* Farm Security and Rural Investment Act of 2002, Pub. L. 107-171, § 4401, 116 Stat. 134 (2002); Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. 11-3, § 214, 123 Stat. 8 (2009)." *Id.* at 226.

Weeks after enacting the Welfare Reform Act, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) ("IIRIRA"). One of the sweeping changes that IIRIRA made to the INA was to require, for the first time, that consular officers or the Attorney General consider an itemized list of factors in making the public-charge determination, ensuring that the public-charge inquiry was searching rather than superficial. *See* 8 U.S.C. § 1182(a)(4)(B)(i) ("the consular officer or the Attorney General shall at a minimum consider" the alien's age; health; family status; assets, resources, and financial status; and education and skills).

IIRIRA added a subsection to the INA's public-charge language rendering most family-sponsored applicants automatically inadmissible on public-charge grounds unless they obtained the enforceable affidavit of support that had been added to the INA by the Welfare Reform Act. *Id.* § 1182(a)(4)(C) (family-sponsored alien is inadmissible unless the sponsor executes an "affidavit of support described in [8 U.S.C. § 1183a] with respect to such alien"). In addition to making the

affidavit of support mandatory, the IIRIRA significantly expanded what the affidavit was required to include.

The support-affidavit requirement empowers the federal government, as well as state and local governments, to demand reimbursement from the sponsor for any means-tested public benefit received by the sponsored alien. *Id.* § 1183a(b)(1)(A). A "means-tested public benefit" is one available to those whose income falls below a certain level. The reimbursement authority explicitly excludes certain benefits, regardless of whether they are means tested, from the sponsor's reimbursement obligation, thus including by implication every other means-tested benefit. If the sponsor doesn't pay upon request, the government can sue the sponsor. *Id.* § 1183a(b)(2). A sponsor who doesn't keep "the Attorney General and the State in which the sponsored alien is currently a resident" apprised of changes in the sponsor's address is subject to a civil penalty—and that penalty is higher if the sponsor knows "that the sponsored alien has received any means-tested public benefits" other than those described in three cross-referenced portions of the Welfare Reform Act. *Id.* § 1183a(d). The affidavit is generally enforceable for ten years or until the sponsored noncitizen is naturalized. *Id.* § 1183a(a)(2).

II. The 1999 Field Guidance

In 1999, the Immigration and Naturalization Service adopted administrative guidance defining a public charge as a noncitizen who is "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." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999) ("1999 Field Guidance"). The Field Guidance thus excluded aliens who greatly depended on the government but whose dependence was short of "nearly complete." The 1999

Guidance directed officers "not [to] 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." 1999 Guidance, 64 Fed. Reg. at 28,689.

The 1999 Field Guidance never underwent notice-and-comment rulemaking.

III. The 2019 Rule

In 2019, the Department of Homeland Security ("DHS") issued a rule called "Inadmissibility on Public Charge Grounds." 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("2019 Rule"). The 2019 superseded the 1999 Field Guidance. *Id.* at 41,292.

The 2019 Rule applied to decisions about (1) an alien's admissibility and (2) adjustment of an alien's status. 84 Fed. Reg. at 41,294 n.3.

The 2019 Rule defined "public charge" as "an alien 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." 84 Fed. Reg. at 41,501 (adopting 8 C.F.R. § 212.21(a)).

With respect to admissibility, the 2019 Rule provided, "The determination of an alien's likelihood of becoming a public charge at any time in the future must be based on the totality of the alien's circumstances by weighing all factors that are relevant to whether the alien is more likely than not at any time in the future to receive one or more public benefits, as defined in 8 C.F.R. § 212.21(b)." 84 Fed. Reg. at 41,502 (adopting 8 C.F.R. § 212.22(a)). It gives standards by which to evaluate an alien's age; health; family status; assets, resources, and financial status; and education and skills, as required by 8 U.S.C. § 1182(a)(4)(B)(i). *Id.* at 41,502–04 (adopting 8 C.F.R. § 212.22(b)). It also contained a list of heavily weighted negative factors and heavily weighted positive factors:

Heavily Weighted Positive Factors

- Household income, assets, resources, or support of at least 250% of the Federal Poverty Guidelines for the household size
- Current employment with an annual income of at least 250% of the Federal Poverty Guidelines for the household size
- Private health insurance other than subsidized insurance under the Affordable Care Act

Heavily Weighted Negative Factors

- Lack of current employment or reasonable prospect of future employment
- Previous receipt of or approval for receipt of 12 months' worth of public benefits in a three-year period
- Medical condition that is likely to require extensive treatment or institutionalization or that will interfere with the ability to provide for oneself or attend school, or work
- Lack of insurance and no prospect of obtaining private health insurance or insufficient financial resources to pay for reasonably foreseeable medical costs related to such medical condition
- Prior determination of inadmissibility or deportability on public-charge grounds

Id. at 41,504 (adopting 8 C.F.R. § 212.22(c)).

The 2019 Rule defined "public benefits" as including any federal, state, local, or tribal cash assistance for income maintenance, Supplemental Nutrition Assistance Program (SNAP) benefits, most forms of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher Program, Section 8 Project-Based Rental Assistance, and certain other forms of subsidized housing. *Id.* at 41501 (adopting 8 C.F.R. § 212.21(b)). In other words, the 2019 Rule included non-cash benefits in "public benefits," consistent with the definitions in 8 U.S.C. §§ 1611(c)(1)(B), 1621(c)(1)(B), which were adopted in 1996.

IV. The purported "repeal" of the 2019 Rule

The 2019 Rule's implementation was stalled by a slew of lawsuits, one of which eventually resulted in a vacatur by the Northern District of Illinois. *See City & Cnty. of San Francisco v. USCIS*, 992 F.3d 742, 745–47 (9th Cir. 2021) (VanDyke, J., dissenting).

On March 9, 2021, Defendants announced that they would no longer defend the 2019 Rule. U.S. Dep't of Homeland Security, DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility (Mar. 9, 2021).[1]

Defendants then moved to dismiss every pending review of the 2019 Rule, including the Supreme Court's granted petition for certiorari, *DHS v. New York*, 141 S. Ct. 1370 (Feb. 22, 2021), cert. dismissed by agreement of the parties, 141 S. Ct. 1292 (Mar. 9, 2021), the result of which was acquiescence in the Northern District of Illinois's vacatur of the 2019 Rule.

Within a week, DHS and USCIS formalized the Secretary's statement with a notice that "simply implement[ed] the district court's vacatur." Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221, 14,221 (Mar. 15, 2021) ("Repeal of the 2019 Rule"). Asserting an "immediate need to implement the now-effective final judgment," Defendants claimed that the notice-and-comment process generally required by the APA to rescind a rule that had been promulgated through the notice-and-comment process—a rule such as this one—was "unnecessary, impracticable, and contrary to the public interest." *Id.*

V. The 2022 Rule

On September 9, 2022, after a notice-and-comment period, Defendants published the 2022 Rule. 87 Fed. Reg. 55,472.

The 2022 Rule defines "likely at any time to become a public charge" as "likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense." 87 Fed. Reg. at 55,636 (adopting 8 C.F.R. § 212.21(a)).

[1] Available at https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility.

It further defines "public cash assistance for income maintenance" as "(1) Supplemental Security Income (SSI), 42 U.S.C. 1381 et seq.; (2) Cash assistance for income maintenance under the Temporary Assistance for Needy Families (TANF) program, 42 U.S.C. 601 et seq.; or (3) State, Tribal, territorial, or local cash benefit programs for income maintenance (often called ''General Assistance'' in the State context, but which also exist under other names)." *Id.* (adopting 8 C.F.R. § 212.21(b)).

Defendants' justification for these changes is that the 2022 Rule (1) more faithfully defines "likely at any time to become a public charge" and (2) will make it easier for aliens to get benefits. 87 Fed. Reg. at 55,473.

The 2022 Rule also differs from the 2019 Rule in how the affidavits of support are evaluated, with the 2022 Rule simply stating that it will be favorably considered in making a public charge inadmissibility determination. 87 Fed. Reg. 55,472. Conversely, the 2019 Rule stated that DHS would "consider the likelihood that the sponsor would actually provide the statutorily-required amount of financial support to the alien, and any other related considerations." 84 Fed. Reg. 41,292. The 2019 Rule also required USCIS to consider the following evidence: "(1) The sponsor's annual income, assets, and resources; (2) The sponsor's relationship to the applicant, including but not limited to whether the sponsor lives with the alien; and (3) Whether the sponsor has submitted an affidavit of support with respect to other individuals." *Id.*

Undisputed Facts

I. The 2022 Rule will result in more aliens present in Texas, resulting in more costs to Texas.

Because the 2022 Rule reduces the number of aliens who will be found to be inadmissible public charges, the predictable effect of the 2022 Rule will be an increase in the number of aliens

present in Texas, with a resulting increase of Texas's costs. Plaintiff attaches four declarations to prove some of these costs.

Exhibit 1	Declaration of Sheri Gipson, Chief, Texas Department of Public Safety Driver License Division
Exhibit 2	Declaration of Rebecca Waltz, Budget Director, Texas Department of Criminal Justice
Exhibit 3	Declaration of Michael Meyer, Deputy Commissioner of Finance, Texas Education Agency
Exhibit 4	Declaration of Susan Bricker, manager of the Health Program Outcomes and Epidemiology ("HPOE") Team within the Office of Data, Analytics and Performance at the Texas Health and Human Services Commission.

A. Driver's Licenses

Additional aliens in Texas means that Texas will have to issue additional driver's licenses. "The added customer base that may be created by an increase in the number of individuals authorized to be in the United States who chose to reside in Texas will substantially burden driver license resources without additional funding and support." Ex. 1 at ¶ 10.

If an individual presents documentation issued by the federal government showing authorization to be in the United States and otherwise meets eligibility requirements, DPS will issue a limited-term driver license or personal identification certificate to a non-citizen resident of Texas. *Id.* ¶ 5. To date, in fiscal year 2023 (September 2022 through July 2023), DPS issued 436,205 limited-term licenses and identification certificates.

For each non-United States citizen resident of Texas who seeks a limited-term driver license, DPS verifies the individual's social security number and that person's eligibility through Social Security Online Verification ("SSOLV") and the American Association of Motor Vehicle Administrators' ("AAMVA") Problem Drivers Pointer System ("PDPS") and, if applicable, the

Commercial Driver License Information System ("CDLIS"). *Id.* ¶ 6. The State of Texas currently pays $0.05 per customer for SSOLV and PDPS verification purposes. There is a cost of $0.028 for CDLIS verification purposes, which is about 2% of all limited-term licenses. *Id.* ¶ 7.

Each additional customer seeking a limited-term driver license or personal identification certificate imposes a cost on DPS exceeding $33. *Id.* ¶ 8. Furthermore, DPS estimates that for an additional 10,000 driver license customers seeking a limited-term license, DPS would incur a biennial cost of approximately $3,681,692. *Id.* For every 10,000 additional customers above the 10,000-customer threshold, DPS may have to open additional driver license offices or expand current facilities to meet that increase in customer demand. *Id.*

B. Incarceration

Additional aliens in Texas means additional incarcerated aliens in Texas and additional aliens on parole or mandatory supervision in Texas. "Whether incarcerating criminal aliens or having them on parole or mandatory supervision, TDCJ incurs costs." Ex. 2 ¶ 10.

According to the most recently available data, the average cost of incarcerating an inmate who qualifies for reimbursement under the federal government's State Criminal Alien Assistance Program ("SCAAP") in Texas Department of Criminal Justice ("TDCJ") facilities was $77.49 per day from July 1, 2021 to June 30, 2022. *Id.* ¶ 6. During that period, TDCJ incarcerated 6,914 eligible inmates for a total of 2,019,635 days. The total cost of incarcerating these inmates for that period was $156,501,516. The SCAAP program has not reimbursed those costs. *Id.* ¶ 8. To the extent that the number of aliens in TDCJ custody increases, TDCJ's unreimbursed expenses will increase as well. *Id.* ¶ 9.

TDCJ also incurs costs to keep aliens in custody or add them to mandatory parole or supervision programs when those aliens are not detained or removed by federal immigration

authorities. *Id.* ¶ 10. For Fiscal Year 2022, the average per-day cost of these programs for each inmate not detained or removed is $4.69, which would total $9,307,760, based on the number of inmates for the most recently completed SCAAP application. *Id.*

C. Education

More aliens in Texas means more alien students enrolled in Texas schools, including more unaccompanied alien children (UAC). Texas public school formula funding is comprised of state and local funds. The state funding is initially based on projections made by each school district at the end of the previous biennium. The Foundation School Program is the primary funding mechanism for providing state aid to public schools in Texas. Any additional alien children enrolled in Texas public schools would increase the State's cost of the Foundation School Program over what would otherwise have been spent. Ex. 3 ¶¶ 5–7.

The estimated average per-student, per-year funding entitlement for a student in Texas public schools in Fiscal Year 2023 will be $9,564. *Id.* at ¶ 2. For a student who qualifies for Bilingual and Compensatory Education weighted funding, that amount is $11,781. *Id.*

While Texas does not have information on the total number of alien children attending public schools in the State, there is available data for a subset of those children—unaccompanied alien children (UAC). *Id.* ¶ 3–4. UAC are likely to qualify for Bilingual and Compensatory Education weighted funding, making their per-student, per-year costs $11,781. *Id.* ¶ 2.

Data from the U.S. Health and Human Services Office of Refugee Resettlement indicates that in Texas, 19,071 UAC were released during the 12-month period covering October 2021 through September 2022.

If each of the children described above enrolls in and achieves full attendance at a Texas public school during the school year following the period during which they are released to a

sponsor, and qualifies for Bilingual and Compensatory Education weighted funding (such that the annual cost to educate each student from state and local sources for fiscal year2023 would be approximately $11,781), the annual costs to educate this group of children for fiscal years 2023 would be approximately $224.67 million. This estimate does not include any potential costs associated with UAC continuing in Texas public schools beyond one year. *Id.* ¶¶ 3–4.

D. Social Services

More aliens in Texas means more expenditures on aliens in Texas.

Texas Health and Human Services Commission ("HHSC") reports the cost of services and benefits provided by HHSC to undocumented immigrants in the State of Texas. The latest report was completed in 2021 covered state fiscal year (SFY) 2019. Ex. 4 ¶ 4.

HHSC provides three principal categories of services and benefits to illegal aliens in Texas: (i) Texas Emergency Medicaid; (ii) the Texas Family Violence Program (FVP); and (iii) Texas Children's Health Insurance Program (CHIP) Perinatal Coverage ("CHIP Perinate"). Illegal aliens also receive uncompensated medical care from public hospitals in the State. *Id.* ¶ 5.

HHSC has estimated the portion of Emergency Medicaid payments attributable to illegal aliens in Texas $116 million in CY 2019; $88.3 million in CY 2020; $95.6 million in CY 2021; and $72.2 million in CY 2022. *Id.* ¶¶ 8.

Texas CHIP Perinate Coverage provides prenatal care to certain low-income women who do not otherwise qualify for Medicaid. The total estimated cost to the State for CHIP Perinatal Coverage to undocumented immigrants residing in Texas was $11.1 million in CY 2019; $16.9 million in CY2020; $25.8 million in CY 2021; and $30.9 million in CY2022. Attached as Ex. 2 is a report providing detailed information and data sources for these calculations.

II. The 2022 Rule will immediately result in more aliens enrolling in public benefits programs, resulting in more costs to Texas.

When Defendants adopted the 2019 Rule, they estimated that it would result in 2.5% disenrollment or forgone enrollment, which would save the states over a billion dollars annually. 84 Fed. Reg. at 41,463. When they adopted the 2022 Rule, relying on new research, they concluded that the 2019 Rule would result in 3.1% in disenrollment or foregone enrollment, with an annual savings of over $1.6 billion to the states. 87 Fed. Reg. at 55,631. This was the most conservative estimate. *Id.* at 55,621. Defendants ultimately settled on using 3.1% on the low end and 14.7% on the high end for their fiscal analysis. 87 Fed. Reg. at 55,631. Defendants estimate that the states will save $6.25 billion annually using the 14.7% rate. *Id.*

Medicaid is jointly financed by the federal government and the States. In 2020, over 4 million Texans relied on Medicaid. Tex. Health & Human Servs. Comm'n, Texas Medicaid and Chip in Perspective 2 (13th ed. 2020), https://tinyurl.com/y4bhjfyv. That same year, Medicaid funds represented approximately 28% of Texas's budget. Kaiser Family Foundation, Medicaid Expenditures as a Percent of Total State Expenditures by Fund, https://tinyurl.com/czpjys9v (last visited Dec. 19, 2022). Although the exact amount of Texas's Medicaid budget spent on aliens who would otherwise be inadmissible under the 2022 Rule has varied, the total budget is always measured in billions of dollars. *Id.* (total Texas-financed expenditures for Medicaid represented approximately $30.8 billion).

Texas would save between $954.8 million and $4.528 billion annually if it saw a corresponding 3.1% to 14.7% decrease in overall Medicaid enrollment.

"DHS acknowledges that the 2019 Final Rule caused fear and confusion among U.S. citizens and noncitizens and had a significant chilling effect on the use of public benefits by

noncitizens, even among those who were not subject to the rule and with respect to public benefits that were not covered by the rule." 87 Fed. Reg. at 55,505.

"DHS admits that, without the [2022] Rule, some number of additional noncitizens will become eligible for public benefits by achieving lawful permanent resident status. A predictable consequence of that eligibility is that those noncitizens will obtain public benefits." *Cook Cnty., Illinois v. Mayorkas*, 340 F.R.D. 35, 42 (N.D. Ill. 2021), *aff'd sub nom. Cook Cnty., Illinois v. Tex.*, 37 F.4th 1335 (7th Cir. 2022), *cert. denied sub nom. Tex. v. Cook Cnty.*, 143 S. Ct. 565 (2023).

III. The 2022 will result in more aliens enrolling in public benefits programs in five years, resulting in more costs to Texas.

As noted above, the Welfare Reform Act "restrict[s] most noncitizens from eligibility for many federal and state public benefits. It grants lawful permanent residents access to means-tested public benefits only after they have spent five years as a lawful permanent resident [although there are many exceptions allowing immediate benefits]." *Cook Cnty.*, 962 F.3d at 225 (citing 8 U.S.C.§§ 1611, 1613, 1621). More aliens admitted means more aliens will receive benefits from Texas five years after they are admitted.

MOTION FOR SUMMARY JUDGMENT STANDARD

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 247–49 (1986). The movant "must demonstrate the absence of a genuine issue of material fact," but does not have "to

negate the elements of the nonmovant's case." *Id.*; *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005).

ARGUMENTS AND AUTHORITIES

I. The repeal of the 2019 Rule violated the APA and should be vacated.

The APA defines "rulemaking" as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Legislative rules, or those that have the "force and effect of law" require notice-and-comment rulemaking. *Chrysler Corp. v. Brown*, 441 U.S. 281, 313-15 (1979); 5 U.S.C. § 553.

"A regulation originally promulgated using notice and comment (as the [2019 Rule] was) *may only* be repealed through notice and comment." *Arizona v. City & Cnty. of San Francisco, California*, 142 S. Ct. 1926, 1928 (2022) (Roberts, J., concurring) (emphasis added); *see also Perez v. Mortgage Bankers Assn.*, 575 U.S. 92, 101 (2015).

The 2019 Rule was adopted through the notice and comment process. It could only be repealed through the same notice-and-comment process. *Id.* Defendants repealed the 2019 Rule without going through the notice and comment process. 86 Fed. Reg. 14221, 14221.

Defendants failed to comply with the APA's notice and comment process when repealing the 2019 Rule; consequently, this Court should vacate this action. 5 U.S.C. § 706(2)(C), (D); *Perez*, 575 U.S. at 96 ("[T]he APA [] mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.")

II. The 2022 Rule was adopted in violation of the APA and should be vacated.

A. The 2022 Rule lacks statutory authority.

The 2022 Rule's provisions related to the definition of public charge and support affidavits must be vacated and set aside because they are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

1. The 2022 Rule is contrary to the statutory requirement that non-cash benefits be considered when determining if an alien is "likely at any time to become a public charge."

"Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). Agencies lack the "power to revise clear statutory terms" even when the agency believes those terms "turn out not to work in practice." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 327 (2014).

The Welfare Reform Act and the INA must be read together when determining what Congress meant by a public charge. Their collective support-affidavit requirement evinces Congress's intent "to aggressively protect the public fisc" and "is at odds with the view that [Congress] used the term 'public charge' to refer exclusively to primary and permanent dependence." *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 253 (4th Cir. 2020), *reh'g en banc granted*, 981 F.3d 311 (4th Cir. 2020) (quoting *Cook Cnty.*, 962 F.3d at 246 (Barrett, J., dissenting)).[2]

The 2022 Rule is contrary to the statutory requirement that non-cash benefits be considered when determining if an alien is "likely at any time to become a public charge." The 2022 Rule considers cash benefits for income-maintenance purposes or long-term institutionalization at government expense as the only situations that could render an alien a public

[2] Although not reported in Westlaw, this case was one of the many dismissed by the Biden Administration in early 2021, before *en banc* argument. *CASA de Md., Inc. v. Trump*, No. 19-2222, ECF No. 211 (March 11, 2021).

charge. Defendants claim that "DHS now believes the 'primarily dependent' standard is a better interpretation of the statute and properly balances the competing policy objectives established by Congress." 87 Fed. Reg. 10,570, 10,606 (Feb. 24, 2022).

But this definition conflicts with the clear statutory meaning of "public charge." *See Casa de Md., Inc.*, 971 F.3d at 242 ("The ordinary meaning of 'public charge'" is "one who produces a money charge upon, or an expense to, the public for support and care.").

And it directly conflicts with Congress's' deliberately broad definition of "public benefits" in the Welfare Reform Act. *See* 8 U.S.C. §§ 1611(c)(1)(B), 1621(c)(1)(B) ("*any* retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit" (emphasis added)). Congress clearly sees no functional difference, economic or otherwise, between a cash benefit and an in-kind benefit such as Medicaid. *Id.* A recipient of federal or state housing assistance is significantly reliant on the government, as are recipients of Medicaid or other state low- or no-cost medical benefits.

Moreover, the so-called "competing policy objectives" asserted by Defendants are not Congressional policies that are at war with each other; Congress's policy is reflected in more than a century of statutes aimed at ensuring that aliens do not rely on public benefits. In short, Congress—pursuant to federal statute—does not want aliens drawn to the United States by the promise of reliance on public benefits at taxpayer expense. Congress was, and is, explicitly concerned about aliens' relying on government-funded welfare programs, not about their reliance *only* on income-deriving (cash) benefits.

Congress's express policy is that aliens should avoid reliance on the government for support. 8 U.S.C.A. § 1601. This is not a semantic distinction: Congress wants an alien who relies on government support, regardless of the type and regardless of the use, to be evaluated as a potential public charge. *Id.*; *see also* 8 U.S.C. § 1182(a)(4). Defendants do not.

This Court should vacate the 2022 Rule because its narrow and flawed definition of public benefit is inconsistent with Congress's intent and with the way states and the federal government distribute monies for public benefits.

2. The 2022 Rule's definition of "support affidavit" is contrary to statute.

The Welfare Reform Act "added a subsection to the public charge provision rendering most family-sponsored applicants automatically inadmissible on public charge grounds unless they obtained an enforceable affidavit of support from a sponsor (usually the family member petitioning for their admission)." *Cook Cnty.*, 962 F.3d at 243) (Barrett, J., dissenting); 8 U.S.C. § 1182(a)(4)(C) (family-sponsored alien is inadmissible unless the sponsor executes an "affidavit of support described in [8 U.S.C. § 1183a] with respect to such alien"). In addition to making the affidavit of support mandatory, the IIRIRA significantly expanded what the affidavit was required to include.

The 2022 Rule de-fangs § 1182(a)(4)(C)'s mandatory requirement by prohibiting a meaningful evaluation of whether the affidavit is true and correct. The 2022 Rule simply states, "DHS will favorably consider an Affidavit of Support Under [8 U.S.C. § 1183a], when required under [8 U.S.C. § 1182(a)(4)(B) or (C)] that meets the requirements of section [8 U.S.C. § 1183a] and 8 CFR part 213a, in making a public charge inadmissibility determination." 87 Fed. Reg. at 55,637 (adopting 8 C.F.R. § 212.22(a)(2).

Conversely, the 2019 Rule required DHS to determine whether the sponsor could support the alien. 84 Fed. Reg. at 41,504 (adopting 8 C.F.R. § 212.22(b)(7)).

By removing the requirements of the 2019 Rule, the 2022 Rule empowers sponsors to submit false support affidavits "that will be favorably considered" in the secure knowledge that Defendants will not check the accuracy of the affidavit.

* * *

The Welfare Reform Act and the INA must be read together when determining what Congress meant by a public charge. Their collective support-affidavit requirement evinces Congress's intent "to aggressively protect the public fisc" and "is at odds with the view that [Congress] used the term 'public charge' to refer exclusively to primary and permanent dependence." *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 253 (4th Cir. 2020), reh'g en banc granted, 981 F.3d 311 (4th Cir. 2020) (quoting *Cook Cnty.*, 962 F.3d at 246 (Barrett, J., dissenting)).

This Court should conclude that the 2022 Rule must be vacated and set aside because it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

B. The 2022 Rule is arbitrary and capricious.

1. Defendants provide no reasoned justification for the 2022 Rule's significant departures from the 2019 Rule.

In adopting the 2022 Rule, Defendants incorrectly assumed that the Repeal of the 2019 Rule was valid. 87 Fed. Reg. at 55,472. This may explain why they failed to adequately explain the 2022 Rule's significant departures from the 2019 Rule.

Defendants' failure to provide a reasoned justification for departing from the 2019 Rule renders the 2022 Rule arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto.*

Ins. Co., 463 U.S. 30, 42 (1983) (when an agency substantially alters a position, it must "supply a reasoned analysis for the change," and may not "depart from a prior policy sub silentio or simply disregard rules that are still on the books.").

The 2019 Rule set standards, and required applicants to provide evidence, concerning how to address the statutory public charge factors and made clear how those factors should be weighed in adjudication. Defendants dismiss these standards as too complex and result in disenrollment and foregone enrollment in public benefits. 87 Fed. Reg. at 55,507. But these reasons for departing from the 2019 Rule fail to meet the requirements of reasoned decision making under the APA.

2. Defendants relied on factors that Congress prohibited it from considering.

Defendants explain that one goal of the 2022 Rule is to "mitigate the possibility of widespread 'chilling effects'[FN] with respect to [alien] individuals disenrolling or declining to enroll themselves or family members in public benefits programs for which they are eligible. FN: The term 'chilling effects' used throughout this rule is meant to convey the indirect effect of chilling an individual's participation in public benefit programs, regardless of whether they are subject to the public charge ground of inadmissibility, based on fear of negative immigration consequences." 87 Fed. Reg. at 55,473 & n.9.

This goal is contrary to statute because aliens must "not depend on public resources." 8 U.S.C. § 1601(2). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Defendants' delegated role in enforcing the INA is *not* to maximize aliens' access to public benefits. Defendants' role is, instead, to enforce the INA as Congress wrote it, including the INA's prohibitions on denying admission to public charges.

"[B]ecause agency action must be based on non-arbitrary, relevant factors, the agency's approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang v. Holder*, 565 U.S. 42, 55 (2011) (cleaned up). The rationale for agency action reflected in the 2022 Rule contradicts those purposes.

3. The 2022 Rule fails to take Texas's reliance interests into account.

When an agency changes course, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020).

The 2022 Rule wholly ignores state costs, such as the billions of dollars Texas spends to provide Medicaid benefits to low-income individuals. Indeed, in 2019, the average beneficiary cost Texas's Medicaid program more than $9,000. Medicaid.gov, Medicaid Per Capita Expenditures, https://tinyurl.com/heayt2 (last visited Dec. 21, 2022) (average benefit of $9,084 per capita). And Texas must fund a substantial portion of that cost for each individual recipient. Under the 2022 Rule, these and other costs associated with in-kind benefits would not be considered in a public-charge determination.

The 2022 Rule's economic analysis purports to consider the cost it imposes. This analysis is deficient, as it fails to consider the actual administrative burdens placed on each State—parties affected by this 2022 Rule—which pay for most of the public benefits considered in this analysis. Instead, the analysis often focuses on the "chilling effect" of defining "public charge" in line with Congress's wishes, spending its concern on the impact on aliens of disenrollment (or foregone enrollment) rather than the impact on governments and the public at large of its refusal to conform to statutorily enacted policy.

* * *

The 2022 Rule must be vacated and set aside because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

III. Texas has standing.

The Supreme Court has distilled the standing doctrine into an "irreducible constitutional minimum" whereby a plaintiff must demonstrate (1) that it suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent," (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338–39 (2016).

Defendants' illegal repeal of the 2019 Rule and their adoption of the 2022 Rule have the predictable result—indeed, the intended result—of more aliens in Texas, more costs to Texas, and more aliens receiving benefits from Texas. Texas has standing to challenge both final agency actions.

A. Texas is entitled to special solicitude.

"Special solicitude has two requirements: (1) the State must have a procedural right to challenge the action in question, and (2) the challenged action must affect one of the State's quasi-sovereign interests." *Texas v. United States*, 50 F.4th 498, 514 (5th Cir. 2022) ("*DACA*") (citing *Texas v. United States*, 809 F.3d 134, 151-52 (5th Cir. 2015) ("*DAPA*")). Texas easily meets both requirements for special solicitude. Quasi-sovereign interests are "not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 602 (1982). Rather, they "consist of a set of interests that the State has in the well-being of its populace." *Id.* These include interests in "the

health and well-being—both physical and economic—of its residents" and in "not being discriminatorily denied its rightful status in the federal system." *Id.* at 607.

First, the APA provides Texas with a procedural right to challenge repeal of the 2019 Rule and the adoption of the 2022 Rule. 5 U.S.C. § 704; *see also DAPA*, 809 F.3d at 152 ("In enacting the APA, Congress intended for those suffering legal wrong because of agency action to have judicial recourse, and the states fall well within that definition." (cleaned up)).

Second, Texas has a quasi-sovereign interest in public charge determinations. The Fifth Circuit has held that that "[t]he importance of immigration policy and its consequences to Texas, coupled with the restraints on Texas' power to make it, create a quasi-sovereign interest." *DACA*, 50 F.4th at 516. Here, Defendants' public charge rules will have a major effect on the states' fiscs, causing billions of dollars in losses to the State from admitting more aliens, which will increase Texas's costs of providing driver's licenses, incarceration, education, and social service, and from the administration and distribution of benefits to those who would otherwise disenroll or forego enrollment, either immediately or in five years, depending on the benefit. Texas must bear these costs. Defendants' repeal of the 2019 Rule and adoption of the 2022 Rule greatly increases the class of people whom Texas law entitles to public services and benefits, which in turn pressures Texas to change its laws, thereby affecting a quasi-sovereign interest. *See Texas v. Biden*, 20 F.4th 928, 969 (5th Cir. 2021) ("*MPP*"), *rev'd and remanded on other grounds*, 142 S. Ct. 2528 (2022).

This Court previously found special solicitude for Texas when challenging agency action impacting immigration policy. *Texas v. United States*, 606 F. Supp. 3d 437, 467 (S.D. Tex. 2022), *rev'd*, 143 S. Ct. 1964 (2023). The Fifth Circuit upheld this Court's ruling. *Texas v. United State*s, 40 F.4th 205, 229 (5th Cir. 2022) ("*Enforcement Priorities*").

The Supreme Court reversed, but not because Texas was not injured. Instead, the Supreme Court stated that states do not have standing to challenge the Executive Branch's arrest decisions, which are not at issue here. 143 S. Ct. at 1968.

This holding was based *solely* on the rule that a party typically lacks standing to compel the arrest and prosecution of another. *See id.* "This case [] involves both a highly unusual provision of federal law and a highly unusual lawsuit." *Id.* at 1974.

Thus, this Court's ruling that Texas has standing to challenge immigration policies that harm it remains good law.

B. Texas has suffered a concrete and particularized injury that is fairly traceable to Defendants' actions and that will be redressed by a favorable decision.

Standing requires "an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *DAPA*, 809 F.3d at 150 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)).

1. Texas has suffered a concrete and particularized injury.

Texas incurs extra costs of providing services when more aliens are present in Texas. Exs. 1–4. Texas also incurs extra costs when more aliens enroll in benefits, either immediately or in five years, depending on when they become eligible for the benefits. Texas has "met [its] burden of showing that third parties [i.e., aliens] will likely react in predictable ways" by raising Texas's costs. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). Texas's standing theories do not "rest on speculation about the decisions of independent actors." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013).

Regarding enrollment, Defendants themselves admit that the repeal of the 2019 Rule and the adoption of the 2022 Rule will injure Texas. *See* Undisputed Facts, *supra*.

2. Texas' injuries are fairly traceable to Defendants' actions.

Texas's injuries are fairly traceable to the repeal of the 2019 Rule and adoption of the 2022 Rule because these injuries will predictably result from an increase in the number of aliens present in Texas and an increase in the number of aliens enrolling in benefit programs. Defendants, in the 2022 Rule, concluded that there was a *causal connection* between the 2019 Rule and individuals disenrolling or foregoing enrollment in public benefits. *See, e.g.*, 87 Fed. Reg. 55,505 ("DHS acknowledges that the 2019 Final Rule caused fear and confusion among U.S. citizens and noncitizens and had a significant chilling effect on the use of public benefits by noncitizens, even among those who were not subject to the rule and with respect to public benefits that were not covered by the rule."). Defendants found the relationship between the 2019 Rule and disenrollment and foregone enrollment so compelling that it warranted changing national immigration policy through the adoption of the 2022 Rule. *Id.* at 55,579 ("This public charge rule intends to administer the statute faithfully and fairly, while avoiding predictable adverse and indirect consequences such as disenrollment or forgone enrollment by individuals who would not be subject to the public charge ground of inadmissibility in any event.").

3. Texas' alleged injuries will be redressed by a favorable ruling.

A favorable ruling vacating Defendants' repeal of the 2019 Rule and adoption of the 2022 Rule would redress Texas's injuries. It would erase the amendments to the Code of Federal Regulations illegally made by those final agency actions and would reestablish the Code of Federal Regulations as adopted in the 2019 Rule. To the extent that the 2019 Rule is not enforceable, the statutory defaults would apply, and would preclude Defendants from trying to increase benefits for aliens. It would not reestablish the 1999 Field Guidance because the 2019 Rule explicitly superseded the field guidance. 84 Fed. Reg. at 41,292 ("This final rule supersedes the 1999 Interim

Field Guidance on Deportability and Inadmissibility on Public Charge Grounds."). Just as the "repeal or expiration of a repealing statue does not reinstate the original statute," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 334-35 (2012) (explaining the "Repeal-of-Repealer Canon"), the vacatur of the 2019 Rule did not reinstate the superseded field guidance. The repeal of the Field Guidance by the 2019 Rule was valid, but the repeal of the 2019 Rule by the 2022 Rule was not because it was not pursuant to notice and comment.

Moreover, the 1999 Field Guidance was never formally adopted in the first place. If this Court were to grant this motion for summary judgment, and if Defendants were to try to re-"adopt" the 1999 Field Guidelines without going through notice and comment, Texas would sue them again and win again. The 1999 Field Guidelines are legislative rules that cannot be adopted without notice and comment.

A favorable ruling for Texas would reset the parties to March 9, 2021 and require Defendants to comply with the APA notice-and-comment process if they wish to repeal the 2019 Rule and require them to consider the savings to the States when adopting a new rule. *See Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 432 (5th Cir. 2014) (the redressability requirement is satisfied if a favorable decision will relieve a discrete injury—plaintiffs need not show that a favorable decision will relieve *every* injury).

To the extent Defendants contend that Texas will experience no benefit from reinstatement of a vacated rule, this contention is belied by their own data showing a marked decrease in applicants seeking to change their status and increased disenrollment and foregone enrollment both prior to the adoption of the 2019 Rule and while it was the subject of court-imposed stays.

* * *

Texas has met every element of standing, with or without the special solicitude to which it is entitled.

Conclusion and Prayer

Plaintiffs request that the Court grant their Motion for Summary Judgment and enter a judgment vacating and holding unlawful the repeal of the 2019 Rule and the adoption of the 2022 Rule.

Dated: September 8, 2023.

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Certificate of Service

I certify that on September 8, 2023, I filed this motion for summary judgment through the Court's CM.ECF system, which served it on all counsel of record.

/s/ Johnathon Stone
Johnathon Stone

Certificate of Word Count

I certify that this motion for summary judgment, according to the word-count function of Microsoft Word, on which this motion for summary judgment was prepared, contains 8,015 words.

/s/ Johnathon Stone
Johnathon Stone